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COURT OF APPEALS

STATE OF NEW YORK

TIPALDO,

Respondent,

-against-

No. 143

LYNN, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
September 16, 2015

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 JUDGE PIGOTT: Chief Judge Lippman is
2 recused in this case. So the case is Tipaldo v.
3 Lynn.

4 Ms. Ross, and then there were five.

5 MS. ROSS: Yes.

6 JUDGE PIGOTT: We - - - we will hear this
7 case, of course. We still need four votes for a
8 decision, so - - -

9 MS. ROSS: So I understand.

10 JUDGE PIGOTT: All right. Would you like
11 any rebuttal time?

12 MS. ROSS: I will take three minutes, Your
13 Honor, please.

14 JUDGE PIGOTT: Three minutes.

15 MS. ROSS: Thank you.

16 May it please the court, Marta Ross for the
17 City Department of Transportation. Your Honors,
18 there's only one claim here, and it's under the state
19 Civil Service Law. The conditions to sue are
20 explicit, and they were not satisfied here.

21 When the legislature first enacted the
22 Whistleblower Statute, of course, which did not exist
23 in common law, an integral part of the statute's
24 enactment dealt with the - - - the requirement of the
25 internal report. And of course, that served to

1 balance the interests - - -

2 JUDGE ABDUS-SALAAM: Well, is there any
3 difference here because the - - - I guess, you're - -
4 - you're saying the report has to go to the
5 appointing authority?

6 MS. ROSS: Yes, Your Honor.

7 JUDGE ABDUS-SALAAM: That that's the
8 requirement. So the appointing authority here is the
9 commissioner and his first deputy, correct?

10 MS. ROSS: Correct, Your Honor.

11 JUDGE ABDUS-SALAAM: And they're the
12 persons accused of the misconduct?

13 MS. ROSS: Yes, Your Honor.

14 JUDGE ABDUS-SALAAM: And so does it make
15 common sense to report what you consider misconduct
16 to the individuals who you think have committed the
17 misconduct; for them to then report their own
18 misconduct to the Department of Investigation or the
19 Inspector General? Does that make common sense?

20 MS. ROSS: It - - - it - - - it does Your
21 Honor, and I know that my - - - my colleague refers
22 to it also as absurd and as - - - and illogical. We
23 can imagine a different policy choice being made.
24 But to require it, no, it's - - - it's not absurd for
25 - - -

1 JUDGE STEIN: What about the city law? I
2 mean, doesn't the city law effectively prevent a - -
3 - a city employee from ever availing him or herself
4 of the Civil Service Law?

5 MS. ROSS: No, Your Honor. We - - - we
6 contend that - - -

7 JUDGE STEIN: As you understand it, I mean.

8 MS. ROSS: Yes, the - - - the manual here -
9 - - the handbook, which - - - which requires or - - -
10 requires the - - - the reporting employee to, without
11 undue delay in - - - or in an appropriate time to
12 report any misconduct is not incompat - - - is not
13 incompatible with the state statute. And that is
14 because the - - - the manual's obligations to report
15 to DOI in an appropriate time in no way diminish the
16 obligations that the state law imposes to bring a
17 private right of action and to require an internal
18 report be made first. So we contend that - - -

19 JUDGE STEIN: But - - - but the city law
20 requires that the employee go immediately to the IG
21 as soon as they know of anything. And how does that
22 fit in with the Civil Service Law requirement that
23 you report first to - - - to the supervisor or
24 whatever and - - - and then give reasonable time for
25 - - - for some action to be had? How can those two

1 things be done at the same time? I don't understand.

2 MS. ROSS: They're - - - they're - - - the
3 - - - first of all, the city law, of course, does not
4 - - - deliberately and specifically does not afford a
5 private right of action. It affords many
6 protections; and, in fact, the plaintiff here did - -
7 -

8 JUDGE STEIN: But it does threaten possible
9 loss of job if you don't comply with it.

10 MS. ROSS: The - - - the - - - and again,
11 he - - - he got the benefit of the city law here
12 twice. He - - - he was - - - he was given the
13 protections. He was afforded the protections under
14 the city law.

15 JUDGE STEIN: But what you're saying then,
16 and that was my question is, is he - - - he has to
17 comply with the city law under threat of loss of his
18 job. And if he does, then you say, he's out his
19 remedy under the state law.

20 MS. ROSS: Again, Your Honor, we contend
21 that both laws align. They're both completely
22 compatible, because the - - - the obligation - - -

23 JUDGE RIVERA: Well, I - - - I think Judge
24 Stein's point is, how can it be compatible if the - -
25 - the executive order and - - - and the handbook

1 tells him that he's got to report immediately with un
2 - - - without undue delay, and the state law is
3 saying you first got to go to the appointing
4 authority and you've got to give them a reasonable
5 amount of time. It - - - it does seem that there's
6 obvious tension there. That - - - that it would be
7 the - - - the most unique situation where the
8 employee could - - - could satisfy both; and this is
9 not that situation.

10 MS. ROSS: The - - - again, the protections
11 are different. In order - - - plaintiff would like -
12 - -

13 JUDGE RIVERA: No, no, no I'm not talking
14 about the - - - I'm talking about the requirements to
15 get the protections. I mean, I think that's Judge
16 Stein's question, and I'm asking the same thing. How
17 could he, under the facts of this case, have
18 satisfied both as you interpret both?

19 MS. ROSS: He could have apprised the
20 appointing authority, Commissioner Lynn or the
21 designee Malchow of his concerns.

22 JUDGE RIVERA: But when he did that, wasn't
23 that at the point in time when he should have gone to
24 the IG for DOT?

