GOLDBERG SEGALLA LLP

# Governmental Liability, Civil Rights, and Labor and Employment

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## GOVERNMENTAL LIABILITY AND CIVIL RIGHTS

### Federal Court Decisions

#### Police Officers Have Qualified Immunity to Enter a Residence Without a Warrant Where There is a Reasonable Belief of Danger

*Ryburn v. Huff, 2012 U.S. LEXIS 910*

In a per curiam decision, the Supreme Court reversed a Ninth Circuit ruling, which held that police officers were not entitled to qualified immunity to enter the home of the respondents, the Huffs, without a warrant. In this case, four police officers were investigating a rumor that Vincent Huff, a student at Bellarmine-Jefferson High School, had threatened to "shoot up" the school. Upon arrival to the Huff residence, the officers knocked on the door and no one answered. The officers then called the home telephone and again, no one answered. The officers then called Mrs. Huff's cell phone. She answered and told them that she was in the house along with her son Vincent and hung up the phone on the officer. A couple minutes later, Mrs. Huff and Vincent came outside and stood on the front steps to talk to the officers. During this time, Mrs. Huff never asked the reason for the officers' visit nor did she express concern that they were investigating her son. When asked whether there were guns in the house, Mrs. Huff did not answer and instead immediately turned and ran into the house. Sergeant Ryburn immediately followed Mrs. Huff. Vincent entered the home after Ryburn and Officer Zepeda also entered the home as he was concerned for officer safety. The other two officers (who were out of earshot) followed on the assumption that Mrs. Huff had given Ryburn and Zepeda permission to enter the residence. None of the officers conducted a search of the Huffs or their property. The Huffs brought an action against all four officers claiming they violated their Fourth Amendment rights by entering their home without a warrant.

The district court entered judgment in favor of the officers finding that they were entitled to qualified immunity "because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led reasonable officers to believe 'that there could be weapons inside the house, and that family members or the officers themselves were in danger.'" The Ninth Circuit affirmed the district court's decision with respect to the two officers that entered the home last on



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.



the assumption that Mrs. Huff had given permission to enter. However, it reversed the decision as to Ryburn and Zepeda on the basis that "any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable" based on the fact that Mrs. Huff's conduct was lawful.

The Supreme Court reversed, stating that the Ninth Circuit's conclusion was flawed for four reasons. First, the Ninth Circuit changed the findings of the district court by finding that Mrs. Huff "merely asserted her right to end her conversation with the officers" and return to her home "after telling the officers 'that she would go get her husband.'" This testimony was not credited by the district court and therefore, the Ninth Circuit could not reverse because it weighed the testimony of witnesses in another manner. Second, the Supreme Court held that the Ninth Circuit's "view that conduct cannot be regarded as a matter of concern so long as it is lawful" was in error. The court stated that "[i]t should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence." Third, the Ninth Circuit erred by viewing each event at the Huff residence as a separate isolated event, not a combination of events. And fourth, the Ninth Circuit majority "did not heed the district court's wise admonition that judges should be cautious about second-guessing a police officer's assessment … of the danger presented by a particular situation." Therefore, the Supreme Court held that "reasonable police officers in the petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent." Based on the facts determined by the district court, the officers came to the reasonable conclusion that they had qualified immunity to enter the residence without a warrant.

Therefore, the Ninth Circuit judgment was reversed and the case was remanded for entry of judgment in favor of the police officer petitioners.

## Supreme Court Does Not Allow Bivens Action Against Employees of a Privately Owned Federal Prison

*Minneci v. Pollard, 2012 U.S. LEXIS 573*

Richard Lee Pollard was a prisoner at a federal facility owned by a private company. In 2002, Pollard filed a complaint in federal court against several of the prison employees. The plaintiff alleged that the employees deprived him of adequate medical care, thereby violating the Eighth Amendment prohibition against cruel and unusual punishment.

In Bivens, the Supreme Court held that the Fourth Amendment implicitly authorized a court to authorize federal agents to be subject to damages to a person injured by the agent's violation of an individual's constitutional rights. The court noted that where federally protected rights have been invaded, courts can adjust their remedies to grant the necessary release.

In this case, the court held that the plaintiff could not assert a Bivens claim. The court held that the plaintiff's Eighth Amendment claim focused upon a kind of conduct that typically falls within the scope of traditional state tort law. In the case of a privately employed defendant, state tort law provides an alternative, existing process capable of protecting a constitutional interest at stake. The court held that the existence of that alternative constitutes a convincing reason for the court to refrain from providing a new and freestanding remedy in damages. Simply put, because a state tort law action is available against employees of a private corporation, the court saw no need to expand Bivens to allow plaintiff a remedy in this case. The court held that a federal prisoner seeking damages from privately employed personnel working at a privately operated federal prison must seek a remedy under state tort law.

## Supreme Court Adopts the Ministerial Exception

*Hosanna - Tabor Evangelical Lutherin Church and School v. EEOC, 132 S. Ct. 694, 2012 U.S. LEXIS 578 (January 11, 2012)*

