GOLDBERG SEGALLA LLP

Governmental Liability, Civil Rights and Labor and Employment

FALL 2011

GOVERNMENTAL LIABILITY AND CIVIL RIGHTS

State Court Decisions

New York's Highest Court Concludes Governmental Immunity Bars Claims Against Port Authority for 1993 World Trade Center Bombing

In the Matter of World Trade Center Bombing Litigation Steering Committee v. Port Authority of New York and New Jersey, *2011 N.Y. LEXIS 2971 (2011)*

The legacy of the World Trade Center terrorist attack lives on not only in our hearts and the history books, but now in the jurisprudence of New York State. Eighteen years after the first bombing of the World Trade Center (WTC), the Port Authority of New York and New Jersey has been exonerated of liability based on governmental immunity.

Plaintiffs claimed that the Port Authority, as a landlord, did not provide reasonable security measures to guard against a terrorist attack, which the Port Authority had previously been advised was a possibility. The case went to trial and a jury found the Port Authority 68 percent liable and the terrorists 32 percent liable. The Appellate Division affirmed the verdict and the prior denial of the Port Authority's motion for summary judgment based on governmental immunity. After one of the lawsuits went to verdict on damages, the Port Authority filed a motion seeking permission from the Court of Appeals to appeal from that judgment. The motion was granted and the case was decided in the Port Authority's favor by just a one judge majority.

To decide the appeal, the Court of Appeals had to determine whether the Port Authority's actions in providing security at the WTC qualify as a governmental function or a proprietary function. The court concluded that the Port Authority "acted within its governmental capacity because its security operations at the WTC constituted police protection." Since the Port Authority was acting in its governmental capacity, it was entitled to immunity for claims challenging its security decisions.

The doctrine of governmental immunity is "intended to afford deference to the exercise of discretion by the officials of municipalities and governmental entities, especially with respect to security measures and deployment of resources." This

Goldberg Segalla LLP's *Governmental Liability, Civil Rights and Labor and Employment Newsletter* provides a summary of the latest court decisions shaping the landscape of civil rights, government liability and employment practice. The intent of our review is to provide local governments, school districts, governmental agencies, governmental officials, private entities and insurance companies with an overview of the national decisions impacting the representation and defense of all entities that may be subject to claims involving individual civil rights and employment practices. We greatly appreciate your interest in our newsletter and ask for your commentary, as well as questions. Please feel free to share this publication with your colleagues. If others in your organization are interested in receiving the publication, or if you do not wish to receive future issues, please contact Jonathan Bernstein at jbernstein@goldbergsegalla.com.

permits government entities to make critical decisions regarding security without the threat of legal repercussion. When a governmental entity is also a landlord, the issue then arises as to whether the entity's decision with respect to the security issue at hand qualifies as government function or a proprietary function, for which there is no immunity.

The 1993 bombing involved a bomb that was placed in a van. The van was parked in one of the ramps on the second level of the basement garage. The van was parked in an area that was accessible to the public. Prior to the bombing, the Port Authority had extensively studied and analyzed the risks of a terrorist attack on the WTC. The studies all agreed that the parking garage under the towers was an area that was vulnerable to an attack. However, all the studies rated the risk as low. The studies concluded that the more populated plaza and concourse areas were at a much higher risk for an attack. Armed with this information, the Port Authority increased security measures at the plaza and concourse levels. The Port Authority also implemented additional security measures for the garage, which included the installation of surveillance cameras, increased lighting, door alarms and security patrols. Since the risk of an attack was low in the garage and the Port Authority never received any direct threats involving a car bomb in the garage, the decision was made to still allow the public access to the garage. The controlling inquiry as to whether a governmental entity is acting in a governmental or proprietary capacity is to examine its role with respect to the act or the failure to act that caused the injury. Ownership or control over the location of the accident is not dispositive of whether the entity was acting in a governmental or proprietary capacity.

The court held that the Port Authority's security decisions qualify as police protection because it had its own police force, it constantly analyzed the security risks and it met with other federal and state police agencies. The scope of the Port Authority's decisions with respect to security at the WTC was much broader than that of a landowner, who has to provide reasonable security measures for the protection of those on its property.