25 MS. ROSS: If he would like a private - - -

1 if he is seeking whistleblower status under the state
2 statute, the requirement is clear. He would need to
3 have had gone to the appointing authority - - -

4 JUDGE RIVERA: But then that's the point
5 under - - -

6 MS. ROSS: - - - or the designee in order
7 to bring a lawsuit.

8 JUDGE RIVERA: But then - - - but then
9 that's - - - but that's the point, that it seems that
10 as written, the executive order and the employee
11 handbook ask him to choose between the job and
12 potentially a whistleblower action if he's retaliated
13 against.

14 MS. ROSS: He - - - Your Honor, he's
15 expected to - - - one is expected to know the law.
16 This - - - the - - - in order to sue for a - - -
17 under the Civil Service Law, the requirement is
18 clear.

19 JUDGE RIVERA: Upon your - - - the city
20 expected to know the law too.

21 MS. ROSS: And - - -

22 JUDGE RIVERA: And if you have
23 intentionally chosen a procedure that undermines a
24 state law, doesn't that make it questionable exactly
25 what kinds of protections you're trying to give to

1 your employees?

2 MS. ROSS: Your Honor, the - - - the manual
3 that - - - that he refers to also talk - - - it also
4 contemplates internal reporting. On page 207 of the
5 record - - -

6 JUDGE FAHEY: You see I - - - I thought
7 that the appoint - - - notifying the appointing
8 authority, it could be the appointing authority or
9 his or her designee. And I thought that Keegan could
10 be arguably considered a designee here. So that he
11 would fulfill that requirement of 75-b by doing that.
12 The more difficult problem for the - - - for the
13 petitioner here is the one day before he went to DOI
14 - - -

15 MS. ROSS: Yes, absolutely, Your Honor.

16 JUDGE FAHEY: I think that's - - - that's
17 more difficult probably because - - -

18 MS. ROSS: Even - - - even assuming - - -

19 JUDGE RIVERA: But you've taken the
20 position that Lynn never chose a designee, so how
21 could he? And how would he know?

22 JUDGE ABDUS-SALAAM: Or - - - or the
23 designee was Malchow who was also one of the people
24 who has been accused of the misconduct. So how does
25 that work?

1 MS. ROSS: The - - - we don't have a
2 written designation in this case, but it was not
3 contested that if there were to be one, the first dep
4 would presumably be the person, because typically the
5 appointing authority would - - - would designate the
6 - - - the next highest in command.

7 JUDGE STEIN: But could we interpret the
8 City rules as a de jure or de facto designation of
9 the IG as the designee? Could - - -

10 MS. ROSS: No, Your Honor.

11 JUDGE STEIN: Why not?

12 MS. ROSS: For a - - - for a multitude of
13 reasons. First of all, there - - - there is no
14 written designation to - - - to that extent.

15 JUDGE STEIN: But where does it say - - -

16 MS. ROSS: There's no evidence of it - - -

17 JUDGE STEIN: - - - it has to be a written
18 designee?

19 MS. ROSS: The - - - the - - -

20 JUDGE STEIN: Does it say it anywhere?

21 MS. ROSS: The charter - - - the charter
22 lays out the organizations of agencies. And
23 typically one - - - a designation is - - - is in
24 writing. However - - -

25 JUDGE PIGOTT: What about - - -

1 MS. ROSS: - - - even putting that aside -
2 - -

3 JUDGE PIGOTT: I'm - - - I apologize, but
4 what about the 1978 executive order?

5 MS. ROSS: The 1970 - - - well, the - - -
6 the most recent executive order is exec - - -
7 Executive Order 105 which completely revamped the
8 inspector general's system to specifically separate
9 the inspectors generals from the agencies that they
10 are to investigate. And - - - and that was a huge
11 change back in 1986. And it - - - it expressly made
12 it clear that DOI is a separate and independent
13 agency.

14 JUDGE ABDUS-SALAAM: Okay, so assuming
15 that's true, what about the good-faith language in
16 the - - - in the requirement - - - in the state
17 requirement that - - - that the reporting person or
18 the person reporting make a good-faith effort to
19 report the misconduct to the appointing authority?
20 Why wasn't the Appellate Division's decision
21 regarding this petitioner making a good faith, why -
22 - - what's wrong with that?

23 MS. ROSS: A - - - a couple of reasons,
24 Your Honor. The - - - the good-faith requirement was
25 not met here because the conversation - - - assuming

1 the Keegan conversation could be focused on - - - it
2 was at all not a conversation that was led to further
3 up - - - to be further up the chain of command to
4 serve as a report to further disclosure within the
5 agency and of course the - - -

6 JUDGE FAHEY: Well, but she - - - she - - -
7 he didn't go to her for advice like in the Brohman
8 case. It was - - - that's not the situation.

9 MS. ROSS: No. He went to her to tell her
10 he was going to DOI.

11 JUDGE PIGOTT: What - - - what about a
12 situation that you have - - - you have of sexual
13 harassment where the boss and somebody is - - - is
14 involved to some degree and - - - and at some point
15 the subordinate has had enough. Does the subordinate
16 then have to go to that person and say I am now
17 blowing the whistle on you, so - - - or - - - or you
18 have to exercise corrective action?

19 MS. ROSS: That is what the statute
20 requires, Your Honor - - -

21 JUDGE PIGOTT: So the - - - so the - - - so
22 the boss - - -

23 MS. ROSS: - - - until the legislature - -

24 -

25 JUDGE PIGOTT: Let me finish my thought on

1 this and you can correct me.

