

Volume 31
Fall 2012

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

SECOND CIRCUIT FINDS THAT A PAYROLL CLERK'S COMPLAINTS OF FINANCIAL MALFEASANCE WERE MADE IN THE COURSE OF HER OFFICIAL DUTIES AND DID NOT FALL WITHIN THE FIRST AMENDMENT'S PROTECTION.

Ross v. Breslin et al., Docket No. 10-5275-cv. (September 10, 2012).

Plaintiff in this case was a Board of Education pay roll clerk typist alleging retaliatory termination in response to her complaints about pay irregularities that she detected in the course of her duties. While the Southern District Court found issues of fact as to whether her complaints were protected First Amendment speech such that her employer was not entitled to qualified immunity, the Court of Appeals disagreed and found that her complaints were made in her official duties and that the defendant School District and administration were thus shielded from suit.

Plaintiff described her job duties as including processing payroll, knowing the salaries of each district employee, processing payment requisitions and making sure that pay requisitions were correct with verified and approved totals. Plaintiff testified that it was also part of her duties to alter the "appropriate person" if she felt that there was a mistake or issue with pay requisitions. Indeed, plaintiff made numerous written and verbal complaints to her supervisor throughout her employment, alerting him to the fact that numerous employees were claiming bonus and payment requisitions without the required approval and that many payment requisitions were generally improper. Plaintiff complained about these questionable requisitions on several occasions, specifically to the District Superintendent, who was not her direct supervisor.

Plaintiff was ultimately fired sometime later because a newly-appointed consultant from a neighboring School District recognized that the plaintiff was previously fired from her job there, yet failed to list this prior employment (let alone her termination) on her employment application for her current school, as required. Evidently, the consultant also brought to light the fact that plaintiff also failed to list her prior employment from two other School Districts on her application as well.

Post termination, plaintiff wrote a letter to the President of the Board of Education, purportedly because she felt that her Superintendent had failed to take the appropriate action in response to her complaints about payment irregularities. In the letter, plaintiff noted that while she was a Board of Education employee, she was writing him "on a personal note out of

complete frustration with the District's Administration" and to express her concern that she was terminated in retaliation for reporting financial malfeasance. A subsequent, pre termination hearing resulted in a unanimous vote to terminate the plaintiff for knowingly making false statements on her employment application.

The Court of Appeals emphasized that defendants were entitled to qualified immunity for firing the plaintiff because the decision to do so was an exercise of their discretion as a Municipality. However, the Court opined that plaintiff could circumvent this immunity by establishing that defendants violated her "clearly established" Constitutional right of which a reasonable person would have known. Plaintiff unsuccessfully attempted to argue that defendants had violated her First Amendment rights by terminating her for speaking out about financial misconduct within her school district.

The Second Circuit noted that in order for plaintiff's speech to be protected by the First Amendment (and constitute a valid basis for overriding defendants' qualified immunity), her speech must have been made as a *citizen* on a matter of public concern, as opposed to as an *employee* speaking in the context of her official duties. In drawing this distinction, the Court emphasized that there is no bright line rule and that considerable, practical factors are the nature of the plaintiff's job responsibilities, the relationship between the speech and those duties and whether or not the speech was actually made to the public. The Court noted that an employee's self serving characterization of his or her job duties or voicing complaints outside the chain of command are hardly dispositive factors in this analysis.

The Court ultimately found that plaintiff's speech fell into an unprotected category because it was her very duty as payroll clerk to report financial malfeasance to the appropriate administrators and this is exactly what she did. As such, plaintiff's "speech" in the form of her complaints about improper disbursements were made pursuant to her official duties and not as a citizen, even though the issue of which she complained could be one of public concern. Thus, because the plaintiff's speech did not fall within the First Amendment's protection, defendants did not violate a clearly established constitutional right that a reasonable person would have known and therefore, were entitled to qualified immunity.

While plaintiff technically made complaints to the Superintendent as opposed to her direct supervisor, the Court found that she was still alerting the "appropriate person" as required by her job description and that plaintiff, indeed, went to the Superintendent (and later, the Board of Education President) because she felt that her complaints were not being addressed. The Court also found plaintiff's characterization of her duties as merely "clerical" to be unavailing.

The Court opined that the State has an interest in regulating its employees' speech in certain contexts and that it does not unduly infringe on public employees' liberties to allow the State to regulate employee duties and responsibilities that it has, itself, created. Furthermore, the Court indicated that plaintiff could have an alternative avenue of redress for her termination under the New York Whistleblower's Statute and Employment laws.

**COURT OF CLAIMS ABSOLVES THE DEPARTMENT OF CORRECTIONS FOR
PEACE OFFICERS' CONDUCT IN SHOOTING HIS ASSAILANT DURING AN OFF
DUTY ENCOUNTER.**

Wood v. State of New York, 2012 N.Y. Slip Op. 51741(U).

