IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Linda Woodson Plaintiff, vs. Atlantic City Board of Education, James Knox, National Association of Elementary School Principals, Defendants	Court No.: 1:19-cv-14572

OPPOSITION TO MOTION TO DISMISS AND MOTION TO AMEND COMPLAINT

Plaintiff Linda Woodson herein respectfully responds jointly to the separate Motions to Dismiss of National Association of Elementary School Principals ("NAESP") and the Atlantic City Board of Education and Knox (collectively "ACBE Defendants"):

Contents

Cases

Rules

Treatises

I. Introduction

Plaintiff Linda Woodson ("Woodson") claims that the NAESP and ACBE Defendants infringed her lawful copyright by incorporating a document she wrote (Complaint, Ex. A) ("Work") into an article that Defendant James Knox claimed to have written (Complaint, Ex. D.)("Article") As the attached Amended Complaint states, while the Article was published in 2011 Woodson did not discover its existence until 2018 because it was published in an academic journal available only to members of NAESP *to wit*, principals—not teachers like Woodson. As soon as she acquired knowledge of this publication, she moved to protect her legal rights in her Work, which she wrote completely outside of her role as a fourth-grade teacher, her job with the Defendant Atlantic City Board of Education.

Woodson seeks to amend her original complaint to add facts that will clarify that she did not discover, and could not have discovered, the publication of the Article until 2018, within the statute of limitations of 17 U.S.C. § 507(b) under the "discovery rule" adopted by the Third Circuit in *William A. Graham v. Haughey*, 568 F. 3d 425 (3rd Cir. 2009). With this clarification, Woodson's Amended Complaint is sufficient and should not be dismissed under FRCP 12(b)(6).

II. Statement of Facts

Woodson has been a teacher at New York Avenue School since 2009.

Knox was, and is, her principal. In approximately 2010 Knox approached Woodson and asked her if she would prepare a writing about the change at the New York Avenue School since he arrived, to be used to apply for a National School Change Award ("Award"). Woodson has always been a teacher, charged with no administrative responsibilities, like reporting on the overall condition of her school. Knox's request was not required by her job duties and fell well beyond the scope of her employment, as alleged in Paragraph 32 of the Complaint. Nonetheless,

she agreed, after Knox told her to write it "however she wanted." He exercised no control over it. Woodson wrote what became her work, Complaint Ex. A, outside of the time she spent fulfilling her teaching responsibilities and at home. She used her writing in the preparation and submission of the application for the Award, which her school did not receive.

Years passed and Woodson knew only that her work did not result in the Award, which is the only reason why she wrote it.[1] She did not know that Knox had used her work to write the Article entitled "At Risk for More than Academic Failure" for the NAESP's professional journal called "Principal". The Article was published in the January/February 2011 edition. "Principal" is written for elementary school principals, available only to members of NAESP.[2] Because Woodson is not a principal, she was not a member of NAESP in 2011 and she did not receive "Principal" at that time. She was not told by Knox that he had taken her work and submitted it to "Principal". She had no reason to believe at that time that he would do so because she thought that the only use for her work was to apply for the Award---not for re-purposing as an academic journal article, without giving Woodson authorship credit. She first learned of the 2011 publication of her work in the "Principal" in 2018. At that time, she was on leave from her job and she googled Knox and discovered the Article that was attributed *to him*. She was shocked when she saw that Knox had stolen her work for his professional aggrandizement. She then sought advice of counsel and filed for, and received, a copyright registration for the Article. No defendant has protested or claimed ownership of this copyrighted work.

[1] Woodson is not claiming copyright infringement for use of her work in 2010-2011.
[2] https://www.naesp.org/publications-0

III. The Standard of a Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of a complaint, permitting the court to dismiss a complaint when it "[fails] to state a claim upon which relief can be granted".

Under the Federal Rules of Civil Procedure, a claimant must only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). In assessing the sufficiency of plaintiff's complaint under Rule 12(b) (6), a Court must "draw all inferences in the light most favorable to the non-moving party." *In re NYSE Specialists Sec. Litig*., 503 F.3d 90, 95 (2d Cir.2007).

Specifically, "a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In *Iqbal*, the Supreme Court set forth a two-pronged guide for a trial court's analysis. First, the trial court ruling on a defendant's motion to dismiss, must accept as true a Complaint's factual allegations (*Twombly* at 547, citing *Swierkiewicz v. Sorema N. A*., 534 U. S. 506 , n. 1, (2002)), and draw all reasonable inferences from those allegations in favor of the plaintiff. *Ofori-Tenkorang v. American Int'l Group, Inc.* 460 F.3d 296,298 (2d Cir 2006). The court should then identify those statements in the Complaint that *"because they are no more than conclusions, are not entitled to the assumption of truth;"* (emphasis added) *Iqbal*, 556 U.S. at 679, 129 S.Ct. at 1950 and the allegations in the complaint must meet the standard of "plausibility". *Twombly,* 127 S. Ct. at 1970.