2 MS. ROSS: Yes, Your Honor.

3 JUDGE PIGOTT: Because the boss can say,
4 absolutely, I get it. You - - - we're - - - I'm
5 going to correct myself. And for the next six months
6 there's nothing but unsatisfactory reports but he or
7 she says nothing to the - - - to the subordinate and
8 absolutely lays off. Is - - - do you see any
9 problems with that? And all of a sudden now, the
10 subordinate is saying, I did what I was supposed to
11 do; and now I'm going to get fired, because I got six
12 months of unsatisfactories?

13 MS. ROSS: The - - - in that - - - I'm not
14 exactly clear what the question is, Your Honor.

15 JUDGE PIGOTT: Well, I'm saying that - - -
16 that the subordinate did what the law says. You got
17 to - - -

18 MS. ROSS: Yes.

19 JUDGE PIGOTT: You got to report it to your
20 superior. Well, the superior is the bad person.

21 MS. ROSS: Right.

22 JUDGE PIGOTT: So he or she does that, even
23 though it seems like a mistake, and the whole purpose
24 of that is so corrective action can be taken. So
25 corrective action's taken, unsatisfactories as far as

1 the eye can see, the subordinate's fired, and it's
2 all okay. I - - - I have a problem with - - - with
3 the Whistleblower's Statute saying that's okay.

4 MS. ROSS: The - - - and again, the
5 legislature has been approached for the last couple
6 of decades to amend the statute to enact a futility
7 exception; and again, and again, and again, the
8 statute has not been amended. I know that - - -

9 JUDGE RIVERA: Counselor, your time is up,
10 but let me just quickly ask you this if I may,
11 getting back to the point Judge Abdus-Salaam was
12 asking you about, on the good-faith effort to provide
13 the appointing authority or the des - - - designee
14 information. Is - - - is there any doubt in this
15 case that the appointing authorities knew about these
16 claims, these concerns, about the violation of the
17 procurement process?

18 They certainly knew. Isn't the point of
19 this statute to give them notice to either cure or to
20 clarify and explain? And is there any doubt that in
21 this case, on these facts - - - I'm not talking about
22 any other case; just this case - - - that this
23 appointing authority knew and in fact, tried to cure?

24 MS. ROSS: The appointing authority was
25 approached by, in fact, Wally Davidowitz. And he

1 told the commissioner, hey, you didn't follow the
2 procurement rules. And so he was alerted to - - - to
3 the - - - to that situation. We - - - we can't know
4 what appropriate action could have happened if - - -
5 if the plaintiff had gone up and followed the correct
6 steps here in order to - - -

7 JUDGE FAHEY: But - - - but isn't - - -
8 isn't your argument that the AD was wrong, that they
9 created a futility exception, which is - - - which
10 isn't available in the law?

11 MS. ROSS: Correct.

12 JUDGE FAHEY: Okay. The way I read it
13 though, is it seems that what they said was Tipaldo
14 specifically satisfied the requirements by making a
15 good-faith effort in reporting the matter to his
16 superiors. You're saying, oh, well, wrong superior.
17 Well, okay. And then - - - but even though he did
18 make a good-faith effort, that seems uncontested in
19 the record, and then he waited one or two days before
20 complying with the next city requirement which is to
21 go to the DOI.

22 MS. ROSS: Which we said is not - - -

23 JUDGE FAHEY: And you saying that's not a
24 reasonable time.

25 MS. ROSS: Exactly, Your Honor.

1 JUDGE FAHEY: Well, let me just say this.
2 You know, it would've taken him twenty seconds to
3 negate that contract and to solve this problem. So
4 it - - - I don't know how much time you need, but - -
5 - you know, you're advocating so - - - about what a
6 reasonable time is - - -

7 JUDGE PIGOTT: Judge - - - Judge Abdus-
8 Salaam?

9 JUDGE FAHEY: - - - but let me say, if I
10 was one, that would have been plenty of time to solve
11 that problem. I just really understand - - - I - - -
12 I - - - it's hard for me to see, once you get past
13 the good-faith argument, why - - - how much time you
14 need to really respond.

15 JUDGE PIGOTT: Judge Abdus-Salaam?

16 JUDGE ABDUS-SALAAM: Your - - - your light
17 is on, counsel. But I was just interested in your -
18 - - your position on the pre-judgment or pre-
19 determination interest, because you didn't get a
20 chance to say anything about that, so I wanted to
21 give you an opportunity, or you can do it in your
22 rebuttal time. It's up to you.

23 MS. ROSS: Whatever the court prefers.

24 JUDGE PIGOTT: Why don't we wait for
25 rebuttal and we'll pick - - -

1 MS. ROSS: Okay, Your Honor.

2 JUDGE PIGOTT: - - - and we'll pick on your
3 opponent for a little while.

4 MS. ROSS: Okay. Thank you.

5 MR. ROSENBERG: May it please the court,
6 I'm Lewis Rosenberg, and I've had the pleasure of
7 representing Mr. Tipaldo for many years. And we were
8 hoping that this would have been over long ago.

9 JUDGE ABDUS-SALAAM: Almost twenty now,
10 right?

11 MR. ROSENBERG: As a matter of fact, his
12 daughter was born when this occurred, and she started
13 college at Hunter this year. So that would be to sum
14 up - - -

15 JUDGE PIGOTT: Well, let - - - let's put it
16 the other way. Let's suppose this - - - this whole
17 thing is - - - is nonsense that - - - that the reason
18 for getting the signs was legitimate, that the
19 emergency was necessary and, not your client, but
20 someone else in the - - - in the Department who's
21 always had a - - - a problem with the commissioner,
22 decides he's going to start his own little - - -
23 little internecine war, and starts blowing the
24 whistle on something that's absolutely fabricated and
25 not - - - and not required at all.

