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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re September 11th Disaster
Site Litigation,

21 MC 100

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New York, N.Y.
February 2, 2006
4:00 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,
District Judge

APPEARANCES

WEITZ & LUXENBERG, P.C.
Attorney for Plaintiffs
BY: STEPHEN J. RIEGEL

UNITED STATES DEPARTMENT OF JUSTICE CIVIL DIVISION, TORTS
BRANCH CONSTITUTIONAL AND SPECIALIZED TORTS
Attorneys for Defendants
BY: GLENN S. GREENE
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(In open court)
(Case called)

MR. RIEGEL: Stephen Riegel from Weitz & Luxenberg for
plaintiffs.

MR. GREENE: Good afternoon. Glenn Greene from the
Department of Justice for the defendant.

MR. GARREN: Tim Garren from the Department of Justice
for the defendants.

MR. BUCHOLTZ: Jeffrey Bucholtz from the Department of
Justice for the defendants.

THE COURT: First, Mr. Greene, is it?

MR. GREENE: Green, yes, your Honor.

THE COURT: G-R-E-E-N-E.

MR. GREENE: Yes.

THE COURT: And your colleague just to your right.

16 MR. GARREN: Tim Garren, G-A-R-R-E-N.
17 THE COURT: And to your right?
18 MR. BUCHOLTZ: Jeffrey Bucholtz, B-U-C-H-O-L-T-Z.
19 THE COURT: All from Washington?
20 MR. GREENE: Yes, your Honor.
21 THE COURT: Thank you for coming up. Okay. You may
22 be seated, everybody. Mr. Riegel.
23 MR. RIEGEL: Your Honor, I believe it was defendant's
24 motion.
25 THE COURT: It was defendant's motion. It is
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1 defendant's motion, but does that mean I can't talk to you
2 first?
3 MR. RIEGEL: Certainly.
4 THE COURT: I'd like to first deal with the Army
5 National Guard medic.
6 Supposing he was, as a soldier, sent into a dangerous
7 place. Would that give you an ability to say that the
8 soldier's constitutional rights were violated?
9 MR. RIEGEL: Well, your Honor, there -- like all the
10 plaintiffs, it's our position that they, other than a Biven
11 remedy, they don't have any form in which to assert their
12 violation of substantive due process rights. Let's me just
13 explain that. Defendants rely on U.S. v. Stanley as to whether
14 military service is a special factor which would preclude a
15 Bivens action.
16 In Stanley this was a case where the U.S. military
17 serviceman sued his military superiors and some private
18 citizens who were assisting because of the defendant's
19 unconsented provision of experimental drugs to the plaintiff.
20 And indeed in U.S. v. Stanley the Supreme Court said that the
21 unique military -- disciplinary structure of the military
22 establishment and Congress' activity in the field constituted
23 special factors.
24 The key distinction here, your Honor, is that
25 Mr. Lombardi was not a member of the U.S. military. He was a
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1 member of the New York National Guard.
2 THE COURT: Called up to serve.
3 MR. RIEGEL: I'm sorry?
4 THE COURT: Called up to serve, right? He was called
5 into service?
6 MR. RIEGEL: I believe he was ordered, but I believe
7 he was ordered by the New York National Guard, not by the
8 United States military. And the New York National Guard is a
9 state military organization, and certainly federal law and
10 Congress do not govern and regulate the affairs of the New York
11 National Guard because that's done by the state, obviously.
12 So, in essence what we're arguing is that similar to
13 the -- we argued for the other plaintiffs, Mr. Lombardi has no
14 remedy under federal law the way a United States serviceman
15 would have.
16 THE COURT: What's the remedy of the United States
17 serviceman?
18 MR. RIEGEL: I believe -- probably regulations
19 promulgated by Congress which have various proceedings and
20 remedies for this type of lawsuit.

21 I would just -- but the first part is that
22 Mr. Lombardi does not have that remedy.
23 The second part is that this lawsuit --
24 THE COURT: I'm not sure what remedy a soldier has.
25 Let's suppose that his lieutenant tells him to do a thing that
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1 the lieutenant knows has not much military value or it is
2 charged that he should know that, and the soldier is maimed and
3 brings a lawsuit, there is no right to recovery.
4 MR. RIEGEL: Your Honor, there's certainly no right to
5 a civil lawsuit, whether he has some recourse --
6 THE COURT: What's the difference?
7 MR. RIEGEL: Well, the difference is whether
8 Mr. Lombardi can present his claim through the military justice
9 system or whatever.
10 THE COURT: Military justice system is a criminal
11 system. There is no right of the serviceman to recover against
12 an officer who tells him stupid things.
13 MR. RIEGEL: Your Honor, most likely not, but that's
14 not this case at all.
15 THE COURT: Well, what is this case if not the same
16 thing for the serviceman? The serviceman is told to go into a
17 place that is inherently dangerous and to involve himself in
18 rescue missions, and it is charged that he should have been
19 told that it really is inherently dangerous instead of being
20 told it's not.
21 MR. RIEGEL: Your Honor, the key difference is that
22 the defendants here are not military superiors. They are not
23 people acting pursuant to military authority.
24 Indeed, they are officials of the EPA, OSHA, and white
25 House officials who are not exercising any military discretion.
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1 And the acts that are alleged here were certainly not done
2 pursuant to military authority.
3 THE COURT: Mr. Riegel, your fellow was told to go in
4 and involve himself in rescue operations, and let us say that
5 he was told not so dangerous, don't worry about it. Let's
6 suppose he was however told it was dangerous and you might be
7 hurt by this, but you got to go, it's your duty. Would he say
8 no?
9 MR. RIEGEL: Your Honor --
10 THE COURT: Can he lawfully refuse an order that
11 subjects him to great risk of personal safety because of just
12 that fact? And not do something that his commanding officer
13 tells him to do?
14 MR. RIEGEL: No. I think he would obviously have to
15 obey his commanding officer.
16 THE COURT: Let's say his commanding officer says, "I
17 have been assured by the commissioner it's safe," and the
18 commanding officer knows it's not safe, and the soldier knows
19 it's not safe, he still has to go. The soldier still has to
20 go.
21 I don't see how there can be a remedy against a third
22 party saying something negligently or foolishly. A
23 serviceman -- there is no volitional act of the serviceman
24 other than to obey the order or suffer court martial for
25 failing to do that.

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1 MR. RIEGEL: Well, your Honor, this isn't just, you
2 know mere negligent misrepresentations by the EPA officials and
3 the OSHA officials. They were the ones that were in charge of
4 testing and assessing for the safety of the environment at
5 ground zero.

6 And the allegations in the complaint which have to be
7 accepted as true are essentially they gave misleading
8 statements, false statements that were intended to convey the
9 impression that it was safe when, in fact, they knew it was
10 extremely dangerous. And these aren't just allegations.

11 THE COURT: How many incidents in wartime are there of
12 a junior officer giving a noncommissioned officer or an
13 enlisted man an order to do something based on an assurance by
14 the general that it's okay to do that, and the general didn't
15 know what he was talking about. You wouldn't have enough space
16 in the law books to cover instances of that. The Massacre at
17 Mazar was ascribed to poor generaling. There's so many battles
18 fought in every single war because a senior officer says
19 something or gives an assurance that turns out not to be so and
20 probably was known not to be so or believed not to be so at the
21 time but in the exigency of the situation is nevertheless
22 commanded.

