



# New York Municipal Liability Update

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## Table of Contents

<b>Notice of Claims</b> .....	<b>3</b>
Ruiz v. City of New York.....	3
<b>Traffic Control and Safe Sidewalks</b> .....	<b>4</b>
Olenick v. City of New York.....	4
Loghry v. Village of Scarsdale.....	5
<b>Zoning Ordinances</b> .....	<b>6</b>
Matter of Ravena-Coeymans-Selkirk Cent. Sch. Dist. v Town of Bethlehem.....	6
<b>Special Duty</b> .....	<b>7</b>
Tara N.P. v. Western Suffolk Bd. of Co-op. Educ. Servs.....	7
Full v. Monroe County Sheriff’s Dep’t.....	7
Marks-Barcia v. Village of Sleepy Hollow.....	8
<b>Emergency Operations</b> .....	<b>9</b>
Green v. Zarella.....	9
<b>Police Misconduct</b> .....	<b>10</b>
Cordero v. City of New York.....	10
Bah v. City of New York.....	11
<b>False Arrest</b> .....	<b>12</b>
District of Columbia v. Wesby.....	12
Grice v. McVeigh.....	13
Kass v. City of New York.....	15
Simon v. City of New York.....	17
<b>Qualified Immunity</b> .....	<b>19</b>
Kisela v. Hughes.....	19
<b>Title VII and Sex Discrimination</b> .....	<b>20</b>
Zarda v. Altitude Express, Inc.....	20

## NOTICE OF CLAIM

### **Ruiz v. City of New York, 154 A.D.3d 945 (2d Dep't 2017)**

On September 10, 2014, plaintiff was arrested, arraigned, and detained until September 13, 2014. On March 27, 2014, the criminal charges against plaintiff were dismissed, and on or about May 21, 2015, plaintiff commenced this proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim upon the City of New York and the New York City Police Department. On May 27, 2015, plaintiff served the petition and proposed notices of claim upon the City. Although the notices of the claim for malicious prosecution were timely, they were untimely for the false arrest and false imprisonment claims. The Supreme Court denied the petition for leave to serve the late notice of claim, and the petitioner appealed.

The Second Department affirmed, finding that plaintiff had failed to establish that the City had actual knowledge of the facts constituting the claims of false arrest and false imprisonment within 90 days after the claims arose or a reasonable time thereafter. That plaintiff delayed serving a timely notice of claim while his criminal charges were pending does not constitute a reasonable excuse under the circumstances of this case. Even if he was waiting for his criminal charges to be dropped, he failed to explain why he waited another two months after that to commence this proceeding. The fact that the City failed to show that it had been substantially prejudiced by the delay did not shift the balancing scales so far into plaintiff's favor as to prove that the trial court improvidently exercised its discretion. Plaintiff failed to establish that the City had actual knowledge; therefore, it was within the trial court's discretion to deny plaintiff leave to serve a late notice of claim.

Two judges dissented, arguing that the trial court should have granted the petition. The dissent explained that when determining whether to grant a petition to serve a late notice of claim, a court should consider all relevant facts and circumstances. In this case, plaintiff had submitted an affidavit that he did not timely file a notice of claim on his false arrest and false imprisonment claims because of his pending criminal proceedings and fear that the District Attorney's office would retaliate against him if he did file a notice of claim. Furthermore, while he did not prove that the City had actual notice, it likely would have been difficult for plaintiff to access his records while the criminal charges were still pending. Thus, plaintiff's failure to provide evidence demonstrating that the City had actual knowledge within 90 days or a reasonable time thereafter would not be fatal to his petition. Finally, plaintiff met his initial burden that the City would not be substantially prejudiced because he alleged that police officers participated in the acts giving rise to plaintiff's claims, City employees participated in the criminal investigation and prosecution of petitioner, and his records were maintained in the City's files. In response, the City failed to provide a reason why it would be substantially prejudiced. Based on these circumstances, the dissent determined that the petition should have been granted.

## TRAFFIC CONTROL AND SAFE SIDEWALKS

### **Olenick v. City of New York, 52 N.Y.S.3d 839 (Sup. Ct., Kings Cty. 2017)**

In July 2010, plaintiff was riding a bicycle across the Brooklyn Bridge from Manhattan towards Brooklyn. On the bridge, the bike lane was marked with painted bicycle signs and was next to the pedestrian lane, which was marked with painted stick figures of people walking. A painted white line separated the bike lane from the pedestrian lane, and each lane was intended for two-way traffic. While plaintiff was riding along the bridge, a pedestrian stepped into the bicycle lane, causing plaintiff to fall and sustain injuries. At the time of the accident, plaintiff was unable to stop.

Plaintiff argued that the walkway and bike path had inadequate traffic control devices, including regulatory signs or safe separation of the pedestrian and bike paths. He also alleged that defendant had prior written or actual or constructive knowledge of the inadequate traffic control devices on the Brooklyn Bridge because at least eight other similar accidents occurred within two years prior to plaintiff's accident.

Defendant argued that it was entitled to summary judgment because it could invoke government function immunity. It reasoned that in 2008 it had created a plan to update the bicycle/pedestrian markings to improve visibility on the bridge. The markings on the bridge on the date of the accident were added as part of this plan. These designs were discretionary, and therefore, the government was entitled to immunity.

The Court found that defendant's plan to increase visibility on the bridge was a proprietary function because it was similar to roadway planning, design, and maintenance. Therefore, defendant was not entitled to summary judgment based on government function immunity. The Court further found that defendant could not invoke a qualified immunity defense because it did not conduct a safety study of possible collisions and injuries on path before creating the plan to update the markings.