1 MR. ROSENBERG: The law provides in those
2 circumstances, Your Honor, that a court could award
3 costs and attorneys' fees against such a ploy.

4 JUDGE PIGOTT: No, the - - - the - - - the
5 statute requires that the person who thinks he or
6 she's going to do this go to the appointing
7 authority, so before they can start this little grass
8 fire, they got to talk to the commissioner. And at
9 that point, the commissioner would explain to him or
10 her that everything was copasetic and - - - and we
11 would avoid an entire lawsuit.

12 MR. ROSENBERG: But that's not what
13 happened here, Your Honor.

14 JUDGE PIGOTT: I'm not suggesting yours.
15 I'm saying when - - - when we make a decision on
16 these cases, I - - - I understand you - - - you've
17 got to focus, but when we make a decision on these
18 cases, we got to think about, you know, the
19 government qua government, and they have a government
20 to run, and if - - - if people have got complaints,
21 the idea is take them to your superior.

22 MR. ROSENBERG: The City of New York
23 employed this man and instructed him what to do under
24 these circumstances. Un - - - under the - - - under
25 the scenario that's proposed by the - - - by

1 corporation counsel, he'd have to get a - - - a
2 declaratory judgment as to which rule to follow.

3 JUDGE PIGOTT: No, he could have gone to
4 his superior and said, you shouldn't do this with
5 these signs.

6 MR. ROSENBERG: But he made a good-faith
7 effort to communicate by discussing this with one of
8 his subordinates. It's obvious that the - - - in
9 this instance, with these facts - - -

10 JUDGE PIGOTT: Let's assume for a minute -
11 - - you mean, Ms. Keegan?

12 MR. ROSENBERG: Yes.

13 JUDGE PIGOTT: All right. Let's assume the
14 two of them got together and said, you know what?
15 Let's - - - let's dump the commish. And they decide
16 they're going to do the - - - do you understand the
17 point of not everybody is as - - - as pure of heart
18 as your client. And when a - - - when a law is
19 drafted for everybody, the idea is that there's going
20 to be some jokers in the deck, and - - - and - - -
21 and at the least, we ought to start at the appointing
22 authority level, and what would have been the harm to
23 your client if he'd started at that level?

24 MR. ROSENBERG: Well, the retaliation
25 probably would have been much quicker then. And - -

1 - and - - -

2 JUDGE PIGOTT: How fast was it then?

3 MR. ROSENBERG: Well, it was pretty quick,
4 but - - - but - - - and in addition to that, the
5 commissioner probably would have done a better job of
6 covering his tracks and - - -

7 JUDGE ABDUS-SALAAM: Well, isn't that why -
8 - - I mean, I don't know what the - - - the
9 motivation was for your client even going to the IG.
10 I'm not saying that I know exactly what it is, but at
11 least under the facts as I understand them, after the
12 bid came in - - - the public bid came in - - - and
13 the amounts for signs was lower than the bid that the
14 commissioner - - - or the contract that the
15 commissioner and the deputy commissioner entered
16 into, then they backdated a memo saying there was an
17 emergency, right? So that - - - that suggests that
18 they kind of knew something was up.

19 MR. ROSENBERG: No question about it.

20 JUDGE ABDUS-SALAAM: As - - - as Judge
21 Rivera said, they had notice - - -

22 MR. ROSENBERG: Oh, absolute notice.

23 JUDGE ABDUS-SALAAM: - - - that there was a
24 problem here.

25 MR. ROSENBERG: The difference - - - the

1 disparity was 6,000 as compared to 1,800. So they -
2 - - they knew there was something wrong.

3 JUDGE RIVERA: Let me ask you. I just want
4 to clarify something in - - - in the record - - -
5 something in his affidavits. He claims that there
6 are these meetings where Lynn and Malchow are
7 informed about this, and then that's when they act to
8 try and cover some of this up. So was he himself
9 present in these meetings?

10 MR. ROSENBERG: No, he was excluded from
11 meetings.

12 JUDGE RIVERA: Okay.

13 MR. ROSENBERG: I mean - - -

14 JUDGE RIVERA: So - - - so it's that he
15 hears from this either second- or third-hand that
16 these meetings have occurred?

17 MR. ROSENBERG: Well, he - - -

18 JUDGE RIVERA: So he's hearsay to him that
19 Lynn and Malchow know about the complaints?

20 MR. ROSENBERG: Objectively, we - - - we
21 can determine because they co - - - they'd made an
22 attempt to cover it up, that they were aware that
23 their conduct was - - -

24 JUDGE RIVERA: So based on subsequent
25 actions - - -

1 MR. ROSENBERG: Yes, yes.

2 JUDGE RIVERA: - - - I understand what
3 you're saying. But he has not asserted at any point
4 in this case that he was physically present when
5 someone else, not - - - not necessarily Mr. Tipaldo,
6 but someone else informed Lynn or Malchow about the
7 violations or the alleged violations, the appearances
8 of a violation of the procurement policies?

9 MR. ROSENBERG: The record is ab - - - is
10 not clear on that point.

11 JUDGE PIGOTT: So even though he didn't
12 follow the procedure, they found out anyway, right?

13 MR. ROSENBERG: Oh, sure, they did.

14 JUDGE PIGOTT: So he could have followed
15 the procedure and this - - - the - - - the
16 retaliation would have been the same.