23 MR. RIEGEL: This is certainly not a wartime
24 situation.

25 THE COURT: But it was a federalized National Guard
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1 situation. It was a calamity in New York. The condition of
2 9/11 we hope will never be repeated and was unprecedented.
3 More than 3,000 people were dead; more than that were believed
4 to be dead. The structure of New York City was altered beyond
5 belief at the time. And we still don't believe it.

6 MR. RIEGEL: Your Honor, obviously knows discovery has
7 not gone forward, but the gist of the allegations are not so
8 much when emergency responders were in the first few days
9 looking to save people. But I think at a certain point it was
10 declared that the recovery -- the attempts to rescue and
11 recover people --

12 THE COURT: Two weeks after. There was a point that I
13 rested on on my issue of jurisdiction with the healthcare
14 workers, Mr. Napoli and Mr. Carboy, and the audience thought I
15 was wrong then. They prevailed in the Second Circuit --

16 MR. RIEGEL: I'm aware.

17 THE COURT: But that was an arbitrary point. Sure
18 there was no more rescue that was available after two weeks and
19 people were reasonably confident that there would be no bodies
20 to recover, but there still were body parts to recover. There
21 still was a recovery mission. There still was a clean up
22 mission. Anyone who drove down to New York for months smelled
23 the terrible odor that emanated from the World Trade Center.

24 MR. RIEGEL: Your Honor, if I could, again, discovery
25 hasn't commenced but at a certain point, and Mr. Lombardi was
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1 there throughout the month of October, it was basically just a
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2 cleanup and dismantling and shipping out and, in fact, that's
3 what Mr. Lombardi did.
4 THE COURT: How many months was it before people could
5 get into their offices -- not months, weeks I mean?
6 MR. RIEGEL: I think it was weeks, your Honor, I
7 believe.
8 THE COURT: There was a long period of time where you
9 needed a pass to get in, because I had used a pass. It was an
10 enjoyable ride, in a way, down the West Side Highway because
11 there were no cars. They were not permitted to come south of
12 34th Street and then south of Canal Street.
13 I don't know what time it was, but it was a long time.
14 MR. RIEGEL: Your Honor, I returned to my office on
15 Maiden Lane, I believe, about ten days after.
16 But anyway, the --
17 THE COURT: But the restrictions were longer than
18 that.
19 MR. RIEGEL: And also the misleading statements,
20 public statements and press releases that the EPA and the white
21 House continued to provide which -- you don't have to take my
22 word for it. It's in the EPA, Inspector General's report that
23 certain of the proposed press releases were actually changed as
24 a result of calls from senior white House officials. And in
25 the EPA Inspector General's report they actually have the
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1 prerelease, preedit version of the press release and the
2 post --
3 THE COURT: Mr. Riegel, it may all be true, and it may
4 all be subject to intense criticism, but in my opinion it does
5 not create a lawsuit.
6 Anyhow, how do you get past Jones against New York
7 State Division of Military and Naval Affairs, 166 F.3d 45,
8 Second Circuit, 1999?
9 MR. RIEGEL: Your Honor, it would be the same argument
10 that I've made, that he was a member of the state military and
11 basically has no recourse to any federal remedies and his only
12 remedy would be a Bivens action.
13 THE COURT: Well, I think I'm bound. The court has
14 well established that a member of the United States military
15 may not seek damages for injury suffered incident to military
16 service, and we hold that similar suits brought by National
17 Guard personnel also should be barred, and they discuss Bivens
18 and the like.
19 Now, I think it would be a great mischief indeed if a
20 person in line of duty, a soldier in line of duty could sue
21 somebody for giving him a foolish command. Unfortunately, in
22 the heat of complex situations, it's not always easy to know
23 what's right and what's wrong, what's sensible and what's not
24 sensible, but unless an order is inconsistent with the rules of
25 war or the rules of conduct in a situation like that, I can't
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1 see that there is any right of action and the case of John
2 Lombardi will be dismissed, the motion granted.
3 The next person I'd like to discuss would be Rafael
4 Garcia, the Deputy United States Marshal. He was directed, was
5 he not, to go and help?
6 MR. RIEGEL: He was directed by his employer, who is
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7 the City.
8 THE COURT: Well, the United States Marshal. Deputy
9 Garcia was a deputy of the United States Marshal. He worked in
10 this building.
11 MR. RIEGEL: Right. His employer what was the U.S.
12 Marshal Service.
13 THE WITNESS: He guarded my life and the lives of my
14 colleagues. He was a valuable member of this building, and is,
15 and he also received compensation from the office of federal
16 workers' compensation programs.
17 MR. RIEGEL: Pursuant to the federal employee
18 compensation act.
19 THE COURT: For injuries allegedly sustained due to
20 his job-related exposures at ground zero.
21 MR. RIEGEL: That's correct, your Honor.
22 THE COURT: So how shall I entertain his claim in this
23 lawsuit?
24 MR. RIEGEL: Well, your Honor, first of all, again his
25 employers are not defendants here. The defendants are members
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1 of another agency and, again, whose conduct was not pursuant to
2 any direction of the marshal service and did not affect
3 directly the employment relationship between Mr. Garcia and the
4 marshal service.
5 Also --
6 THE COURT: But he was a federal worker.
7 MR. RIEGEL: Right.
8 Your Honor, if I could address the legal cases that
9 defendants are relying on. I think defendants are overstating
10 the holdings in cases like the Supreme Court case Bush v. Lucas
11 or Judge McMahon's Hightower v. United States. They seem to be
12 claiming that the proposition that these cases held that a FECA
13 claim or the ability to bring a FECA claim alone would be
14 preclusive of a Bivens claim under the special factors
15 exception.
16 In fact, if you read Bush v. Lucas, there's absolutely
17 no mention of the FECA. The Supreme Court held there that the
18 comprehensiveness of the rules and remedies established by
19 Congress through the Civil Service Reform Act, also known as
20 CSRA for short, cautioned against the fashioning of a Bivens
21 remedy. And the important fact here is in that case briefly a
22 federal employee brought a Bivens case against his superiors
23 within the agency because he was demoted after making some
24 public statements critical of his agency. And he claimed his
25 first amendment rights as a whistle blower, what have you, had
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1 been violated.
2 Now, in that case he did have a remedy to bring his
3 allegations of unconstitutional conduct by the defendants
4 because in proceedings under CSRA -- and this is stated in the
5 Hightower case -- employees are allowed to raise and have
6 adjudicated constitutional claims, any personnel actions -- in
7 essence, Mr. Garcia could raise his claims of unconstitutional
8 conduct -- I'm sorry. Let me step back.
9 The plaintiff in that case could raise these claims of
10 constitutional violations before CSRA, but there is no mention
11 of FECA alone precluding a Bivens remedy.

12 I'd like to add that the circuit in a recent case
13 *Stuto v. Fleishman* particularly said that we are not deciding
14 whether a federal employee's FECA remedy alone precludes
15 fashioning a Bivens remedy.

16 So, in other words, they expressly did not decide
17 that. And actually the Second Circuit's last word on this is
18 in a case that, I apologize, I neglected to put in the
19 briefing, but they affirmed a case, *Grachenko v. U.S. Postal*
20 *Service*, 524 F.Supp 672, Eastern District, New York, 1981,
21 affirmed 751 F.2d 368, Second Circuit, 1984.