Therefore, because defendant could not invoke immunity, and because defendant knew of the previous collisions and failed to conduct a safety study, the court denied defendant's motion for summary judgment, finding instead that there was a question of fact as to whether defendant's failure to conduct a safety study contributed to plaintiff's accident and injury.

**Loghry v. Village of Scarsdale, 149 A.D.3d 714 (2d Dep’t 2017)**

Plaintiff allegedly tripped on a sidewalk made of bluestone and fell, injuring his shoulder and back. Plaintiff alleged that defendant affirmatively created the defect through its negligent design, selection, and installation of the bluestone sidewalk, and that it negligently maintained and repaired the sidewalk. Defendant moved for summary judgment dismissing the complaint because it had not received prior written notice of the alleged defect, nor did it create the defect. The Supreme Court granted defendant’s motion, and plaintiff appealed.

The Second Department affirmed. It reasoned that defendant had to demonstrate that it lacked prior written notice of the alleged defect and that it did not create the defect. The defendant demonstrated that it lacked prior written notice by offering an affidavit from a village official who conducted a records search on the location of the incident and found no prior written notice of any defect. The defendant demonstrated that it did not affirmatively create the defect by offering deposition testimony of two village officials indicating that a committee had selected the sidewalk design after consulting with a landscape architecture firm. Furthermore, one village official, who was an engineer, testified that the bluestone was suitable for the climate of the area. Thus, defendant demonstrated that its actions did not “immediately result in the existence of a dangerous condition,” as would be required for defendant to be liable for affirmatively creating the defect.

Because plaintiff did not raise a triable fact of issue, the Supreme Court properly granted defendant’s motion for summary judgment dismissing the complaint.

## ZONING ORDINANCES

### **Matter of Ravena-Coeymans-Selkirk Cent. Sch. Dist. v Town of Bethlehem, 156 A.D.3d 179 (3d Dep't 2017)**

The School District asked the Town whether any local law would prohibit it from replacing its elementary school sign with an electronic message board sign. The Town responded that it was expressly prohibited. The School District then applied for a variance to install such a sign, which the Town denied. The Town then learned that the School District had already erected the sign and, when the Town informed the School District that it had violated several local laws, the School District stated that the zoning laws did not apply to it, reasoning that it was a public school. As a precautionary measure, the School District appealed to the Zoning Board of Appeals, which promptly denied the School District's application for a variance. The School District commenced this action, seeking judgment that it was immune and exempt from the Town's zoning law; the Zoning Board and the Town sought an order for the School District to remove the electronic sign. The Supreme Court dismissed the petition and ordered the School District to remove the sign.

The Third Department affirmed. It rejected the School District's argument that the School District was immune and exempt from all municipal zoning regulations as they apply to the use of real property for school purposes. Although schools and churches were regularly exempt from local zoning ordinances because they were beneficial to the community, those inherent beneficial effects had to be weighed against their potential harm for the community. Thus, the court stated, "If, in the event of a sufficient safety concern, educational uses of property by a school district may be wholly excluded by local law, it follows that a school may be subject to minor curtailment of an accessory use of real property on the same basis."

The court then rejected the School District's argument that it was entitled to immunity under *Matter of County of Monroe*. Instead, the court determined that the zoning principles of *Cornell Univ. v. Bagnardi* applied. Because the School District was not immune from the zoning laws, the court then considered whether the Zoning Board properly denied the School District's application for a variance. It then concluded that the Zoning Board's decision was neither arbitrary nor capricious, but was instead based on a concern for traffic safety due to the sign's brightness and potential to be more distracting to passing vehicles than an ordinary sign. Therefore, the Supreme Court properly dismissed the School District's petition and ordered it to remove the sign.

## **SPECIAL DUTY**

### **Tara N.P. v. Western Suffolk Bd. of Co-op. Educ. Servs., 28 N.Y.3d 709 (2017)**

Plaintiff was sexually assaulted while attending classes at Western Suffolk Board of Cooperative Educational Services at a facility operated by North Amityville Community Economic Council (NACEC). NACEC agreed to use its facility as a work site for a “welfare to work” program that was run by the Suffolk County Department of Labor (DOL). NACEC agreed to accept referrals of individuals who did not have a criminal record; despite this agreement, DOL referred a level three sex offender for a job, and NACEC accepted the referral. Months later, this sex offender sexually assaulted plaintiff.

Plaintiff brought this action to recover damages for personal injuries against multiple entities, including the County. The County moved for summary judgment dismissing the complaint against it, but the Supreme Court denied the motion. The Appellate Division reversed and granted the County’s motion, holding that the County was acting in its governmental capacity and did not voluntarily assume a special duty to plaintiff.

Plaintiff argued that the County’s negligence arose out of its proprietary function as a landlord, and that the County’s failure to provide security or warning to protect those on campus from foreseeable harm raised issues of fact that precluded summary judgment. Alternatively, plaintiff argued that if the County was acting in a governmental capacity, the County had a special duty to plaintiff.

The Court of Appeals affirmed. It held that the County was acting in its governmental capacity when it referred the sex offender to NACEC because the administration of the “welfare to work” program was a governmental role and the referral was undertaken solely in connection with administration of that program. Because the County was exercising a governmental function, it could be held liable only if it owed a special duty to plaintiff.

The court determined, however, that the County did not owe plaintiff a special duty. No evidence suggested that the County voluntarily assumed a special duty to plaintiff. Even if the County promised not to refer anyone with a criminal background, that promise was made solely to NACEC. Furthermore, plaintiff and the County had no direct contact. Without direct contact with the County, no special duty between plaintiff and the County could have formed. Thus, plaintiff could not prove justifiable reliance. Therefore, the court affirmed the Appellate Division because the County was immune from liability.