17 MR. ROSENBERG: Well, of course, but - - -
18 but - - -

19 JUDGE STEIN: Are you arguing that there
20 should be a futility exception; or are you arguing
21 that reporting to Keegan was proper? I'm - - - I'm
22 not clear on what your argument is.

23 MR. ROSENBERG: Let's - - - let's go back
24 to what the Appellate Division did.

25 JUDGE STEIN: Well, I know what the

1 Appellate Division did. Is that - - - is that - - -

2 MR. ROSENBERG: All right. And I - - - I
3 think they did - - - they did was proper. They
4 balanced the facts of this case to conform to the
5 statute's requirements. It's not - - -

6 JUDGE FAHEY: Yeah, but you need to really
7 - - - you need to really answer the judge's question,
8 because we - - - that's what we want to know about.

9 JUDGE STEIN: Well, yeah, I understand
10 you're happy with it, but that's - - - that wasn't
11 really the nature of your argument before the
12 Appellate Division, was it, or before the Supreme
13 Court, that there's a futility exception?

14 MR. ROSENBERG: No.

15 JUDGE STEIN: Okay. So - - - so explain to
16 me - - -

17 MR. ROSENBERG: Well, actually, we did use
18 that word in our brief. I - - - I sifted through it
19 and - - - and I did find that word in our brief, but
20 - - -

21 JUDGE STEIN: But that wasn't really the -
22 - - the - - - the thrust of it.

23 MR. ROSENBERG: That wasn't the guts of the
24 case.

25 JUDGE STEIN: Was it - - - was it the good-

1 faith effort, is that - - -

2 MR. ROSENBERG: Yes.

3 JUDGE STEIN: Okay, and - - - and - - -

4 MR. ROSENBERG: That was the principal
5 thing that we focused on.

6 JUDGE STEIN: Okay.

7 MR. ROSENBERG: And the demonstration of
8 good faith is complying with the City's own manuals
9 and regulations. I mean - - -

10 JUDGE FAHEY: Can we just talk about the
11 pre-determination interest question a little bit - -
12 -

13 MR. ROSENBERG: Yes.

14 JUDGE FAHEY: - - - which seems a
15 significant issue here. Labor Law Section 740(5)
16 lists a specific - - - has an enumerated list of
17 remedies; and then there's the Bello case which
18 applies to, I guess, 77 - - -

19 MR. ROSENBERG: Yes.

20 JUDGE FAHEY: - - - of the Civil Service
21 Law. But you aren't relying on either one of those.
22 I don't think they support your position. You're
23 relying on the expanded reading that I think the
24 court gave to a civil rights case. Is that right?

25 MR. ROSENBERG: Yes, Aurecchione.

1 JUDGE FAHEY: Is that how you say it?

2 MR. ROSENBERG: I don't - - -

3 JUDGE FAHEY: [Archer-one]?

4 MR. ROSENBERG: [Archer-ron-e].

5 JUDGE FAHEY: [Archer-ron-e], okay.

6 JUDGE RIVERA: Aurecchione.

7 MR. ROSENBERG: You would know better than
8 me. Aurecchione. Anyway, that's - - - that's how it
9 would sound mellifluously.

10 JUDGE FAHEY: Does that statute
11 specifically - - - the Human Rights Statute in
12 Executive Law 24 - - - 2974(c)(3)(I), create a right
13 to pre-determina - - - determination interest or it's
14 just the reading of an expanded remedy? There is no
15 specific enumerated right there - - -

16 MR. ROSENBERG: No.

17 JUDGE FAHEY: - - - either, is there?

18 MR. ROSENBERG: No, there isn't. And the
19 Appellate Division adopted those - - - that
20 reasoning. Now, there's something else. The - - -
21 the legislative history, we've - - - we've aler - - -
22 alluded to that. The legislative history in the 1984
23 bill jacket and in a 2002 amendment to 740 of the - -
24 - of the Labor Law, alludes to a complete remedy,
25 making the person whole. And that's the language

1 that the - - - that this court - - - that the - - -
2 that the - - - that was used in Aurecchione by Judge
3 Ciparick, and it - - - it's very consistent with the
4 legislative history here.

5 JUDGE FAHEY: Yeah, in the Greenberg case
6 too, in the Workman's Comp case, similar language was
7 used.

8 MR. ROSENBERG: Yes.

9 JUDGE ABDUS-SALAAM: So you're saying that
10 that language in the bill jacket, Mr. Rosenberg,
11 affects what the statute itself says, which is - - -
12 this is 740 - - -

13 MR. ROSENBERG: Yes.

14 JUDGE ABDUS-SALAAM: "Relief in any action
15 brought against - - - or pursuant to subdivision four
16 of this section, this court may order relief as
17 follows," or the court may order relief as follows,
18 and then there are five separate - - -