The Port Authority provided police protection to the entire 16 acres of the WTC for everybody visiting the site, not just the tenants. Courts have continually held that police protection is a government function. Police protection is not the same as a landowner's duty to maintain his property in a reasonably safe condition in view of all the circumstances. Police protection is limited by the resources of the community and by a considered legislative - executive decision as to how those resources are deployed.

There was a three-judge dissent. The dissent essentially concluded that the Port Authority's action with respect to providing security at the WTC is a proprietary function, not governmental. The dissent believed that simple site-specific measures could have been implemented to secure the garage better and that implementation of such measures is more of a proprietary function, rather than the governmental function of providing police protection. The dissent focused on what plaintiffs argued should have been done to make the garage safer. The majority's focus was on the totality of the Port Authority's function at the WTC with respect to security.

As a side note, with the exception of approximately five bodily injury lawsuits, hundreds of lawsuits against the Port Authority were settled prior to the appeal being heard. The bodily injury lawsuits that remain were tried on damages and resulted in judgments that are in the millions of dollars. Those judgments and the commercial business interruption claims that are also in the millions of dollars will be directly affected by this decision.

Hopefully, this decision will never have to be referred to again in the context of a terrorist attack. However, it is an important decision on the doctrine of governmental immunity when a governmental entity plays a dual role. It is a favorable decision for governmental entities, especially since the context in which it was decided was extreme, and future litigation involving negligent security will likely not arise in such an extreme context.

Prior Written Notice Not Received

***Groninger v. Village of Mamaroneck*, 17 N.Y.3d 125 (2011)**

In a 4-3 decision, the majority of the New York Court of Appeals in the case of *Margaret Groninger v. Village of Mamaroneck*, 17 N.Y.3d 125 (2011) held that the municipal defendant did not receive prior written notice of any icy condition in a publicly owned parking lot that allegedly caused the plaintiff's injuries. In reaching its decision, the majority rejected the plaintiff's argument that because a publicly owned parking lot does not fall within any of the six specifically enumerated under N.Y. Village Law §6-628 (i.e., sidewalk, cross-walk, street, highway, bridge or culvert), written notice of the icy condition was not required. The majority noted that "[f]or nearly thirty years, the courts in this state have consistently found that a publicly owned parking lot falls within the definition of a 'highway' and therefore

prior notice of the defect is required ... ." The court also held that the plaintiff failed to demonstrate that notice was obviated because the municipality created the defect or hazard through an affirmative act of negligence or that a "special use" conferred a benefit on the municipality (*Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999). The three dissenting judges relied upon the court's prior holding in *Walker v. Town of Hempstead*, 84 N.Y.2d 360 (1994) and noted that a parking lot does not fulfill the same function as a highway and, therefore, written prior notice was not required.

Court of Appeals Sends Case to Trial Despite Lack of Written Notice

San Marco v. Mount Kisco, 16 NY3d 111 (2010)

It is well established that municipal defendants are not liable for street or sidewalk defects unless plaintiff proves that written notice was given to the statutory designee of a municipal defendant.

Where written notice is given to the wrong department in a municipality, it is insufficient to satisfy the requirement. See *Gorman v. Town of Huntington*, 12 NY3d 275 (2009).

A telephone complaint that is maintained on a computer database is not the equivalent of written notice satisfying town law or municipal code. See *Politis v. Town of Islip*, 82 AD3d 11191 (2nd Dept. 2011).

In *San Marco v. Mount Kisco*, 16 NY3d 111 (2010), plaintiff fell on ice in a Town parking lot on a Saturday morning. The day before, the Village plowed and salted the lot. After plowing the lot, the temperature rose for several hours and then dropped. Since plaintiff did not have proof that written notice was provided to the Village under Village Law §6-628 or Village Code, she argued that the Village employees "created" the defect by negligently piling the snow in the lot.

The Appellate Division, Second Department, rejected plaintiff's claim, but granted plaintiff leave to appeal to the Court of Appeals.

The Court of Appeals examined whether there was sufficient evidence to establish a triable question of fact as to whether the acts of plowing the snow into a pile constituted "creation" of ice after the snow melted.

The court held that piling snow into a pile could foreseeably lead to ice after melting and refreezing. Therefore, a jury needed to decide if the Village negligently plowed the lot and created the ice that formed the following day.

