

06-1077
Lombardi v. Whitman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: November 27, 2006 Decided: April 19, 2007)

Docket No. 06-1077-cv

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JOHN LOMBARDI, ROBERTO RAMOS JR., HASAN
A. MUHAMMAD, RAFAEL A. GARCIA and
THOMAS E. CARLSTROM, individually and
as representatives of a class of
individuals similarly situated,

Plaintiffs-Appellants,

- v. -

CHRISTINE T. WHITMAN, in her individual
capacity, JAMES L. CONNAUGHTON, in his
individual capacity, EILEEN MCGINNIS,
in her individual capacity, WILLIAM J.
MUSZYNSKI, in his individual capacity,
JOHN L. HENSHAW, in his individual
capacity, SAMUEL THERNSTROM, in his
individual capacity, and JOHN DOES, 1-
10, in their individual capacities,

Defendants-Appellees.

- - - - -x

Before: JACOBS, Chief Judge, SACK, and RAGGI, Circuit
Judges.

Appeal from a judgment of the United States District
Court for the Southern District of New York (Hellerstein,

1 J.) entered on February 6, 2006, granting the defendants'
2 motion to dismiss for failure to state a claim.

3 Affirmed.

4 STEPHEN J. RIEGEL, Weitz &
5 Luxemburg, P.C., New York, NY, for
6 Plaintiffs-Appellants.

7
8 MARK B. STERN, Appellate Staff,
9 Civil Division, United States
10 Department of Justice (Peter D.
11 Keisler, Assistant Attorney General
12 of the United States, Alisa Klein,
13 Scott A. Hershovitz, on the brief),
14 Washington, DC, for _____
15 Defendants-Appellees.

16
17 DENNIS JACOBS, Chief Judge:
18

19 The five plaintiffs performed search, rescue and clean-
20 up work at the World Trade Center site (the "site") in the
21 aftermath of the September 2001 terrorist attacks. They
22 allege that the defendants, all of them federal officials,
23 issued reassuring--and knowingly false--announcements about
24 the air quality in lower Manhattan; that the plaintiffs
25 therefore believed it was safe to work at the site without
26 needed respiratory protection, and did; and that the
27 defendants' conduct violated plaintiffs' right to
28 substantive due process. This is an appeal from a February
29 6, 2006 order entered in the United States District Court
30 for the Southern District of New York (Hellerstein, J.),

1 which dismissed the complaint. We affirm because the
2 complaint's allegations do not shock the conscience even if
3 the defendants acted with deliberate indifference: when
4 agency officials decide how to reconcile competing
5 governmental obligations in the face of disaster, only an
6 intent to cause harm arbitrarily can shock the conscience in
7 a way that justifies constitutional liability.

8 9 **BACKGROUND**

10 The facts are drawn from the complaint, the documents
11 referenced therein, and common knowledge of the events of
12 September 11, 2001.

13 The collapse of the World Trade Center towers on that
14 day generated a cloud of debris that coated the surrounding
15 buildings and streets of Lower Manhattan with concrete dust,
16 asbestos, lead, and other building materials. Fires within
17 the wreckage burned for months, emitting various metals and
18 particulate matter in addition to such potentially harmful
19 substances as dioxin, polychlorinated biphenyls (PCBs),
20 volatile organic compounds (VOCs), and polycyclic aromatic
21 hydrocarbons (PAHs).

22 The plaintiffs arrived at the site on September 11 or
23 in the days soon after: John Lombardi is a New York Army

1 National Guard medic; Roberto Ramos, Jr. is an Emergency
2 Services Officer in the New York City Corrections
3 Department; Hasan A. Muhammad is an Emergency Services
4 Captain in the New York City Corrections Department; Rafael
5 A. Garcia is a Deputy U.S. Marshal; and Thomas E. Carlstrom
6 is a paramedic in the New York City Fire Department. They
7 participated in search, rescue, and clean-up work at the
8 site, with little or no equipment to protect their lungs.
9 They were not told by their employers or any government
10 official about the health risks posed by the dangerous
11 contaminants in the air, and they thought they could work at
12 the site with little or no respiratory protection based on
13 the information available to them, including statements of
14 government officials indicating that Lower Manhattan's air
15 quality presented no significant health risks to the public.