The question presented before the court was whether the Establishment and Free Exercise Clauses of the First Amendment bar an employment discrimination action when the employer is a religious group and the employee is one of the group's ministers. The court held that the action is barred. The church involved in this matter operates a small school in Redford, Michigan, offering a religious education to students in kindergarten through eighth grade. The plaintiff was first employed by the church as a lay teacher in 1999. When the plaintiff completed her colloquy later that school year, the church asked her to become a called teacher. Called teachers are regarded as having been called to their location by God to a congregation. The plaintiff became ill in 2004 and was eventually diagnosed as having narcolepsy. Plaintiff began the 2004-2005 school year on disability leave. On January 27, 2005, the plaintiff notified the school principal that she

would be able to work the following month. The principal responded that the school had already contracted with a lay teacher to fill the plaintiff's position for the remainder of the school year. On January 30, 2005, the church had a meeting of its congregation, at which school administrators stated that the plaintiff was unlikely to be physically capable of returning to school that school year or the next. On the morning of February 22, 2005, the first day that the plaintiff was medically cleared to return to work, the plaintiff presented herself at the school. The principal asked the plaintiff to leave. That afternoon, the principal called the plaintiff at home and told her that she would likely be fired. The plaintiff responded that she had spoken with an attorney and intended to assert her legal rights. The school board decided to terminate the plaintiff's call. The plaintiff was terminated for insubordination and disruptive behavior, and damage she had done to her working relationship with the school by threatening to take legal action. The plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that her employment had been terminated in violation of the Americans with Disabilities Act (ADA). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. Suit was eventually brought. The church alleged that due to the ministerial exception the suit was barred by the First Amendment.

The court held that the ministerial exception applies. The Establishment Clause prevents the government from appointing ministers and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own ministers. The court held that the ministerial exception granted in the First Amendment precludes the applications of Title VII of the Civil Rights Act of 1964 to claims concerning the employment relationship between a religious institution and its ministers. The court held that the government is not to get involved in a church's decision on who becomes a minister.

In this case, the church held that the plaintiff held herself out as a minister. The church extended her a call. The plaintiff's title as a minister reflected a significant degree of religious training, followed by a formal process of commissioning. The plaintiff held herself out as a minister of the church by accepting the formal call to religious service, according to its terms. The court held that the plaintiff qualified as a minister so that the ministerial exception applied.

The exception ensures that the authority to select and control who will minister to the faith is a matter that is strictly ecclesiastical. The court noted that the interest of society and the enforcement of employment discrimination statutes are important. But, so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission. The court held that when a minister has been fired and then sues her church alleging that her termination was discriminatory, the First Amendment protects the church. The court held that the church must be free to choose those who will guide it on its way.

## Hearing Held Subject to Public Access

*New York Civil Liberties Union v. New York City Transit Auth., 2011 U.S. App. LEXIS 26087 (Jan. 4, 2012)*

In this case, the New York Civil Liberties Union (NYCLU) challenged the New York City Transit Authority (NYCTA)'s policy of prohibiting public access to certain Transit Adjudication Bureau (TAB) hearings that adjudicated police-issued citations. Pursuant to NYCTA's policies, any observer may be excluded from a TAB hearing if the respondent objects to the observer's presence.

NYCLU brought suit under 42 U.S.C. § 1983 to enjoin this policy, claiming that it violated NYCLU's First Amendment right of access to government proceedings. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the U.S. Supreme Court identified two "helpful principles" to guide courts in determining whether a qualified right of access attaches to a given government proceeding. First, courts should inquire into "experience" (history) and consider whether the place and process have historically been open to the public. Second, courts should consider "logic" (functionality) and ask whether public access plays a significant positive role in the functioning of the particular process in question.

The Second Circuit applied the *Richmond Newspapers* "experience" and "logic" test to the TAB's proceedings. The court found that TAB hearings and criminal court hearings were the same type of hearing because of the jurisdictional overlap and shared function of the two forums. The court found that access to criminal hearings is at the core of the entire *Richmond Newspapers* line of cases, and a similar result for the TAB hearings was required. The court noted that the government cannot dress up a criminal trial in the guise of an administrative hearing and thereby evade the well-established requirement that criminal proceedings be open to the public. The court also commented that the TAB proceedings have historically been open to the public. TAB hearings involve a determination of whether a respondent

has violated a transit authority rule. That process was presumptively open from the inception of the transit authority rules system in 1966 when such proceedings were heard openly in criminal courts.

The court then examined the "logic" test and again was guided by the logic of access to the criminal court. The "logic" prong of the inquiry essentially asks whether openness enhances the ability of the government proceeding to work properly and to fulfill its function. This inquiry requires an understanding of what the function of a particular process is and an evaluation of the role of openness in it. TAB hearings, like court trials, depend on publicity as a check that enhances the fairness of the proceeding. Furthermore, in a TAB proceeding, individuals confront the power of their government to judge and penalize their actions. Like a trial, a TAB hearing is part of the general administration of justice that is central to government authority. In this sense, one of TAB's functions, like a trial, is to maintain the public perception of government as a legitimate authority that satisfies the appearance of fairness essential to public confidence in the system. Finally, free access to TAB proceedings informs the populace of the workings of government and fosters more robust democratic debate. Thus, because public access plays a significant positive role in the functioning of the TABS process, the Second Circuit held that TAB proceedings are subject to a public right of access under the First Amendment.

## State Court Decisions

### No "Special Duty" -- Police Officer's Failure to Make Good on Promise to Arrest a Man Does Not Result in Liability When Man Then Shoots a Woman

*Valdez v. City of New York, 18 N.Y.3d 69 (Oct. 2011)*

After her ex-boyfriend shot her in the face and arm, the plaintiff Carmen Valdez sued the City of New York for failing to provide her with adequate police protection to prevent the attack. A jury awarded her $9.93 million. The appellate division reversed. The Court of Appeals then heard the case. The issue was whether the police had created a "special relationship" with the plaintiff. The Court of Appeals held that there was no special relationship, thus the case was dismissed.

The plaintiff had a protective order against her ex-boyfriend, but he nonetheless called her on the phone one evening and threatened to kill her. Alarmed, the plaintiff called the police. The police told her that they would arrest the ex-boyfriend immediately and that she should stay inside her apartment. The plaintiff did not hear from the police again, nor did she contact them to ask whether her ex-boyfriend had been arrested. The following evening, the plaintiff was in the hallway of her apartment building taking out the garbage when her ex-boyfriend appeared and shot her. He then killed himself.