In *San Marco*, the court distinguished recent decisions where the court decided that to prove affirmative creation of a hazardous condition, the creation of a defect had to take place immediately. Negligent repair work that led to a pothole months later did not constitute "creation of a defect" because it was not immediate. See *Yarborough v. City of New York*, 10 NY3d 726 (2008). See also *Oboler v. City of New York*, 8 NY3d 888 (2007).

In *San Marco*, the accident occurred 27 hours after the Village plowed the lot creating snow piles that melted and refroze overnight. There was a vigorous three-Judge dissent that felt the case should have been dismissed because the act of plowing the snow did not immediately create ice. Ice was formed only after melting and refreezing due to temperature changes. *San Marco* could be a signal that the Court of Appeals is ready to relax the strict interpretation given to written notice statutes in favor of municipal defendants.

The "creation of a defect" exception is commonly argued by injured plaintiffs, but the courts have rejected this claim in many cases, holding that the argument was speculative.

Whether *San Marco* leads to other decisions requiring jury trials of plaintiff's claims a municipality created a defect remains to be determined.

No Qualified Immunity for Police Officers Who Obtained No-Knock Search Warrant for Wrong Apartment on Basis of Uncorroborated Information

Delgado v. City of New York, 2011 NY Slip Op 6081 (1st Dept., July 28, 2011)

This action involves the extent to which police officers are protected by qualified immunity when they obtain and execute a no-knock search warrant for the wrong location based on erroneous information from an informant.

In the middle of the night, 12 police officers crashed in to the apartment where a mother and her six children were sleeping, held guns to their heads, handcuffed them, held them for hours, and threatened to take the children to foster care. The police trashed the apartment searching for drugs and guns but found nothing. It was the wrong apartment. The warrant authorized the officers to search this apartment, but only because an informant misidentified the apartment as the site of a drug operation.

The plaintiffs filed suit against the officers who applied for the warrant, the officers who executed the warrant, and the police department. They asserted various tort causes of action and a 42 U.S.C. 1983 claim. The officer defendants moved for summary judgment on the ground that they were protected by qualified immunity.

To analyze the case, the court applied the two-prong *Aguilar-Spinelli* test. The test requires that the application for a search warrant must demonstrate to the issuing judge (1) the veracity or reliability of the informant, and (2) the basis of the informant's knowledge. Here, the court found that neither prong was satisfied. As for the first prong, the police had no basis to believe that the informant was reliable: the informant had never before provided information, he was not a registered informant, he did not make an admission against penal interest, and, perhaps most importantly, the police did no investigation to corroborate the informant's information. As for the second prong, again, the police did nothing to even minimally corroborate the information. The search warrant was therefore invalid.

The court explained the general rule that officers performing a discretionary function are entitled to qualified immunity if their conduct does not violate clearly established rights of which a reasonable person would have known, and if it was objectively reasonable for the officers to believe that their conduct was appropriate.

The court held that the officers executing the search warrant were protected by qualified immunity because they did so with the understanding that a valid warrant had been issued. However, the officers that applied for the search warrant were not protected by qualified immunity because they did nothing to establish the informant's reliability or the reliability of the information.

Statutory Claim of Negligence That Was Improperly Alleged Under Conn. Gen. Stat. § 52-577n Was Interpreted as a Common Law Claim; Connecticut Supreme Court Still Finds the Claim Insufficient Due to Existence of Immunity Defense

Coe v. Board of Educ. of the Town of Watertown, 301 Conn. 112 (June 7, 2011)

In this case, the Connecticut Supreme Court upheld the trial court's granting of a motion to strike against the Town of Watertown, the Board of Education, and two individual teachers on governmental immunity grounds. The plaintiffs, a minor student and her mother, filed suit against the defendants claiming that the plaintiff severely injured her foot at a school dance after voluntarily removing her shoes. The plaintiff alleged a claim of negligence against the defendants pursuant to Conn. Gen. Stat. § 52-577n, and a claim requesting indemnification from the Town and the Board for the torts of the two individual employees. The trial court struck the negligence claim against the Town and the Board, ruling that the claim was barred by governmental immunity and did not come within the scope of the exception to immunity set forth in Conn. Gen. Stat. § 52-557n. The Supreme Court ruled that the sponsoring of a school dance at an off-school location constituted a discretionary act. The court determined that the plaintiff did not satisfy the exception to the rule of governmental immunity because she was not an identifiable person in imminent harm. The trial court also struck the negligence count alleged in the first count against the individual teachers because § 52-557n does not create a cause of action against individual municipal employees. The trial court also ruled that in the absence of a common law negligence claim against the individual employees, there was no basis for indemnification by the Town pursuant to Conn. Gen. Stat. § 7-465.