22 And in that case the Second Circuit summarily affirmed
23 Judge Platt's decision which said that the mere fact that a
24 federal employee had a FECA claim would not preclude his
25 bringing a Bivens action -- asserting -- alleging allegations

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1 of his fifth amendment due process rights.

2 THE COURT: That was before the development of the
3 Supreme Court law in *Schweiker* against *Chilicky* and
4 *Correctional Services* against *Malesko*.

5 MR. RIEGEL: Well, your Honor, it was -- the
6 affirmance was after *Bush v. Lucas* and I think that's the
7 key -- that's the key Supreme Court case addressing federal
8 employee relationships and Bivens actions. *Chilicky v.*
9 *Schweiker* involved somebody -- some Bivens claim brought by
10 recipient of welfare benefits, I think.

11 But *Bush v. Lucas* is I think the key case here and I
12 think even defendants rely very heavily in their motion papers
13 and the Second Circuit affirmance in this *Grichenko* case was
14 practically a year after *Bush v. Lucas* was issued by the
15 Supreme Court.

16 Lastly, we did state in our papers, there is a
17 decision which I think is most factually on point with this
18 unusual array of plaintiffs and defendants, and that's
19 *Luczyszyn v. General Services Administration*. It's a westlaw
20 cite that's in our brief. It's Eastern District of
21 Pennsylvania, 1986. And in that case a V.A. employee came into
22 her workplace and as she was working, G.S.A. employees,
23 employees from another agency, came in and arrested her on
24 unwork-related charges. And she alleged that in the arrest --
25 well she alleged a claim of false arrest and excessive use of

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1 force by the G.S.A. defendants.

2 In that case, the district court said that, you know,
3 the -- since the Bivens suit is not against your employer, who
4 is the the V.A. but instead is against another government
5 official acting under totally different authority and for
6 totally different purposes, that the plaintiff would be allowed
7 to pursue both a claim for FECA benefits and a Bivens claim
8 against the G.S.A. defendants for violation of her fourth
9 amendment constitutional rights.

10 Just to sum up, I think Ms. -- not only Mr. Garcia --
11 well first of all, Mr. Garcia, although he does have a FECA
12 claim, does not have a CSRA claim against the marshals because
13 the marshals did not engage in the unconstitutional conduct.

14 THE COURT: What's the difference? Certainly Judge
15 McMahon didn't think there was any point to the distinction in
16 the Hightower case.

17 MR. RIEGEL: Well if you read -- when he refers to
18 Bush v. Lucas in the last pages of the decision, he really
19 emphasizes the fact that the plaintiff had a CSRA remedy in
20 which he could have raised his constitutional allegations --
21 allegations of constitutional rights violations. And in fact,
22 if your Honor wants, I could point you to the exact pages.

23 THE COURT: In Judge McMahon's decision?

24 MR. RIEGEL: Yes.

25 THE COURT: Are we talking about Judge McMahon's
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decision?

1 MR. RIEGEL: Right. In Hightower.

2 If your Honor looks at pages --

3 THE COURT: Judge McMahon is feminine, Colleen
4 McMahon.

5 MR. RIEGEL: I'm sorry. But if you look at pages 155,
6 56, 57 where there is an extensive discussion of exactly what
7 remedies -- at page 156, for example, he specifically says
8 employees employment-related claims alleging constitutional
9 violations are prohibited personnel actions within the meaning
10 of CSRA, and I think he places a lot of emphasis -- in this
11 case the plaintiff didn't actually use their CSRA remedies but
12 I think Judge McMahon clearly thought that the fact that she
13 had an opportunity to raise these issues under CSRA was really
14 what precluded a Bivens -- and again, I think the basic
15 principle here, which is common to all the plaintiffs, is a
16 Bivens claim -- the basic purpose, the Supreme Court has said,
17 of a Bivens claim is basically to give a forum for somebody
18 who's asserting violation of their federal constitutional
19 rights if they don't have an adequate alternative. And also --
20 and the main point being that if they're successful in their
21 assertion of constitutional rights, then this will serve as a
22 deterrent to government officials in the future engaging in
23 such unconstitutional conduct.

24 I think that's clear, especially from the Supreme
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1 Court cases in Carlson v. Greene and Malesko.

2 THE COURT: I structured the argument so we didn't get
3 into the issue: Was there a violation of a constitutional
4 right, but maybe we should go directly to that because much of
5 your argument is premised on it.

6 Hightower was a false arrest case. The Bush against
7 Lucas was a first amendment case. These are situations where
8 the violation of constitutional rights is rather clear, being
9 arrested by someone who is acting as a policeman is well
10 recognized as a violation of due process, that there was no due
11 process; restricting the right of speech in criticism is
12 clearly a first amendment right. But what we have here is
13 going into a dangerous workplace, lulled by a false assurance
14 and in the case of Lombardi -- not Lombardi, in the case of
15 Garcia, being compensated for that.

16 Focus on the issue of the violation of the
17 constitutional right. What is the constitutional right?

18 MR. RIEGEL: Your Honor, it's a substantive due
19 process claim under the fifth amendment, and it also it's
20 equivalent as a state -- section 1983, substantive due process
21 claim against state officials under the 14th amendment.

22 THE COURT: And what is the due process right that has
23 been violated?
24 MR. RIEGEL: Well, I mean that takes a little
25 explanation.

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1 THE COURT: Usually if you have to explain it, it's
2 not so clear, you don't have a Bivens remedy.
3 MR. RIEGEL: Essentially I would phrase it as a
4 violation of intentional -- intentional violation of the
5 plaintiff's rights to life and bodily integrity and health and
6 its rights to be -- to not be deprived of those under the
7 substantive due process clause.
8 THE COURT: Does that mean that a United States
9 marshal can say: I'm not going to go into a situation because
10 my life is in danger? If some lunatic would come into this
11 courtroom armed with a gun somehow, which he got past the metal
12 detectors on the first floor, and I pushed the button to have a
13 marshal come in, does the marshal have a right to say: I'm not
14 going there, that person is armed, he might kill me?
15 MR. RIEGEL: Well, Mr. Garcia's claim is a little
16 different.
17 THE COURT: It's to refrain to go into a dangerous
18 situation.
19 MR. RIEGEL: I think what we're claiming is that he
20 should have the right to go into a dangerous situation informed
21 of the dangers and able to take adequate precautionary
22 measures.
23 THE COURT: What could he have done?
24 MR. RIEGEL: Well, as your Honor knows --
25 THE COURT: Go around for a mask? And a marshal could

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1 say: whoops, I left my body armour downstairs in the bathroom
2 or wherever, locker room, I'll get that first before I go in to
3 save Judge Hellerstein?
4 MR. RIEGEL: Well, Mr. Garcia told me that if he had
5 been informed of what the contaminants and toxins that were
6 down here, he would have insisted on an adequate mask.
7 I mean a lot of the people at ground zero workers
8 weren't wearing any masks. Some were wearing just painters'
9 masks, which were totally inadequate, and some were even using
10 canister masks, which were totally inadequate.
11 THE COURT: That's the story of all the cases that
12 Mr. Napoli and Mr. Carboy are bringing, but we have a deputy
13 marshal who has been ordered to go into a situation to provide
14 help and rescue and he's saying: No, I'm not going? That's
15 really the issue that you're putting.
16 He was compensated. He had a remedy. But basically
17 the question is: Can I not go?
18 We'll get to the firemen. Can the firemen not go?
19 MR. RIEGEL: I think that's a factual issue.
20 THE COURT: I don't think so. I think when you take
21 on a certain job, which is inherently risky, you assume the
22 risk. You assume the order to go into a dangerous place, and
23 you have to go. That's part of what it takes.
24 That's the difference between your case and the Carboy
25 and Napoli cases. They represent workers who were not under a

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1 legal compulsion to go into a dangerous place. They were
2 volunteers.