The plaintiff filed a negligence action against the city, alleging that, based on her phone conversation with the police, the city had undertaken a special relationship with her, which created a duty of care, and that the city breached that duty by failing to arrest the ex-boyfriend.

When a plaintiff who is injured by a third person sues a public entity for negligence, the first thing the plaintiff has to establish is that the public entity owed her a duty of care. While a public entity does owe a general duty of care to the public to provide police protection, this general duty is insufficient to support a negligence claim. There can only be negligence if there is a "special duty."

To establish a special duty, a plaintiff has to prove four elements: 1) an assumption by the public entity, through promises or actions, or an affirmative duty to act on behalf of the injured party; 2) knowledge by the public entity's agents that inaction could lead to harm; 3) some form of direct contact between the public entity's agents and the injured party; and 4) the injured party's justifiable reliance on the public entity's affirmative undertaking.

Focusing on the fourth element, the court found that there was no justifiable reliance because it was not reasonable for the plaintiff to relax her vigilance based on nothing more than an officer's statement that they were going to arrest the ex-boyfriend "immediately." Neither plaintiff nor the police knew the ex-boyfriend's whereabouts, thus plaintiff could not reasonably expect his immediate arrest. Additionally, based on her prior experience, plaintiff expected that the police would call her back to confirm that they had arrested the ex-boyfriend. But the police never called her back, so for this reason too, plaintiff was not justified in relaxing her vigilance.

The court dismissed the case because there was no special duty, but the court also explained in relatively great detail how another principle of law – the governmental function immunity defense – might have been relevant. This defense provides that a public employee's discretionary acts (i.e., conduct involving the exercise of reasoned judgment) cannot result in the public entity's liability even when the conduct is negligent. In other words, even in cases where a plaintiff is able to establish all the elements of negligence, special duty included, a public entity will still not be liable if the negligent conduct involved a discretionary function. Since the plaintiff in this case did not establish all the elements of negligence, the court did not decide whether the city could have avoided liability under the governmental function immunity defense.

## School District Does Not Have to Pay Educational Costs for Children Living in Local Child Care Institution if Those Children Are Nonresidents of the School District

*Board of Education of the Garrison Union Free School District v. Greek Archdiocese Institute of St. Basil, 2012 NY Slip Op 23 (Jan. 2012)*

The Greek Archdiocese Institute of St. Basil is a licensed residential childcare institution that houses children whose parents are unable to care for them. St. Basil is located in the Garrison Union Free School District. Some of the children's parents are not residents of the school district and St. Basil does not have legal custody or guardianship status over all the children. Thus, even though the children live at St. Basil, some of them are not actually residents of the school district. For years, the school district and St. Basil have fought about who has to pay the educational costs for those particular children, both insisting that the other has to pay. The Court of Appeals recently put the dispute to rest, ruling in favor of the school district.

St. Basil argued that the children's educational rights are governed exclusively by Education Law Article 81 (§4001, et seq.). Article 81 provides that every child residing in a child care institution is entitled to a free education in the local public schools or neighboring public schools. But the article does not fully address who bears the cost of the education.

The school district argued that Education Law §3202 governs the issue. Section 3202 provides that the school district of a child's residence is financially responsible for the cost of educating a child.

According to St. Basil, Article 81 children – those in child care institutions – are not subject to §3202's residency requirement. The court disagreed, holding that a school district does not have to pay for the educational costs of children at licensed child care institutions who do not qualify as residents of the school district, and that children living in licensed child care institutions are not deemed residents of the local school district purely by reason of their presence in the institution.

## Court Rejects Plaintiff's Claim of Negligent Security in Assault at Town Park

*Salone v. Town of Hempstead, 2012 N.Y. App.Div. 358 (January 17, 2012)*

In *Salone v. Town of Hempstead*, 2012 NY Slip Op 00352, the plaintiff was injured by three unidentified youths who attacked him during the course of a pickup game of basketball at a park owned and maintained by the Town of Hempstead. The plaintiff sued alleging the defendant was liable for failure to provide adequate security. The trial court denied the defendant's motion for summary judgment, but the Second Department reversed and dismissed the complaint.

The court held that public entities are immune from negligence claims arising out of their governmental function unless the injured person establishes a special relationship, creating a duty to protect the individual.

Whether the governmental defendant was acting in a proprietary or governmental function depends upon the acts or omissions claimed to have caused injury.

In *Salone*, the defendant had personnel patrol the park and the plaintiff claimed that they had done so negligently. This allocation of security resources implicated policy making as to the nature of risks at the park. Thus the alleged omissions arose out of the defendant's governmental function.

Since there was no special relationship between the Town and the plaintiff, summary judgment was granted and the case dismissed.

### Appellate Division Second Department Affirms Plaintiff's Verdict in Police Emergency Vehicle Accident

*Elnakib v. County of Suffolk, 934 N.Y.S.2d 223 (2nd Dept. December 6, 2011)*

In *Elnakib v. County of Suffolk*, 2011 NY Slip Op 08898, December 6, 2011, the Second Department affirmed a liability judgment in favor of the plaintiff in a two-vehicle accident case involving a police vehicle. The officer was engaged in an emergency situation and entered an intersection without stopping at a stop sign. The plaintiff's evidence showed that the view at the intersection was obstructed and the officer was traveling at 50 mph entering the intersection.

The officer testified he slowed down as he entered the intersection. Although the defendant was entitled to the reckless disregard standard, under Vehicle and Traffic Law §1104(e), the court held that a jury had a rational basis to find he acted with reckless disregard for the safety of others. Reckless disregard was defined as committing an act in disregard of a known or obvious risk such that it was highly probable harm would follow. The plaintiff's liability verdict was affirmed.

