NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
January 15 – 19, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts January 15 – 19, 2024, and Posted on the New York Appellate Digest Website Monday, January 22, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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CIVIL PROCEDURE, MEDICAID.

PETITIONERS, RESIDENTIAL HEALTH CARE FACILITIES, SOUGHT A WRIT OF MANDAMUS PURSUANT TO CPLR ARTICLE 78 COMPELLING THE NYS DEPARTMENT OF HEALTH TO HEAR RATE APPEALS WHICH CHALLENGE MEDICAID RATE PAYMENTS; BECAUSE THE REQUESTED RELIEF REQUIRED THE EXERCISE OF DISCRETION ON THE PART OF THE DEPARTMENT OF HEALTH, MANDAMUS RELIEF WAS NOT AVAILABLE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined that petitioners, 23 residential health care facilities which participate in the federal and state Medicaid programs administered by the NYS Department of Health, did not meet the criteria for mandamus relief pursuant to CPLR Article 78. Petitioner sought to compel the respondent to hear rate appeals which challenge payment rates:

… [I]t is axiomatic that "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances. Such remedy will lie only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law. While mandamus to compel is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which a public officer may exercise judgment or discretion" … . "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" … .

To be entitled to such relief, petitioners must establish both a clear legal right to the relief demanded and a corresponding nondiscretionary duty — both are equally necessary for mandamus to lie. Petitioners, relying on Klostermann v Cuomo (61 NY2d 525 [1984]), contend that respondent's duty to process rate appeals is clear and that respondent is mandated to process the appeals even if the statutory cap prevents respondent from paying the amount due. However, even if we agree with petitioners that respondent has a duty to process appeals, the determination of whether something has taken place within a reasonable time necessarily "involves

a discretionary determination" … and thus precludes mandamus relief. Matter of Woodside Manor Nursing Home, Inc. v Zucker, 2024 NY Slip Op 00211, Third Dept 1-18-24

Practice Point: Only ministerial acts can be compelled by a writ of mandamus pursuant to CPLR Article 78. If, as here, the requested relief requires the exercise of discretion, mandamus is not available.

JANUARY 18, 2024

CIVIL RIGHTS LAW, DEFAMATION.

THE 2020 AMENDMENTS TO THE ANTI-SLAPP STATUTE DO NOT APPLY AS A DEFENSE TO THIS DEFAMATION ACTION BASED UPON DEFENDANTS' CRITICISM OF PLAINTIFF DOG-GROOMER POSTED ON SOCIAL MEDIA (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, in a matter of first impression in the Second Department, determined the 2020 anti-SLAPP amendments, which expanded the scope of the statute to some defamatory statements made on social media, did not apply retroactively. Therefore the defendants in the defamation action (the Sproules) were not entitled to dismissal of the defamation complaint pursuant to the anti-SLAPP statute. The Sproules had left their puppy at plaintiff VIP's dog-grooming facility. The dog allegedly had trouble breathing when the Sproules picked him up. They took him to a veterinarian who concluded the dog had water in his lungs. When the dog failed to improve on a ventilator he was put to sleep. Robert Sproule posted a description of the incident on Yelp and Google urging readers to avoid using VIP:

The 2020 amendments to the Civil Rights Law expanded the pool of parties that may raise anti-SLAPP defenses, counterclaims, and cross-claims in their actions, now including journalists, consumer advocates, survivors of sexual abuse, and others. The expansion will naturally lead to an increase in the occasions where anti-SLAPP statutes shall be litigated in the courts. In fact, some upswing is already noted in this developing area of law. * * *

… [T]he Sproules did not establish that this action constitutes an action involving public petition and participation under the anti-SLAPP statute in the form that existed when this action was commenced … . Thus, to decide whether the standards under CPLR 3211(g) and Civil Rights Law § 76-a(2) apply, we must address whether the 2020 amendments to the anti-SLAPP statute apply retroactively or prospectively…. * * *

We hold that the presumption of prospective application has not been overcome here. Indeed, the remedial nature of a statutory amendment, which is generally at play with many amendments, is not a basis, in and of itself, for ignoring the long-standing legal presumption that new enactments be prospective, particularly where there is no expressed provision that a new law be given retroactive effect … . VIP Pet Grooming Studio, Inc. v Sproule, 2024 NY Slip Op 00205, Second Dept 1-17-24

Practice Point: The 2020 amendments to the anti-SLAPP statute, which expanded the scope of the statute to include some critical social media posts, do not apply retroactively. Here defendants in a defamation action based on their social media posts alleging plaintiff dog-groomer's incompetence and negligence could not take advantage of the 2020 amendments as a defense to the action.