19 MR. ROSENBERG: Yes.

20 JUDGE ABDUS-SALAAM: - - - types of relief
21 that - - -

22 MR. ROSENBERG: Right.

23 JUDGE ABDUS-SALAAM: - - - are listed. So
24 you're saying, beyond that, there's this making
25 someone whole.

1 MR. ROSENBERG: I'm - - - I'm saying that
2 this is an equitable remedy - - -

3 JUDGE ABDUS-SALAAM: Right.

4 MR. ROSENBERG: - - - because injunctive
5 relief is included.

6 JUDGE FAHEY: How?

7 JUDGE RIVERA: Are you saying this reflects
8 an attempt to make someone whole?

9 MR. ROSENBERG: Yes.

10 JUDGE RIVERA: And that the word
11 "remuneration" should be read broadly to ensure that
12 you make someone whole.

13 MR. ROSENBERG: Exactly.

14 JUDGE PIGOTT: All right. So to make - - -
15 to make your client whole, you had Dr. Bynoe testify,
16 right?

17 MR. ROSENBERG: Yes.

18 JUDGE PIGOTT: All right. And she came up
19 with the present value of his lost wages as of 2008
20 or something?

21 MR. ROSENBERG: Yes.

22 JUDGE PIGOTT: All right.

23 MR. ROSENBERG: She discounted - - - in
24 other words, what she did was - - -

25 JUDGE PIGOTT: So that takes - - -

1 MR. ROSENBERG: - - - segment a piece at a
2 time, but - - -

3 JUDGE PIGOTT: So you - - - you could get
4 interest after that judgment but you can't get
5 interest before that because that's already - - -

6 MR. ROSENBERG: Well - - -

7 JUDGE PIGOTT: - - - that's already
8 calculated in.

9 MR. ROSENBERG: No, the - - - the - - - it
10 was a discount. It wasn't applied plus - - -

11 JUDGE PIGOTT: Of course, it is. That - -
12 -

13 MR. ROSENBERG: - - - it was a minus.

14 JUDGE PIGOTT: Of course, it is, I mean,
15 that's - - - that's what they do. And they say the
16 present value of - - - of the lost wages, if the lost
17 wages that he suffered were paid to him today, he
18 should get a check for 662,000 dollars, and then he's
19 made whole. Now if they don't pay it today, you get
20 interest at nine - - - well, I don't know what the
21 city interest - - -

22 MR. ROSENBERG: Well, they didn't pay it at
23 all, so - - -

24 JUDGE PIGOTT: I understand, but what I'm
25 saying is that - - -

1 MR. ROSENBERG: But - - -

2 JUDGE PIGOTT: - - - you don't say, you
3 know, we - - - we figured the present value of - - -
4 of what he was supposed to be paid as of today and
5 now we're going to go back and give him interest.

6 MR. ROSENBERG: It was the present value as
7 of the time the benefit was conferred.

8 JUDGE PIGOTT: Right - - - as of 2008, when
9 you had the hearing.

10 MR. ROSENBERG: Yes.

11 JUDGE PIGOTT: Right.

12 MR. ROSENBERG: And - - -

13 JUDGE PIGOTT: So there's no interest
14 before that. I mean, that's already calculated into
15 the - - - into the lost wages.

16 JUDGE FAHEY: I thought you were asking for
17 pre-determination interest.

18 MR. ROSENBERG: Exactly.

19 JUDGE FAHEY: So that's pre-determination.
20 That's before - - -

21 MR. ROSENBERG: Before that. Before that.

22 JUDGE FAHEY: This is before that.

23 JUDGE PIGOTT: On what?

24 MR. ROSENBERG: Each of the - - - each of
25 the amounts that he was deprived of for the period of

1 time - - -

2 JUDGE PIGOTT: She computed that, didn't
3 she? In other words, if he was supposed to be paid
4 100 dollars on the - - - in 2000, she said 100
5 dollars in 2008 would 175 dollars, so you owe him 175
6 dollars. You don't say, okay, take that 175 and give
7 me interest back from 2000, because you've got
8 present day, right?

9 MR. ROSENBERG: Her calculations assumed as
10 a model a - - - a salary schedule based on those two
11 comparatives.

12 JUDGE PIGOTT: But I - - - my - - - my
13 understand - - - in any case where people have lost
14 wages, you've got to figure out how do you compensate
15 them? And so you get these economists who do the
16 cost of living and - - - which is what she did, and
17 she says he's out 662,000 dollars.

18 MR. ROSENBERG: But that's based upon what
19 - - - what these amounts would have added up to had
20 they - - -

21 JUDGE PIGOTT: But it's the - - -

22 MR. ROSENBERG: Well - - -

23 JUDGE PIGOTT: - - - but it's today's
24 value. It's not - - - it's not the 100 dollars in
25 2000, it's what the value of 100 dollars would be in

1 2008.

2 MR. ROSENBERG: It's - - -

3 JUDGE ABDUS-SALAAM: But even if that's
4 true, is he entitled or is the employee entitled to
5 be compensated for not having that money - - -

6 MR. ROSENBERG: Right.

7 JUDGE ABDUS-SALAAM: - - - to spend?

8 MR. ROSENBERG: That's the whole idea. I
9 mean, he - - - he - - - as an example - - -

10 JUDGE RIVERA: Because the employer has the
11 money and - - -

12 MR. ROSENBERG: He's working with it.

13 JUDGE RIVERA: - - - and is profiting off
14 it.

15 MR. ROSENBERG: He's using it. In - - - in
16 1996, when this occurred - - - this is a little
17 aside; it's not in the record, but it may be - - -
18 it'll illustrate this point - - - Mr. Tipaldo was
19 living in the a two-family house. The owner of the
20 house was on the ground floor, an elderly woman, and
21 he and his wife and then his children lived in the -
22 - - in the second floor. And she wanted to sell that
23 house, and he wanted to buy it. And he couldn't
24 qualify to buy that, because he'd been deprived of
25 the money that he would have earned had - - - had

1 this raise that was promised to him been given to
2 him. And that house has appreciated dramatically - -
3 -

4 JUDGE PIGOTT: Is that an element of
5 damages?

6 MR. ROSENBERG: What's that?

7 JUDGE PIGOTT: Is that an element of
8 damages?

9 MR. ROSENBERG: No, but the - - - the
10 illustration as to why - - -

11 JUDGE PIGOTT: That's my - - -

12 MR. ROSENBERG: - - - interest should be
13 applied.

14 JUDGE PIGOTT: But that's my point.

15 MR. ROSENBERG: Is why - - -

16 JUDGE PIGOTT: You can't - - - you can't do
17 all of that.

18 MR. ROSENBERG: No, you can't do that.

19 JUDGE PIGOTT: I mean, all you can do is
20 give him - - -

21 MR. ROSENBERG: But we attempt to do it by
22 - - - by applying interest to it.

23 JUDGE PIGOTT: All you do is give him the
24 money he is entitled to. And they're saying it - - -
25 he may have been entitled to 30,000 dollars in 2000.