Although the Supreme Court ultimately affirmed the trial court's ruling, the Supreme Court ruled that the trial court improperly struck the first count (claiming negligence) against the individual employees. The Supreme Court held that although the allegations in the first count against the individual defendants were framed under Conn. Gen. Stat. § 52-577n, which was improper, the allegations were still sufficient to state a common law negligence claim against the individuals and the count should not have be stricken against them. However, the Supreme Court ruled that there was an alternate ground on which to affirm the trial court's ruling. The Supreme Court ruled that the individual defendants, like the Town, possessed the defense of governmental immunity because they were engaged in discretionary acts and that the trial court's ruling could be sustained on that ground.

Federal Court Decisions

Supreme Court Allows Release of Prisoners in California

Brown v. Plata, 131 S.Ct. 1910

The case arose from serious constitutional violations in California's prison system. The violations existed for years. The appeal came to the Supreme Court from a three-judge District Court

order directing California to remedy two ongoing violations of the Cruel and Unusual Punishments Clause, binding on the states by the Due Process Clause of the Fourteenth Amendment. The violations were the subject of two class actions in two Federal District Courts. The first, *Coleman v. Brown*, involved a class of prisoners with serious mental disorders. The second case, *Plata v. Brown*, involved prisoners with serious medical conditions. The order of the three-judge District Court was applicable to both cases. After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. The three-judge panel allowed for such a reduction. The Supreme Court held that the Prison Litigation Reform Act of 1995 (PLRA) allowed for the reduction.

At the time this matter went to trial, California's correctional facility held some 156,000 persons. This was double the amount that California's prison system was designed to hold. The three-judge panel estimated that the required population reduction could be as high as 46,000 persons. The states had, at one point, reduced the population by 9,000 persons during the pendency of the appeal, creating a further reduction necessary of 37,000 persons. The court noted that the state may employ measures, including good time credits and diversion of low-risk offenders and technical parole violators to community-based programs that will mitigate the order's impact to reduce the prison population. However, a reduction of the prison population was necessary regardless.

The court held that a reduction of the prison population was necessary because for years the medical and mental health care provided by California's prisons had fallen short of minimum constitutional requirements and had failed to meet prisoner's basic health needs. The court noted that there had been needless suffering and deaths as a result. The overcrowding had overtaken the limited resources of prison staff, imposed demands well beyond the capacity of medical and mental health facilities, created unsanitary and unsafe conditions, and made progress in the provision of care difficult or impossible to achieve.

In Case of First Impression, U.S. District Court Finds Prosecutor Has Absolute Immunity in Applying for and Presenting Evidence to Connecticut's Unusual One-Person Investigatory Grand Jury

Lawlor v. Connelly, 2011 U.S. Dist. LEXIS 48058 (May 5, 2011)

The defendant, a former state prosecutor, applied for a special, one-person investigatory grand jury to investigate an incident where the plaintiff, a police officer, used deadly force in the line of duty, to see if there was probable cause to arrest the plaintiff. The grand jury investigation ultimately resulted in the arrest of the plaintiff, but he was acquitted following a trial. The plaintiff then sued the prosecutor under 42 U.S.C. § 1983 alleging that he failed to disclose exculpatory evidence when applying for the grand jury investigation, and during and after the investigation. The defendant moved to dismiss the complaint arguing that, as a prosecutor, he was entitled to absolute immunity. The motion to dismiss presented two issues of first impression: (1) whether absolute immunity applied to a prosecutor's conduct in seeking appointment of Connecticut's unusual, investigatory grand jury; and (2) whether absolute immunity applied to a prosecutor's presentation of evidence to such a grand jury.