JANUARY 17, 2024

CONTRACT LAW, CIVIL PROCEDURE.

THE CONTRACT CALLED FOR LIQUIDATED DAMAGES AS THE "SOLE REMEDY" FOR BREACH; HOWEVER NOTHING IN THE CONTRACT LANGUAGE WAIVED THE NONBREACHING PARTY'S RIGHT TO PREJUDGMENT INTEREST PURSUANT TO CPLR 5001(A) (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, reversing Supreme Court, determined the contract language, which provided that liquidated damages constituted the "sole remedy" for breach, did not waive the nonbreaching party's right to prejudgment interest pursuant to CPLR 5001 (a):

At issue in this appeal is whether the parties' contract language specifying that purchaser's "sole remedy" in the event of sellers' breach is the return of its

downpayment constitutes a clear waiver of CPLR 5001 (a) as defined by the Court of Appeals in J. D' Addario & Co., Inc. v Embassy Indus., Inc. (20 NY3d 113 [2012]) and requires denying the nonbreaching party statutory prejudgment interest. … [W]e conclude that it does not and hold that CPLR 5001 (a) requires that plaintiff …, the nonbreaching purchaser, be awarded prejudgment interest on its $626,250.00 downpayment, at the statutory rate of 9% … . IHG Harlem I LLC v 406 Manhattan LLC,2024 NY Slip Op 00164, First Dept 1-16-24

Practice Point: The contract provided that liquidated damages constituted the "sole remedy" for breach. However, nothing in the contract language indicated the nonbreaching party's right to prejudgment interest pursuant to CPLR 5001 (a) was waived.

JANUARY 16, 2024

CRIMINAL LAW, EVIDENCE.

THE POLICE HAD ENOUGH CAUSE FOR A LEVEL TWO INQUIRY BUT DID NOT HAVE REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED, FRISKED AND BROUGHT TO THE GROUND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the police did not have reasonable suspicion defendant was involved in a crime at the time defendant was stopped, grabbed and brought to the ground. The police were aware there had been 10 robberies in the area where the victims were punched or struck with objects. The arresting officer saw two men, including the defendant, holding onto a third man on a bicycle. When the men saw the police, one man ran and the man on the bicycle left the scene. Defendant began walking. The police stopped defendant with the police car. The officer touched what he thought was a gun in defendant's pocket and then brought defendant to the ground. At the station the defendant stated the gun belonged to one of the other men and he had prevented a shooting: The gun and the statement should have been suppressed:

Officer Garcia did not have the requisite reasonable suspicion to detain and frisk the defendant. The unusual interaction that Officer Garcia described regarding the

man on the bicycle, coupled with reports and "intel" as to robberies in the area, may have provided circumstances giving rise to a founded suspicion that criminal activity was afoot—i.e., level two under De Bour. Thus, Officer Garcia would have had a right of inquiry that permitted him to approach the defendant. However, rather than conducting meaningful inquiry to further his investigation, after the police vehicle stopped in front of the defendant, Officer Garcia exited the vehicle and immediately grabbed the defendant and touched his right rear pants pocket. People v Hernandez, 2024 NY Slip Op 00196, Second Dept 1-17-24

Practice Point: The case illustrates the difference between the police having enough information to approach a defendant on the street to make an inquiry, and having reasonable suspicion of criminal activity. Here the police had sufficient cause to inquire further, but not to stop and frisk.