### **Full v. Monroe County Sheriff’s Dep’t., 152 A.D.3d 1237 (4th Dep’t 2017)**

Plaintiff commenced this action on behalf of her husband against, inter alia, the County of Monroe, the Monroe County Sheriff’s Department, the City of Rochester, and the City of Rochester Police Department. On the day of the accident, the County of Monroe sponsored a show at a park, which was owned by the City of Rochester. To accommodate, Beach Avenue was temporarily designated as a one-way street, side streets were barricaded, and parking was banned along Beach Avenue. Prior to the accident, plaintiff’s husband drove down the avenue,

temporarily parked in a private driveway, and crossed the street to ask pedestrians about parking. When he went to cross the street again, he was struck by a vehicle and suffered severe brain injuries. The municipality defendants moved for summary judgment dismissing the complaint as against them, and the district court granted the motions. Plaintiff appealed.

The Fourth Department affirmed. It determined that the creation of Beach Avenue was a governmental function, and therefore the allegedly negligent conversion of Beach Avenue into a one-way street was not actionable unless a special duty was owed to plaintiff's husband. The traffic regulation on Beach Avenue did not transform into a proprietary function when it was undertaken in furtherance of the proprietary show in the park. Furthermore, no special duty was owed to plaintiff's husband because he did not have any direct contact with the defendants' representative. Without direct contact, no special duty could exist. Therefore, defendants were entitled to summary judgment.

**Marks-Barcia v. Village of Sleepy Hollow, et al., No. 69941/2014 (Sup. Ct. 2017)**

Plaintiff's husband died after police and emergency medical technicians tried to revive him. Plaintiff had dialed 911 and was connected to the police department. Within 10 minutes, the officer reached out to several places until a medic could be located and dispatched to plaintiff's home. Police officers arrived within 7 minutes and applied the automated external defibrillator. After 12 minutes had passed since the initial 911 call, plaintiff called 911 again and asked what was taking the ambulance so long. After being informed that it was on its way, plaintiff tried to get decedent to the hospital another way, but that failed. After 20 minutes since the initial 911 call, an ambulance arrived at plaintiff's residence, and decedent was pronounced dead at his home.

Plaintiff commenced this action to recover damages for personal injuries and wrongful death against the Village of Sleepy Hollow and its ambulance and police. Plaintiff argued that defendants had a special duty to act on the decedent's behalf, but defendants moved for summary judgment dismissing the complaint.

The court granted the defendants' motion for summary judgment. Following precedent from the Second Department, the court determined that defendants would be held liable only if they owed a special duty to decedent. Yet there was no special duty because neither decedent nor plaintiff relied—to their detriment—on the 911 dispatcher's response of "we'll be right there." At all times, decedent was unconscious and therefore unaware of anything occurring. Therefore, decedent could not rely on any assurances from agents of the municipality. Furthermore, the fact that plaintiff sought other means to transport decedent to the hospital meant that she did not rely on defendants. Finally, defendants did not make any specific assurances that would create a special duty on behalf of decedent or plaintiff. A dispatcher saying "we'll be right there" was not enough to create a special duty. Therefore, the court granted defendants' motion for summary judgment dismissing the complaint.



## EMERGENCY OPERATIONS

### **Green v. Zarella, 153 A.D.3d 1162 (1st Dep't 2017)**

Plaintiff was struck by a police officer's vehicle. Plaintiff sued the officer and the city, alleging that the officer recklessly operated the vehicle. Defendants moved for summary judgment, arguing that the officer was engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law § 1104 at the time of the accident. The trial court denied defendants' motion for summary judgment, and the defendants appealed.

The First Department reversed, finding that the officer was engaged in an "emergency operation" when she was responding to a radio call about a "man with a gun." Therefore, the officer's conduct should be analyzed under the reckless disregard standard. The court found that the officer did not operate the police vehicle in reckless disregard for the safety of others. Traffic warranted her to operate her vehicle on the double yellow lines to avoid the stopped vehicles on the right ahead of her. Furthermore, the officer had no duty to engage her sirens or lights because she was operating a police vehicle, and her lack of sirens or lights did not evidence her recklessness. Finally, the officer had attempted to avoid plaintiff, who was standing on the yellow lines. For these reasons, the officer was not acting with a reckless disregard for others' safety, and the defendants were entitled to summary judgment.

## POLICE MISCONDUCT

### Cordero v. City of New York, 282 F. Supp. 3d 549 (E.D.N.Y. 2017)

Plaintiff sued the City of New York, Lieutenant Moran, and Officers Hugasian, Rubin, and Essig. Plaintiff alleged that his street sale drug charges occurred because a group of NYPD officers wanted to make an arrest at the end of their tour of duty to obtain overtime for completing the attendant paperwork. He contended that there was no factual basis for his arrest. Plaintiff alleged that the NYPD had a policy of failing to take reasonable steps to control lying by police officers. He argued that officers will often make false arrests at the end of tours to get paid overtime; that the City had a policy of not properly disciplining officers who testify falsely; and that the City failed to properly discipline officers who had falsified evidence. The court allowed plaintiff to keep the charges against the City on *Monell* grounds.