The court noted that whether or not a prosecutor's conduct is protected by absolute immunity depends on the function he was performing. Absolute immunity applies where a prosecutor is performing his responsibilities as a state's advocate and an officer of the court, or where a prosecutor is engaged in conduct that is intimately connected to judicial proceedings or the initiation of prosecution. Absolute immunity may not apply when a prosecutor is engaged in other tasks such as investigative or administrative tasks. As to the first issue of first impression, the court determined that the prosecutor's actions in preparing and filing an application for an investigative grand jury were protected by absolute immunity because he was performing a task assigned by law to a state's attorney, the task was intimately associated with the judicial phase of the criminal process, and he was acting as an advocate of the state. As to the second issue of first impression, the court ruled that a prosecutor is entitled to absolute immunity in the presentation of evidence before a traditional grand jury, and this rule should apply equally to the presentation of evidence before Connecticut's unique investigatory grand jury. The court also ruled that the defendant was entitled to absolute immunity relating to the plaintiff's allegation that the defendant failed to disclose exculpatory information after the grand jury investigation was over and the case against the plaintiff was being prosecuted by another prosecutor. The court granted the prosecutor's motion to dismiss the § 1983 complaint based on absolute immunity.

Standing to Challenge the Patient Protection and Affordance Care Act

New Jersey Physicians, Inc. v President of the United States, 2011 U.S. App. LEXIS 15899 (3d Cir. August 3, 2011)

Plaintiffs are a licensed physician, a patient and a non-profit corporation. They objected to the Patient Protection and Affordance Care Act (Health Care Act) and alleged its minimum essential coverage provision, which requires all non-exempt applicable individuals to either maintain a certain minimum level of health insurance or pay a monetary penalty. Furthermore, plaintiffs allege the entire Health Care Act is unconstitutional because it exceeds Congress' authority to pass laws. The District Court dismissed the complaint based upon lack of standing.

The Health Care Act requires all "applicable individuals" to obtain coverage or pay a penalty. Applicable individuals does not include those with insufficient income, those whose premium payments exceed eight percent of their household income, and those who establish that the individual mandate imposes a hardship. All non-exempt individuals must comply by either enrolling in an employer-based insurance plan, individual market plans, or certain government sponsored programs such as Medicare or Medicaid.

The three elements of standing are (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) a showing that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The first element can be established if the injury is concrete and particularized, and actual or imminent, not conjectural or hypothetical.

The Third Circuit agreed the patient had no standing because he failed to adequately plead he was impacted by the Health Care Act. He did not allege any financial hardship. Moreover, the patient was free to choose who and how to pay for health care needs when the Health Care Act takes effect. The same reasoning applied to the physician because the Health Care Act will not effect how he performs his job or gets paid for same. Finally, with regard to the organization, the Third Circuit agreed it had no standing because there were no allegations that any of its members would suffer harm from the Health Care Act.

LABOR AND EMPLOYMENT

Federal Court Decisions

Plaintiff's Claim That Her Prior Employer Terminated Her in Violation of FMLA Dismissed Because Her Unapproved Vacation Violated Company Policy

Pellegrino v. Communications Workers of Am., AFL-CIO, CLC, 2011 U.S. Dist. LEXIS 54052 (W.D. Pa. May 18, 2011)

Plaintiff Denise Pellegrino claimed that her employer, Communications Workers of America (CWA), wrongfully terminated her employment while she was out on approved FMLA leave. Defendant CWA filed a motion for summary judgment maintaining that during Pellegrino's FMLA leave she engaged in an unapproved vacation to Mexico. CWA's motion for summary judgment was granted.

The District Court noted that CWA provided an employee handbook to all employees which documented the procedure for approved medical leave. Pursuant to the handbook, said leave was subject to certain restrictions. Notably, all employees were required to remain within the vicinity of their homes while on leave unless: (a) they were receiving medical treatment; (b) they were attending to personal needs; or (c) they received the express permission of CWA.

Pellegrino was on approved leave following surgery. Accordingly, she received sick leave pay from CWA. However, during leave Pellegrino took an unapproved vacation to Cancun, Mexico. Upon learning of her vacation, CWA terminated Pellegrino.

Pellegrino initiated suit alleging unlawful interference with FMLA. CWA responded that the termination was exclusively due to Pellegrino's violation of CWA's express leave policies. The court noted that the issue was whether "CWA terminated Pellegrino for a legitimate reason not related to her FMLA leave." The court held that although Pellegrino had availed herself of legitimate FMLA policies, CWA was within its rights to terminate Pellegrino for violating those policies. According to the court, "the FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of FMLA leave."

This decision addresses the key distinction between the employer's interest in combating FMLA abuse and interfering with an employee's right to sick leave. When concerned about potential abuse, an employer must fully investigate and document the facts in an effort to prevent, or at the very least assist in the defense of, a potential FMLA dispute down the road.