The complaint need not provide detailed factual allegations, but must sufficiently state the grounds upon which the plaintiff's claim rests "through factual allegations sufficient 'to

raise a right to relief above the speculative level.'" *ATSI Commc'ns v. Shaar Fund, Ltd.* 493 F.3d 87, 98 (2d Cir. 2007). Once it has stripped away the conclusory allegations, the court may then determine whether the complaint's "well-pleaded allegations…plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679, 129 S.Ct. at 1950. Moreover, plaintiffs must allege sufficient facts to "nudge[] their claims across the line from conceivable to plausible. *Twombly* at 570. Though the court must accept the factual allegation as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal* at 1949 (quoting *Twombly* at 555). "[T]he claim may still fail as a matter of law . . . if the claim is not legally feasible" under those facts. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 457 F. Supp. 2d 455, 459 (S.D.N.Y. 2006). Thus, "bald assertions and conclusions of law will not suffice." *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.,* 309 F.3d 71, 74 (2d Cir. 2002).

During this threshold review, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Twombly* at 583. In particular, "[a] claim has facial plausibility [only] when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal* at 1949 (citing *Twombly* at 556), and the factual matter alleged must "raise a right to relief above the speculative level," *TotesIsotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

A Complaint must contain more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*. (quoting *Twombly* at 557) (alteration in original). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Twombly* at 570. Thus, pleadings that contain "no more than conclusions ... are not entitled to

the assumption of truth" otherwise applicable to complaints in the context of motions to dismiss. *Iqbal* at 679. Also See *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009).

"[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal* at 663-664, citing *Twombly* at 556.

IV. Legal Argument

a. Leave to amend the *complaint should be granted, rather than dismissal.*

The Third Circuit has held "that even when a plaintiff does not seek to amend, if a complaint is vulnerable to a 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile." *Alston v. Parker*, 363 F. 3d 229, 235 (3rd Cir. 2004).

Here, Woodson seeks to amend the complaint because it is essential to Woodson's opposition to the Defendants' Motion to Dismiss. Woodson respectfully moves the Court to allow her to file the attached Amended Complaint. This amendment will cure any defect in the initial Complaint and provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face."" *Ashcroft. V. Iqbal*, 556 U.S. 662, 678 (2009), such that Defendants' motion to dismiss must be denied.

Under Fed. R. Civ. P. 15(a)(2), the Court is to freely grant leave "when justice so requires." *Id.* The decision to grant a motion to amend a pleading rest in the sound discretion of the district court. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 330 (1970). Generally, leave to amend should be granted unless there is: (1) undue delay or prejudice; (2) bad faith; (3) dilatory motive; (4) repeated failure to cure deficiencies through previous amendments; or (5) futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The futility analysis on

a motion to amend is essentially the same as a Rule 12(b)(6) motion. However, given the liberal standard for the amendment of pleadings, "courts place a heavy burden on opponents who wish to declare a proposed amendment futile." *See Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.*, 106 F.Supp.2d 761, 764 (D.N.J.2000) (citations omitted). "If a proposed amendment is not *clearly* futile, then denial of leave to amend is improper." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J. 1990) (emphasis added); *see also* 6 Wright, Miller & Kane, Federal Practice and Procedure, § 1487 (2d ed. 1990).

None of the factors for denial are present in this case. The proposed amendment clearly would not be futile because it states sufficient facts to allow Woodson to avail herself of the "discovery rule" adopted in *William A. Graham v. Haughey*, 568 F. 3d 425 (3rd Cir. 2009). Under that rule, Woodson can rebut the Defendants' affirmative defense of the statute of limitations because Woodson can establish that she did not discover, nor in the exercise of reasonable diligence should have discovered, the basis for her claim against the Defendants until after July 1, 2016. *Id.* at 438. The ACBE Defendants admit that Woodson's "knowledge of the published article is not fully developed"[3], which concedes that factual discovery is required on a determinative issue *of the discovery of Woodson's cause of action.* It would be inequitable to deny Woodson the chance to state facts that are relevant on this determinative issue.

Defendants also argue that Woodson was put on "inquiry notice" of the Article so that Woodson's claims are time-barred, without providing facts upon which to base this argument. See **Exhibit A** as a true and valid copy of the e-mail that Defendant Knox sent to the school faculty which all Defendants are relying upon as evidence that Woodson should have known was about her. The subject is "Message from KMBT_600". That subject line tells the recipient

[3] Brief in Support of ACBE Defendants' Motion to Dismiss, p. 7.

nothing about the inner contents of the e-mail. The only substantive message is "Principal's Magazine article....Enjoy!!!" There is nothing in this e-mail that describes what the magazine article is. There is nothing in this e-mail that describes what the attachment is. There is nothing in this e-mail, in **Exhibit A**, that is supposed to link Woodson to the contents of the e-mail that she should have known or would have been aware of the infringement by the Defendants. There are no words in this e-mail, which the Defendants claim started the clock of the Statute of Limitations, to actually alert Woodson that the contents of the e-mail would relate to her work.