Four officers were involved with plaintiff's arrest. Officer Hugasian observed what he believed was a drug deal in front of a bodega. He immediately went on the radio and transmitted the interaction and said that the seller entered the bodega. Lieutenant Moran and Officers Palminteri, Rubin, and Essig responded to the call. While the Lieutenant and Officer Palminteri arrested the buyer, Officers Rubin and Essig entered the bodega to arrest the seller. Officer Hugasian told the officers that the man behind the counter was the seller. Officers Rubin and Essig did not find any drugs or paraphernalia on the cashier, plaintiff, but they arrested him and then brought plaintiff to the precinct. Once at the precinct, Officer Rubin performed a strip search of plaintiff, and Officer Essig was present during the search. No contraband was found. Plaintiff was charged for selling drugs but was never indicted. The precinct received at least 22 hours of overtime for the arrest and processing of plaintiff and the buyer—17 of which were claimed by Officers Hugasian and Essig. Officer Hugasian was once disciplined for requesting overtime compensation for tours he did not perform. He had also been sued for false arrest on three other occasions in the Eastern District of New York.

Defendants moved for summary judgment on plaintiff's claims for: (1) unlawful stop and search; (2) false arrests as to Officers Essig and Rubin; (3) failure to intervene, by Officer Essig, in the unlawful strip search; (4) a *Monell* violation against the City of New York; and (5) supervisory liability. The court granted summary judgment for the claims of unlawful stop and search and for the claims of false arrests as to Officers Essig and Rubin. The court denied summary judgment for the other claims.

The court determined that this was a "sudden arrest," and therefore the stop and search was lawful. It found that Officers Essig and Rubin arrested plaintiff based on the information that Officer Hugasian told them. Therefore, it was reasonable for them to rely on Officer Hugasian, and claims of false arrest must fail against them. Plaintiff still had a claim for false arrest against Officer Hugasian, however, because a question of fact exists as to whether plaintiff ever left the bodega to make the drug sale. Officer Essig's failure to intervene was not dismissed because there was a question of fact as to whether Officer Essig witnessed the illegal strip search. He claimed that he could not remember whether plaintiff was clothed or not during the search. The court did not dismiss the *Monell* claim because there was sufficient evidence for plaintiff to argue that the City's overtime policy incentivized officers to make false arrests and that the City

failed to adequately monitor abuse of the overtime policy. Finally, the court did not dismiss the supervisory liability claim because Lieutenant Moran oversaw the investigation and arrest, and he approved the overtimes.

**Bah v. City of New York, 2018 WL 2357260 (S.D.N.Y. 2018)**

This action arose from the fatal shooting of Mohamed Bah, an emotionally disturbed man, who was initially alone behind the locked door of his apartment. Lieutenant Licitra was the highest ranking officer. Sergeant McCormack and Officers Mateo, Kress, Green, and Zaberto were all present. Licitra gave the order to enter the apartment. Within 15 seconds of opening the door, the several officers fired at Bah, resulting in his death. The precise facts were confusing and somewhat contradictory. Kress had entered the apartment first with a shield; Bah had stabbed Kress's bullet-proof vest so Kress fired his Taser. Mateo moved into the apartment behind Kress. Mateo felt something hit him, and he fell to the ground and yelled that Bah was shooting him and to shoot Bah. One of McCormack's Tasers had hit Mateo in the shoulder before Mateo fell. Green and Mateo both shot at Bah.

The jury returned a verdict in favor of six NYPD officers but found Mateo guilty of federal excessive force and state law battery claims. Additionally, plaintiff prevailed against Licitra on federal and state failure to supervise claims. The verdict rendered the City of New York liable on the state law battery claim and negligent supervision claim under the doctrine of *respondeat superior*. Mateo, Licitra, and the City moved for judgment as a matter of law, or, alternatively, for a new trial. They also moved for judgment, arguing that Mateo and Licitra were entitled to qualified immunity. The court granted Licitra's motion for judgment as a matter of law but denied Mateo's motions and the City's motions related to Mateo.

The court reasoned that a reasonable jury could find for plaintiff on the excessive force claim against Mateo. Given that Kress had been stabbed and that Mateo had shouted that he was being stabbed, it was reasonable for the other officers to use the force that they did at that moment. Mateo, however, was not being stabbed, and some of the evidence suggested that Mateo had shot Bah when he was already on the ground. Thus, a reasonable jury could have found that Mateo used excessive force. Furthermore, Mateo did not qualify for qualified immunity because defendants did not carry their burden of submitting questions that would clarify the issues of fact as would be required to determine whether Mateo was entitled to qualified immunity. For these reasons, the court denied Mateo's motions and, by extension, the City's motions related to the claims against Mateo.

The court found that no reasonable jury could have found Licitra liable for failure to supervise. The jury found that the officers' entry into Bah's apartment was reasonable and that it was reasonable to conclude that Bah urgently needed medical assistance. The shooting lasted about two seconds—too short of a period of time for Licitra to intervene. Finally, Licitra had worked with these officers before, and no evidence was presented that Licitra had reason to believe that the officers lacked the adequate training, or would use excessive force, in this situation. Under these circumstances, a reasonable jury could not find Licitra liable. Therefore, the court granted Licitra's motion for judgment as a matter of law on the sufficiency of evidence on the federal and state supervisor liability claims.

## FALSE ARREST

### **District of Columbia v. Wesby, 138 S. Ct. 577 (2018)**

Police officers responded to a complaint about loud music and illegal activities at a house. The person who called in the complaint and several neighbors told the officers that the house should have been vacant, but when the officers approached it, they heard loud music. The officers knocked on the front door and saw a man look out the window briefly before running upstairs. Another person opened the door, and the officers immediately walked inside.

The officers said that the house looked vacant. With the exception of some metal folding chairs, there was no furniture downstairs. The officers smelled marijuana and saw beer bottles and cups littering the filthy floor. The house did have electricity and plumbing, but there were few other signs of habitation. The living room had been turned into a makeshift strip club, and upstairs was a naked woman with several men on a bare mattress—the only one in the house—on the floor. Upon seeing the officers, many partygoers scattered, and some hid.