Waiters in Restaurant Tip-Sharing Case Can Bring Single Suit Consisting of FLSA Collective Action and New York Labor Law Class Action

Shahriar v. Smith & Wollensky Restaurant Group, Inc., 2011 U.S.App. LEXIS 19625 (2d. Cir. September 26, 2011)

This Second Circuit decision focuses on the extent to which a federal court can exercise supplemental jurisdiction over, and certify a class of, state law wage claims in an action that also alleges federal Fair Labor Standards Act (FLSA) claims. The FLSA permits employees to bring a collective action on behalf of themselves and other employees similarly situated, but it requires other employees to opt in by giving written consent. The New York Labor Law (NYLL), on the other hand, permits employees to pursue traditional opt-out class actions through class certification. A practical effect of the difference between the opt-out procedure and the opt-in procedure is that employees who fear retaliation may choose not to assert his or her FLSA rights, whereas the NYLL allows them to recover lost wages without the risks attendant to affirmatively asserting an FLSA claim. Since FLSA and NYLL claims usually revolve around the same set of facts, plaintiffs often file a single action alleging both types of claims.

The plaintiffs here were waiters at the defendant restaurants. The waiters alleged that the restaurants violated the FLSA by requiring waiters to share tips with tip-ineligible employees (e.g., managers and non-service employees), and violated the NYLL by those tip-sharing practices and also by failing to pay waiters for an extra hour's work when their workdays lasted more than 10 hours. Only 25 waiters asserted FLSA claims, but 275 waiters asserted NYLL claims. The District Court granted the waiters' motion for class certification of their state law claims, and the restaurants appealed. The appellate court affirmed.

In permitting the federal law collective action and the state law class action to proceed as a dual action, the court methodically analyzed, first, the elements required by 28 U.S.C. section 1367 for exercising supplemental jurisdiction, and then the elements required by FRCP 23 for certifying a class. Regarding supplemental jurisdiction, the court found the following: the FLSA and NYLL claims derived from a common nucleus of operative fact because they both arose out of the restaurants' compensation policies; the tip-sharing and hourly pay were not novel or complex issues of state law; the NYLL claims largely replicated the FLSA claims and thus did not substantially predominate; having more class members in the NYLL class action than in the FLSA collective action did not mean the state claims predominated; the FLSA's opt-in procedures do not operate to limit a district court's supplemental jurisdiction to only those state law claims that also involve opt-in procedures; and requiring the actions to proceed in separate courts would result in confusion to the employees. Regarding class action certification, the court found the following: the putative class of 275 people was sufficiently numerous; there were common questions of law or fact because the NYLL class claims all derived from the same tipping policies; the representative parties' claims were typical of the claims of the class as a whole because the tipping policies affected all waiters; the representative parties adequately protected the interests of the class as there were no known conflicts; and class issues predominated over individual issues because all waiters were subject to the tip-sharing.

State Court Decisions

School Districts and the Public Bidding Process

In the Matter of L & M Bus Corp, et al. v. The New York City Department of Education, et al., 2011 N.Y. LEXIS (N.Y. June 14, 2011)

In a decision written by Chief Justice Jonathan Lippman of the New York State Court of Appeals, the issue of compliance with public bidding laws was addressed. This issue arose as a result of the New York City Department of Education soliciting public bids from private bus companies seeking to transport disabled students. The Department of Education sought bids on a "per-rider, per-day basis." Potential vendors, 23 in all, commenced an Article 78 proceeding seeking to prevent the Department of Education from seeking bids in this manner. They argue that the per-rider, per-day basis would create speculative bids and the contract would be awarded unfairly.

The Department of Education argued that its bid solicitation was proper since it needed a method to track transportation costs per student. Furthermore, the Department of Education argued that it would allow discounts for timely payments and therefore the incentive to comply with the bid process would be fair to all applicants. Last, the Department of Education argued that the prior contracts that were utilized for 15 years and called for a per-vehicle, per-day price scheme did not motivate the contractors to become efficient and hold down unnecessary costs.

The Court of Appeals reversed the Appellate Division's order as it pertained to restricting the bid specifications. The Court of Appeals held that the 23 vendors had failed to demonstrate that the Department of Education's decision regarding the implementation of the per-rider, per-day policy scheme was irrational. The court felt that it was not up to them to second guess the Department of Education's business judgment. Additionally, the court held that the inclusion of a 2 percent discount for all payments made would apply to all bidders and therefore cannot be deemed to be anticompetitive.

