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VIA OVERNIGHT MAIL

EL232364784US

May 23, 2016

Hon. John P. Asiello, Clerk of Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *Matter of Johnson v. County of Orange, et al.*
App. Div. No. 2016-03604; Orange County Index No. 2013-7464

Dear Honorable Sir,

I represent the Plaintiff-Appellant, Janine Johnson, in the above-referenced matter. I am in receipt of your letter dated May 16, 2016 and, in response thereto, respectfully provide this statement justifying the Court's retention of subject matter jurisdiction over this matter as an appeal as of right.

Factual and Procedural Background

By way of background, and to provide proper context, a brief recitation of the facts and procedural history may be helpful.¹ The Respondents hired Ms. Johnson as a Deputy Sheriff in March 2012 subject to an eighteen month probationary term. Ms. Johnson successfully completed all necessary training and excelled at her job, receiving a positive evaluation at the end of her first year and being selected to serve on a special joint-task force with the FBI. In short, she performed her job well and exhibited great potential as a police officer.

By September 2012, about seven months into her employment, Ms. Johnson met and became friendly with an equal-ranking Deputy Sheriff, Charles Stalter. In January 2013, the two became romantically involved and quickly fell in love. At the time, Stalter was still legally married, but separated and estranged from his wife. Johnson's relationship with Stalter never interfered with her work performance or the effective operations of the Sheriff's Office.

¹ For a full statement of the facts with citations to the record on appeal below, the Court is respectfully referred to the Statement of Facts section contained in Ms. Johnson's Appellant's Brief in the Second Department, which is enclosed.

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By early February 2013, Johnson and Stalter confessed their relationship to their superior officer, Captain Barry, whom they had reason to believe had recently been made aware of it by Stalter's then mother-in-law. By the end of February, after an off-duty altercation in which Stalter's estranged wife and mother-in-law encountered Johnson at the latter's home, trespassed upon her property and assaulted her, the Undersheriff, Kenneth Jones, ordered Johnson to end her relationship with Stalter. Disbelieving that her employer could lawfully regulate her off-duty romantic life, Johnson continued to see Stalter while off-duty and at her home, located outside of the county in which she worked. When Respondents learned of this, they suspended her for two weeks and, when she returned from suspension in early April, ordered that she "refrain from associating with [Stalter] in any fashion."

Again, believing that Respondents' order was unlawful, and desperately wanting to have contact with the man she loved, Johnson continued to see Stalter while off-duty, though she had no contact with him at work. On May 6, 2013, Captain Barry demanded that Johnson detail her contacts with Stalter since returning to work the prior month. Johnson truthfully recounted her off-duty contacts with Stalter. The following week, Respondents fired Johnson, citing as its reason her failure to satisfy her probationary term. But when Johnson met with Undersheriff Jones the following week as permitted by the County's Civil Service Rules, as the appointing authority's designee, he admitted that her work performance was not an issue -- in fact, it was quite good -- and that her relationship with Stalter provided the only basis for her termination.

Ms. Johnson timely commenced an Article 78 proceeding to challenge her termination. She argued principally that her termination must be annulled because it violates her right to intimate association as protected by the United States Constitution. As an alternative ground, she argued that her termination was arbitrary and capricious and in bad faith because Respondents knew of, condoned and allowed several other intra-office romances but singled out only her for adverse action on the basis of her romantic relationship with Stalter.

Respondents filed a pre-answer motion to dismiss, which Supreme Court, County of Orange granted. The court concluded that the right to intimate association protected by the U.S. Constitution did not protect her relationship with Stalter because the two were not married and because Stalter was still legally married to another at the time. It also rejected Johnson's alternative argument, holding that Respondents did not need to provide Johnson with, or even possess, a substantive reason to terminate her probationary employment.

Johnson timely appealed Supreme Court's order to the Appellate Division, Second Department. That court affirmed, holding that Johnson's relationship with Stalter was not constitutionally protected and that Respondents' disparate treatment of Johnson as compared to similarly-situated employees engaged in intra-office romances did not render their termination decision arbitrary and capricious or in bad faith. The Second Department did not provide any extensive analysis of the issues.

Johnson then timely filed a Notice of Appeal to this Court from the Second Department's Decision and Order. In doing so, she invoked Section 5601(b) of the New York State Civil Practice Law and Rules as the ground for subject matter jurisdiction as an appeal as of right.

Legal Analysis

Appeals to this Court are primarily discretionary; however the New York State Constitution permits appeals as of right in certain circumstances. As pertinent here, an appeal as of right may be taken “from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action . . . wherein is directly involved the construction of the constitution of the state or of the United States” N.Y. Const., art. VI, § 3(b)(1); See also N.Y. C.P.L.R. § 5601(b)(1).

Respectfully, this case directly involves the construction of the U.S. Constitution, thus invoking this Court’s subject matter jurisdiction over this matter as an appeal as of right. Specifically, this case directly involves the following substantial constitutional questions: (1) Whether the United States Constitution’s protection of the right to intimate association protects Johnson’s romantic relationship with Stalter; and (2) Whether Respondents’ decision to terminate her because of that relationship violated her constitutionally protected right.

