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Summarizing recent significant New York appellate cases

When an employee reports significant safety concerns regarding state operations, and the government fails to take any action in a response, but instead terminates the employee's employment, can the employee state a whistleblower retaliation claim based on the government's inaction? The Third Department recently addressed that question, holding that it could. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

THIRD DEPARTMENT

RETIREMENT AND SOCIAL SECURITY LAW, ADMINISTRATIVE LAW

Matter of Pasinkoff v New York State & Local Retirement Sys., 2026 NY Slip Op 06599 (3d Dept Nov. 12, 2026)

Issue: **Is a retiree who transfers from a municipal retirement system, where they were a tier 4 member, to the New York State and Local Retirement System, as a tier 6 member, entitled to refunds of contributions previously made prior to the effective date of the transfer?**

Facts: "Petitioner was employed as an assistant district attorney in New York County beginning in September 2007 and, in connection with that employment, joined the New York City Employees' Retirement System as a tier 4 member in June 2009. In January 2020, petitioner transitioned to state employment with the State Division of Human Rights and enrolled in [the New York State and Local Retirement System] as a tier 6 member." Two years later, petitioner applied and was approved to transfer his NYCERS membership to the NYSLRS. "Notably, under the Retirement and Social Security Law, once an individual successfully transfers their membership to [the NYSLRS], they will be deemed to have been a member of [the NYSLRS] for 'the entire period of membership service credited to them in the system from which they have transferred' (Retirement and Social Security Law § 43 [b]). As a result, when [the NYSLRS] approved petitioner's transfer, it changed his date of membership to June 2009 and his membership status from tier 6 to tier 4."

This was significant because "unlike tier 6 members who must contribute a certain percentage of their annual wages for all years of public service, under article 19 of the Retirement and Social Security Law, tier 4 employees who achieve 10 or more years of membership or 10 or more years of credited service with respondent are no longer required to contribute." "Upon petitioner's transfer, [the NYSLRS] calculated his cessation date to be March 1, 2022 and issued a refund of all contributions made after that date, approximately $2,550. Petitioner sought a hearing and redetermination pursuant to Retirement and Social Security Law § 74, asserting, as relevant here, that his cessation date was the date he joined respondent in January 2020. He therefore requested a refund of all contributions he made since joining respondent — approximately $20,000, plus interest."

A hearing officer rejected the petitioner's argument, and determined instead that "respondent reasonably interpreted Retirement and Social Security Law § 902 (b) to conclude that petitioner became a tier 4 member and attained 10 years of membership only after the date on which his transfer from NYCERS became effective in March 2022." The Comptroller adopted the hearing officer's determination. Petitioner commenced an Article 78 proceeding, and Supreme Court dismissed the petition.

Holding: The Third Department affirmed, holding that the plain language of the statutes and the legislative history did not shed light on the question before the court—whether a retiree who transfers from a municipal retirement system to the NYSLRS is entitled to refunds of contributions previously made prior to the effective date of the transfer. The court noted that "The statutes in question — namely, Retirement and Social Security Law §§ 43, 900, and 902 — do not explicitly address the situation before us. Article 19 of the Retirement and Social Security Law does not cross-reference section 43 transferees and, although section 43 (b) deems a person transferred from one retirement system to another 'to have been a member of the system to which they transferred during the entire period of membership service credited to them,' the statute is silent with respect to refunds due to such transferees under the subsequently enacted article 19."

As a result, the court was left to defer to the NYSLRS's reasonable interpretation of the statutory provisions that "petitioner did not become eligible for the enhanced benefits provided for in Retirement and Social Security Law article 19 until his transfer was complete because, before that time, he was a tier 6 member of respondent and therefore had no right to contribution cessation in that retirement system. Thus, respondent could conclude that the phrase 'the effective date as of which such employee becomes eligible for the benefits' refers to the date respondent deems the transfer to be *effective* — at least where, as here, the member transfers from another retirement system resulting in their tier changing from tier 6 to 4." This rule, the court noted, has been applied by the NYSLRS to all transfers for the past 30 years, and adopting the petitioner's rule instead would "open the floodgates to refund requests that seek to claw back years or de-

cades of contributions, plus interest, subjecting respondent's funds to needless and potentially detrimental uncertainty." Thus, although both interpretations of the statutes were reasonable, the Court deferred to the NYSLRS.