JANUARY 17, 2024

CRIMINAL LAW, IMMIGRATION LAW.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS GUILTY PLEA; DEFENDANT WAS TOLD BY DEFENSE COUNSEL THAT DEPORTATION BASED ON THE PLEA WAS POSSIBLE, BUT HE WAS NOT TOLD IT WAS MANDATORY; DEFENDANT DEMONSTRATED HE MAY HAVE DECIDED TO GO TO TRIAL IF HE HAD BEEN AWARE OF THE MANDATORY DEPORTATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his guilty plea. Although the court and defense counsel warned defendant he may be subject to deportation based upon his guilty plea, defendant was not told by counsel that deportation would be mandatory. Defendant was entitled to a hearing on whether he was afforded effective assistance of counsel:

During the plea colloquy, County Court — after prompting by the People — advised defendant that his plea to a felony "may result in [his] deportation" and, at the time of sentencing, defense counsel acknowledged that defendant "took a plea with the understanding that there might be some [i]mmigration issues." Similarly,

defendant averred in support of his CPL 440.10 motion that defense counsel "said that there was only a possibility that [he] could be deported," and that neither County Court nor defense counsel ever told him "that [he] would be deported if [he] plead[ed] guilty." These advisements were erroneous, and, as … defense counsel readily could have ascertained — simply from a reading of the relevant statutes — …defendant's plea to criminal possession of a controlled substance in the third degree rendered deportation presumptively mandatory … and rendered defendant ineligible for cancellation of an order of removal … . "Where, as here, defense counsel gives incorrect advice regarding the immigration consequences of a guilty plea, that constitutes ineffective assistance under the first prong of Strickland" [466 US 668] … .

With respect to the issue of prejudice, defendant averred that he came to the United States as an asylee in 2000 and, in 2006, his status was adjusted to lawful permanent resident. According to defendant, he elected to plead guilty because counsel advised him "that it was the only way to avoid going to jail for a prolonged period of time, and because [counsel] said [he] would have a chance to prevail if [i]mmigration tried to deport [him]." Had he been aware that "criminal [possession] of a controlled substance in the third degree was a mandatory deportable crime," defendant averred, "[he] would not have plead[ed] guilty and [would have] insisted on going to trial." These averments, coupled with the fact that, at the time of his arrest, defendant had been residing in Schenectady County for eight years, was self-employed as a mechanic and, together with his long-term partner, was the parent of triplets, raise "a question of fact as to whether it was reasonably probable that [he] would not have entered a plea of guilty if he had been correctly advised of the deportation consequences of the plea" … . "As defendant sufficiently alleged that counsel provided incorrect information concerning the deportation consequences that would result from [his] guilty plea and that [he] was prejudiced as a result thereof, [he] was entitled to a hearing on . . . [his] CPL 440.10 motion" … . People v Marcellus, 2024 NY Slip Op 00209, Third Dept 1-18-24

Practice Point: Informing a defendant that he may be deported based upon his guilty plea when deportation is mandatory constitutes ineffective assistance of counsel.

JANUARY 18, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT CANNOT APPEAL THE DENIAL OF HIS MOTION TO DISMISS THE SORA RISK-LEVEL PROCEEDING; HE MUST FIRST BE ADJUDICATED BY THE SORA COURT AND MAY SUBSEQUENTLY APPEAL REQUESTING AN ANNULMENT (FIRST DEPT).

The First Department, in full-fledged opinion by Judge Pitt-Burke, determined the defendant could not appeal an interlocutory order which denied his motion to dismiss the SORA proceeding. Defendant had been convicted of a federal offense and argued the Penal Law did not criminalize the use of morphed images which did not depict actual sexual conduct by a child. The First Department held the defendant must go through with the SORA hearing and subsequently make this argument on appeal:

By its plain language, Correction Law § 168-n (3) only permits an appeal "as of right" from the SORA court's risk level determination order. To find otherwise would be to ignore the legislative intent of the statutory language … . Namely, the procedural safeguards afforded to defendant in Correction Law § 168-n (3) require the SORA court to conduct a risk assessment hearing before it renders an order requiring him to register as a sex offender in New York and assigns him a risk level designation. Until a hearing is held and a determination made, the defendant's liberty interest as related to the SORA proceeding has not yet been adjudicated (see Correction Law § 168-n [3]). …