Defendants also bear the burden of substantiating this argument under *Graham*, 568 F.3d at 438. At this stage it is woefully premature to even consider this argument when Woodson could have no reason to suspect that her work, prepared for one specific purpose (the Award), would be used for a completely different purpose (the Article) for publication in a periodical that she would not have access to, alerted by an e-mail that made **no mention of her name**!

In sum, justice requires Amendment of the Complaint to state sufficient facts about Woodson's discovery of Defendants' infringement to withstand Defendants' Fed. R. Civ. P. 12(b) (6) motion.

b. ***Dismissal is not Warranted because the Work is not a "Work for Hire".***

The ACBE Defendants prematurely, and inappropriately, launch a summary judgment argument; namely that the undisputed fact that Woodson is an employee of the Atlantic City Board of Education means that the Work belongs to it as a "work for hire." Notably, Defendant NAESP recognized the inappropriateness of this argument in a Fed. R. Civ. P. 12(b)(6) motion because NAESP did not raise it. The only thing to be resolved a Fed. R. Civ. P. 12(b)(6) motion is whether the complaint is sufficient at this point as a matter of law. This Court must accept the allegations pleaded by the plaintiff as true. *Morse v. Lower Merion School Dist.*, 132 F. 3d 902,

906 (3d Cir. 1997). Therefore, this Court must accept as true the allegation in Par. 32 of the initial Complaint that "Plaintiff created Plaintiff's Work not as an employee in furtherance of her work, but as a bonus to Defendant Atlantic City Board of Education and as an author who was able to make her own decisions as to the creation of Plaintiff's Work."

This contention puts at issue whether the Work is, indeed, a "work for hire" because Woodson claims that the Work was not done within the scope of her employment. The ACBE Defendants maybe able to contest this fact through discovery, and in subsequent motions, but not with its instant motion.

Second, the legal premise of the ACBE Defendants argument is incorrect. They claim that the only determinative fact is whether the work at issue was created while the creator was an employee or while an independent contractor.[4] Not so. The Third Circuit recently clarified that what is determinative is whether the work at issue-albeit created by an employee-falls within the "scope of employment." In *TD Bank v. Hill* _____ F. 3d _____ (No. 16-2897) (*decided July 1, 2019*) at 27 the Third Circuit said:

> the terms "employee" and "scope of employment" should be construed in light of general principles of agency law, citing section 228 of the Restatement (Second) of Agency. 490 U.S. at 740. Taking their cue from *CCNV*, other Courts of Appeals have concluded that a work falls within the scope of employment only if "[1] it is of the kind he is employed to perform; [2] it occurs substantially within the authorized time and space limits; and [3] it is actuated, at least in part, by a purpose to serve the [employer]." *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994) (quoting Restatement (Second) of Agency § 228 (1958)) (internal alterations omitted); *see U.S. Auto Parts Network*, 692 F.3d at 1015; *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004).
>
> We agree with our sister circuits that *CCNV* counsels in favor of adopting the Second Restatement's test.

[4] [4] Brief in Support of Motion to Dismiss, p. 9.

The Third Circuit cited with approval a case from this district, *City of Newark v. Beasley*, 883 F. Supp. 3 (D.N.J. 19915) in discussing these factors for determining if a work is a "work for hire." This case is more applicable than *Le v. City* of *Wilmington,* 736 F. Supp. 842 (D. Del. 2010), relied upon by Defendants. In *Beasley* the City of Newark claimed ownership of copyrights for two literary manuals used in conjunction with a "People Against Car Theft" educational program as "works for hire". These manuals were created by Beasley while he was an employee of the Newark Police Department. The Court applied the three-pronged test from the Restatement (Second) of Agency § 228 (1958). It found that the scope of employment of a patrol officer did not embrace the creation of the manuals. Next, it found that the manuals were not created on the clock of the Department but were done during off hours on personal facilities. Finally, the Court found that Beasley was not motivated to create the materials to benefit his employer and thus the City did not own the manuals as works-for-hire. *Beasley* demonstrates the multiple factors, all of which are very fact- specific, that Courts must consider in ruling on "works-for-hire." The fact of employment alone is not dispositive, as the ACBE Defendants erroneously seem to maintain.

Exhibit B is a true and valid copy of an e-mail sent from Defendant Knox to Woodson. There is no mention of how much work was done, how much supervision would be given, or any other guidelines. In fact, Ms. Woodson had complete control over the entire project and there was no instruction given. In the e-mail from Knox, there is only the line of "I pray you are willing to take on this project." to discuss any control. This is not an order or a command from a superior. If anything, this is a request, and a weak request at that. Knox "would like" Woodson to "facilitate" the application process. Knox had no control over this project. As stated above, Woodson has been a teacher at New York Avenue School since 2009. She is a teacher – her job

is not to create reports to win awards at corporate-sponsored competitions and the ACBE Defendants have no evidence to show otherwise.