### Court Clarifies Connecticut's Notice of Claim Statute

*Frandy v. Commissioner of Transportation, 132 Conn. App. 750 (Dec. 27, 2011)*

The plaintiff was injured when the bicycle she was riding hit a hole in the road. The plaintiff sent a timely notice of claim to the defendant Commissioner of Transportation pursuant to Conn. Gen. Stat. §13a-144. The notice stated that the plaintiff's injuries were the result of "the defective condition of the pavement," which caused her to be thrown from her bicycle. The plaintiff later sued and, for the first time, alleged in her complaint that the defective condition was a hole in the road. The defendant moved to dismiss the suit for lack of subject matter jurisdiction, arguing that the notice of claim pursuant to §13a-144 was defective because it failed to indicate the cause of the plaintiff's injury. The trial court denied the motion to dismiss, finding that the plaintiff's notice was adequate under the statute, and the commissioner appealed.

Conn. Gen. Stat. §13a-144 provides that an action based on a highway defect shall not be brought unless "notice of such injury and a general description of the same and of the cause thereof and of the time and place of its occurrence has been given in writing" to the commissioner within 90 days. The notice requirement is a condition precedent which, if not met, will prevent the destruction of sovereign immunity.

The Appellate Court found that the plaintiff's notice failed to state a cause of the injury as required by §13a-144. The plaintiff's notice merely stated that the cause of her accident was "the defective condition of the pavement" but it did not specify the precise nature of the claimed defect. The plaintiff tried to argue that the court should read the notice of claim holistically, and because she was able to pinpoint the exact location of the accident and provided that information in the notice, the notice should have been found adequate. The plaintiff also tried to argue that the notice should be read in conjunction with her complaint. The Appellate Court rejected both arguments. The Appellate Court reversed the trial court's denial of the commissioner's motion to dismiss and the case was remanded with direction to enter judgment for the commissioner.

## LABOR AND EMPLOYMENT

## Federal Court Decisions

### Second Circuit Upholds Summary Dismissal of Sex Discrimination Claim Versus Roman Catholic Diocese of Rochester Due to Plaintiff's Own Lack of Credibility

*Rojas v. The Roman Catholic Diocese of Rochester, et al., 660 F.3d 98 (2d Cir. 2011)*

In *Rojas v. The Roman Catholic Diocese of Rochester, et al.,* the Second Circuit upheld the district court's summary dismissal of the plaintiff's sex discrimination claim even though plaintiff alleged questions of fact precluded summary judgment. The plaintiff alleged a hostile work environment and that she was fired for complaining about the sexual harassment. A critical issue for determination was whether the conduct of the alleged offending individual, who was not an employee of the Diocese, would be imputed to the Diocese in order

to establish liability. The plaintiff made numerous specific allegations as to how the offensive conduct was brought to the attention of the Diocese. Regardless, the lower court, as well as the Second Circuit, searched the record and granted summary judgment finding this to be "one of the rare circumstance(s) where the plaintiff relies almost entirely on (her) own testimony, much of which is contradictory and incomplete and where the facts alleged are so contradictory that doubt is cast upon their plausibility."

Accordingly the Second Circuit upheld the district court's dismissal on summary judgment following an assessment of the evidence submitted in opposition, concluding that "no reasonable jury could believe it." The plaintiff's many conflicting sworn statements concerning her complaints of sex discrimination were such that rather than creating a question of fact, they created a question of implausibility, depriving the plaintiff of her day in court.

## Second Circuit Clarifies Standard of Review for ERISA Plans and Establishes Standard for Triggering Statute of Limitations in ERISA Benefit Claims

*Novella v. Westchester County, 661 F.3d 128 (2d Cir. 2011)*

In November, the Second Circuit addressed an ERISA benefit claim case involving numerous employees and the employer, Westchester County and the New York Carpenters' Pension Fund. The case was brought by Carlo Novella, a 78-year-old former carpenter, who claimed that his disability pension was miscalculated by the fund by using two different pension rates; Novella claimed the fund should have only used one rate. The defendants argued that the two rates were appropriate because Novella had a break in service from 1982 through 1986 and therefore the plan called for applying two rates - one for the first applicable work period (1962-1981) and a second for the subsequent work period (1987-1995). However, the plan did not provide for a two-rate calculation under its disability pension; it only provided for such a calculation under its deferred pension provisions. The district court thereby granted Novella's motion for summary judgment stating that there was no support in the language of the fund's controlling documents. After the court's decision granting Novella's individual claims, he sought class certification, which was granted. The lower court's decision on Novella's motion for summary judgment was affirmed by the Second Circuit. Although the court was addressing a summary judgment motion, which reviewed de novo, the Second Circuit reviewed the lower court decision by applying the more deferential arbitrary and capricious standard. The court explained its decision to use the standard citing Supreme Court precedent that "plans investing the administrator with broad discretionary authority to determine eligibility are reviewed under the arbitrary and capricious standard." In affirming the district court's decision, the Second Circuit stated that the defendants' decision was arbitrary and capricious because nothing in the plan permitted the Westchester Fund "to apply a section controlling one specific type of pension to a pension of a different kind."

However, the Second Circuit vacated the district court's judgments certifying the plaintiff class, granting summary judgment to the class and granting prejudgment interest to Novella and the class members based on its finding that it could not determine whether the certified class was sufficiently large to satisfy Rule 23. This determination "hinge[d] on whether the statute of limitations for each class member's claim began to run upon receipt of his first pension payment … or upon a class member's first inquiry to the fund regarding the amount of his benefits and the fund's rejection of his request that his pension be calculated using one rate." The district court used the latter as the triggering the six-year statute of limitations. The Second Circuit addressed the dispute over the time a pensioner can be considered to have been put on notice as the issue had been undecided in the circuit. The court determined that "notice of a miscalculation can be imputed to a pensioner … when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation." This ruling is consistent with other circuits, including the Third, which have also adopted "a similar reasonableness approach."