The officers rounded up a total of twenty-one people in the house and began interviewing them, but no one could give a consistent story. They all stated that they had permission to use the house. Many said that they were attending a bachelor party but could not identify the bachelor. Eventually, the officers discovered that the person who claimed to give people permission to use the house was not the owner, and the owner had not given anyone to use the house at all. The police brought all twenty-one people to the police station, where they were charged with disorderly conduct. The people were then released, and eventually, the charges were dropped. Of the twenty-one partygoers, sixteen sued the District of Columbia and the arresting officers, claiming false arrest and negligent supervision under the District law. The crutch of their claims was that they were arrested without probable cause.

On cross-motions for summary judgment, the district court awarded partial summary judgment to the partygoers, concluding that the officers lacked probable cause to arrest the partygoers for unlawful entry. The district court also determined that the officers were not entitled to qualified immunity because the officers had no evidence that the alleged intruders knew or should have known, upon entry, that such entry was against the will of the owner. At the trial, a jury awarded plaintiffs \$680,000 in compensatory damages. On appeal, the split D.C. Circuit affirmed. It determined that the non-owner's invitation was enough, and there was no evidence for the partygoers to think that the invitation was invalid. As for qualified immunity, the Circuit found that the officers were not entitled to it. The Supreme Court granted certiorari to determine whether the officers had probable cause to arrest the partygoers and whether the officers were entitled to qualified immunity.

First, the Supreme Court reversed the holding that the officers lacked probable cause to arrest. It emphasized that when determining whether the officers had probable cause, a court had to look at the totality of the circumstances. In this case, the house appeared vacant and nearly barren. Several neighbors had told the officers that the house was vacant. People turned the living room into a strip club, had sex on the one mattress, and left the floors filthy. Most homeowners would not allow such conduct in their own home, and most homeowners would

also have furniture. Additionally, the many partygoers ran or hid when the officers approached. Finally, many partygoers claimed that they were at a bachelor party but could not identify the bachelor, nor could all but two of them name the person who had “invited” them to the house. The inviter herself initially lied to the police officers before eventually admitting that she was not the owner and did not have permission to invite people. Based on the surrounding circumstances, a reasonable officer could conclude that there was a substantial chance of criminal activity—specifically, that the partygoers entered the house when they knew or should have known that they were not invited. Therefore, the defendants were entitled to summary judgment as to all of the plaintiffs’ claims.

Second, the Supreme Court concluded that the officers were entitled to qualified immunity because they could be reasonably but mistakenly conclude that probable cause was present. No similar case law said otherwise. Because a reasonable officer could have believed that the law permitted arrests in these circumstances, the officers were entitled to qualified immunity.

### **Grice v. McVeigh, 873 F.3d 162 (2d Cir. 2017)**

Plaintiff was lawfully watching trains and recording them with his phone at a railroad crossing. A passing driver saw him and called 911 because she found his behavior suspicious. The dispatcher directed police units to identify “a male white, wearing a red shirt bending down by the tracks with a remote control object in his hands.” Sergeant Anthony McVeigh was the first to arrive to the scene. He had previously received several briefings about terrorists potentially attempting to sabotage railroad tracks, and one month prior to meeting plaintiff, McVeigh had received a circular on attempted rail sabotage in a nearby town.

When McVeigh arrived, plaintiff, who was standing about 15 feet from the tracks, was wearing a red shirt and holding a camera. His backpack, cell phone, and a radio scanner were next to him. Contrary to the description on the radio, plaintiff was African American, not white. When McVeigh asked plaintiff what he was doing, plaintiff offered to show McVeigh a letter from the MTA that explained that plaintiff was lawfully there. When plaintiff told McVeigh that the letter was in his backpack, McVeigh stated, “Right now I’m going to cuff you for my safety and your safety . . . Until I find out what’s going on here.”

Several other police officers, including Lieutenant Frank Farina, arrived, followed by MTA officers. The MTA officers questioned plaintiff and searched the tracks for a bomb, finding nothing. McVeigh then switched out his handcuffs with the MTA’s. Plaintiff was in McVeigh’s handcuffs for about 33 minutes. The MTA officers took plaintiff to an MTA facility and gave him summons for trespass, which was ultimately dropped.

Plaintiff sued several police officers, including McVeigh and Farina, alleging claims of false arrest, failure to intercede, and supervisory liability. Both officers moved for summary judgment, but the district court denied their motions. The officers appealed, arguing that they were entitled to qualified immunity. The Second Circuit reversed, determining that both McVeigh and Farina were entitled to qualified immunity.

First, the court explained that plaintiff's false arrest claim failed because the handcuffing was a Terry stop that was supported by reasonable suspicion and never transformed into an arrest. McVeigh had reasonable suspicion to stop plaintiff for either unlawful interference with a train or for trespass. McVeigh had previously been told to look out for sabotage on railroads and had been informed about someone trying to sabotage a railroad in a nearby town using a homemade device with a radio-control antenna fixed. The dispatcher stated that there was a person observed at the train tracks was bending down at the tracks and had a remote control object in his hands. McVeigh saw plaintiff matching the dispatched description with several electronic devices. Furthermore, when McVeigh and plaintiff spoke, McVeigh had never heard of train spotting. Given McVeigh's knowledge at the time, McVeigh's suspicion that plaintiff may have committed a crime was reasonable.