Therefore, Woodson's Complaint that asserts the Work was not created while in the scope of her employment creates needs to be accepted as true at this point and tested subsequently through discovery—not dismissed on a Fed. R. Civ. P. 12(b)(6) motion.

V. Conclusion

Woodson's Complaint was timely filed. The e-mail the Defendants all rely upon as notice that Woodson should have known of the infringement and starting the statute of limitations fails as a document to provide notice. The Court needs to take the facts in Woodson's Complaint as true. Woodson's Award application is also not a work made for hire because none of the Defendants offered guidance, instruction, or control of the award application that form's Woodson's copyrighted work. In light of these facts, the Court should allow Woodson to amend her complaint.

Respectfully submitted,

Dated: September 23, 2019

Anthony M. Verna III, Esq.
Verna Law, P.C.
80 Theodore Fremd Ave.
Rye, NY 10580
Attorney for Plaintiff
Linda Woodson

EXHIBIT A

From: James Knox
Sent: Tuesday, January 4, 2011 10:45 AM
To: NYAstaff
Subject: FW: Message from KMBT_600

Principal's Magazine article....Enjoy!!!

James E. Knox, Jr.

Principal

New York Avenue School

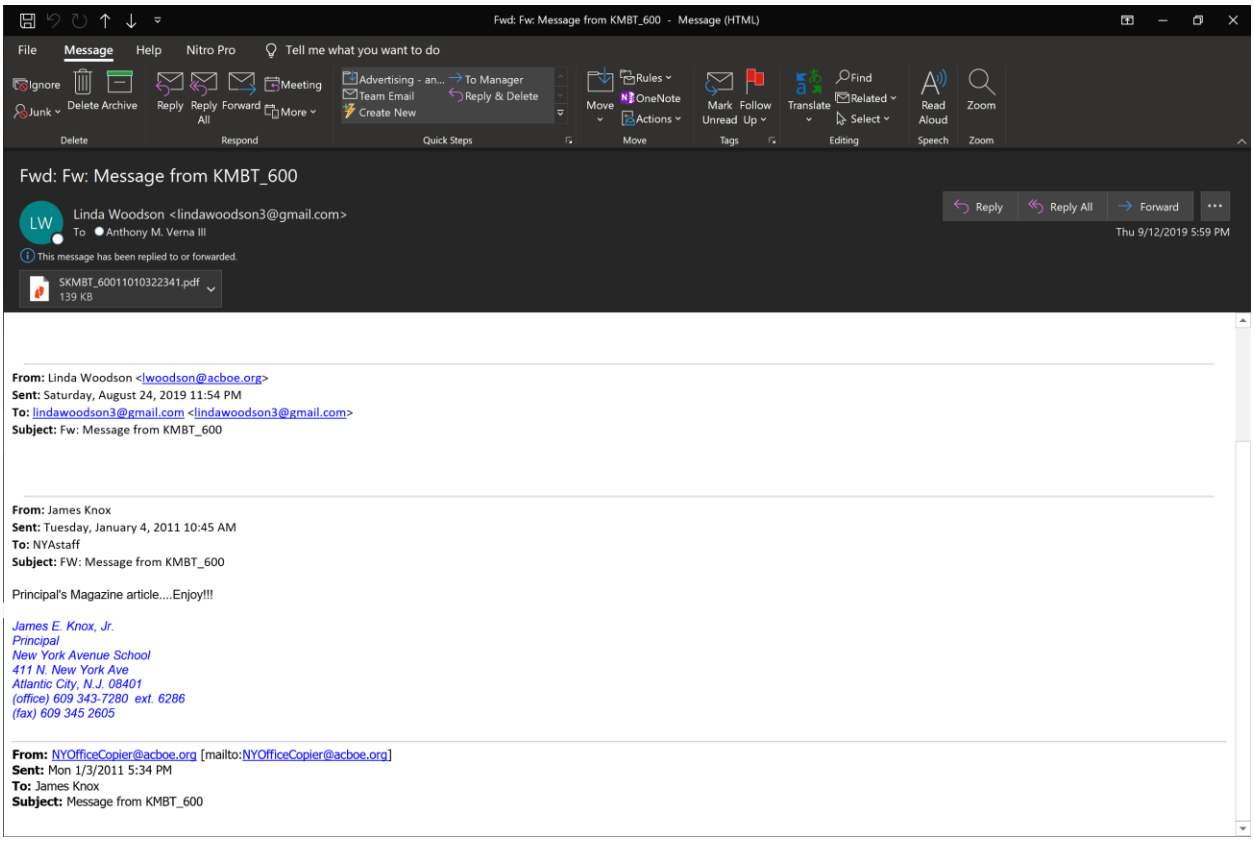
411 N. New York Ave

Atlantic City, N.J. 08401

(office) 609 343-7280 ext. 6286