3 Your client, Deputy Marshal Garcia, was doing his job,
4 as were the people who were killed. There were a number of
5 peace officers from the Supreme Court next door who didn't come
6 back.

7 MR. RIEGEL: I realize that, your Honor.

8 THE COURT: Can they say I'm not going?

9 MR. RIEGEL: I think the issue is, again, is not so
10 much refusing to go but having been told, informed --

11 THE COURT: Have been lulled into a sense,
12 perhaps, of security, though I would say anyone who was here at
13 the time knew that place was dangerous in all kinds of ways;
14 every step was dangerous; every breath was dangerous; every
15 exposure was dangerous.

16 Deputy Garcia is among the heroes of 9/11, but that
17 doesn't entitle him to make a Bivens claim as I see it.

18 Let's go on to another case. Unless, Mr. Greene, you
19 want to respond at this point in time.

20 MR. GREENE: If the court wants me to respond.

21 THE COURT: Why don't you pick it up, give Mr. Riegel
22 a little rest. He's been battling hard.

23 MR. GREENE: I think the court correctly recognized
24 that the distinction, that the key -- counsel is correct that
25 we do cite Bush v. Lucas, but the key is that Bush established

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1 that so long as there was a comprehensive federal remedy
2 available, that precludes Bivens claims.

3 THE COURT: What is a comprehensive remedy?

4 MR. GREENE: Means a remedy that's been provided --
5 that Congress has provided for the specific situation, and
6 ultimately it's Congress that decides that this is a remedy
7 that covers the injuries that are being alleged.

8 And FECA, the Second Circuit has recognized and the
9 Supreme Court has recognized that FECA is the exclusive remedy
10 for injuries that are sustained by federal employees during the
11 course of their employment.

12 THE COURT: Even though the rights of recovery may be
13 much more limited than they would be in the court?

14 MR. GREENE: Yes, your Honor. The Supreme Court has
15 recognized in cases construing Bivens that even if the
16 alternative remedial scheme doesn't provide the same relief,
17 doesn't provide complete relief to the plaintiff, it in some
18 cases may not even provide any relief if Congress has spoken on
19 the issue and said this is what's available to you and then
20 it's not for courts to create a new remedy. That is what
21 Bivens is. It's the court creating a remedy that hasn't been
22 provided for by Congress.

23 THE COURT: What about the reasoning that I expressed
24 before about the obligation of the marshal and the obligation
25 of the medic, the National Guard medic to go into the dangerous

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1 places notwithstanding what others may say or not say?

2 MR. GREENE: Well, your Honor, we didn't specifically

3 brief that in our motions, but I think the court is correct and
4 I think that's why the Federal Employees Compensation or the
5 FECA would apply because ultimately there's an expectation that
6 employees will do their job and they have to do their job. If
7 I don't do my job, I could be fired for it, and certainly my
8 job is not as dangerous as --

9 THE COURT: What about the medic Lombardi? He was not
10 a federal employee.

11 MR. GREENE: The National Guard member?

12 THE COURT: Yes.

13 MR. GREENE: Well, as the court recognized in the
14 Jones case, the Second Circuit has recognized that the same
15 rationale that precludes claims by military -- members of the
16 military also precludes claims by members of the National
17 Guard.

18 THE COURT: They have no remedies?

19 MR. GREENE: Well, ultimately that's a congressional
20 issue or a state issue.

21 THE COURT: So the requirement that there be a
22 congressional scheme is not really the critical factor, at
23 least not with the Lombardi case?

24 MR. GREENE: Well in the Lombardi case -- there are
25 two things that are at work here. When the Supreme Court

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1 created the Bivens remedy and said this is for a specific
2 situation where there is either -- where the plaintiff has no
3 other available remedy and where there are no special factors
4 that would counsel against the court creating remedy, so in the
5 case of plaintiff Lombardi who is the National Guard medic,
6 whether or not the -- the issue is not that there's an
7 alternate scheme, though there may well be -- there may be some
8 scheme within military law -- but the issue is that the Supreme
9 Court has refused to recognize that members of the military who
10 get injured during the course of military service, they can't
11 bring Bivens claims, and the Second Circuit has recognized that
12 that applies to people in the National Guard.

13 THE COURT: I think at this point I'd like to read out
14 what the Supreme Court of the United States said in Schweiker
15 against Chilicky, 1089 Supreme Court 2460, 487 U.S. 412,
16 decided 1988. At page 421, 422: "Our more recent decisions
17 have responded cautiously to suggestions that Bivens remedies
18 be extended into new contexts. The absence of statutory relief
19 for a constitutional violation, for example, does not by any
20 means necessarily imply that courts should award money damages
21 against the officers responsible for the violation. Thus, in
22 Chappell against Wallace, a 1983 decision, we refused
23 unanimously to create a Bivens action for enlisted military
24 personnel who alleged that they had been injured by the
25 unconstitutional actions of their superior officers and who had

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1 no remedy against the government itself."

2 The Supreme Court stated, referring to the Stanley
3 decision, "The special nature of military life, the need for
4 unhesitating and decisive action by military officers and
5 equally disciplined responses by enlisted personnel, would be
6 undermined by a judicially-created remedy exposing officers to
7 personal liability at the hands of those they are charged to

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command," or I would add, "or be commanded."
Also Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for which claims by military personnel that constitutional rights have been violated by superior officers. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field.

I hold with regard to the National Guard medic, John Lombardi, as I already held, and with regard to Rafael Garcia, the deputy United States marshal, that there is no claim. Garcia had a remedy under a Federal Employers Act, FECA, and he did receive compensation. And I, therefore, follow the Jones case, the Stanley case and the Schweiker against Chilicky case.

Let's go on to the City employees. We can start with Thomas Carlstrom, the paramedic in the New York City fire department.

MR. RIEGEL: Your Honor, our basic argument is that SOUTHERN DISTRICT REPORTERS, P.C. (212) 805-0300

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with all three of the city employees, Mr. Ramos, Mr. Carlstrom, and Mr. Muhammed --

THE COURT: I'll just add Thomas Carlstrom is a paramedic in the New York City fire department. Roberto Ramos and her son Hasan Muhammed are emergency services officials in the New York City corrections department.

MR. RIEGEL: Defendant makes the sort of novel legal argument that a state law remedy can constitute a special factor in deciding not to recognize a Bivens liability. First of all, they cite absolutely no cases on that and --

THE COURT: There is no cases either way.

MR. RIEGEL: You're right. I don't remember any going either way. I think there citations of Malesko are off point and that case doesn't really address this central issue. But it seems to me that if you recognize a -- basically it's contrary to our whole federal legal system. If you recognize having an adequate state remedy as being to preclude your assertion of a federal constitutional right, I think that's unheard of. For one thing, it would mean that there would be a different standard for determining whether a Bivens action exists, depending on the particular remedies and laws of the -- of each state, and that's never been held to be so.