Last, despite the fact that the Court of Appeals upheld the per-rider, per-day business scheme, it did strike that part of the bid that constituted an "employee protection provision," known as an "EPP." This provision created a master seniority list requiring contractors to hire those employees that became unemployed due to the bidding of the contract. The Court of Appeals agreed with the Appellate Division that found that an EPP was similar to a Project Labor Agreement (PLA). Courts have long held that PLAs have an anticompetitive effect on the bidding process and therefore can only be justified if they save the public money by causing the contracts to be performed at a smaller cost or without disruption. Since most EPPs are permanent, unlike PLAs that are job specific, the court felt that the Department of Education has failed to refute the anti-competitiveness of the EPP and that portion of the bid process would be stricken.

Discrepancies Between the Collective Bargaining Agreement and Education Law Section 3020-A Provisions

In the Matter of Helen Hickey, et al. v. The New York City Department of Education, et al.; In the Matter of Rachel Cohn v. Board of Education of the City School District of the City of New York, 2011 N.Y. LEXIS (N.Y. June 2, 2011)

These two appeals were joined for review due to identical fact patterns — i.e., the teachers involved were seeking to expunge from their personnel file "letters of reprimand." The letter placed in Hickey's file involved allegations of incompetence and unsatisfactory professional attitude as a result of her preparing students for a field trip. The letter placed in Cohn's file involved an Equal Employment Opportunity Commission (EEOC) charge wherein she attributed the principal's race to what she deemed to be the principal's temper. Both teachers argued that the placement of the letters violated Education Law Section 3020-a. The lower court agreed with the teachers and directed expungement of the disciplinary letters. The Appellate Division reversed and directed that the petitions filed for expungement should be denied. The Court of Appeals agreed with the Appellate Division and held that the teachers were not entitled to have the letters expunged.

Section 3020-a of the Education Law provides that no person "enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause … ." The court considered the letters "discipline" as defined under the Education Law and therefore felt that, in general, a discipline letter may not be placed in a personnel file pursuant to Section 3020-a. The Court did go on to state, however, that there may be exceptions to the mandates of Section 3020-a. Pursuant to Section 3020, a collective bargaining agreement negotiated between a teacher's union and the school district may modify or waive the 3020-a procedures.

The facts in this matter establish that Article 21A of the petitioners' collective bargaining agreement addresses the placement of written reprimands in a tenured teacher's file. Article 21A allows the placement of discipline letters in the personnel files if the teacher has read the "charge" and signed an acknowledgment of its existence. The signing would *not* constitute an agreement with the contents. Thus, the Court of Appeals found that Article 21A is inconsistent with the procedures of Section 3020-a and the collective bargaining agreement provisions, as adopted, would control.

RECENT VICTORIES

Marianne Arcieri

of the Long Island office recently obtained summary judgment on behalf of the ASPCA in a federal civil rights case. The case involved four plaintiffs, each with separate factual claims. The plaintiffs alleged that the ASPCA violated their civil rights when the Humane Law Enforcement division of the ASPCA seized their animals. In addition to compensatory damages, plaintiffs were seeking punitive damages and attorney fees. After discovery was completed, a motion was made before Judge Hellerstein in the Southern District of New York. The judge dismissed the complaint, concluding that the ASPCA did not violate any of the plaintiffs' civil rights.

Matthew C. Van Vessem

of the Buffalo office obtained a victory at the New York Court of Appeals. In a ruling issued on March 29, 2011 — *In the Matter of Meegan v. Brown*, *Foley v. Brown*, and *BTF v. Buffalo BOE*, 2011 Court of Appeals, No. 37 (March 29, 2011) — the New York Court of Appeals **reversed** the decision of the Appellate Division, Fourth Department and ruled in favor of the City of Buffalo, the Buffalo Board of Education, and the Buffalo Fiscal Stability Authority. The City of Buffalo was represented by Matt.

The Court of Appeals dismissed claims by the Police and Firefighters Union against the City seeking millions of dollars in back pay in a dispute arising from end of the wage freeze imposed by the Buffalo Fiscal Stability Authority (BFSA). The court also dismissed claims by the Buffalo Teachers Federation (BTF) for back pay against the City of Buffalo Board of Education (BOE).