(fax) 609 345 2605

From: NYOfficeCopier@acboe.org [mailto:NYOfficeCopier@acboe.org]
Sent: Mon 1/3/2011 5:34 PM
To: James Knox
Subject: Message from KMBT_600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File
Message
Help
Nitro Pro
Tell me what you want to do
Ignore
Delete Archive
Junk
Reply
Reply All
Forward
Meeting
More
Delete
Respond
Advertising - an...
To Manager
Team Email
Reply & Delete
Create New
Quick Steps
Move
Rules
OneNote
Actions
Mark Unread
Follow Up
Tags
Translate
Find
Related
Select
Editing
Read Aloud
Speech
Zoom
Zoom
Fwd: Fw: Message from KMBT_600
LW
Linda Woodson <lindawoodson3@gmail.com>
To Anthony M. Verna III
This message has been replied to or forwarded.
SKMBT_60011010322341.pdf
139 KB
Reply
Reply All
Forward
Thu 9/12/2019 5:59 PM
From: Linda Woodson <lwoodson@acboe.org>
Sent: Saturday, August 24, 2019 11:54 PM
To: lindawoodson3@gmail.com <lindawoodson3@gmail.com>
Subject: Fw: Message from KMBT_600
From: James Knox
Sent: Tuesday, January 4, 2011 10:45 AM
To: NYAstaff
Subject: FW: Message from KMBT_600
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James E. Knox, Jr.
Principal
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(fax) 609 345 2605
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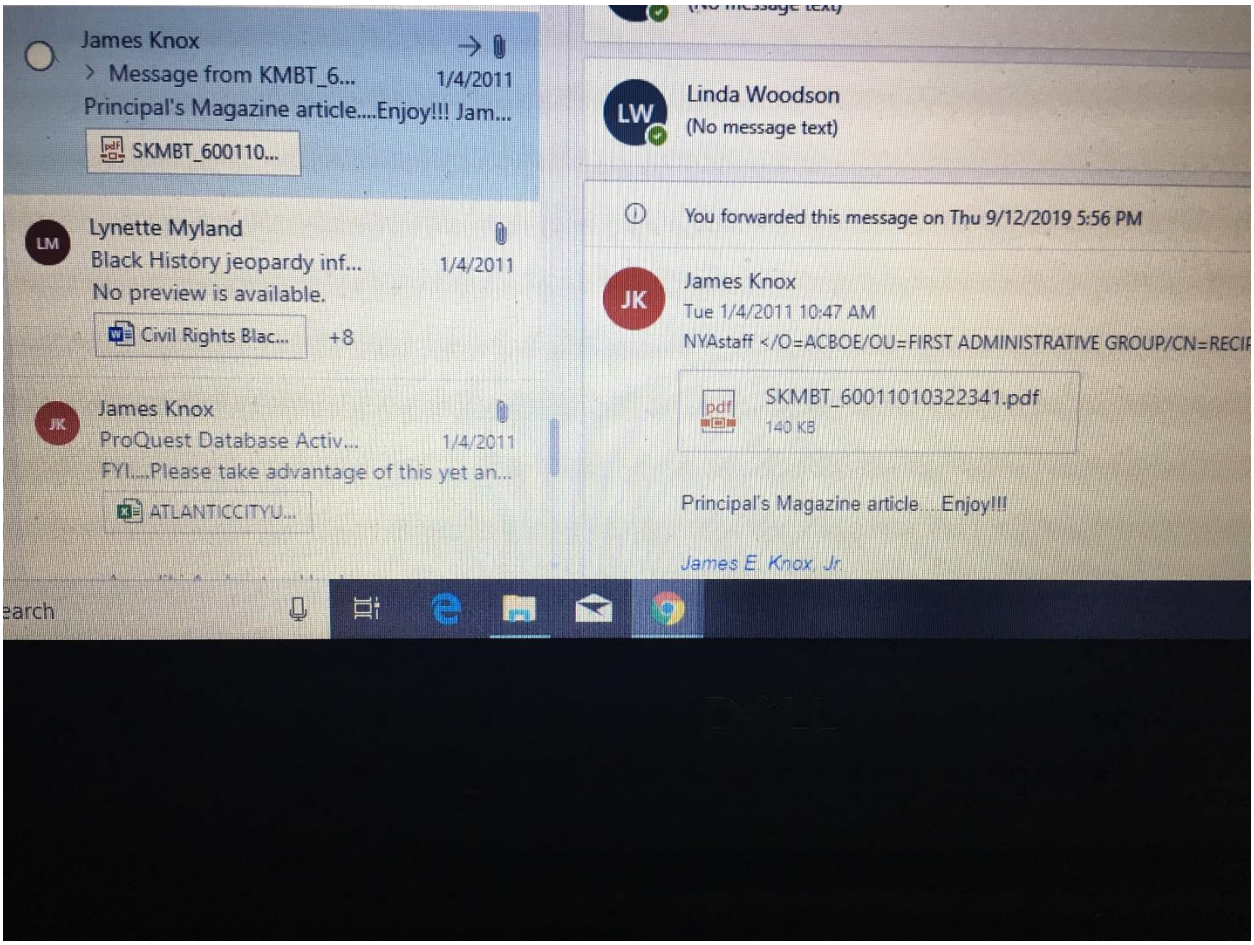
Subject: Message from KMBT_600