Otherwise I think -- well in Bivens itself the Supreme Court rejected a state law remedy in recognizing the Bivens action under the fourth amendment. And it just -- it's just --

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doesn't make sense essentially. I mean the purpose of a Bivens remedy is to give somebody a chance to challenge and vindicate its rights -- its federal constitutional rights when they're violated. And to say no, you can't assert your federal constitutional right because you have a state law adequate remedy just seems preposterous, and I think that's the reason there is no cases on it.

Also, defendants suggest that particularly a workers' compensation state law might be an adequate remedy for special factor purposes of determining Bivens action.

But in most work -- state workers' compensation proceedings that I know, it's a no fault proceeding. The

13 claimant is not allowed to challenge or raise the issue of
14 who's at fault for their injuries or whether somebody has
15 violated their constitutional rights.

16 THE COURT: Isn't that better for the plaintiff?

17 MR. RIEGEL: I'm sorry?

18 THE COURT: Isn't that better for the plaintiff? I
19 mean the problem in these kinds of proceedings is that most
20 people claim that there's an insufficient compensation, but
21 certainly there's an easier path towards recovery.

22 MR. RIEGEL: You're right. There's also a trade off
23 between a fast recovery -- that's true.

24 THE COURT: You don't have to prove fault. You can
25 get to the recovery stage much more quickly. The happiness is

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1 that you don't recover as much as you would in a civil case and
2 many would argue you don't recover enough in relationship to
3 the damage caused by the injury. The workmen's compensation
4 laws were an extraordinary advance, extraordinary social and
5 economic advance in the beginning part of the 1900s, but
6 towards the end of the 20th century most people felt that
7 they were inadequate because they have not kept up. We're not
8 going to get into here, to talk about the adequacy or
9 inadequacy of the precise recovery. That would not be the
10 proper scope of a 12(b) motion anyhow.

11 what we're talking about is whether, first of all
12 there is a right to a Bivens recovery, whether there was a
13 constitutional right that was violated; and second, whether the
14 availability of a remedy believed to be sufficiently
15 comprehensive in the employment situation under state law would
16 serve to deter a Bivens remedy in a federal claim. I think
17 those are the issues.

18 MR. RIEGEL: That's my point exactly, your Honor.

19 THE COURT: And I think to support your argument, you
20 could cite the state law which allows third party actions to
21 supplement a workers' compensation recovery; namely, if I were
22 a worker on a site and a third party caused damage, I would
23 have a right to recover from my employer -- not from my
24 employer, but I would have the right to recover from workmen's
25 compensation, paid for by insurance premiums, in effect paid by

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1 the employer, but I have the right to recover from workmen's
2 comp. and sue the third party for additional recovery, so your
3 argument -- I don't know if you've made it, but the argument
4 would make that as an illustration why the state remedy is not
5 sufficient.

6 MR. RIEGEL: I think, your Honor, the basic argument
7 is that are these plaintiffs going to get an opportunity to
8 assert that their constitutional rights have been violated, and
9 they simply cannot do that in a workers' compensation
10 proceeding. I mean that's what I understand the whole Bivens
11 remedy to be about, is to vindicate violations of
12 constitutional rights and to be able to deter federal officials
13 from misconduct in the future.

14 THE COURT: what about the right of immunity; that
15 since there was no clear indication that Commissioner Whitman,
16 Administrator Whitman or staff and others were violating some
17 specific provision of the constitution as defined by the

18 courts, they had an immunity that would now be violated if I
19 allow this lawsuit against them.

20 MR. RIEGEL: Your Honor, if I could speak to that, at
21 this -- since this is a motion to dismiss, we have to take all
22 allegations in this case as true and to draw all --

23 THE COURT: And the immunity is anticipated by the
24 12(b)(6) motions. It hasn't been made by way of a 12(c)
25 motion, but I have discretion since the filings were tendered,

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1 to deal with it now, and it would be better given everything
2 else, since we're all here on these other issues, to deal with
3 them in a related and comprehensive fashion. So exercising my
4 discretion, I will anticipate the defense and convert the
5 12(b)(6) motion to a 12(c) motion.

6 MR. RIEGEL: Your Honor, what -- well, according to
7 the allegations of the complaint, the defendant government
8 officials made affirmative misleading and inaccurate statements
9 over a period of approximately six weeks after September 11
10 that were intended to minimize safety concerns about working at
11 ground zero while they did know that these plaintiffs would be
12 exposed unknowingly, without adequate protection to probably
13 one of the worse -- greatest combinations in concentrations of
14 toxic chemicals and carcinogens in one place ever -- I've heard
15 that, for example, the amount of dioxin was unprecedented in
16 history.

17 THE COURT: It was a terrible place.

18 MR. RIEGEL: And what's also important, and a lot of
19 this is focused on ground zero workers, is because these
20 carcinogens, the PCBs, the asbestos, the dioxins, the OCs were
21 mainly produced from the underground fires that were burning
22 for three months at the ground zero site.

23 And so that's the linchpin of our case because we're
24 asserting that through these misrepresentations, intentional
25 misrepresentations about the safety, plaintiffs and also

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1 volunteers, private workers were induced to come work at the
2 site and to be exposed unknowingly to these horrible
3 combination of carcinogens that were basically just floating in
4 the smoke around ground zero.

5 Again, they were all byproducts, most of them, of the
6 underground fires which they weren't able to put out for three
7 months, and so essentially these people were unknowingly
8 exposed to these horrendous chemicals which are already having
9 an impact.

10 There's new stories of people who are dying, you know,
11 firemen, police officers, from cancers. There's all kinds of
12 medical studies that a huge amount of firemen there were --
13 have come down with bronchial infections, coughs, asthma,
14 decreases in lung capacities, and this could have all been
15 avoided if they had been -- if the EPA and the official -- the
16 OSHA officials and the white House officials had just said even
17 we don't know what's down there, we're testing, we'll get
18 back -- you know, we'll announce the results of the tests. But
19 instead they made pronouncements when they didn't even have
20 test information, and they suppressed test results that showed
21 dangerous concentrations of these toxic substances. And as a
22 result of this, basically these plaintiffs were walking blindly

23 into almost a long-term killing field. We still don't know
24 what the repercussions are going to be.
25 what should have been done, if honest representations
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1 and public statements had been made, I think everyone who
2 worked there after the first few days when they were trying to
3 recover live victims would have insisted on donning appropriate
4 respiratory and other protective gear. And, in fact, they
5 didn't do that for weeks. According to the Inspector General's
6 report, you know, even months after 9/11 they weren't wearing
7 adequate protection.

8 So, essentially if your Honor wants me to address the
9 clearly established law or --

10 THE COURT: There was no clearly established law, was
11 there?

12 MR. RIEGEL: I believe that's not right, your Honor.

13 THE COURT: Well tell me about it then.

14 MR. RIEGEL: Well let me step back a sec.

15 THE COURT: I'm going to assume for this purpose that
16 the statements made were misleading and false, and I'm going to
17 assume for this purpose that the plaintiffs all, under their
18 jobs, were required to put themselves into dangerous positions,
19 to perform their jobs, went into a dangerous situation,
20 environmentally dangerous.

21 MR. RIEGEL: There's actually one more element that is
22 alleged in the complaint that's important, especially for a
23 substantive due process claim.

24 It's alleged that they intentionally or with willful
25 disregard of the harm to the plaintiffs intentionally put out

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1 these press releases --

2 THE COURT: There was no privity between the
3 defendants and these particular plaintiffs. The defendants
4 were concerned with the overall environment in Southern
5 Manhattan and issued their press releases in that context.