The Terry stop also never became an arrest. Although handcuffing usually shows that a stop has become an arrest, in certain unusual circumstances, handcuffing a suspect does not transform a Terry stop into an arrest. For example, if an officer reasonably believes that a person poses a physical threat and handcuffing is the least intrusive means to protect against that threat, then a Terry stop remains a Terry stop despite the handcuffing. Here, given the circumstances and McVeigh's knowledge at the time, it was not unreasonable for him, a lone officer, to handcuff plaintiff. By handcuffing plaintiff, McVeigh could prevent plaintiff from using an electronic device to set off an explosive until the tracks could be searched for a bomb. The fact that McVeigh did not administer *Miranda* warning and told plaintiff that he was handcuffing him for their safety showed McVeigh's intention to handcuff plaintiff was for protection, not to arrest. Furthermore, it was not unreasonable to keep plaintiff in handcuffs for thirty-three minutes. Therefore, the court concluded that plaintiff's false arrest claim failed.

The court also determined that McVeigh and Farina could not be held liable for their failure to intercede with the MTA police officers because they had no authority over officers of the MTA. Without authority over the MTA, McVeigh and Farina lacked a clearly established duty to intervene; thus, they were entitled to qualified immunity.

Finally, Farina was entitled to qualified immunity on the supervisory liability claim because his subordinate, McVeigh, did not violate clearly established law.

The dissent disagreed, arguing that plaintiff's detention was an arrest, not a Terry stop. Furthermore, there was no probable cause for the arrest. Here, plaintiff was a train buff who had gone to train crossings many times to photograph trains. The description that McVeigh heard was of a "white male" who was trespassing on the tracks. Plaintiff, however, was African American and standing far away from the tracks. When McVeigh spoke to plaintiff, plaintiff told him why he was there and offered to show or to have McVeigh retrieve the letter from the MTA that gave plaintiff permission to be there. Instead, McVeigh handcuffed plaintiff and began questioning him aggressively. The dissent determined that these actions constituted an arrest.

McVeigh and Farina acknowledged that while plaintiff was detained, they realized that he posed no threat of violence or train interference. Later on, McVeigh justified handcuffing plaintiff by claiming that he suspected plaintiff of trespassing on the tracks. McVeigh, however, never saw plaintiff on the tracks and could only conclude that plaintiff had trespassed based on

the report of an absent 911 caller. Even after releasing plaintiff, McVeigh handed over custody to the MTA officers, telling them that he had seen plaintiff on the tracks.

Handcuffing is a factor that ordinarily points to arrest. Unlike the other cases where a court determined that handcuffing was a Terry stop and not an arrest, McVeigh could have avoided handcuffing plaintiff for an extended period of time if he had merely looked at the letter in plaintiff's bag after handcuffing him. Had McVeigh done that, then his suspicions would have been dispelled almost immediately. McVeigh's subjective intent was irrelevant. Therefore, the dissent concluded, because McVeigh arrested plaintiff, and because there was enough evidence to conclude that McVeigh arrested plaintiff without probable cause, this case should have been decided by a jury rather than by judges.

**Kass v. City of New York, 864 F.3d 200 (2d Cir. 2017)**

On September 17, 2013, protestors gathered in Zuccotti Park to commemorate the second anniversary of the Occupy Wall Street movement. The NYPD placed barricades around the perimeter of the park to separate the protestors inside of the park from the pedestrians who were walking on the adjacent sidewalk. Plaintiff Kass was walking on the adjacent sidewalk and began speaking to several protestors. He did not impede pedestrian or vehicular traffic while speaking with some protestors. Officer Ernst told plaintiff to keep walking and to move away from the sidewalk, which plaintiff refused to do. Ernst then called over Sergeant Alfieri.

One of the protestors then began recording the interaction. Ernst and Alfieri continued to tell plaintiff to keep walking, but plaintiff refused, arguing that he wanted to speak to the protestors and was not blocking pedestrian traffic. Alfieri placed his hand on plaintiff's elbow to attempt to drag him away from the barricade, and when plaintiff told him to get off of him, Ernst suggested that plaintiff go inside of the park. Plaintiff refused, and Alfieri began pulling plaintiff away from the barricade. Plaintiff then became belligerent, telling the police to "get your hands off of me." A third officer then grabbed plaintiff's other arm. The officers handcuffed plaintiff and brought him to the precinct. He was issued a summons for disorderly conduct, but the charge was dismissed for failure to prosecute.

Plaintiff commenced this action against the City, Ernst, Alfieri, and Officer Biggin, who was later identified as the third officer. Plaintiff alleged false arrest and imprisonment, and assault and battery. Before Biggin was served, the City, Ernst, and Alfieri moved for judgment on the pleadings, arguing that Ernst and Alfieri were entitled to qualified immunity. The district court rejected their qualified immunity defense. Defendants appealed.

The Second Circuit reversed because it found that Ernst and Alfieri were entitled to qualified immunity. It reasoned that it was at least debatable whether plaintiff had obstructed governmental administration in violation of N.Y. Penal Law § 195.05, and reasonable officers could disagree as to whether the elements of the law were met. The first element of Section 195.05 is that the public servant must be performing an official function that is "authorized by law." Here, the officers asked plaintiff to move from the sidewalk or enter the park to speak to the protestors because the officers were trying to contain the protestors to the inside of the park and keep the area secure. That the officers issued orders to plaintiff when he was standing on a

sidewalk in downtown Manhattan shortly before 5 P.M. lent support to the officers' beliefs that they were authorized to order plaintiff to move.

