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Court of Appeals Absolves State of Liability for Diver's Accident Where Diver Was Well Aware of the Lake's Shallowness.

Tkeshelashvili v. State, 18 N.Y.3d 199 (2011).

The plaintiff in this case often frequented the Colgate Lake in Greene County for recreation and was rendered quadriplegic when he attempted to dive into its shallow waters on Labor Day weekend. Plaintiff subsequently commenced suit against the State for allegedly failing to maintain lake in a reasonably safe condition. The Court of Appeals dismissed the complaint.

Lake Colgate was formed after the building of a nearby dam, which allowed for spillover water to flow into the lake area. Because the lake came from spillover water, the depth of the lake often fluctuated, but was 4.6 feet on average. The water level also fluctuated seasonally, due to snow and rainfall and receding water in the summer.

It was the plaintiff's familiarity and prior experiences with the Lake that served as the basis for the Court's decision granting summary judgment for the State. The Court found that because the plaintiff had been to the lake at least twenty times during the five years before the accident and was aware of the fluctuating water levels, his decision to dive in having "no clue" about the water depth and not stopping at all beforehand constituted as reckless conduct which was the sole proximate cause of his accident.

Of note, a non-party witness confirmed that plaintiff dove into the lake headfirst without any hesitation at all. By plaintiff's own admission, he stated that the water was murky and that the brim of the water was below the spillway, which was three feet above the dam's crest and no more than four feet above the lakebed. A post accident investigation by the New York State Department of Environmental Conservation revealed that the depth of the water on the date of loss was likely two and certainly no more than four feet deep, which was confirmed by a witness' testimony that parts of the lake were not much higher than his knee when he went to the plaintiff's aid.

The Court held that any State issued warnings regarding the lake's fluctuating water levels would have only alerted plaintiff to a danger that he was already aware of and that there was no evidence beyond speculation that the dam was "leakier" at the time of his accident as opposed to when he previously dove into the lake.

First Department Upholds Plaintiff Employee's Complaint Against Private School for Retaliatory Discharge.

Villarin v. Rabbi Haskel Lookstein Sch., 2012 N.Y. Slip Op. 2786.

In this matter, the plaintiff was a former nurse at defendant's school who reported suspected child abuse, but was allegedly fired for doing so. Specifically, plaintiff observed a prominent left cheek injury to one of her student patients, confirmed with the child that his father intentionally struck him and even spoke to the child's father, who conceded that he hit his son intentionally and with his mother's approval. Plaintiff orally reported the incident to the school headmaster, who questioned her motives and attempted to discourage her from making a formal report under Social Services Law section 413. Plaintiff informed the headmaster that she was under a legal obligation to report the incident and nonetheless, did make a report to the Register. Plaintiff's employer fired her a month and a half later, purportedly, for not being a "team player."

Social Services Law section 413 (1) (a) provides that school officials, including nurses, report or cause a report to be made when they have reason to suspect child abuse or maltreatment. Section 413 (1) (c) prohibits a school from taking any retaliatory action against school personnel for doing so, provided the report is made with reasonable cause.

Plaintiff's suit against the school, as her former employee, sounded in wrongful termination and retaliatory discharge, only the latter of which survived defendant's motion to dismiss.

The Court dismissed plaintiff's wrongful termination cause of action against defendant because New York employment, by default, is considered "at will," in that either the employer or employee may terminate the employment relationship for any *or no reason*. Because there was no employment duration or documents regarding plaintiff's employment which would negate her status as an at-will employee, the Court found that she could not commence a claim against defendants for wrongfully terminating her.

However, the Court noted that even employment at will is subject to certain "whistle-blower" exceptions, including Labor Law 740. This provision prohibits employers from taking any retaliatory action (including firing) against personnel for their refusal or objection to participate in unlawful activity, provided that the unlawful activity presents a substantial and specific danger to the public health. In acknowledging this statutory exception to employment at will, the Court upheld the plaintiff's cause of action for retaliatory discharge, wherein she claimed that the defendant school terminated her because she refused to violate Social Services Law 413.

The Court emphasized that under Labor Law 740, plaintiff was required to ultimately prove (1) that her employer violated a law, rule or regulation and (2) that the violation presents a substantial and specific danger to the public health. Taking the allegations in plaintiff's complaint as true, as is required in deciding CPLR 3211 Motions to Dismiss, the Court found that plaintiff sufficiently plead both elements in the four corners of the complaint.

The Court found that the plaintiff's complaint sufficiently pled a 740 cause of action under prong (1), because defendant arguably violated Social Services Law 413 in encouraging plaintiff not to report suspected child abuse and allegedly terminated her for doing so. However, element (2) was more heavily disputed, with defendant arguing that a violation of Social Services Law 413 could not serve as a basis for a 740 cause of action, because discouraging plaintiff from reporting a single incident of purported child abuse does not constitute as a "substantial and specific danger to the public health."

The Majority decision disagreed and found that plaintiff sufficiently pled a 740 cause of action under prong (2) as well. While the Court acknowledged that "substantial and specific danger to the public health" is undefined in the statute, it recognized that case law and public policy have never required Labor Law 740 causes of action to be predicated on large scale threats or multiple potential or actual victims. Rather, the Court opined that a threat to any member of the public may very well be satisfy element (2), particularly if the single incident is an inherently dangerous practice which might recur.

The Majority opined that although the plaintiff was only allegedly terminated for reporting abuse to a single student, the threat of discouraging other school officials from reporting child abuse in accordance with Social Services Law 413 could be considered an inherently dangerous practice and that the dissent could not seriously argue otherwise.

The majority went further and emphasized that the history behind New York legislature evinces a concern for the widespread protection of abused children and lends credence to the argument that child abuse prevention is a public health and safety concern. The Court went on to detail that Social Services Law 419 and 420 further establish a public policy against child abuse and a policy to report it. Social Services Law secion 419 immunizes school personnel who report suspected child abuse from suit (absent a showing of willful misconduct or gross negligence in doing so) and 420 provides for a private cause of action for monetary damages against those school officials who fail to do so. The Court also found it significant that case law addressing Social Services Law 413 found that immunity was "indispensable" to child abuse reports to further the "strong public policy of protecting children."

As such, the majority found that the intent behind Social Services Law 413 is to encourage school officials to freely report suspected child abuse without fear of retaliation, that the policy at issue touched upon a substantial and specific danger to the public health and that the plaintiff, thus, sufficiently pleaded *both* elements of a Labor Law 740 claim against her employer.

The dissent opined that alleged retaliation in response to reporting one incident of child abuse is not a specific danger to public health or safety, as "public" means "relating or belonging to an entire community, state or nation" and the plaintiff's complaint does not speak to any such concern. The dissent argued that even if the defendant's alleged conduct could have an adverse effect on reporting child abuse *within the school*, this still falls short of a public concern and that the defendant's single incident of alleged misconduct is not indicative of a school wide problem of child abuse or failing to report it.

The majority held that adopting the dissent's position would contravene the very purpose behind Social Services Law 413, in forcing school officials to choose between facing possible liability under 419 for failing to report the abuse, or alternatively, being terminated if they do report it and leaving them with no recourse against their employers under a whistleblower statute.