James Knox
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James Knox
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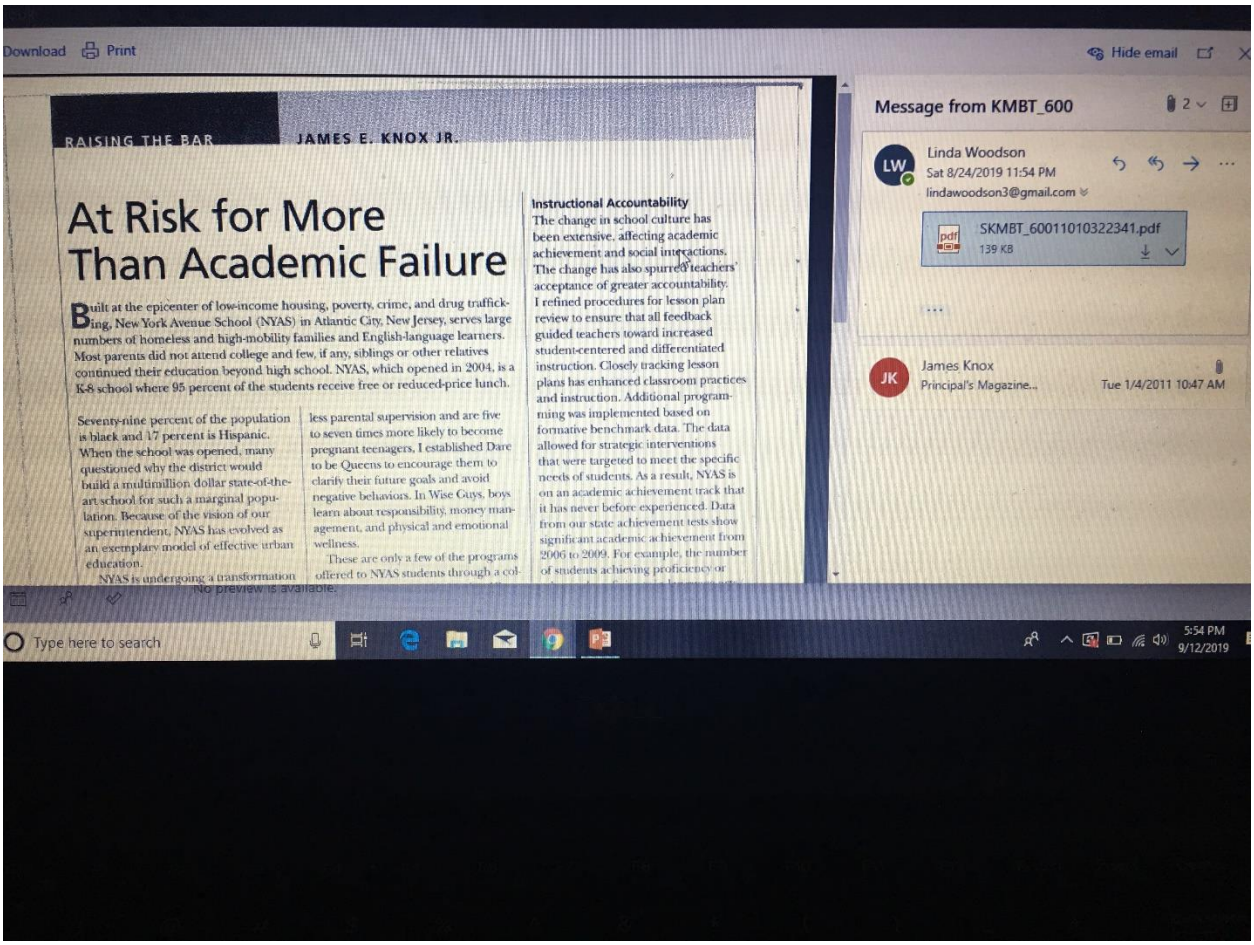
Principal's Magazine article....Enjoy!!!
James E. Knox, Jr.