6 MR. RIEGEL: Well, your Honor, that's -- we
7 incorporated the Inspector General's report which actually says
8 the EPA Inspector General -- that the white House officials and
9 the EPA officials were intent on getting people to work there
10 as soon as possible --

11 THE COURT: Because of the emergency -- I'm going to
12 assume that these statements were made to quiet the opportunity
13 of panic and the potential of panic and to get people in to do
14 their jobs and to ameliorate the very dangerous conditions that
15 existed in Southern Manhattan and the outlying areas.

16 So what comes next? What's the constitutional right
17 that's affected by this?

18 It's like in wartime. Workers were told to put out
19 the liberty ships even though it is alleged, and it's since
20 been fairly well documented, that people knew that there was
21 asbestos in the air and that the environment was dangerous.
22 This exists with rescue workers in cities that were bombed when
23 rescue workers go into buildings -- and in New York, the rescue
24 workers go into buildings knowing that the building may
25 collapse over them.

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1 People have to do difficult things. We're not talking
2 about a tort action. We're talking about deprivation of
3 constitutional rights.

4 We're not talking about the plaintiffs here suing
5 under the Federal Tort Claims Act. There is no liability under
6 the Act. Sovereign has not waived its immunity. We're talking
7 about a way to get around that because there is no provision in
8 the Federal Tort Claims Act. That's the Bivens remedy.

9 So tell me what is the clearly established law that
10 should have let the defendants know they should not issue false
11 and misleading statements.

12 MR. RIEGEL: If I could just say first --

13 THE COURT: Allegedly false and misleading. It's not
14 been proved. It's alleged. And I'm accepting it as true
15 because of the motion.

16 I don't know if any of you are reporters here, but
17 it's very important to understand this. In a motion that's
18 made at this point of the case, I am required, as a judge, to
19 accept the allegations of the complaint as if proved, and that
20 I examine those allegations as if proved against the law. And
21 I then ascertain if there is a legally sufficient claim for
22 relief that's been stated in the complaint.

23 I'm not permitted to engage in fact finding. I have
24 to accept the facts that were alleged as true.

25 Hence, when I say that the defendants issued false and
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1 misleading statements, I say that because that is how
2 Mr. Riegel wants me to understand the complaint. I must except
3 it that way. Then I examine if so accepted, what is the legal
4 consequence?

5 I hope that's clear to you because that's an important
6 point that lawyers often gloss over and judges gloss over, but
7 which if the public needs to know this, must be understood.

8 MR. RIEGEL: First of all, I just take issue with your
9 constant saying that this was war scene or whatever. I think
10 even from commonly accepted testimony after the first couple of
11 weeks this was not an emergency, that the workers were there to
12 clean up, to dismantle, to cart away and it wasn't just
13 officers who were there who was doing the same work --

14 THE COURT: We're not talking about plaintiffs in the
15 other cases. We're talking about emergency service officials
16 in the corrections department, and we're talking about a
17 paramedic in the New York City fire department.

18 These were city workers who was pressed into very
19 important service to clean up the situation, to quench the
20 fires, to make sure that any body parts were found and properly
21 processed.

22 This is more than just an ordinary situation.

23 MR. RIEGEL: I think the plaintiffs would testify --

24 THE COURT: Let's go back. What is the clearly
25 established constitutional right that was violated? There's

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1 not a case that says anything that the facts here would
2 constitute a constitutional right.

3 All the Bivens cases deal with arrests or free speech

4 that was violated, searches that were pursued without warrants,
5 all recognized incursions into the first or fourth or fifth
6 amendment.

7 We've never had a situation in any case that I've read
8 dealing with going in to a dangerous condition because the
9 government officials charged with telling us the truth
10 allegedly gave false or misleading statements about what the
11 conditions were.

12 I don't think anybody in that area for months
13 afterwards knew that it was dangerous, extremely dangerous.

14 MR. RIEGEL: Your Honor, the Second Circuit, as have
15 all circuits around the country, I believe, have adopted what's
16 called the state endangerment theory of substantive due
17 process. In the case of Dwares, which is a Second Circuit
18 case, which we cite in our brief, from 1993, held -- it held
19 that -- it reversed the grant of dismissal on qualified
20 immunity and said that a claim for violation of substantive due
21 process had been stated under this state endangerment type of
22 claim.

23 And the facts in that case were -- there was a protest
24 and the police officers who were in the area happened to get
25 together with, I think it was a bunch of skinheads, they were

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1 referred to, and realized that they were going -- basically
2 gave them the okay to go ahead and attack the protestors and do
3 harm to them.

4 And the Second Circuit in that case said that the
5 injured protestors had a substantive due process right, a
6 Bivens suit against the officers because what the officers did
7 was they placed the plaintiffs in -- essentially in a more
8 grave condition or a more harmful position than they were
9 beforehand.

10 This stated endangerment claim, as I said, is well
11 established. It's basically based on some language from the
12 DeShaney Supreme Court case, and the way it's been basically
13 formulated.

14 THE COURT: It's a very important distinction --
15 pardon me for interrupting, Mr. Riegel, but I have to do this.
16 Throughout history police have been, in certain countries, and
17 at certain times, have been instigators of violence against
18 populations.

19 In Jewish history, in Eastern Europe it's well known
20 and documented with the Burghers. In Fiddler on the Roof it
21 was depicted on Broadway where the state police encouraged and
22 promoted violence against the Jewish population to serve a
23 national purpose. In Nuremberg in 1937 the Nazis did that in
24 the -- not Burghers against Jews there.

25 In DeShaney, in the Second Circuit case of Dwares,
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1 985 F.2d, 94, we have analogous conduct. The complaint
2 alleged, I read from the opinion, "That the officers conspired
3 with the skinheads to permit the latter to beat up flag-burners
4 with relative impunity, assuring the skinheads that unless they
5 got totally out of control they would not be impeded or
6 arrested. It requires no stretch to infer that such prior
7 assurances would have increased the likelihood that the
8 skinheads would assault demonstrators." The Second Circuit in

9 Dwares distinguished that.
10 It's not this case. It's just not this case. I've
11 given my reasons.
12 MR. RIEGEL: Your Honor, if I could just speak to
13 that.
14 THE COURT: Yes, go ahead.
15 MR. RIEGEL: This stated endangerment due process
16 claim has been -- has been recognized, as I said in almost
17 every circuit, not just against police officers, social
18 workers, all different scenarios, and the basic premise is if
19 the government increases the danger, creates or increases the
20 danger to the person, or leaves them in a more vulnerable
21 position than they were beforehand --
22 THE COURT: In Dwares and the other cases I cite,
23 people's bodies were physically assaulted. We don't have that.
24 There's a distinction.
25 All these plaintiffs were doing heroic acts within
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1 their lines of competence and duty, and that is helping New
2 York emerge from a time of catastrophe.
3 The case is distinguishable. There is no clear
4 statement that anyone has told me about or I recognize myself
5 that a constitutional right was being violated when
6 Administrator Whitman issued the statement that she issued,
7 regardless whether it was true or not true, regardless whether
8 it was accurate or false or misleading.
9 MR. RIEGEL: Isn't there an injury, though, to these
10 people who worked?
11 THE COURT: There are lots of injuries that occurred,
12 but the lifeblood of New York was at stake and people do things
13 and say things and involve themselves in activities knowing
14 they are risky because there's a higher calling. It was
15 patriotic. Because they want to help.
16 why does a person risk his life and jump into a raging
17 inferno or a rushing water to rescue someone? Because human
18 life is at stake? Because we can do something heroic and noble
19 and good.
20 MR. RIEGEL: Your Honor --
21 THE COURT: I think, Mr. Riegel -- I don't want to
22 denigrate these party plaintiffs. They all did heroic things
23 and may have suffered, may have suffered really terribly, but
24 that doesn't mean there's a remedy. And it's important to go
25 back to Bivens -- I've gotten the gist of your comments. I
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1 don't know if there's anything more you want to tell me.
2 MR. RIEGEL: I would just say that each of these
3 plaintiffs did not -- certainly did not have the attitude that
4 they would be heroes and go into ground zero. They all told me
5 that they felt lied to, they felt misrepresented, and they
6 would have not stepped near ground zero if -- without adequate
7 protection if they had been honestly told about the dangers
8 that were awaiting them.
9 THE COURT: I don't know if they would or wouldn't.
10 I'm not sure they knew. I'm sure --
11 MR. RIEGEL: This is what the plaintiffs said.
12 THE COURT: I'm sure that I would believe that -- no
13 one knows -- actually let me just digress.