Contrary to plaintiff's claims, the officers' orders did not violate the First Amendment by preventing him from hearing the protesters' message. Rather, their orders were a content-neutral time, place, and manner restriction that were narrowly tailored to serve a significant government interest. A government has a significant interest in keeping public spaces safe and free of congestion. Here, plaintiff was standing on a sidewalk in downtown Manhattan shortly before rush hour and next to the protesters. The government had a significant interest in keeping the protest within the park and allowing the pedestrian traffic on the sidewalk to move about freely. Furthermore, the officers' orders were narrowly tailored to achieve this interest. They told plaintiff to keep walking or to alternatively go into the park to listen to the protesters. Such orders would prevent the protest from potentially expanding onto the adjacent sidewalk and causing congestion. Meanwhile, plaintiff could continue to listen to the protesters so long as he entered the park. Such a suggestion was an adequate, alternative forum for the plaintiff to speak to the protesters. Therefore, the officers' orders did not violate the First Amendment because they were a permissible time, place, and manner restriction on speech.

Reasonable officers could debate as to whether the other elements of Section 195.05 were met because plaintiff had physically interfered with the officers' efforts to confine the protest to the park and keep the sidewalk clear for pedestrians. The officers had repeatedly ordered plaintiff to move, but plaintiff refused. When Alfieri attempted to guide plaintiff away from the barricades, plaintiff pulled away. Finally, given plaintiff's repeated refusals to move, it was reasonable for the officers to infer that plaintiff intended to interfere with the officers' efforts to confine the protest and prevent sidewalk congestion. Thus, there was a probable cause to arrest plaintiff, and the officers were entitled to qualified immunity for the federal false arrest and imprisonment claim.

For similar reasons, the Second Circuit found that the officers also had probable cause to arrest plaintiff for disorderly conduct. First, it was objectively reasonable for the officers to determine that plaintiff was congregating with other persons in a public space because he was speaking in close proximity to two protesters. The barricade between plaintiff and the protesters did not change the fact that plaintiff was "congregating." Second, the officers lawfully ordered plaintiff to disperse to maintain crowd control and security. Nothing indicated that their orders were contradictory or unclear. Third, plaintiff refused to obey the officers' orders. Finally, reasonable officers could disagree as to whether plaintiff's continued refusal to leave the area recklessly created a risk of causing public inconvenience, annoyance, or alarm. As stated above, plaintiff was on the sidewalk in downtown Manhattan shortly before rush hour and close to a public protest. Because plaintiff repeatedly refused to obey the officers' orders and became more resistant as time passed, competent police officers could reasonably disagree as to whether plaintiff had recklessly created a risk that would cause public inconvenience, annoyance, or alarm. Therefore, Ernst and Alfieri were entitled to qualified immunity.



**Simon v. City of New York, 893 F.3d 83 (2018)**

Defendant Longobardi was a prosecutor investigating a potential crime. He believed that plaintiff knew information relevant to the investigation and wished to compel her to speak. Longobardi applied for a hearing for the purpose of adjudging the plaintiff a material witness and for an arrest warrant to ensure that plaintiff would be at the hearing. A judge issued a warrant for plaintiff's arrest, and the warrant stated that it was to take her into custody and bring her to the hearing to determine whether she should be adjudged a material witness.

Longobardi gave the warrant to Defendants Lee and Alegre, who were both detectives. On the morning of the day of the hearing, the detectives went to plaintiff's work to arrest her and threatened to handcuff her if she did not cooperate. Instead of bringing plaintiff to the courthouse, they brought her to the precinct, where she waited in a small room for most of the day without food. The officers did ask her questions related to the investigation throughout the day. After it became dark, plaintiff was brought to the courthouse and met with Longobardi briefly. Shortly thereafter, Lee and Alegre drove plaintiff home but told her that she needed to go back to the precinct the next day.

The next morning, Lee and Alegre picked up plaintiff and brought her to the precinct to ask her questions related to the investigation. Plaintiff again spent many hours in the small room and was not given food. Eventually, plaintiff was told that she could leave. In total, Lee and Alegre held plaintiff against her will for 18 hours in two days. Plaintiff commenced this action against Longobardi, Lee, and Alegre, alleging false arrest and imprisonment in violation of the Fourth Amendment. The defendants moved for summary judgment, claiming absolute immunity. The district court granted the motion, but the Second Circuit vacated the judgment. On remand, the district court again granted summary judgment in favor of the defendants, reasoning that they were entitled to qualified immunity. Plaintiff appealed.

The Second Circuit vacated and remanded, finding that the defendants were not entitled to qualified immunity at the summary judgment stage. It based its decision on general Fourth Amendment principles. First, the reasonableness requirement of the Fourth Amendment is to ensure reasonableness in the manner and scope of searches and seizures carried out. Second, to act unreasonably beyond the terms of a warrant is like acting without a warrant at all. Based on these principles, officers must abide by the limitations provided on the face of the warrant in question. In this case, the warrant required the officers to bring plaintiff to the material witness hearing. According to plaintiff, however, the detectives did not bring plaintiff to the scheduled hearing but instead held her in a small room for most of the day. The Court found that this violated the Fourth Amendment.

The Court next determined whether the unlawfulness of the detectives' conduct was clearly established at the time of the alleged incident. It admitted that there was little case law in the area of material witnesses, but it found that despite the lack of precedent, the unlawfulness of the detectives' conduct was sufficiently clear. That the defendants detained plaintiff in a small room for ten hours instead of bringing her to the hearing was clearly unlawful. Furthermore, for the same reasons listed above, the defendants violated the Fourth Amendment when they detained her again the day after the hearing. Although the defendants argued that plaintiff

returned willingly to the precinct the next day, the surrounding circumstances involving the defendants going to plaintiff's house to pick her up and reminding her about the arrest warrant lead the Court to conclude that plaintiff was coerced. Therefore, it violated the Fourth Amendment.