Download
Print
Hide email
Message from KMBT_600
Linda Woodson
Sat 8/24/2019 11:54 PM
lindawoodson3@gmail.com
SKMBT_60011010322341.pdf
139 KB
James Knox
Principal's Magazine...
Tue 1/4/2011 10:47 AM
RAISING THE BAR
JAMES E. KNOX JR.
At Risk for More Than Academic Failure
Built at the epicenter of low-income housing, poverty, crime, and drug trafficking, New York Avenue School (NYAS) in Atlantic City, New Jersey, serves large numbers of homeless and high-mobility families and English-language learners. Most parents did not attend college and few, if any, siblings or other relatives continued their education beyond high school. NYAS, which opened in 2004, is a K-8 school where 95 percent of the students receive free or reduced-price lunch.
Seventy-nine percent of the population is black and 17 percent is Hispanic. When the school was opened, many questioned why the district would build a multimillion dollar state-of-the-art school for such a marginal population. Because of the vision of our superintendent, NYAS has evolved as an exemplary model of effective urban education.
NYAS is undergoing a transformation
less parental supervision and are five to seven times more likely to become pregnant teenagers, I established Dare to be Queens to encourage them to clarify their future goals and avoid negative behaviors. In Wise Guys, boys learn about responsibility, money management, and physical and emotional wellness.
These are only a few of the programs offered to NYAS students through a col-
Instructional Accountability
The change in school culture has been extensive, affecting academic achievement and social interactions. The change has also spurred teachers' acceptance of greater accountability. I refined procedures for lesson plan review to ensure that all feedback guided teachers toward increased student-centered and differentiated instruction. Closely tracking lesson plans has enhanced classroom practices and instruction. Additional programming was implemented based on formative benchmark data. The data allowed for strategic interventions that were targeted to meet the specific needs of students. As a result, NYAS is on an academic achievement track that it has never before experienced. Data from our state achievement tests show significant academic achievement from 2006 to 2009. For example, the number of students achieving proficiency or
No preview is available.
Type here to search
5:54 PM
9/12/2019

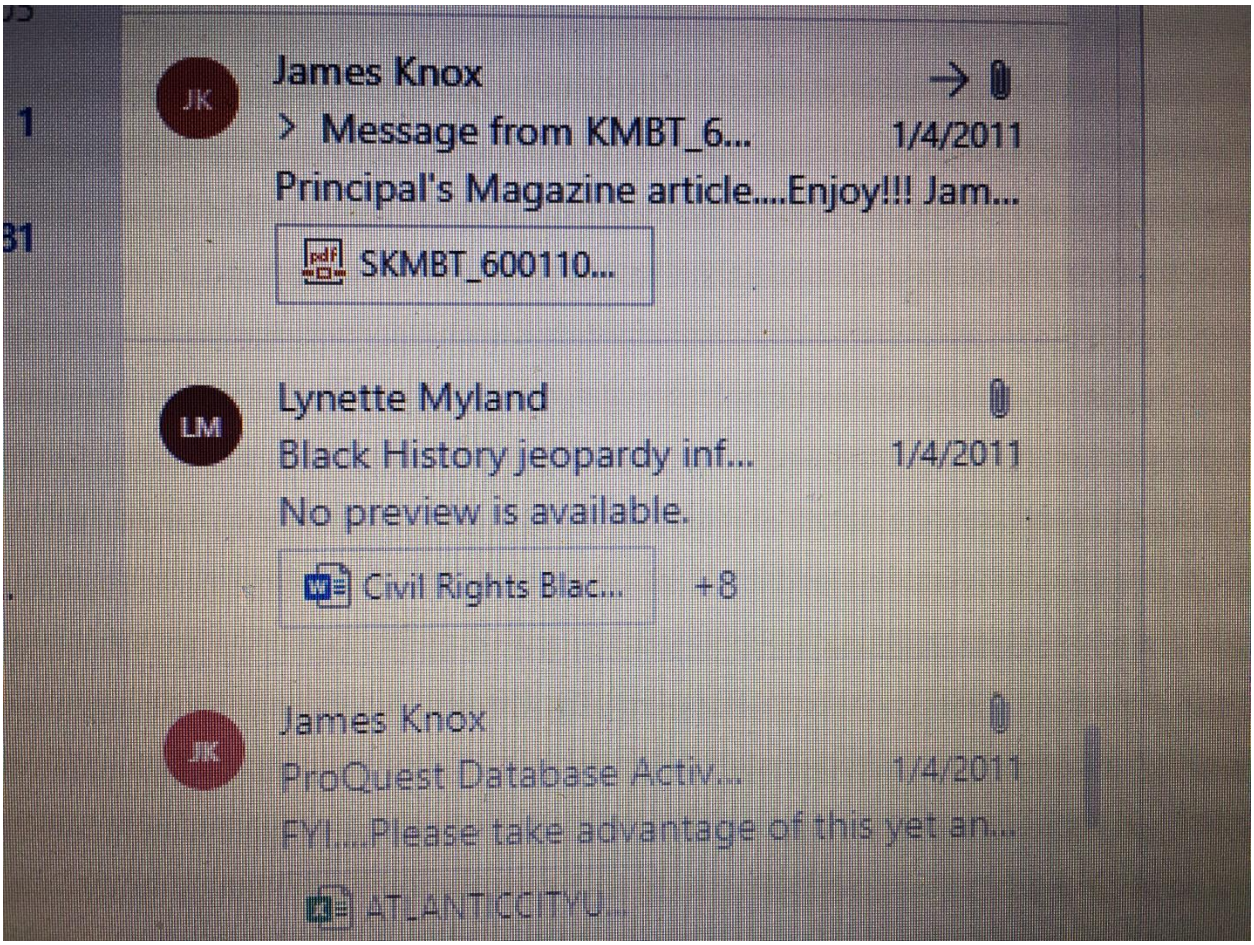

JK
James Knox
> Message from KMBT_6...
1/4/2011
Principal's Magazine article....Enjoy!!! Jam...
SKMBT_600110...
LM
Lynette Myland
Black History jeopardy inf...
1/4/2011
No preview is available.
Civil Rights Blac...
+8
JK
James Knox
ProQuest Database Activ...
1/4/2011
FYI....Please take advantage of this yet an...
ATLANTICCITYU...