14 No one knows what he or she would do in a dangerous
15 situation if you could do something noble and heroic. Why did
16 all the people come down to the World Trade Center to offer to
17 help? I'm sure they knew there was risk. I'm sure they knew
18 there was danger, in all kinds of unforeseeable ways. But they
19 came. They came in one of the most noble events that New York
20 City has witnessed.

21 And I think it's true of many catastrophes in many
22 places, people do good and noble and heroic things to save
23 lives; and again, I stress, I don't want to denigrate the
24 plaintiffs. They also did noble and heroic things and they
25 have a right to seek redress for their injury, and I don't want

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1 to criticize them for bringing this lawsuit either, or you, for
2 presenting as vigorously and as zealously you have your
3 clients' rights and interests -- but that doesn't mean -- do
4 you have anything more you want to tell me because I want to
5 express a decision.

6 MR. RIEGEL: I would just add that it's a proposed
7 class action and which would include --

8 THE COURT: We're not there yet. We're at the point
9 where we see if the individual plaintiffs have claims for
10 relief. And I'm going to hold that they don't. But if you
11 have anything more to tell me.

12 MR. RIEGEL: Would your Honor be amenable to -- I mean
13 we didn't happen to have one of the volunteers or the private
14 parties, workmen who came, as a named plaintiff. Would that
15 change?

16 THE COURT: The plaintiffs are already in the case.
17 I've held before that these are not class actions, that the
18 common questions of law and fact do not predominate over the
19 individual claims and that the case is not necessarily managed
20 better as a class action. So, I'm not at that point. We're
21 not there. If your claims can't succeed, they can't have class
22 action.

23 So I'm at a point: Do they have a legally sufficient
24 claim for relief? And I hold they don't. But, again, anything
25 more to say on that issue, I'll hear you; if not, let me

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1 express my decision.

2 MR. RIEGEL: I would just say for the record that I
3 don't know if the issue of whether they had to go there,
4 whether they felt compelled, has been filled out on the record.

5 THE COURT: That's a factual issue.

6 MR. RIEGEL: Well, you know, at this point --

7 THE COURT: What they feel what they were or were not
8 compelled is a factual issue. Every soldier can say no and
9 risk court martial. Every individual can say I'm not going to
10 go. I'm sure the corrections officers can say I'm not going to
11 go there. My job is in the prison. They all went.

12 MR. RIEGEL: I would just add, your Honor, no
13 discovery has been taken and we have to accept the ideations of
14 the complaint as true.

15 THE COURT: I understand. I'm examining the claims as
16 if proven. Okay, Mr. Riegel, please.

17 Just to summarize the complaint, the plaintiffs allege
18 that the September 11 attacks released an unprecedented

19 combination and concentration of toxic substances and
20 carcinogens.

21 The Environmental Protection Administration was
22 designated as the lead agency for the response to the dangers
23 and threat posed by the hazardous materials present at ground
24 zero. And on September 13, 2001, the EPA announced that it was
25 taking steps to protect the safety of people working at the

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1 site on recovery, rescue, fire control, clean-up and
2 transportation operations.

3 The complaint further alleges that the named
4 individual defendants, who are Christina Todd Whitman, a former
5 administrator of the environmental protection administration;
6 Eileen McGinnis, the chief of staff; William J. Muszynski, the
7 acting regional administrator; and of the Council on
8 Environmental Quality, James L. Connaughton, the chairman;
9 Samuel Thernstrom, the former associate director; of the
10 Occupational Safety and Health Administration, OSHA, Assistant
11 Secretary John L. Henshaw, these are all the defendants, it is
12 alleged by the complaint that these defendants had actual or
13 constructive knowledge of the serious safety and health dangers
14 posed by contaminants at the site. The defendants also knew
15 and could foresee that anyone who worked and was exposed to
16 these contaminants without adequate protective equipment had a
17 substantial risk of suffering severe physical consequences.

18 The complaint alleges that the defendants conspired
19 to, and with deliberate indifference did, issue false and
20 misleading public announcements creating the impression that no
21 significant dangers were posed.

22 The complaint alleges that the plaintiffs heard
23 directly or indirectly these statements and relied upon them
24 and did not use or receive proper safety equipment.

25 And finally, as a result of being exposed to
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1 contaminants at ground zero, plaintiffs have suffered from
2 chronic impairments of disease and substantial damage and
3 injury.

4 As I said before, I must take these allegations as if
5 proved. My function is not to assess the weight of the
6 evidence which might be offered in support of the complaint but
7 merely to assess the legal feasibility of the complaint. I
8 must take the facts alleged in the complaint as true. I must
9 draw all reasonable inferences in favor of the plaintiff, and
10 so doing examine if a legally sufficient claim for relief has
11 been stated.

12 The seminal case is Bivens against six unknown named
13 agents of the Federal Bureau of Narcotics, the case involving
14 an illegal search by agents of the bureau in violation of the
15 fourth amendment.

16 The Supreme Court in that case, decided in 1971, held
17 that a federal cause of action for money damages could be
18 inferred directly from the fourth amendment.

19 However, since that time, the Supreme Court has
20 narrowed the application of Bivens and at this time most
21 commentators believe that there is very little room for a
22 Bivens action, particularly when there is not a
23 clearly-articulated constitutional right that has been

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violated.

In Bivens, the majority suggested two situations in
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which it would not recognize a cause of action for
constitutional violations. These are:

1. That there would be no cause of action if there
are special factors counselling hesitation in the absence of
affirmative action by Congress. And I think that is true of
all the cases here; and

2. That there is no cause of action if Congress has
specified an alternative mechanism that Congress believes
provides an equally effective substitute, and I've held that is
the case with the case of the New York Army National Guard
medic, John Lombardi, and the deputy United States marshal,
Rafael Garcia, both of whom were in the federal employ; and
with the case of John Lombardi, if not in the federal employ,
in the National Guard called upon to serve in a national
emergency.

