

July 31, 2019

*Via email*

Jon Dileno  
Zashin & Rich Co., LPA  
950 Main Ave., 4th Floor  
Cleveland, OH 44113

Re: *Brack v. Budish, et al.*

Dear Mr. Dileno:

I am writing in response to your letter dated July 19, 2019, in which you condemn me for remarks made at a press conference conducted on May 22, 2019 (and not the day before, as your letter erroneously claims).

I have reviewed the video of the entire event. The gravamen of your concerns appears to be that during the press conference, I said that MetroHealth lacked the contractual authority to punish my client, Nurse Gary Brack, in retaliation for statements he made to the County Council critical of the Budish administration's management of the beleaguered county jail.

You suggest that the contract in force when your client removed Nurse Brack from his position somehow allowed the County and MetroHealth to punish Nurse Brack for his speech, and insinuate that I deliberately misled the public into believing that the provisions of a later contract controlled your client's actions.

You misunderstand the issues in play.

The essence of Nurse Brack's claim is simple. MetroHealth, a public entity, retaliated against him because of public comments he made to a public body on what is unquestionably a matter of serious public concern. I am mystified as to why you believe your client can take safe harbor as to that conduct in a contract, no matter when it was modified, and no matter what it provides.

That retaliatory termination is unlawful is well established as a matter of First Amendment law, and the contracts you invoke, whenever adopted and however modified, embody within them the applicable law. No contract could confer on your clients the right to do what they did. How could it be otherwise, since – contract or not – the First Amendment prohibits retaliation against employees like Nurse Brack by public entities like MetroHealth and the County.

Instead of participating in an unconstitutional act, your clients should have refused County Executive Armond Budish’s demand that your clients retaliate against Nurse Brack for his criticisms of the Budish administration.

During the press conference, I read – accurately – excerpts of two contracts between MetroHealth and the County we obtained through public-records requests – a contract signed in 2014 and effective in 2015, and a contract apparently signed in March 2019, the year following Nurse Brack’s dismissal. We are unaware that any other contract conceivably applies – not that any contract would justify what MetroHealth, the County, and their officials did to Nurse Brack.

While the 2019 contractual language did not yet apply when MetroHealth illegally and unconstitutionally removed Nurse Brack from his position in May 2018, MetroHealth publicly admitted in its May 23, 2019 news release following our press conference that it “specifically added” this language “under the new agreement to prevent this exact type of situation from happening again” – which is a clear admission that MetroHealth officials grasped that Budish’s demand to remove Nurse Brack was improper, unconstitutional, and retaliatory.

Your letter intimates that MetroHealth has somehow been defamed. That is not the case. The public entity itself, as a matter of law, cannot be defamed. *New York Times v. Sullivan*, 376 U.S. 254, 291 (1964), *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966).

If you contend that Dr. Boutros or Ms. Platten have been defamed individually (an accusation I hope that you are not making on the public’s dime) your case would fare no better. The gist and sting of my remarks was that Nurse Brack was removed unlawfully. Would you prefer that we said your clients had acted in contravention of both the Constitution and the contract? Would that put them in a better place?

The law, especially in matters of public concern, does not require mathematical precision of every statement contested as defamatory. The essence of our criticism is that Nurse Brack was removed for reasons the law does not allow. That statement of our legal opinion was supported by nearly 45 minutes of factual give and take, more than adequate to allow viewers to reach their own conclusions as to the merits of our allegations. That too makes it protected expression.

We will post your July 19, 2019 letter and this response<sup>1</sup> as an update to our firm's May 22 blog post about Nurse Brack's complaint and the press conference announcing it. Your clients are welcome to share that link as well:

<https://www.chandralaw.com/blog/former-jail-nursing-director-gary-brack-sues-county-executive-budish-metrohealth-ceo-boutros-others-for-first-amendment-retaliation>

Sincerely,



Subodh Chandra

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<sup>1</sup> Your allusion to a completely unrelated litigation matter is an unprofessional red herring and merits no response. As MetroHealth is well aware, because it has supplied evidence in that case, our complaint in the Common Pleas Court against our former client sets forth the facts regarding our prior representation.