On remand, each of the potential class members' cases will have to be evaluated to determine when the statute of limitations started to run in each individual's case. The court's decision may make it difficult for the potential class representative to meet the typicality requirement, thereby destroying any chance Novella and the other potential class members have to move forward with a class action against Westchester County and the Pension Fund. The Second Circuit clarifies a 90-day limitations period for filing of ADA claims following receipt of a right to sue letter from the EEOC.

In *Tiberio v. Allergy Asthma Immunology 664 F3d 35 (2nd Cir 12/20/2011),* Lorrie Tiberio was an RN-infusion nurse for Allergy Asthma Immunology

of Rochester, P.C. She was terminated from her position with her employer in May 2010 following accusations of improper access to patient records, among other things. Tiberio filed a disability discrimination claim under the ADA with the EEOC. The EEOC issued a right to sue letter dated November 24, 2010 to Tiberio and her counsel. Tiberio commenced an action in Federal Court 96 days later, on February 28, 2010. The trial court dismissed the case, on the basis that it was not filed within the 90-day limitations period provided by 42 USC § 2000e-5(f)(1). The Second Circuit affirmed the dismissal and clarified that "the 90-day limitations period … begins to run when a right-to-sue letter is first received either by the claimant or by the claimant's counsel" (emphasis added). The court explained that a presumption applies to the date set forth on a notice by a government agency and a further presumption is made concerning the date of receipt of such governmental notices. Tiberio attempted to argue that the date of receipt of the EEOC notice by her counsel should control the calculation of the limitations period under the ADA. The court rejected this argument, absent certain limited circumstances not applicable in this case, and clarified that the 90-day limitations period set forth in 42 USC §2000e-5(f)(1) begins to run on the date a right to sue letter is first received by either claimant or counsel, whichever is earlier. Although time limitation periods should always be analyzed, following this decision, a careful review (including potentially during discovery) should occur, even if the complaint arguably asserts that the filing was timely based on counsel's receipt of the EEOC notice (as occurred in this case). Tiberio's suit was not timely filed even though her lawyer asserted that she "timely" filed it. Tiberio was unable to dispute that she had received the EEOC notice earlier than her attorney, thus compelling dismissal of the suit as untimely.

## State Court Decisions

### Arbitration Decision May Stand Despite Fact That, on Its Face, It Would Violate Public Policy

*The City School District of the City of New York v. Colleen McGraham, 17 N.Y.3d 917 (Nov. 17, 2011)*

The Court of Appeals reviewed a First Department decision that allowed an arbitration award to stand involving a teacher's inappropriate contact with a student. A 36-year-old tenured female teacher was engaging in a course of questionable conduct by routinely texting a 15-year-old male student every evening. The messages involved a variety of personal matters and the teacher eventually tried to discuss the nature of their relationship, which in her view was romantic. The conduct was always by way of text messages and was never physical. Despite this, complaints were made and she was subject to an Education Law §3020-a hearing for improper conduct.

Although the hearing officer found the teacher guilty of inappropriate communications with the student, he found her to be remorseful and imposed a penalty of a 90-day suspension without pay and reassignment to a different school upon her reinstatement. The school district commenced a CPLR §7511 hearing to vacate this decision/award, arguing that it was irrational and contrary to the public policy of protecting children.

Following the lower courts, the Court of Appeals held that it cannot disturb the arbitration process. Although the courts may intervene in the arbitration process in cases which public policy considerations prohibit particular matters being decided in certain ways, the fact that the hearing officer engaged in a thorough analysis of this matter and determined that it was an isolated incident, is sufficient to argue that the award was not arbitrary and capricious. The court acknowledged that reasonable minds might differ, but the fact that issues of personal contact between a student and teacher is involved is not sufficient in and of itself to set aside an arbitration decision.

### Employers Must Consider Disciplinary Options Under a Collective Bargaining Agreement Unless Contract Explicitly Provides for Zero Tolerance

*Shenendehowa Central School Dist. Bd. of Educ. v. CSEA, Inc., Local 1000, 934 N.Y.S.2d 540 (3d Dept. 2011)*

The Third Department reversed a Supreme Court's decision to vacate an arbitration award based on the employer's failure to consider all of the disciplinary options under the parties' collective bargaining agreement before discharging an employee. In the underlying arbitration, a former school bus driver (and union member) testified positively for marijuana and was terminated. At the arbitration, the employer's position was that it had a zero tolerance policy with respect to positive drug tests and therefore the driver's termination was mandatory. However, the parties' collective bargaining agreement did not contain such a policy; rather, it stated that "[s]uspension without pay or discharge may be invoked with less than two (2) written warnings where the employee's conduct creates a danger

to the health, safety or welfare of staff, students and/or the general public … a positive result in any required drug or alcohol test is considered such a danger."

In holding that the arbitration award should be confirmed, the Third Department conceded that the employer had the option to terminate the employee. However, it agreed with the arbitrator's decision that because the employer did not consider the disciplinary options in the CBA but rather deemed the employee's termination mandatory, the employer had "violated the CBA by refusing to exercise any discretion in regard to the punishment to be imposed, with [the employer] instead imposing what it incorrectly believed to be a mandatory termination." Therefore, although the ultimate decision was acceptable under the parties' agreement, the reasoning for reaching the decision was not. As a result, the Third Department held that the arbitrator's award was proper as it did not modify any terms of the CBA, was rational, and fell within the powers granted to the arbitrator.