The subsequent cases have added two additional
limitations. Bivens, as noted, created a remedy for
constitutional violations only. If there is no constitutional
violation, there is no cause of action under Bivens. And
particularly interesting is the narrowing that has occurred
since Bivens of the scope of a claim under the due process
clause. And I would add parenthetically that we're really
involved with tort cases, claims for misrepresentation, which
would be cognizable, if at all, under the Federal Tort Claims
Act. One cannot sue a state unless the state has waived its

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immunity. The national government has waived its immunity
under the Federal Tort Claims Act. However, for various
reasons that I will not go into today, there is no right for
these wrongs, even if they were wrongs, under the Federal Tort
Claims Act; thus, the pressure to bring the cause of action
under Bivens, since there is no tort remedy.

The second limitation is that defendants may still
raise immunity as a defense even if a constitutional right is
said to have been violated because under this immunity defense
applicable to both the federal officers and the state officers,
if there is not a clear violation known to them of a violation
of a constitutional right, there is no Bivens remedy.

We remarked before that the individuals employed by
the state have a state remedy under the workmen's compensation
statute. And the federal -- federal workers under the --
either under the Civil Service Reform Act or under the Federal
Employees Compensation Act, and I'm not going to repeat the
cases that deal with those issues.

The due process clause is intended to prevent
government from abusing its power or employing its power as an
instrument of oppression. This is the case that was mentioned
before, *DeShaney v. Winnebago County, Department of Social
Services*, 489 U.S. 189 at page 196, decided in 1989.

The due process clause protects individual liberty
against arbitrary and affirmative government action, regardless

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1 of the fairness of the procedures used to implement them. But
2 the court has been reluctant to expand the scope of substantive
3 due process rights beyond the well known and recognized first
4 amendment right of the right to speak, fourth amendment rights
5 to privacy in one's home, and fifth amendment right to enjoy
6 one's property.

7 One such illustration is the case of Collins against
8 City of Harker Heights, 503 U.S. 115, at page 125, decided in
9 1992. There the plaintiff was a widow of a city employee. She
10 sued claiming that there was an unreasonable risk of harm that
11 was created in the workplace. She did not allege the breach of
12 an affirmative action by the city but alleged instead that the
13 due process clause imposed a duty on the city to provide a safe
14 working environment or in the alternative that it not be
15 deliberately indifferent to her husband's safety, and that
16 deliberative indifference, she argued, reflected arbitrary
17 government action that shocked the conscience.

18 The court rejected plaintiff's claim of a
19 constitutional violation. It held that neither the text nor
20 the history of the due process clause support petitioner's
21 claim that the governmental employer's duty to provide its
22 employees with a safe working environment is a substantive
23 component of the due process clause. The due process clause,
24 the court held, is a limitation on the state's power to act.
25 It's not a guarantee of a certain level of safety.

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1 The court also held the government employers are not
2 obligated to inform employees of known risks. The Supreme
3 Court said we also are not persuaded that the city's alleged
4 failure to train its employees or to warn them about known
5 risks of harm was an omission that could properly be
6 characterized as arbitrary or conscience-shocking in a
7 constitutional sense.

8 Now, plaintiff seeks to distinguish Collins by saying
9 that there were affirmative acts of the government in this
10 case; namely, the issuance of statements the plaintiff alleges
11 is false and misleading. But I hold that that is not a legally
12 distinctive way of avoiding the force of the Collins case.

13 In DeShaney, the mother of a child who had been beaten
14 by his father brought an action against local officials who
15 failed to remove the child from his father's custody after
16 receiving reports of abuse. It's a situation that we're
17 hearing today in the press in New York City. The court held,
18 however, that nothing in the language of the due process clause
19 itself requires the state to protect the life, liberty and
20 property of its citizens against invasion by private actors.
21 The clause is phrased: There's a limitation on the state's
22 power to act, not as a guarantee of certain minimal levels of
23 safety and security.

24 Now I'm not getting into situations of special
25 relationship where the Supreme Court has noted that the

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1 government has taken upon itself a special duty to protect
2 certain classes of individuals or instances, as I mentioned
3 before, in the Dwares against City of New York case where there
4 was active complicity by government officials with those who

5 were affirmatively doing harm to people. This is a different
6 case.

7 We have on the plaintiff's side the anthrax cases
8 wherein Briscoe against Potter 355 F.Supp.2d 30 the district
9 court for the District of Columbia, 2001, upheld a Bivens
10 action against officials of the postal service when the postal
11 service made affirmative misrepresentations about the safety of
12 the postal facility in the wake of the anthrax scare. The
13 court held that because plaintiffs alleged affirmative action
14 by the defendants, that is their false assurances of safety,
15 the plaintiffs have properly stated a claim for deprivation of
16 substantive due process rights, and that these
17 misrepresentations were so egregious as to shock the
18 conscience.

19 I should note, however, that the court dismissed the
20 case on the finding that the defendants were entitled to
21 qualified immunity since they were not aware that there was a
22 clear statement of a constitutional right asserted by the
23 plaintiffs. Briscoe against Potter was affirmed on other
24 grounds by the court of appeals of the District of Columbia.

25 To the extent that the case stands against my view, I
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1 decline to follow it. I think we have here fairly understood
2 actions by officials intending to bring about a sense of
3 involvement by the community to deal with a catastrophe
4 afflicting New York in the aftermath of September 11, 2001.
5 The administration had to deal with a situation of concern, of
6 fear of safety, of a need to get on with work of the community,
7 to avoid an economic catastrophe as well as a physical
8 catastrophe to the City of New York, and what was said was
9 said. I make no finding whether it was true or false, but the
10 record reflects investigations by others into those questions
11 and assertions. In the circumstances of this case, however, I
12 hold that there was not a violation of a constitutional right
13 about which the plaintiffs can bring a lawsuit under Bivens.

14 I am not going to rule that the state remedy under
15 workmen's compensation law was an adequate one because Congress
16 did not review that and we're dealing with Congress and not
17 state remedies. It does, however, play a role in dealing with
18 the need to fashion a Bivens remedy which has to be understood
19 as an extraordinary remedy.

20 There's one more point I want to discuss and that is
21 the qualified immunity that shields government officials who
22 perform discretionary government functions and shields them
23 from civil liability as long as their conduct does not violate
24 any clearly established statutory or constitutional rights of
25 which a reasonable person would have known. That's the rule of

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1 Harlow against Fitzgerald, 457 U.S. 800 at page 818, decided in
2 1982.

3 To overcome a qualified immunity, plaintiff must show
4 that a clearly established constitutional right was violated.
5 Under the standard, the right of the official is alleged to
6 have -- I'm sorry. Under this standard, "the right of the
7 official is alleged to have violated must have been 'clearly
8 established' in a more particularized, and hence more relevant,
9 sense. The contours of the right must be sufficiently clear

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that a reasonable official would understand that what he is doing violates that right." The Supreme Court held that in Anderson against Creighton, 483 U.S. 635 at page 664, decided in 1987.

As illustrated by the difficulty that both Mr. Riegel and I had in articulating the particular substantive right of due process that was violated, plaintiff cannot carry that burden. And I, therefore, hold that defendants also have a right to dismissal on the grounds of their qualified immunity.

So this is my holding. The motion to dismiss by the defendants is granted. And the complaint is dismissed and this is a final order.

So plaintiffs have the ability to appeal to the court of appeals.

Thank you, Mr. Riegel, for a very fine argument. Mr. Greene, I apologize to you, there wasn't much

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occasion for you to speak, but you were eloquent, and your silence and your briefs were very good.

MR. GREENE: Thank you.

(Adjourned)

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