16 The plaintiffs brought suit on November 23, 2004, in
17 the Southern District of New York, on their own behalf and
18 on behalf of a purported class including all those who
19 worked at or in the immediate vicinity of the site during
20 the period September 11, 2001, to October 31, 2001, who did
21 so without sufficient respiratory equipment in reliance on
22 information supplied by government officials, and who as a
23 result suffer or reasonably fear suffering illness or injury

1 from their exposure to asbestos or other harmful substances.

2 The defendants, sued in their individual capacities,
3 are current or former officials of the Environmental
4 Protection Agency ("EPA"), the White House Council on
5 Environmental Quality ("CEQ"), and the Occupational Safety
6 and Health Administration ("OSHA"). The claims against them
7 are based on statements in EPA press releases issued in the
8 wake of the disaster, which (according to the complaint)
9 were made (1) to speed work at the site, (2) with the
10 knowledge they were false or misleading, and (3) with
11 deliberate indifference to the health risks the workers
12 would incur by relying on them.

13
14 **A. The Allegedly Misleading Statements**

15 The complaint invokes a report issued by the EPA Office
16 of the Inspector General, which critiques the EPA's response
17 to the September 11 disaster. See EPA Office of the
18 Inspector General, "EPA's Response to the World Trade Center
19 Collapse: Challenges, Successes, and Areas for Improvement,"
20 Report No. 2003-P-00012 (Aug. 21, 2003), available at
21 http://www.epa.gov/oig/reports/2003/WTC_report_20030821.pdf

1 (last visited April 17, 2007) (the "OIG Report").¹

2 A September 13, 2001, EPA press release, which is cited
3 in the OIG Report, [i] indicated that initial environmental
4 tests done at the site after the terrorist attacks were
5 "very reassuring about potential exposure of rescue crews
6 and the public to environmental contaminants"; [ii]
7 concluded that the results of "[a]dditional sampling of both
8 ambient air quality and dust particles . . . in lower
9 Manhattan . . . were uniformly acceptable"; and [iii]
10 expressed the EPA's intent to work with other agencies and
11 rescue workers to provide respiratory equipment and to make
12 sure they observed appropriate safety precautions--
13 assistance that the plaintiffs allege (to their knowledge)
14 never materialized. OIG Report at 87-88.

15 A September 16 EPA press release reported additional
16 good news:

¹ Both the OIG Report and the EPA press releases, which are attached to the OIG Report as appendices, see Supplemental Appendices to OIG Evaluation Report, available at <http://www.epa.gov/oig/reports/2003/wtc/toc.htm> (last visited April 17, 2007), are public documents on which the complaint heavily relies; and plaintiffs' counsel indicated to the district court at oral argument that the OIG Report was incorporated into the complaint. Mot. to Dismiss Hr'g Tr. 32, Lombardi v. Whitman, No. 04-CV-9272 (S.D.N.Y. Feb. 2, 2006). In ruling on the motion to dismiss, the district court was therefore permitted to consider the entire contents of these documents, as do we. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

1 [N]ew samples confirm previous reports that
2 ambient air quality meets OSHA standards and
3 consequently is not a cause for public concern.
4 New OSHA data also indicates that indoor air
5 quality in downtown buildings will meet standards.
6 EPA has found variable asbestos levels in bulk
7 debris and dust on the ground, but EPA continues
8 to believe that there is no significant health
9 risk to the general public in the coming days.
10 Appropriate steps are being taken to clean up this
11 dust and debris. "Our tests show that it is safe
12 for New Yorkers to go back to work in New York's
13 financial district," said John L. Henshaw,
14 Assistant Secretary of Labor for OSHA. "Keeping
15 the streets clean and being careful not to track
16 dust into buildings will help protect workers from
17 remaining debris."

18
19 Id. at 85.