## Paramedics Entitled to Protection Under CBA

*International Association of Fire Fighters, Local 22, AFL-CIO v. Pennsylvania Labor Relations Board, 202 Pa.Commw. LEXIS 28 (Comm. PA. Jan. 18, 2012)*

International Association of Firefighters, Local 22, AFL-CIO (Local 22) petitioned for review of an order from the Pennsylvania Labor Relations Board (Board) that determined Fire Service Paramedics (FSP) were not firefighters under the Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §217.1, which is commonly known as Act 111. This statute states:

> Policemen or firemen employed by a political subdivision of the Commonwealth … shall through labor organizations or other representatives designated by 50 percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

Local 22 is the bargaining representative for fire personnel in Philadelphia. Firefighters and FSPs undergo different training; however, they both must attend a fire academy. During fires, FSPs establish a first aid station to render care to injured firefighters and civilians. Moreover, FSPs occasionally assist with firefighting tasks.

On appeal, the court agreed with Local 22 that FSPs have authority to perform firefighting tasks. Specifically, 351 Pa.Code §5.5-400 created a fire department to extinguish fires and handle explosion hazards. Consequently, the fire department employs both firefighters and FSPs to work at emergency scenes to save lives. Therefore, FSPs are "firefighters" under ACT 11 and should be provided with collective bargaining rights because they assist in fighting fires and assist others who battle same. The Board's decision was reversed.

Impact: The court determined it was patently unfair to say that Fire Service Paramedics were not entitled to the same collective bargaining rights as firefighters because they both fight fires.

## Arbitrability of "Job Security" Clauses in Public Sector Collective Bargaining Agreements

*In the Matter of the Arbitration Between Johnson City Professional Firefighters Local 921, et al. v. Village of Johnson City, 18 N.Y.3d 32 (2011)*

In *Johnson City Firefighters,* the New York State Court of Appeals ruled that a village could abolish bargaining unit positions for budgetary reasons despite a provision in the collective bargaining agreement (CBA) which stated: "The village shall not lay-off any member of the bargaining unit during the term of this contract." Specifically, the court held that the firefighters' union could not seek arbitration of the reduction in force as a breach of the CBA's job security provision, because that provision violated public policy and therefore was not arbitrable. This decision may indicate an increasing willingness by a majority of the court to stay public sector arbitrations on public policy grounds.

Writing for a 4-3 majority, Judge Pigott stated, "This court has long held that a purported job security provision does not violate public policy, and therefore is valid and enforceable, only if the provision is 'explicit,' the CBA extends for a 'reasonable period of time,' and the CBA 'was not negotiated in a period of a legislatively declared financial emergency between parties of unequal bargaining power.'" If a job security provision does not meet these criteria, it will not be enforceable. This determination usually turns on whether

the provision is sufficiently "explicit." As Judge Pigott stated, "A purported 'job security' clause that is not explicit in its terms is violative of public policy, rendering it invalid and unenforceable." Judge Pigott drew the rules quoted above from a trio of unanimous decisions regarding job security provisions that the court issued on the same day in 1976. Matter of *Burke v. Bowen*, 40 N.Y.2d 264 (1976); Matter of *Board of Education of Yonkers City School District v. Yonkers Federation of Teachers*, 40 N.Y.2d 268 (1976); and *Yonkers School Crossing Guard Union v. City of Yonkers*, 39 N.Y.2d 964 (1976). These decisions acknowledged the gravity of a public employer's promise not to reduce its work force: as noted in *Yonkers Teachers*, if the employer should suffer serious economic difficulties in the future, and its promise was interpreted to prevent it from reducing its labor costs at that time, the promise could become a "suicide pact." Therefore, although the court was not able to find a public policy prohibition against a public employer committing itself to such a promise, it stated that to be enforceable, the promise must be "explicit" that it applies to all circumstances, even future budgeting difficulties. As these decisions demonstrate, the language used in a job security provision is all important.

In the *Yonkers Teachers* case, the CBA job security provision stated:

During the life of this contract no person in this bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance as provided for under the Tenure Law.

The term of this provision was three years, which the court called a "relatively short duration," and the court found the provision to be "explicit in its protection of the teachers from abolition of their positions due to budgetary stringencies." Therefore, the union was permitted to go to arbitration on its claim that the city's termination of teachers constituted a breach of this job security provision.

In the *Burke* case, which involved firefighters, the job security provision stated that for the term of the CBA there would be a minimum of 34 firefighters overall, and all tours would consist of a minimum of six firefighters. It concluded:

> Notwithstanding any provision herein, it is agreed that upon a re-evaluation as to minimum complement, that in no event shall the presently agreed upon minimum be readjusted downward. The specific intent of this provision is to assure public safety standards as well as minimum job protection for the firefighters.

The term of the CBA was three years and seven months, which the court appeared to consider "a reasonable period of time." Although the job security provision did not specifically say it would apply in times of budgetary constraint, the court ruled that it was "explicit," presumably because the statement "in no event shall the presently agreed upon minimum be readjusted downward" made clear that the provision would apply in all future circumstances. This ruling would have allowed the union to arbitrate the employer's alleged breach of the job security provision, if the CBA had an arbitration clause. Since it did not, the court stated that any remedy for this alleged breach would have to be pursued in court by the terminated firefighters.

In the third 1976 case, *Yonkers Crossing Guards*, the court ruled that the CBA "job security" provision was not explicit. That provision stated:

> Present members may be removed for cause but will not be removed as a result of Post elimination.

According to the court, the provisions in the other two cases were "explicit, unambiguous and comprehensive," but this provision was "ambiguous" – apparently meaning that it did not expressly make clear that it was intended to apply in all circumstances. The court therefore affirmed a lower court ruling that the CBA contained no provision barring the city from dismissing bargaining unit members for reasons of economic necessity.