On April 21, 2004, recognizing that the City was in fiscal distress, the BFSA imposed a wage freeze on the City and the BOE. During the period of this freeze, employees did not receive across-the-board contractual increases or longevity based step increases. In light of improved fiscal conditions, on July 1, 2007, the BFSA lifted the wage freeze. The City and the BOE then advanced each employee to the next step of the longevity scale and provided one year of across-the-board wage increase if applicable. The employee organizations representing the City's police and firefighters and the BTF all sued, claiming that employees were entitled to all of the wage and step increases frozen during the term of the wage freeze.

The unions were successful in State Supreme Court and at the Appellate Division, Fourth Department. The New York Court of Appeals granted leave to appeal to the City, the BFSA, and the BOE. Following oral argument on February 9, 2011 (http://1.usa.gov/fxxqFX), the state's highest court, the Court of Appeals, reversed the lower courts and dismissed the claims by the unions.

The Court of Appeals stated: "Ultimately, however, the interpretation proffered by the City most comports with the meaning and purpose of the statute."

This decision will enable the City and the BOE to continue to move forward toward financial stability.

Molly M. Ryan

successfully opposed a claimant's motion for leave to serve a late notice of claim against a town in New York. The claimant was riding his bike on a paved path when his bike hit a crevice, causing him to fall off and fracture his leg. The claimant missed the statutory 90-day deadline to serve a notice of claim, so he filed a motion in the Supreme Court for leave to serve a late notice of claim. He argued that he should be allowed to serve a late notice of claim because it was not until after the 90-day period had expired that he first learned that the town might own the property on which he fell. Meanwhile, unbeknownst to the town that the claimant had had an accident, the town paved over the pathway, thereby unwittingly precluding any investigation of the accident scene. Ms. Ryan successfully argued that the claimant did not have a reasonable excuse for the delay, that the town did not have actual knowledge of the accident within 90 days of the accident, and that because the town paved over the path, the town would be substantially and unfairly prejudiced if the claim were allowed to proceed. The court denied the claimant's motion, thus he was not permitted to proceed with his claim against the town.

Prior results do not guarantee a similar outcome.

Our Municipal and Governmental Liability team consists of the following attorneys:

To learn more and view biographies, please click on the attorney's name and be directed to www.GoldbergSegalla.com.

PARTNERS

Kenneth M. Alweis
Julie P. Apter
Sean P. Beiter
Jonathan M. Bernstein
Paul S. Devine
William J. Greagan
William G. Kelly
Brian W. McElhenny
Patrick B. Naylon
Joseph A. Oliva
Latha Raghavan
Thomas F. Segalla
Matthew C. Van Vessem

SPECIAL COUNSEL

William T. O'Connell
Sandra J. Sabourin

ASSOCIATES

Marianne Arcieri
Melanie J. Beardsley
Jesse D. Rutter

GOLDBERG SEGALLA LLP

READ ADDITIONAL PUBLICATIONS FROM GOLDBERG SEGALLA

To subscribe to *Governmental Liability, Civil Rights and Labor and Employment* and additional Goldberg Segalla publications, visit 'resources' at GoldbergSegalla.com or scan the QR code below.

OFFICES

PHILADELPHIA
1700 Market Street, Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

NEW YORK
1200 Avenue of the Americas, 3rd Floor, New York, New York 10036-1615
Telephone: 646.253.5400 Fax: 646.253.5500

PRINCETON
902 Carnegie Center / Suite 100, Princeton, New Jersey 08540-6530
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD
100 Pearl Street, 7th Floor, Hartford, Connecticut 06103-4506
Telephone: 860.760.3300 Fax: 860.760.3301

BUFFALO
665 Main Street, Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

ROCHESTER
2 State Street, Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE
5786 Widewaters Parkway, Syracuse, New York 13214-1840
Telephone: 315.413.5400 Fax: 315.413.5401

ALBANY
8 Southwoods Boulevard, Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS
11 Martine Avenue, Suite 750, White Plains, New York 10606-1934
Telephone: 914.798.5400 Fax: 914.798.5401

LONG ISLAND
200 Old Country Road, Suite 210, Mineola, New York 11501-9801
Telephone: 516.281.9800 Fax: 516.281.9801