During a road rage encounter that escalated to physical violence, defendant peace officer fired a single, accidental shot that fatally wounded one of his two assailants from another vehicle. The estate of the deceased assailant then sued the Department of Corrections under theories of respondent superior and negligent employment/entrustment with respect to their training and hiring of the peace officer. The Court rejected these claims and granted defendant summary judgment as the peace officer was not in the course of his employment at the time of the incident.

The peace officer was in his vehicle with his wife and child en route home from a day of family activities at the time of the incident, but was carrying his off duty weapon and handcuffs in the vehicle and had his peace officer's badge and sticker displayed on the front dashboard. After beeping and attempting to maneuver around the plaintiffs' vehicle (which remained stopped once a traffic light turned green), two brothers emerged from this vehicle and according to the peace officer's testimony in criminal proceedings, began kicking and punching him.

During the melee, the peace officer attempted to defend himself and identified himself as an "officer" in the hopes that this would deter his assailants from attacking him any further. He summarily testified that he had no intentions of using his weapon to harm either brother, but was merely reaching for his badge and weapon so that he could "detain" the men by ordering them to raise their hands and handcuffing them so as to keep himself and his family safe. Prior to the fatal shot, there was testimony from multiple witnesses that one of the brothers said something to the effect of "he's a cop, let's f- kill him."

The Court noted that Criminal Procedure law allows, but does not *require* Peace Officers to make off-duty, warrantless arrests in the event that they observe a felony and have reasonable cause to do so (as opposed to the Police, who are required to enforce the law, anytime, anywhere).

The Court also emphasized that this particular peace officer had rarely even used his weapon in the line of duty.

Ultimately, the Court dismissed the plaintiff's claims, finding that the peace officer was acting in a personal capacity and not in the scope of his employment, particularly because he was deferential to the police once he was able to ward off his assailants, immediately calling the police and essentially, letting the police officer's take the reins of the situation upon arrival. The Court held that the mere presence of the officer's weapon and badge in the vehicle was simply insufficient to impute his admitted off duty actions of firing an accidental shot at his assailant to his employer.

No City Duty Found to Protect Victim of Pitbull Mauling

Sutton v. City of New York, 102267/09

The Courts have recently held that New York City is not liable for the death of a 90 year-old man who was killed by two pitbulls, even though there were repeated calls to the police that the dogs were roaming the neighborhood unleashed. The wrongful death case filed by the decedent's survivors alleged that the City was negligent in not responding to the numerous warnings of the dangerous dogs roaming free.

There were nine 911 calls made by the decedent's neighbors or extended family in the three months prior to the mauling. However, it is settled law in New York State that in order to recover for the inaction by the municipality, the plaintiff must establish that a "special relationship" existed between the municipality and the decedent. The four elements required to establish such a relationship are: (1) an assumption by the municipality to act on behalf of the party that was injured; (2) knowledge on the part of the municipality that inaction could result in injury; (3) some form of direct contact between the potential victim and the municipality's agents; and (4) the party's reliance on the municipality's affirmative undertaking.

The Staten Island Supreme Court Justice granted the Defendants' motion for summary judgment and determined that although the incident was tragic, the plaintiff was not able to establish that the City had a "special duty" to protect the decedent from the dogs because he never called himself.

The Court held that the victim's family failed to demonstrate that a "special relationship" existed between the victim and the City. The Court determined that the plaintiff failed to show the first element that requires an assumption of any affirmative duty on the part of the City to act explicitly on behalf of the decedent. Specifically, the Court reasoned that there was "clearly no direct contact between the municipality's agents and the decedent" since the 911 calls were made by the decedent's neighbors and distant relatives and not by the decedent himself or someone in his immediate household. Since he or someone from his household did not make the 911 calls, the City cannot be held liable for his death due to their failure to act on complaints of the unleashed dogs.

Court of Appeals Absolves School District of Liability for Altercation Between Students that Occurred Before School Hours and Outside of the School Grounds.

Stephenson v. City of New York,

The Court of Appeals found that a School District did not have a duty to plaintiff, who was injured in an altercation with a fellow student that occurred before school hours and off of the school grounds. These same two students were involved in a similar altercation on school grounds just two days before the subject occurrence. In response, the boys were given in-school suspension, separated and dismissed at separate times.

The Court found that the School had sufficiently supervised the two boys in response to the first altercation and that its duty to protect the plaintiff did not extend to the second. As such, the School was absolved of liability.

In reaching this conclusion, the Court opined that a school's common law duty to adequately supervise its students stems from the fact that the school has *physical* custody of them. As the Court noted, a school cannot be expected to continuously supervise and control all of the student's movement and activities, nor, does its duty to protect the students extend beyond the school premises.

The second altercation was thus deemed to be outside the orbit of the School's authority and duty. The Court also found that the School could not be held liable for failing to apprise the plaintiff's parents of the first altercation, because there is no statutory duty imposed upon Schools to inform parents about generalized threats.