20 A September 18 press release reported that EPA's
21 testing of the air and drinking water showed that "these
22 vital resources are safe" and that the "vast majority" of
23 air samples taken near the site measured harmful substances
24 at below maximum acceptable levels. According to the
25 release, the highest asbestos levels were close to the site
26 itself, where rescue and cleanup workers were supposedly
27 being supplied with adequate equipment. The same release
28 quoted defendant Whitman:

29 "We are very encouraged that the results from our
30 monitoring of air quality and drinking water
31 conditions in both New York and near the Pentagon
32 show that the public in these areas is not being
33 exposed to excessive levels of asbestos or other
34 harmful substances," Whitman said. "Given the
35 scope of the tragedy from last week, I am glad to

1 reassure the people of New York and Washington,
2 D.C. that their air is safe to breath [sic] and
3 their water is safe to drink," she added.
4

5 Id. at 77. In fact, according to the EPA Inspector General,
6 25 percent of the bulk dust samples taken up to that point
7 recorded asbestos at levels representing a significant
8 health risk. See id. at 14.

9 Press releases issued on September 21, October 3, and
10 October 30--as well as a statement made by an EPA
11 spokesperson to the New York Daily News on or about October
12 11--all reiterated the message that testing and sampling
13 done near the site indicated no significant health risk to
14 the public. See Compl. ¶¶ 49-51.

15 The OIG Report suggests that: [i] the EPA's press
16 releases conveyed the dominant message that there was no
17 risk to public health without necessary qualifying
18 statements about, for instance, the initial lack of
19 monitoring data for many harmful substances besides
20 asbestos, see OIG Report at 9-11; [ii] the EPA did not
21 disclose publicly that it lacked adequate benchmarks for
22 measuring the long term health effects of each substance or
23 the combination of them in the unprecedented conditions
24 created by the disaster, see id. at 9-13; [iii] the EPA's
25 reassuring statements were interpreted by some to apply to

1 site workers as well as the public, see id. at 43-44; [iv]
2 the EPA and other agencies sent mixed messages to workers
3 about the need for respirators, see id. at 43-45; and [v]
4 the EPA's decisions as to what information to release were
5 heavily influenced by suggestions from the CEQ, see id. at
6 14-17. See Compl. ¶¶ 52-57.

7 As to the last point, a September 12 internal EPA email
8 directed that all statements to the media were to be cleared
9 by the National Security Council before release, and the OIG
10 Report indicates that an official in the CEQ was the conduit
11 through which this clearance was granted, OIG Report at 15;
12 a comparison of draft press releases with their final
13 counterparts reveals that the CEQ suggested edits that
14 removed cautionary wording (for instance, in the September
15 13 press release, a portion of the title was changed from
16 "[EPA] Testing Terrorized Sites for Environmental Hazards"
17 to "[EPA] Reassures Public About Environmental Hazards"),
18 id. at 17; and in response to the CEQ's suggestions about
19 the September 16 press release, the EPA [i] removed a
20 reference to recent test samples that recorded higher
21 asbestos levels than those in previous samples and [ii]
22 added a quote from John L. Henshaw of OSHA assuring that it
23 was safe to go to work in Lower Manhattan, id. at 16.

1 The press releases were not without cautionary
2 language: they referred to the EPA's plan for continued
3 monitoring efforts; and early press releases warned of the
4 need to take certain cautionary measures--for instance, to
5 change air conditioning filters, sweep up debris, and wet
6 down buildings covered in debris to avoid its becoming
7 airborne.

8

9 **B. The District Court Proceedings**

10 Defendants moved to dismiss the complaint on March 21,
11 2005, and the district court granted the motion from the
12 bench on February 2, 2006,² holding that the defendants had
13 not alleged the violation of a constitutional right and
14 holding alternatively that the defendants in any event
15 enjoyed qualified immunity because they had not violated a
16 right that was clearly established at the time of their
17 conduct. As to two plaintiffs, dismissal was granted on a
18 further alternative ground that "special factors" counseled
19 hesitation in the creation of a cause of action under Bivens
20 v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403
21 U.S. 388 (1971). Specifically: (1) Lombardi's claim was

² The district court dismissed without certifying the purported class.