LABOR AND EMPLOYMENT LAW, RETALIATION, WHISTLEBLOWER CLAIMS

***Rosenthal v State of New York*, 2026 NY Slip Op 06504 (3d Dept Nov. 5, 2026)**

Issue: **Can governmental inaction support a Civil Service Law § 75-b whistleblower retaliation claim?**

Facts: "Claimant formerly served as the President and CEO of the Roosevelt Island Operating Corporation. According to claimant, during her tenure she repeatedly raised concerns regarding what she understood to be potential safety issues related to certain steam tunnels, but no action was taken to address those concerns. In June 2020, she was terminated and, shortly thereafter, a senior advisor to then-Governor Andrew M. Cuomo informed the New York Post that claimant's termination had followed a complaint and related investigation finding that she had used 'racially and sexually offensive' language."

Following numerous civil actions concerning the claimant's termination, including a CPLR Article 78 proceeding and a separate plenary action, the claimant commenced this action against the State in the Court of Claims, "alleging retaliatory termination under New York's whistleblower statute stemming from her disclosure of concerns pertaining to steam-tunnel safety, as well as common-law defamation and a . . . violation of her due process rights under NY Constitution, article I, § 6, asserting that defendant's public statements against her, combined with the failure to afford her a name-clearing hearing, constituted a 'stigma plus' injury."

The Court of Claims dismissed the claims, holding that "it lacked jurisdiction relative to the retaliation claim, that claimant had adequate alternative remedies in lieu of a constitutional tort, and that claimant's defamation claim was untimely."

Holding: The Third Department modified, allowed the claimant's whistleblower claim to proceed, and otherwise affirmed dismissal of the remaining claims. The court held that alternative remedies existed barring claimant's due process claim for money damages based on allegations "that defendant's 'dissemination of . . . false accusations' to a news reporter in connection with her termination from employment, together with the failure to afford her a hearing to dispute the allegations against her, inflicted a 'stigma plus' injury." In particular, the court noted, claimant could pursue "a name-clearing hearing pursuant to CPLR article 78, a common-law tort claim, and a federal civil rights lawsuit pursuant to 42 USC § 1983." Furthermore, this claim, the court held, was not distinct from claimant's defamation claim because they both alleged the same conduct and sought the same damages.

The court also held that claimant's defamation claim was untimely, because she failed to serve "timely notice of intention to file a claim specifying the time when and place where such claim arose and the nature of same," as required for waiver of the State's sovereign immunity under Court of Claims Act § 11(b). The court explained, "whether claimant's cause of action for defamation is timely hinges upon whether her earlier CPLR article 78 petition can be construed as a notice of intention to file a claim under Court of Claims Act § 11. In this regard, claimant concedes that her earlier petition does not expressly set forth a defamation claim. She nevertheless contends that her petition relied upon the same underlying facts as the instant defamation claim such that it met the requisite notice of intention requirements. As the Court of Claims noted, however, nothing in claimant's petition asserted that she had suffered reputational damages as a result of defendant's reported allegations to the press, she did not seek the same relief as she does in the instant matter, nor did she apprise defendant that monetary damages would also be sought. Accordingly, we agree that claimant's CPLR article 78 petition failed to adequately apprise defendant of the possibility that an action for defamation would be brought so as to meet the requirements for a notice of intention to file a claim for purposes of Court of Claims Act § 11."

Finally, the court held, however, that claimant's whistleblower claim should not have been dismissed because "there exists a question of fact as to whether [the State, rather than RIOC,] was claimant's de facto employer such that this issue should not have been resolved on a motion to dismiss." The court further held that claimant's allegations that RIOC failed to act in response to her whistleblower safety warnings regarding the "condition of certain abandoned steam tunnels" could support a whistleblower retaliation claim.

The court explained, "claimant's allegations concerning defendant's *inaction* with respect to the steam tunnels are sufficient to support a retaliation claim under Civil Service Law § 75-b. It is axiomatic that government inaction may have as profound adverse effects to public safety and health as that of an active response. Indeed, whether to respond actively or passively to a safety concern is an affirmative choice taken. By way of example, we can scarcely conceive of a scenario in which whistleblower protections would be denied, as a matter of law, to an employee who discloses a governmental failure to investigate a credible threat to the life or safety of a public figure . . . Accordingly, we now hold that government action, whether passive inaction or an affirmative step taken, may support a Civil Service Law § 75-b claim. To hold the contrary would undermine the salutary purpose of this state's whistleblower protections designed to encourage employees to report violations of health and safety laws and regulations."

Here, the court held, "claimant sufficiently alleged a cause of action for a whistleblower retaliation claim pursuant to Civil Service Law § 75-b (2) (a). Specifically, she sufficiently alleged that defendant's inaction in response to claimant's disclosure of a potential safety risk constituted a violation of law, resulting in a substantial and specific danger to public health or safety, and that her persistent disclosure of her concerns in this regard resulted in her termination. Claimant's retaliation claim under Civil Service Law § 75-b was thus improperly dismissed."

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