1 That in today's dollars is 660,000, so you got - - -

2 MR. ROSENBERG: Well - - -

3 JUDGE PIGOTT: - - - you can't pay him the
4 30; you got to pay him the 660.

5 JUDGE RIVERA: I understood your argument
6 to be that - - - that doing that solely then deprives
7 him of the - - - the accumulation of funds that he
8 would have had - - -

9 MR. ROSENBERG: Yeah.

10 JUDGE RIVERA: - - - had he been paid on
11 time.

12 JUDGE RIVERA: Exactly.

13 JUDGE PIGOTT: That's never been - - -
14 every personal injury case in this state, the - - -
15 you know, talks about lost wages and they want to
16 make the person whole, which is what your argument
17 was.

18 MR. ROSENBERG: Right.

19 JUDGE PIGOTT: You want him to be whole.
20 You want the money that he would have been entitled
21 to had they not done this. And that's what this lady
22 said. She said this is it, so - - -

23 JUDGE FAHEY: See, you got a - - - you got
24 the judgment for the non-jury trial for 175,000
25 dollars in back pay.

1 MR. ROSENBERG: Well, that was the - - -
2 yes.

3 JUDGE FAHEY: Let's take it step by step.

4 MR. ROSENBERG: Okay.

5 JUDGE FAHEY: What was the date of that?

6 MR. ROSENBERG: 2007, I believe.

7 JUDGE FAHEY: All right. And then - - -
8 then it was appealed, went up, and then it went back
9 to the Appellate Division in 2010, in the subsequent
10 appeal, the trial court - - - did they give you - - -
11 they gave you pre-determination interest, right? Or
12 they didn't?

13 MR. ROSENBERG: The Appellate Division did.
14 The - - - the trial judge did not.

15 JUDGE FAHEY: The appellate court did. All
16 right.

17 MR. ROSENBERG: Did not - - -

18 JUDGE FAHEY: So it was sent back, another
19 trial. 2010 it comes back up on the second trial
20 which they affirm for whatever the wage claim is, and
21 plus they grant pre-determination interest which
22 would be interest - - - are you arguing for interest
23 prior to the 2007 determination? The original
24 determination. Are you saying that we go back to
25 when?

1 MR. ROSENBERG: Well, as he - as he - - -
2 the segments that he lost, that he lost.

3 JUDGE FAHEY: So the date - - - you're
4 saying that it goes back to the day that he was fired
5 from the job.

6 MR. ROSENBERG: The day he's - - - yes.
7 The day he's fired from - - -

8 JUDGE FAHEY: Straightforward, is it some
9 day around whatever that was.

10 MR. ROSENBERG: But - - -

11 JUDGE FAHEY: So - - - now wait a minute.
12 In every PI case that I've ever seen, when you're
13 calculating the wages, it's exactly as Judge Pigott
14 says. It goes back - - - that's what they're
15 calculating. They're - - - they're making you whole
16 after as of the day of the verdict. Your interest
17 runs forward from the date of the verdict.

18 MR. ROSENBERG: In a personal injury case,
19 that's true.

20 JUDGE PIGOTT: Well - - -

21 MR. ROSENBERG: There is no - - -

22 JUDGE FAHEY: You're saying there's a
23 separate rule for this - - -

24 MR. ROSENBERG: Yes.

25 JUDGE PIGOTT: But wait.

1 JUDGE FAHEY: - - - which is not even as -
2 - - in the personal injury case - - -

3 JUDGE RIVERA: But there are certainly - -
4 - there are certain - - - we've - - - we've granted
5 pre-determination interest as you've already pointed
6 out in a couple of cases, but - - - in the federal
7 system under Title VII, back wages can, on occasion,
8 include pre-determination interest.

9 MR. ROSENBERG: And it's not - - - in other
10 words, it's not a black and white rule. It's not in
11 every case. It's - - - it's discretionary. It's
12 another applica - - -

13 JUDGE RIVERA: Because the legislature,
14 what - - -

15 JUDGE PIGOTT: Bynoe - - -

16 JUDGE RIVERA: - - - the legislature
17 intended to do.

18 JUDGE PIGOTT: I'm sorry, Judge. Bynoe,
19 when she first testified, she was computing your lost
20 wages from March 4th, '97 through December 31st,
21 2004. And during that time, she determined that he
22 lost 242,000 and change.

23 MR. ROSENBERG: Right.

24 JUDGE PIGOTT: She then calculated the
25 present value of the lost wages by adding compounded

1 interest at nine percent of 81,000 and change for a
2 total of 324,000. Then in September of 2008, when
3 you did - - - after you went back and got the thing
4 on damages, she computed it at 388,000 in wages
5 without interest and calculated a nine percent
6 interest of 275 and that added up to 662. So she
7 gave you interest in your - - - in the judgment.