It is well settled that a terminated probationary civil service employee in New York may challenge her termination in an Article 78 proceeding and that the court may annul her employer’s determination to fire her if it finds that the termination violated her constitutional rights. See Matter of Scherbyn v. Wayne-Finger Lakes BOCES, 77 N.Y.2d 753, 759 (1991). It is also well settled that the United States Constitution protects an individual’s right to “enter into and maintain certain intimate human relationships,” see Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984), particularly those relationships that “involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life,” id. at 619-20; see also Bd. of Dirs. of Rotary Int’l. v. Rotary club of Durate, 481 U.S. 537, 545 (1987); see also, e.g., Matusick v. Erie Cnty Water Auth., 757 F.3d 31, 57-59 (2d Cir. 2014) (holding that a betrothal is a constitutionally protected intimate relationship; Christensen v. County of Boone, 483 F.3d 454, 461-63 (7th Cir. 2007) (holding a long-term romantic relationship between unmarried and unengaged couple is a constitutionally protected intimate association).

The gravamen of Johnson’s argument is that her exclusive, romantic and intimate association with Stalter is the type of relationship the Supreme Court characterized in Roberts as falling within the protections of the U.S. Constitution. Therefore, Respondents’ determination to fire her in reprisal for this relationship impermissibly infringed upon her protected constitutional right. Consequently, construction of that constitutional right – namely, whether it protects Johnsons’ relationship with Stalter and, if so, whether Respondents’ adverse determination impermissibly infringed thereupon – is necessary and, thus, directly involved. Indeed, to dispose of this case, both Supreme Court and the Appellate Division squarely decided these constitutional questions, which Johnson asserted as the principal basis for her challenge to Respondents’ determination.

The constitutional questions involved in this case are also substantial. Indeed, although we believe that Roberts and its progeny, as well as various lower court decisions from the courts of appeals and district courts in the Second Circuit and others, establish that Johnson’s relationship with Stalter is constitutionally protected and that Respondents violated her constitutional rights,

we note that neither the U.S. Supreme Court nor this Court has directly addressed the issues as applied to the factual scenario presented in this case. Moreover, despite our belief that the existing law supports Johnson's claim, the Appellate Division, Second Department rejected our arguments and, in doing so, cited cases from within and without the Second Circuit, which we believe are readily distinguishable. We note also that the Second Department's decision is devoid of any analysis or substantive explanation of its reasoning and that, while it also cited the U.S. Supreme Court's decision in Roberts, we believe that it misinterpreted the holding and constitutional principles set forth in that case. In short, given the state of existing precedent and the need for clearer elucidation, the constitutional issues directly involved in this case are quite substantial and require this court's unique expertise and competence in explicating an important area of constitutional law.²

Finally, we note that Johnson has preserved for review an alternative, non-constitutional ground for annulling her termination – that Respondents' decision to fire her was arbitrary and capricious and in bad faith because, regardless of the constitutionality of their action, they lacked any legitimate, rational substantive ground to terminate her and did not similarly fire, or even discipline, other employees engaged in intra-office romances. The presence of this alternative ground does not defeat this Court's subject matter jurisdiction because the constitutional and non-constitutional grounds are not mutually exclusive. In other words, even if Respondents' disparate treatment of Ms. Johnson as compared to similarly-situated employees and lack of any legitimate substantive reason to fire her did not independently render its determination arbitrary and capricious, their determination still could be found unconstitutional, thus, requiring it to be annulled. In short, Appellate Division's rejection of Ms. Johnson's alternative ground is not adequate to support its judgment, and so resolution of the primary constitutional questions, directly decided by the lower tribunals, is necessary.

In accordance with your May 16, 2016 letter, I am enclosing with this letter a copy of the Record on Appeal in the Appellate Division, Second Department as well as copies of Ms. Johnson's brief-in-chief and reply brief and Respondents brief in that court. Also enclosed is an affidavit of service of one copy of this letter upon opposing counsel.

Wherefore, I respectfully request that the Court retain subject jurisdiction over this matter as an appeal as of right under Section 3(b)(1) of Article VI of the New York State Constitution and Section 5601(b)(1) of the CPLR.

Respectfully submitted,



Michael H. Sussman

Enclosures

cc: Sharon Worthy-Spiegl, counsel for Respondents (by First Class mail; w/out enclosures)

² For a more detailed discussion of the existing precedent on these issues and Ms. Johnson's arguments in support of her position, we respectfully refer the Court to Point I of the Argument sections in Ms. Johnson's opening brief ("Appellant's Brief") and reply brief ("Appellant's Reply Brief") in the Second Department, both of which are enclosed.

STATE OF NEW YORK
COURT OF APPEALS

-----X
In the Matter of JANINE JOHNSON

App. Div. No. 2014-03604

Petitioner-Appellant,

**AFFIDAVIT OF
SERVICE**

vs.

COUNTY OF ORANGE and CARL E.
DUBOIS, Sheriff, County of Orange,

Respondents-Redpondents.

-----X
State of New York)
County of Orange)

The undersigned being duly sworn, deposes and says:

GERYL PRESCOTT, am not a party to the action and am over the age of 18 years of age and reside in New City, New York 10956.

That on May 23, 2016, deponent served the within May 23, 2016 letter of Michael H. Sussman to New York State of Appeals re: Jurisdiction upon Sharon Worthy-Spiegel, Esq., located at Orange County Dept of Law, 15 Matthews Street, Suite 305, Goshen, New York 10924.

By depositing a true copy of the aforesaid documents in a postpaid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Sworn to before me this
23rd day of May, 2016

Notary Public



Geryl Prescott

CHRISTOPHER D. WATKINS
Notary Public, State of New York
No. 02WA6124421
Qualified in Ulster County
Commission Expires March 28, 20 17