Under to CPLR 5701 (a) (2) (v), "[a]n appeal may be taken to the appellate division as of right . . . from an order . . . where the motion it decided was made upon notice and it . . . affects a substantial right." Even assuming defendant's interpretation of Correction Law § 168-n (3) is correct, the interlocutory order appealed from does not require defendant to register as a sex offender. In fact, the very procedural safeguards noted above prevent the SORA court from issuing such an order without a hearing. People v Lewis, 2024 NY Slip Op 00248, First Dept 1-18-24

Practice Point: Defendant could not appeal the denial of his motion to dismiss the SORA risk-level proceeding before it was conducted. Defendant contended the federal offense of which he was convicted involved morphed images that did not depict actual sexual conduct by a child, a circumstance, he argued, not covered by the New York Penal Law.

JANUARY 18, 2024

EMPLOYMENT LAW, LABOR LAW.

THE LABOR LAW DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION ALLOWING A WORKER TO SUE FOR LIQUIDATED DAMAGES, PREJUDGMENT INTEREST, AND ATTORNEY'S FEES BECAUSE THE WORKER WAS PAID BIWEEKLY, NOT WEEKLY AS REQUIRED BY LABOR LAW 191 (SECOND DEPT).

The Second Department, disagreeing with the First Department, over a partial dissent, determined that Labor Law 191, entitled "Frequency of payments," does not create a private right of action which would allow an employee, who was fully paid, to sue for liquidated damages, prejudgment interest and attorney's fees because the employee was paid "biweekly," not "weekly" as required by the statute:

… {The] … legislative history reveals that Labor Law § 198(1-a) was aimed at remedying employers' failure to pay the amount of wages required by contract or law. There is no reference in the legislative history of Labor Law § 198 to the frequency or timing of wage payments, and nothing to suggest that the statute was meant to address circumstances in which an employer pays full wages pursuant to an agreed-upon, biweekly pay schedule that nevertheless does not conform to the frequency of payments provision of law.

[W]e conclude that Labor Law § 198 does not expressly provide for a private right of action to recover liquidated damages, prejudgment interest, and attorneys' fees where a manual worker is paid all of his or her wages biweekly, rather than weekly, in violation of Labor Law § 191(1)(a). Grant v Global Aircraft Dispatch, Inc., 2024 NY Slip Op 00183, Second Dept 1-17-24

Practice Point: The Labor Law does not provide a private right of action allowing a worker to sue for liquidated damage, prejudgment interest and attorney's fees because the worker was paid biweekly, not weekly as required by Labor Law 191.

JANUARY 17, 2024

FAMILY LAW, JUDGES, APPEALS.

ALTHOUGH FATHER FILED A PETITION FOR CUSTODY AFTER GRANDMOTHER WAS AWARDED CUSTODY, FATHER'S APPEAL WAS NOT MOOT; THE JUDGE DID NOT MAKE AN ADEQUATE INQUIRY TO ENSURE FATHER'S WAIVER OF COUNSEL WAS KNOWING, VOLUNTARY AND INTELLIGENT (SECOND DEPT).

The Second Department, reversing Family Court, determined: (1) the fact that father filed a petition for custody after custody had been awarded to grandmother did not render father's appeal of the custody-award to grandmother moot; (2) because the judge failed to make a searching inquiry, father did not effectively waive his right to counsel:

"Once a court makes a finding that extraordinary circumstances exist" to conclude that a parent relinquished his or her otherwise superior right to custody as compared to a nonparent, "that issue cannot be revisited in a subsequent proceeding seeking to modify custody and, thus, such a finding may have enduring consequences for the parties" … . In the order appealed from, the Family Court determined that the requisite extraordinary circumstances existed. This appeal is therefore not academic, among other reasons, because the court's determination in the order appealed from imposes enduring consequences upon the father that will "impact the scope of the pending proceedings" … . …

Family Court failed to conduct a searching inquiry to ensure that the father's waiver of his right to counsel was made knowingly, voluntarily, and intelligently … . The hearing record demonstrates that the father did not wish to proceed pro se, but felt that he had no other option but to do so … . To the extent the attorney for the child contends that the court was not required to conduct a searching inquiry because the father did not demonstrate that he was entitled to assigned counsel, this contention is without merit. A court's obligation to ensure the validity of a party's

waiver of his or her right to counsel extends beyond indigent parties … . In any event, the father indicated that he lacked the funds necessary to afford an attorney, and the court failed to inquire into the father's financial capability to retain counsel … . The court had an independent obligation to conduct such an inquiry and could not rely solely upon information received from the Legal Aid Society of Orange County regarding whether the father qualified for its services … . Matter of Turner v Estate of Laura Katherine Jane Turner, 2024 NY Slip Op 00193, Second Dept 1-17-24

Practice Point: Here father's appeal of the award of custody to grandmother was not moot, even though father first filed for custody after the award of custody to grandmother.