Court of Appeals Finds that a Private Road Cannot Become a Public Street If a Village Does Not Maintain and Repair It.

Marchand v. N.Y. State Dept of Envtl. Conservation, 950 N.Y.S.2d 496.

Plaintiffs were private homeowners whose property included a dirt road used as a thoroughfare by public pedestrians and vehicles without their protest. After the homeowners challenged the Village's attempt to obtain a permit for drainage work to the road, the question before the Court was whether the Village had any ownership interest in it at all. While the lower Courts found in the affirmative, the Court of Appeals reversed and held that the dirt road was a private one and not a Village Street.

In arriving at its conclusion, the Court noted that Village Law § 6-626 deems land within the Village to be a public street if the public uses it, continuously, for more than ten years.

While it was undisputed that the public adversely possessed the dirt road under this provision by traveling upon it for over ten years without any challenge, the Court held that this, in itself, was not enough to confer an ownership interest upon the Village as opposed to the private homeowners. The Court opined that in addition to the public's adverse possession of the road, the Village must have repaired it or took it "in charge" to obtain an ownership interest. The Court held that the Village's conduct did neither.

While the Village admittedly provided police and fire protection, garbage pick-up, plows and sand to the dirt road along with performing inspections and maintenance of fire hydrants thereon, its conduct did not rise to a level of continuous maintenance and repair, which the homeowners performed for the relevant time period.

As such, the road was deemed a private road that the homeowner's had title to.

Federal District Court Absolves Municipality of Liability for Flooding Caused by a Clogged Drainage Culvert.

Am. Ins. Co. v. City of Jamestown, 2012 U.S. Dist. Lexis 152207.

After a sever rain storm, the drainage culvert in this case became clogged with tree limbs and branches and, ultimately, caused flooding to a nearby, low lying Hospital. The plaintiff, the Hospital's insurance company, compensated the Hospital under its flood insurance policy and then sought reimbursement from the City based on a claim that the City was to blame for the culvert becoming clogged.

The City had rebuilt the drainage culvert in 2007 and would inspect it from time to time thereafter for blockage, which was usually incidental to other work to the drainage system in the area or done in response to complaints. The municipality also had a stand-by cleaning team which would rotate through the town and clean the entire drainage system annually. There was no written policy, set scope or frequency regarding the City's cleaning and/or inspection of the culvert, nor were any written records maintained as to when this was done. There were no prior complaints made about clogging of the culvert and the City opined that it never observed or otherwise became aware of even partial clogging in the area where the culvert became clogged during the storm. The City, did, however, perform cleaning and testing for drainage to other, nearby problem areas in the drainage system.

In response to the flood, the City made a written application to the Department of Environmental Conservation ("DEC") to install remedial equipment, because the culvert's chamber "*periodically traps organic debris, thus causing water backup or surcharge. . .*"

The Western District of New York ultimately granted summary judgment for the City, finding that it did not owe plaintiff a duty and that it had no cognizable, prior notice of the culvert becoming clogged.

The Court noted that the presence or absence of the City's duty was a threshold, legal issue to be determined by the Court and that foreseeability is relevant to the scope, but not the *existence* of a duty. The Court opined that while municipalities are often immune from liability for inadequate drainage systems, they are still obligated under common law to exercise a reasonable degree of watchfulness over its storm drainage system sufficient to protect others from the unreasonable risk of injury. This duty of care would encompass keeping streams free of obstructions and providing general flood protection.

Here, however, the City had limited its common law duty by enacting a local, prior written notice statute inclusive of the culvert. The Court deemed the City's statute to be valid, but of course, noted the two exceptions to prior written notice, (1) an affirmative, negligent act which causes a dangerous or obstructed condition or (2) the City's special use of the subject area.

The Court found that because the City did not have any prior written notice of any complications with the culvert in the area of the clog, it did not owe the plaintiff a duty. The

Court rejected the plaintiff's argument that defendant waived its defense under the prior written notice rule by failing to allege it as an affirmative defense because it is a pre requisite to plaintiff's claim which plaintiff had to sufficiently allege in the complaint. The Court held that the plaintiff had not and could not sufficiently plead prior written notice because there simply was none and complaints about nearby areas of the drainage system were insufficient.

The Court found there to be no exceptions to the prior written notice rule because the City's rebuilding of the system was not affirmative negligence, but rather, passive malfeasance at best.

The Court went a step further and held that the City was free from liability even absent consideration of prior written notice because common law negligence principles still require actual or constructive notice, neither of which the City had. In this regard, the Court rejected the plaintiff's argument that the City did not inspect and/or clean the drainage system often enough and held that it was sheer speculation for the plaintiff to argue that the defendant's use of the word "periodically" in its post incident letter to the DEC was referring to prior incidents of clogging in the subject area of the culvert.

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