In *Johnson City Firefighters*, Judge Pigott stated that the test laid down in the 1976 cases is whether a job security provision is "explicit, unambiguous and comprehensive." He explained the reasons for this test as follows:

From a public policy standpoint, our requirement that "job security" clauses meet this stringent test derives from the notion that before a municipality bargains away its right to eliminate positions or terminate or lay off workers for budgeting, economic, or other reasons, the parties must explicitly agree that the municipality is doing so and the scope of the provision must evidence that intent. Absent compliance with these requirements, a municipality's budgetary decisions will be routinely

challenged by employees, and its ability to abolish positions or terminate workers will be subject to the whim of arbitration.

On this basis, the court held that the following CBA "job security" provision was not explicit: "The village shall not lay-off any member of the bargaining unit during the term of this contract." As a result, the court ruled that the provision was not arbitrable, and stayed the union's attempt to arbitrate the village's termination of bargaining unit members.

The majority's stated rationale for the holding was that the term layoff could refer to either a permanent or non-permanent job loss, so it was ambiguous; the job security provision did not "comprehensively prohibit the village from abolishing firefighter positions"; and it did not expressly apply to economic and budgeting stringencies. In dissent, Judge Ciparick argued that whether "layoff" meant a temporary or a permanent job loss, in either case bargaining unit members would be out of work, and the "job security" provision made it explicitly clear that should not happen during the term of the CBA. Judge Ciparick also took issue with the majority's "suggestion" that a job security provision should expressly say that it applies to periods of budgetary difficulty, because the CBA provision in the 1976 Burke case did not do so and that provision was ruled "explicit."

In the future, public employers seeking to stay arbitration of a "job security" provision will attempt to exploit any ambiguities in the language of the provision, particularly if it does not expressly state that it will apply in the event of financial or budgetary difficulties.

## Civil Service Law §72 Does Provide Procedural Safeguards For Voluntary Leave

*In the Matter of Thomas Sheeran v. New York State Department of Transportation; In the Matter of Michelle Birnbaum v. New York State Department of Labor, 18 N.Y.3d 61 (Nov. 17, 2011)*

The Court of Appeals addressed the issue of whether Civil Service Law §72 provides certain procedural safeguards to public employees who are prevented from work following a voluntary absence. The court held that the safeguards provided to public employees placed on involuntary leave also apply to those who originally left voluntarily.

Both of the petitioners in these two actions worked for public employers; Sheeran as a civil engineer for the State Department of Transportation and Birnbaum as an employee of the Department of Labor. Both individuals took voluntary leave due to illness and eventually sought to return to work. Although each submitted the required certification from their treating physician to return to work, both state departments exercised their right pursuant to 4 NYCRR 21.3(e) to have them examined by a state-affiliated physician. After each examination, it was determined that the employees were unfit to return to work; thus they were placed on involuntary leave.

Sheeran and Birnbaum both sought a hearing pursuant to Civil Service Law §72 but each department denied the requests, determining that the applicable collective bargaining agreements and 4 NYCRR 21.3 were the controlling authority. The claimants therefore filed Article 78 petitions to challenge their being placed on involuntary leave. Although the Supreme Court in each case granted the petitions, the Appellate Division reversed and dismissed them stating that the employers were allowed to place both on involuntary leave and, therefore, allowing them to be terminated pursuant to the applicable collective bargaining agreement.

The Court of Appeals looked extensively at the legislative history of the statutes involved and determined that the main purpose of Civil Service Law §72 was to afford tenured civil servant employees with procedural protections prior to involuntary separation from service. This protection should apply to employees who were on sick leave, sought a return to work and thereafter were prohibited from doing so. The court felt that if employers were allowed to act as these employers did in converting a voluntary leave to an involuntary leave, employees would be discouraged from taking voluntary leave when a medical situation would arise. The Court of Appeals felt that the Legislature never intended to deprive the employees of these procedural safeguards; thus the Court of Appeals reversed the Appellate Division and reinstated the judgment of the lower court in granting the petitions.

## Workplace Misconduct Can Serve As Proper Grounds To Terminate Employee Notwithstanding Claimed Disability

*Hazen v. Hill, Betts & Nas, 2012 N.Y. App. LEXIS 30 (New York App Div 01/05/2012)*

James Hazen filed a complaint with the New York State Division of Human Rights (DHR) charging his employer, Hills, Betts & Nash, LLP, with unlawful discrimination

and retaliation based on the disability of bipolar disorder. Hazen was terminated from his employer following discovery of improper charges to the employer's credit card, among other things.

The DHR Administrative Law Judge, following a hearing, found in favor of Hazen. The DHR Commissioner issued a final order awarding Hazen more than $500,000 in damages, plus interest. An appeal followed, in which Hazen sought additional damages and in which the employer sought to annul and vacate the final order. The New York State Supreme Court, Appellate Division, First Department, annulled the commissioner's final order, vacated the award and dismissed Hazen's complaint. Recognizing that judicial review of a DHR Commissioner's determination is narrow, the court nevertheless found that there was no evidence, much less substantial evidence, that the employer discharged Hazen based on his disability. Rather, the employer discharged Hazen for misuse of an employer-provided credit card and for trying to bill those charges to clients. In reaching its decision, the court emphasized that employers are not required to excuse misconduct simply because the employee claims to be "disabled." It is also true that the facts of this case supported the court's determination insofar as Hazen never claimed any disability until after he was confronted with the misconduct. The court did not accept such an after-the-fact excuse. The court also noted that the EEOC has acknowledged in its guidelines that an employee's disability does not shield him or her from the consequences of misconduct. While this decision does give employers some insight dealing with workplace misconduct cases in which the misconduct is claimed to occur because of a disability, it should also be noted that the facts in a specific matter are highly pertinent to any recommendation or determination regarding the employee's employment status. In these cases, careful analysis should occur (as this employer learned at the outset, since it was found liable following the hearing and only defeated the charge on appeal) before any personnel action is taken.