The Court concluded that the defendants were not entitled to qualified immunity at the summary judgment stage, but it also emphasized that it had not determined as a matter of law that the defendants' actions violated plaintiff's clearly established Fourth Amendment rights. It instead left that question to the factfinder.

## QUALIFIED IMMUNITY – EXCESSIVE FORCE

### **Kisela v. Hughes, 138 S. Ct. 1148 (2018)**

Police officers arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a kitchen knife. Upon arrival, officers observed Plaintiff holding a large kitchen knife, and taking steps toward another woman (Chadwick). Plaintiff had refused to drop the knife after at least two commands to do so. A chain-linked fence with a locked gate separated Plaintiff and Chadwick from the officers. Officer Kisela dropped to the ground and shot Plaintiff four times through the fence. Then, the officers jumped the fenced, handcuffed plaintiff, and called paramedics, who transported her to the hospital. There plaintiff was treated for non-life threatening injuries.

After the shooting, the officers discovered that Plaintiff and Chadwick were roommates, plaintiff had a history of mental illness and that Plaintiff was upset with Chadwick over a \$20 debt. Chadwick later stated that she did not feel endangered at any time. However, the police were not aware of any of this at the time of the shooting. The District Court granted Defendants' renewed motion for summary judgment, the Ninth Circuit reversed and remanded the action, and the Supreme Court reversed the Ninth Circuit's decision holding that the Defendants' were entitled to qualified immunity.

The Court relied on Officer Kisela statement that he shot Plaintiff because, although the officers themselves were in no apparent danger, he believed that plaintiff was a threat to Chadwick. The officers had mere seconds to assess the potential danger. Given Plaintiff's behavior and refusal to officers' commands, the Supreme Court found that the officers' actions were reasonable and did not violate clearly established statutory or constitutional rights, entitling them to qualified immunity.

## TITLE VII AND SEX DISCRIMINATION

### **Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc)**

Plaintiff brought a sex discrimination claim under Title VII. He alleged that he was fired from his job, defendant Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Defendants moved for summary judgment dismissing the Title VII claim because sexual orientation had not been interpreted as discrimination “because of . . . sex,” as would be required to bring a Title VII claim. The district court granted the motion for summary judgment. While plaintiff’s other claims were pending, the Equal Employment Opportunity Commission (EEOC) held that discrimination based on sexual orientation qualified as sex discrimination under Title VII. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at \*5 (July 15, 2015). Plaintiff then moved to have his claim reinstated based on *Baldwin* but was denied because binding precedent held that sexual orientation discrimination claims were not cognizable under Title VII. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). After plaintiff went to trial on his other claims and defendants prevailed, plaintiff appealed, arguing that *Simonton* should be overturned and that the court should adopt the logic of *Baldwin*. The Second Circuit ordered this rehearing en banc to revisit *Simonton*’s holding and determine whether claims of sexual orientation discrimination was cognizable under Title VII.

The Second Circuit held that Title VII prohibited sexual orientation discrimination as discrimination “because of . . . sex” and overturned contrary precedents. The court relied heavily on *Price Waterhouse* to support its holding. First, it reasoned that “[b]ecause one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex.” Because it was a function of sex, sexual orientation was protected by Title VII. Then it explained that sexual orientation discrimination was a type of gender stereotyping when an employer acts on the basis of belief that the employee cannot or must not be attracted to someone else of the same sex but does not act when an employee is attracted to someone of the opposite sex. Third, the Court determined that sexual orientation discrimination constituted sex discrimination because it was associational discrimination. The employee was being discriminated based on his or her romantic association with someone of the same sex. Using the logic of associational discrimination based on race, associational discrimination based on sex could be extended to include romantic associations of same-sex couples.

The court rejected the arguments that legislative and subsequent history supported a different holding. It reasoned that legislative history did not indicate that sexual orientation discrimination was considered and purposely left out. Instead, sexual orientation discrimination likely was not thought of at all when the statute initially passed. That was not a reason, however, not to expand that reading of “sex” to include sexual orientation when other claims, like “hostile work environment,” arose despite not being explicitly mentioned. That later statutes included both “sex” and “sexual orientation” as different things was not a reason to interpret Title VII’s “sex” to include “sexual orientation” because, again, sexual orientation was not thought about when the statute initially passed. Therefore, for these reasons, the Court held that sexual orientation discrimination was a subset of sex discrimination and was barred by Title VII.

Several concurrences agreed with the majority but disagreed with parts of the majority's reasons.

Several judges wrote separate dissenting opinions. Judge Lynch argued that the majority's holding was contrary to the history of Title VII. The purpose of including discrimination based on sex was to secure the rights of women in the work force. That is what the legislature debated about, and that is what ordinary citizens would have interpreted the plain language of Title VII to mean. No one thought about sexual orientation as protected by Title VII. Furthermore, the fact that legislatures today are adding sexual orientation as separate from sex means that discrimination based on sex did not include sexual orientation discrimination. After finding the majority's arguments unpersuasive, Judge Lynch distinguished between interpreting statutes enacted by legislature and interpreting the Constitution. He argued that the Constitution is a living document and adapts based on the times. Unlike the Constitution, the legislature can easily change and amend statutes. Thus, courts should interpret statutes based on the meaning of the legislature. By extending the meaning of Title VII to include discrimination based on sexual orientation, the court was overstepping. Therefore, if Title VII included sexual orientation discrimination, it would say so in the statute. It did not include sexual orientation discrimination, however; therefore, plaintiff had no Title VII claim.