1 dismissible because military personnel may not use a § 1983
2 or Bivens action to obtain redress for injuries suffered
3 incident to military service, see United States v. Stanley,
4 483 U.S. 669, 681 (1987) (Bivens action by U.S. military
5 personnel); Jones v. N.Y. State Div. of Military & Naval
6 Affairs, 166 F.3d 45, 50-52 (2d Cir. 1999) (§ 1983 action by
7 state National Guardsman); and (2) Garcia's claim was
8 dismissible because he already had the remedy afforded to
9 U.S. Marshals under the Federal Employees' Compensation Act,
10 see generally Schweiker v. Chilicky, 487 U.S. 412, 424-29
11 (1988); Hudson Valley Black Press v. IRS, 409 F.3d 106, 110-
12 14 (2d Cir. 2005).

13 In assessing the due process claim, the district court
14 emphasized that the "administration had to deal with a
15 situation of concern, of fear [for] safety, of a need to get
16 on with [the] work of the community, to avoid an economic
17 catastrophe as well as a physical catastrophe to the City of
18 New York, and what was said was said." Mot. to Dismiss Hr'g
19 Tr. 49, Lombardi v. Whitman, No. 04-CV-9272 (S.D.N.Y. Feb.
20 2, 2006).

21

22

DISCUSSION

23 We review a dismissal for qualified immunity "de novo,

1 accepting as true the material facts alleged in the
2 complaint and drawing all reasonable inferences in
3 plaintiffs' favor." Johnson v. Newburgh Enlarged School
4 Dist., 239 F.3d 246, 250 (2d Cir. 2001).

5 The Constitution itself does not explicitly provide a
6 damages remedy to redress violations by individual federal
7 officials. And sovereign immunity bars suit for damages
8 against the federal government itself unless it has waived
9 that immunity. But where an individual "has been deprived
10 of a constitutional right by a federal agent acting under
11 color of federal authority," the individual may bring a so-
12 called Bivens action for damages against that federal agent
13 in an individual capacity, Thomas v. Ashcroft, 470 F.3d 491,
14 496 (2d Cir. 2006), provided that Congress has not forbidden
15 such an action and that the situation presents "no special
16 factors counselling hesitation in the absence of affirmative
17 action by Congress," Hudson Valley Black Press, 409 F.3d at
18 108 (quoting Bivens, 403 U.S. at 396).

19 A federal executive official is entitled to invoke
20 qualified immunity as a defense against a Bivens action.

21 See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

22 Qualified immunity analysis in Bivens suits is the same two-
23 step analysis applied in § 1983 suits against state actors.

1 See Wilson v. Layne, 526 U.S. 603, 608 (1999). First,
2 "[t]aken in the light most favorable to the party asserting
3 the injury, do the facts alleged show the officer's conduct
4 violated a constitutional right?" Saucier v. Katz, 533 U.S.
5 194, 201 (2001). Second, was the right so clearly
6 established that a reasonable government official would have
7 known that her conduct violated a constitutional right "in
8 light of the specific context of the case, [and] not as a
9 broad general proposition[?]" Id.

10 The threshold inquiry is therefore whether the
11 complaint alleges the violation of a constitutional right.
12

13 **A. Substantive Due Process**

14 Under the Due Process Clause of the Fifth Amendment of
15 the Constitution, "[n]o person shall . . . be deprived of
16 life, liberty, or property, without due process of law."
17 U.S. Const. amend. V. This clause has been interpreted as a
18 "protection of the individual against arbitrary action of
19 government," County of Sacramento v. Lewis, 523 U.S. 833,
20 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558
21 (1974)), which has both a procedural component protecting
22 against the "denial of fundamental procedural fairness," id.
23 at 845-46, as well as a substantive component guarding the

1 individual against "the exercise of power without any
2 reasonable justification in the service of a legitimate
3 governmental objective," id. at 846. The substantive
4 component of due process encompasses, among other things, an
5 individual's right to bodily integrity free from
6 unjustifiable governmental interference. See Washington v.
7 Glucksberg, 521 U.S. 702, 720 (1997) (citing Rochin v.
8 California, 342 U.S. 165 (1952)). The Due Process Clause,
9 however, "does not transform every tort committed by a state
10 actor into a constitutional violation." DeShaney v.
11 Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202
12 (1989). Government action resulting in bodily harm is not a
13 substantive due process violation unless "the government
14 action was 'so egregious, so outrageous, that it may fairly
15 be said to shock the contemporary conscience.'" Pena v.
16 DePrisco, 432 F.3d 98, 112 (2d Cir. 2005) (quoting Lewis,
17 523 U.S. at 847 n.8).