Practice Point: A sufficient inquiry into whether a party's waiver of the right to counsel is knowing, voluntary and intelligent must go beyond whether the party is financially entitled to assigned counsel.

JANUARY 17, 2024

FAMILY LAW, JUDGES, ATTORNEYS.

THERE IS NO INDICATION MOTHER WAS INFORMED OF HER COUNSEL'S WITHDRAWAL BEFORE THE PERMANENCY HEARING WAS HELD IN MOTHER'S AND COUNSEL'S ABSENCE; NEGLECT FINDING REVERSED; TWO DISSENTERS ARGUED NO APPEAL LIES FROM A DEFAULT AND MOTHER'S ONLY REMEDY IS A MOTION TO VACATE (THIRD DEPT).

The Third Department, reversing Family Court in this neglect proceeding, determined it was not demonstrated mother was informed of her counsel's intent to withdraw from representing her before the judge conducted the permanency hearing in counsel's and mother's absence and found against her. The two-justice dissent argued no appeal lies from a default and mother's recourse was to move to vacate the default pursuant of CPLR 5015(a):

It is well established that the mother, as a respondent in a proceeding pursuant to article 10 of the Family Ct Act, had both a constitutional and a statutory right to the assistance of counsel … . Once counsel has been assigned, an attorney of record

may withdraw from representation only upon reasonable notice to his or her client … . Such requirement remains true even where a party fails to appear at proceedings or there are allegations of a breakdown in communication between the client and the attorney … .

Here, there is no indication in the record that the mother's assigned counsel had informed her that she was seeking to withdraw as counsel … . Nor does the record reveal that Family Court made any inquiry into such notice or whether there was good and sufficient cause for such withdrawal … . Matter of Richard TT. (Kara VV.), 2024 NY Slip Op 00215, Third Dept 1-18-24

Practice Point: There is no evidence mother in this neglect proceeding was informed of her counsel's withdrawal before the court made the neglect finding in her and her counsel's absence. Matter reversed and remitted.

Practice Point: Two dissenters argued no appeal lies from a default and mother's only remedy is a motion to vacate the default.

JANUARY 18, 2024

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF DID NOT CITE A VIOLATION OF ANY INDUSTRIAL CODE PROVISION IN THE COMPLAINT OR BILL OF PARTICULARS, WHICH WOULD ENTITLE DEFENDANT TO SUMMARY JUDGMENT ON THE LABOR LAW 241(6) CAUSE OF ACTION; HOWEVER PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS TO ADD A CODE VIOLATION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff should have been allowed to amend the bill of particulars to allege a violation of an Industrial Code provision describing the construction of platforms. Plaintiff was walking on a rebar mat when he fell. The rebar mat could be considered to be a "platform" which, under the Industrial Code, requires planking:

Regarding the Labor Law § 241(6) claim, defendants "made a prima facie showing of entitlement to [summary] judgment" because "plaintiff did not cite any Industrial Code provision that allegedly was violated here in his complaint [or] bill

of particulars" … . "However, this failure is not necessarily fatal to a section 241(6) claim and, in the absence of unfair surprise or prejudice, may be rectified by amendment, even where a note of issue has been filed" … . Plaintiff, in seeking to amend the bill of particulars, asserted a violation of Industrial Code § 23-1.22(c)(1), which requires that "[a]ny platform used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks" to "be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength." "[T]he platforms contemplated by that section are those used to transport vehicular and/or pedestrian traffic" … . Since it is uncontroverted that plaintiff was traversing the rebar mat carrying more rebar, and workers were expected to walk over the rebar mat, there is at least an issue of fact as to whether the rebar mat qualified as a platform used to transport pedestrian traffic. Plaintiff's "belated identification of th[is] section[] entails no new factual allegations, raises no new theories of liability, and results in no prejudice to the defendant[s]" … . Thus, plaintiff is granted leave to amend his bill of particulars on this point, and summary judgment dismissing the § 241(6) claim is denied. Marte v Tishman Constr. Corp., 2024 NY Slip Op 00231, First Dept 1-18-24