8 MR. ROSENBERG: Exactly.

9 JUDGE PIGOTT: All right. So you're not
10 asking for - - -

11 MR. ROSENBERG: We're not asking for any
12 more - - -

13 JUDGE PIGOTT: - - - us to go back and
14 compute more - - -

15 MR. ROSENBERG: No, no, we're not asking
16 for any more interest than - - - than she calculated
17 and that's what the Appellate Division ruled that she
18 - - - we were entitled to.

19 JUDGE PIGOTT: Got you. I think your time
20 is expired.

21 MR. ROSENBERG: Oh.

22 JUDGE PIGOTT: We'll hear from Ms. Ross.
23 Thank you, sir.

24 MR. ROSENBERG: Thank you.

25 MS. ROSS: To answer your question, Judge

1 Stein, there was never any argument by plaintiff that
2 Keegan was the designee. That was solely something
3 that the Appellate Division held, and - - - and at no
4 point was that an argument that plaintiff made that
5 the sole interpretation of the term designee was
6 meant to refer to DOI.

7 JUDGE STEIN: Right, and I think your - - -
8 your adversary clarified that.

9 MS. ROSS: Yes. I - - - I just want - - -
10 just wanted to clarify it.

11 JUDGE STEIN: Um-hum.

12 MS. ROSS: And in terms of - - -

13 JUDGE ABDUS-SALAAM: What's your position
14 on the pre-judgment interest, counsel? You never got
15 a chance to - - - to speak about that - - -

16 MS. ROSS: Yes, Your Honor.

17 JUDGE ABDUS-SALAAM: - - - when you were up
18 before. So what are your - - -

19 MS. ROSS: Our argument is - - - is simple,
20 Your Honor. It's - - - it's that the remedies here
21 are - - - are numerous, they're specific, and they
22 don't include interest. And - - -

23 JUDGE RIVERA: But what does other
24 remuneration cover? Because it - - - it must mean
25 more than the list.

1 MS. ROSS: It - - - it - - - it does not
2 include interest. It - - - it - - - it includes - -
3 -

4 JUDGE RIVERA: But why not? I understand
5 that's your argument.

6 MS. ROSS: Yes.

7 JUDGE RIVERA: Why - - - why would it not?

8 MS. ROSS: Yes, Your Honor. Because
9 interest would not fall - - - interest would need to
10 be specifically mentioned as in the federal
11 Whistleblower Law, which specifically was amended
12 actually in 2012 - - -

13 JUDGE RIVERA: But we've - - - we've said
14 in other cases - - -

15 MS. ROSS: - - - to include interest.

16 JUDGE RIVERA: - - - that you - - - it need
17 not be specifically mentioned. If the intent of the
18 statute and the purpose is to make someone whole,
19 then why - - - why doesn't the inclusion of such a
20 broad category of relief and this cat - - - this - -
21 - what is very expansive - - - other remunerations
22 suggests that that's indeed what this statute
23 intends.

24 MS. ROSS: The remuneration would not cover
25 interest because any time interest is - - - is

1 mentioned in a statute it is specifically mentioned
2 as a separate remedy and - - - and would not fall
3 under an "other remuneration" category. But - - -
4 but beyond that, Your Honor, as the Greenberg - - -

5 JUDGE ABDUS-SALAAM: Is that true for the
6 Workers' Compensation Law?

7 MS. ROSS: The - - -

8 JUDGE ABDUS-SALAAM: Because we said in
9 Greenberg that you could get interest?

10 MS. ROSS: Yes, Your Honor, because you
11 found that the statute there was more akin to the - -
12 - to the state's Human Rights Law, which had broad
13 remedial provisions.

14 JUDGE ABDUS-SALAAM: But it didn't mention
15 interest, did it?

16 MS. ROSS: No, it didn't. No, it didn't,
17 Your Honor. But you also recognized in Greenberg
18 that strict construction is - - - is necessary in - -
19 - in the circumstances - - -

20 JUDGE FAHEY: Let me ask it this way.
21 You're not - - - you're not arguing that there's a
22 double calculation of interest, are you?

23 MS. ROSS: No, Your Honor.

24 JUDGE FAHEY: You - - - all right, so
25 you're just saying that they shouldn't get interest

1 and that we don't have the power to give them
2 interest because this is not a statutorily enu - - -
3 enumerated under 740; but - - - but it's not a double
4 calculation problem, where they're getting an
5 interest twice for the same time period.

6 MS. ROSS: Yes, that is correct.

7 JUDGE PIGOTT: Did you object when Bynoe
8 gave this testimony?

9 MS. ROSS: I am not sure about that, Your
10 Honor. Okay.

11 JUDGE PIGOTT: I - - - I don't know either.

12 MS. ROSS: I would have to - - - I would have to go
13 back and check the record.

14 JUDGE RIVERA: So I'm sorry; let me go
15 back. What - - - what is your position on - - - on
16 the intent of other remuneration? What would that
17 cover?

18 MS. ROSS: My - - - my feeling is that it
19 would cover mis - - - ministerial costs and not
20 something as - - - as significant as interest, Your
21 Honor.

22 JUDGE PIGOTT: I see your time has expired.
23 Would you like to conclude?

24 MS. ROSS: Your Honor, of course, since we
25 believe the action should be dismissed in full, this

1 court need not each - - - reach interest, and we feel
2 very strongly that if the legislature wanted to enact
3 a futility exception, it would have, and the
4 statute's pre-conditions are clear and were not met
5 in this case, and so the action should be dismissed.

6 JUDGE PIGOTT: Thank you so much.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Tipaldo v. Lynn, No. 143, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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