EXHIBIT B

From: James Knox
Sent: Sunday, October 18, 2009 11:20 AM
To: Linda Woodson <lwoodson@acboe.org>
Subject: FW: Emailing: Panasonic National School Change Awards

Dr. Woodson,

Good morning. Hope all is well. I reviewed the award crteria and believe our school can apply with a great chance of attaining this award. I would like you to facilitate the application process this year for us. Feel free to develop a small committee to assist you with this project. I pray you are willing to take on this project. Please advise.

Thank you

James E. Knox, Jr.

Principal

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411 N. New York Ave

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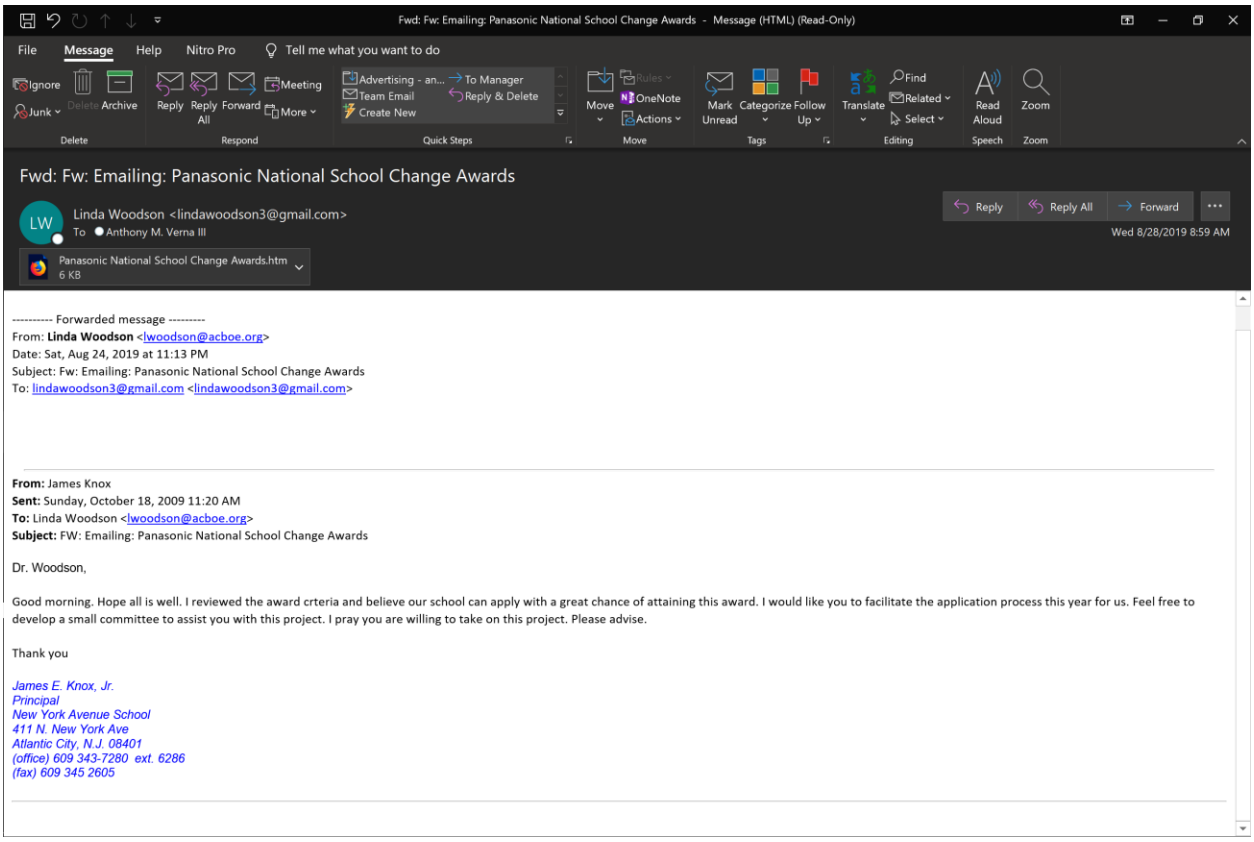

---------- Forwarded message ---------
From: **Linda Woodson** <lwoodson@acboe.org>
Date: Sat, Aug 24, 2019 at 11:13 PM
Subject: Fw: Emailing: Panasonic National School Change Awards
To: lindawoodson3@gmail.com <lindawoodson3@gmail.com>

From: James Knox
Sent: Sunday, October 18, 2009 11:20 AM
To: Linda Woodson <lwoodson@acboe.org>
Subject: FW: Emailing: Panasonic National School Change Awards

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