Practice Point: Here in this Labor Law 240(1) action, plaintiff was allowed to amend his bill of particulars to cite a violation of the Industrial Code. Where there is no prejudice this type of amendment can be allowed even after the note of issue is filed.

JANUARY 18, 2024

MEDICAL MALPRACTICE, PUBLIC HEALTH LAW.

DEFENDANTS WERE ENTITLED TO IMMUNITY FROM THIS MEDICAL MALPRACTICE, WRONGFUL DEATH ACTION; PLAINITFF'S DECEDENT WAS ADMITTED TO THE HOSPITAL WITH COVID AND DIED FROM COVID; IMMUNITY IS PROVIDED BY THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice complaint should have been dismissed. Plaintiff's decedent was

admitted to defendants' hospital with COVID-19 and died from COVID-19. Defendants are entitled to immunity from suit by the Emergency or Disaster Treatment Protection Act (EDTPA):

… [P]laintiff alleges that the decedent was diagnosed with COVID-19 after arriving at Elmhurst Hospital on March 30, 2020, and that he died from COVID-19 on April 9, 2020. The defendants' submissions, including the complaint and the transcript of the plaintiff's hearing pursuant to General Municipal Law § 50-h, conclusively established that the defendants were entitled to immunity under the EDTPA (see Public Health Law former § 3082 …). As the complaint makes no allegations that the defendants' acts or omissions constituted willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm, none of the exceptions to the immunity provisions of EDTPA apply (see Public Health Law former § 3082[2]). Martinez v NYC Health & Hosps. Corp., 2024 NY Slip Op 00186, Second Dept 1-17-24

Practice Point: The defendants in the medical malpractice, wrongful death action are immune from suit pursuant to the Emergency or Disaster Treatment Protection Act (EDTPA). Plaintiff's decedent was admitted to the hospital with COVID and died from COVID.

JANUARY 17, 2024

UNEMPLOYMENT INSURANCE, EDUCATION-SCHOOL LAW.

CLAIMANT, A TEACHER IN A CATHOLIC SCHOOL, WAS NOT GIVEN ENOUGH TIME TO CONSULT WITH HER DOCTOR ABOUT WHETHER TO OBEY THE COVID VACCINE MANDATE; THE DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS REVERSED AND THE MATTER REMITTED (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant, a teacher in a Catholic school, was not given enough time to consult with her doctor about the COVID vaccine. Claimant had been informed on or about September 24 she would be terminated if she did not get vaccinated by September 27. Claimant had already had COVID and wanted to discuss whether she had natural immunity with her doctor. The Board deemed her unable to meet

an essential function of her job on September 28 and denied Unemployment Insurance benefits:

Although claimant testified that she was unsure about whether to get the vaccine, when she was asked, hypothetically, if she would have gotten the vaccine to keep her job if she had been provided more time, she testified that she would have if she "knew it was safe" and that she "probably" would have, provided she was given an opportunity to consult with her doctor. Even crediting the ALJ's finding that claimant was notified on September 23, 2021 about the possibility of a vaccine requirement, providing claimant with only four days, two of which were weekend days, to comply with the vaccination mandate was unreasonable. In light of this finding, the Board's decision that claimant voluntarily left her employment without good cause is not supported by substantial evidence and must be reversed … . Matter of Antonaros (Commissioner of Labor), 2024 NY Slip Op 00217, Third Dept 1-18-24

Practice Point: The claimant had had COVID and wanted to talk to her doctor about natural immunity before deciding to obey the vaccine mandate. Claimant was not given enough time to do so. The denial of Unemployment Insurance benefits was reversed and the matter remitted.

JANUARY 18, 2024