## RECENT VICTORIES

### Unusual Retalition Discrimination Claim Dismissed

Goldberg Segalla's Rochester team was successful in obtaining dismissal of an unusual retaliation discrimination claim, after a hearing before the New York State Division of Human Rights. An employee charged that a village's budgetary change of his position from full-time to part-time amounted to age-based discrimination. Shortly after filing his complaint with the Division of Human Rights, the claimant filed a retaliation complaint, asserting that the alleged actions of the village including negative evaluations, changes in work hours and responsibilities, improper supervision, denial of vacation time, and the like constituted retaliation for filing his age discrimination claim. Even though the initial discrimination complaint was dismissed, the New York State Division of Human Rights found probable cause to believe that retaliatory discrimination may have occurred and directed a hearing. After the hearing the division issued a decision and order dismissing the case, determining all actions of the village were taken for legitimate reasons and that claimant failed to sustain his burden to establish the actions of the village were for retaliatory purposes.

### Federal Civil Rights Against Police Dept. and Officers Dismissed

In another victory for Goldberg Segalla's Rochester office, our team obtained summary judgment from the U.S. District Court for the Western District of New York, dismissing a federal civil rights claim versus a Town Police Department and Police Officers. The plaintiff was arrested for aggravated harassment after the parents of a 14-year-old girl charged that the then 29-year-old plaintiff continued to contact their daughter by telephone after being told to stop calling the house. The charges were dismissed in criminal court for "improper accusatories" and the plaintiff claimed he was targeted and arrested by the female police investigator who purportedly knew the allegations against him were false. The plaintiff's federal malicious prosecution claim was dismissed as the defense established that the plaintiff's voluntary appearance for arraignment, issuance of an appearance ticket, and two subsequent appearances in court were insufficient to establish a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights. In any event, the plaintiff's claims of lack of probable cause due to inadequate investigation were likewise dismissed. While the plaintiff alleged the investigating officer's failure to properly investigate the allegations that he made the harassing phone calls, the court likewise found that the officer was entitled to rely upon the sworn statements of the victim's as establishing

*Prior results do not guarantee a similar outcome.*

reasonable cause to believe an offense had been committed. The action was dismissed in its entirety due to the existence of probable cause, absence of malice, and no unconstitutional restraint on liberty in any event.

## Arbitration Award in Firefighters' Retroactive Pay Raise Case Reversed

The district court ruled in favor of a city over a Professional Firefighters Association in two petitions. Goldberg Segalla's Matthew C. Van Vessem represented the city and was instrumental in developing the best set of facts in which to advocate the city's position. These rulings saved the city tens of millions of dollars in potential liability. One petition was an Article 78 seeking retroactive pay concerning a period covered by the city's wage freeze (that was dismissed). The other petition was an Article 75 seeking to confirm an interest arbitration award. The petition to confirm was denied, and the city's cross motion to vacate was granted.

Matthew C. Van Vessem

## Community College Defeats Claims of ADA Violation by Campus Peace Officer

David E. Leach of Goldberg Segalla's Syracuse office represented a community college in a claim brought by a campus peace officer wherein he alleged a violation of the Americans with Disabilities Act (ADA). The employee was out of work for injuries unrelated to the subject claim, and on the evening before he was scheduled to return to work at the community college, he suffered another injury when a finger on his right dominant hand came into contact with a saw blade. The peace officer was a probationary employee and a decision was due to be made regarding whether to hire him on a permanent basis. The Peace Officer was let go and he filed a claim with the New York State Division of Human Rights (DHR) alleging, among other things, that his discharge was the result of his being discriminated against because of the injury to his finger. He also claimed that a reasonable accommodation could have been made, specifically that he could have either worked in a light duty capacity without a firearm or he could fire his weapon with his left, non-dominant hand. After a conference, the DHR found there was no probable cause to believe he was discriminated against because of his disability. The employee then filed an Article 78 petition seeking to have the DHR's finding vacated. The Supreme Court denied the peace officer's application. The peace officer then appealed to the Appellate Division, Fourth Department. Surprisingly, his attorney withdrew as counsel at this point. The peace officier failed to perfect his appeal on a timely basis, and the motion to dismiss the appeal was granted.

David E. Leach

## Wrongful Death Action Against Municipalities, Fire Departments Dismissed in Federal Court

Brian W. McElhenny and Karen Saab-Dominguez, attorneys in Goldberg Segalla's Municipal and Governmental Liability Practice Group, successfully defended a Long Island town and its public safety department in federal court against civil rights claims stemming from the high-profile 2008 murder of an Ecuadorian immigrant by six teenagers.

Brian W. McElhenny

The plaintiff in this case, the administrator of the decedent's estate, asserted a civil rights claim pursuant to 42 U.S.C. §1983 as well as state law claims of negligence against the municipalities. The plaintiff claimed the municipalities violated the decedent's substantive due process right to be free from harm by failing to properly protect him from the group of individuals who attacked and killed him, pointing to the Substantive Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The state law claims alleged negligence in the hiring, retention, and training of law enforcement officers.

Karen Saab-Dominguez

On November 2, 2011, Hon. Leonard D. Wexler of the U.S. District Court for the Eastern District of New York issued a decision dismissing the complaint against the municipalities in its entirety. The court agreed with the defense that while there is a Constitutional right to the integrity of one's life, the Constitution imposes no duty on the part of public defendants to protect individuals from privately inflicted harm.

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