18

19 **B. Misrepresentation and "State Created Danger"**

20 Only an affirmative act can amount to a violation of
21 substantive due process, because the Due Process Clause "is
22 phrased as a limitation on the State's power to act, not as
23 a guarantee of certain minimal levels of safety and

1 security." DeShaney, 489 U.S. at 195. It is not enough to
2 allege that a government actor failed to protect an
3 individual from a known danger of bodily harm or failed to
4 warn the individual of that danger. See Collins v. City of
5 Harker Heights, 503 U.S. 115, 125-29 (1992) (no due process
6 violation where plaintiff alleged the city failed to
7 properly train or warn its employees of known dangers that
8 resulted in sanitation worker's asphyxiation). So, to the
9 extent the plaintiffs here allege that the defendants had an
10 affirmative duty to prevent them from suffering exposure to
11 environmental contaminants, their claims must fail. They
12 cannot rely on the EPA's failure to instruct workers to wear
13 particular equipment, its failure to explain the exact
14 limitations of its knowledge of the health effects of the
15 airborne substances that were present, or its failure to
16 explain the limitations of its testing technologies.

17 But the complaint goes further; it alleges that
18 defendants' affirmative assurances that the air in Lower
19 Manhattan was safe to breathe created a false sense of
20 security that induced site workers to forgo protective
21 measures, thereby creating a danger where otherwise one
22 would not have existed. "[I]n exceptional circumstances a
23 governmental entity may have a constitutional obligation to

1 provide . . . protection, either because of a special
2 relationship with an individual, or because the governmental
3 entity itself has created or increased the danger to the
4 individual.” Ying Jing Gan v. City of New York, 996 F.2d
5 522, 533 (2d Cir. 1993) (citing DeShaney, 489 U.S. at 198,
6 201). The plaintiffs allege no “special relationship”
7 between them and federal officials.³ They plead that their
8 reliance on the government’s misrepresentations induced them
9 to forgo available safeguards, and thus characterize the
10 harm as a state created danger.

11 Where a government official takes an affirmative act
12 that creates an opportunity for a third party to harm a
13 victim (or increases the risk of such harm), the government
14 official can potentially be liable for damages. See, e.g.,
15 Pena, 432 F.3d at 108; Hemphill v. Schott, 141 F.3d 412, 419

³ Special relationships arise ordinarily if a government actor has assumed an obligation to protect an individual by restricting the individual’s freedom in some manner, as by imprisonment. Such considerations are less relevant where a plaintiff alleges a “state created danger”:

Whether or not a victim was in state custody will surely be relevant to the state’s duty to protect. But because this Circuit treats the “state created danger” exception [considered here] as distinct from the “special relationship” exception, the fact that the victims were not in state custody at the time of the accident is irrelevant here.

Pena, 432 F.3d at 113 n.22.

1 (2d Cir. 1998); Dwares v. City of New York, 985 F.2d 94, 98-
2 99 (2d Cir. 1993). However, the danger alleged in this case
3 is dissimilar from the state created dangers recognized in
4 our precedents; in each of those cases, a third party's
5 criminal behavior harmed the plaintiff after a government
6 actor--always a law enforcement officer--enhanced or created
7 the opportunity for the criminal act through some
8 interaction or relationship with the wrongdoer. See Pena,
9 432 F.3d at 109 (opining that "'special relationship'
10 liability arises from the relationship between the state and
11 a particular victim, whereas 'state created danger'
12 liability arises from the relationship between the state and
13 the private assailant."). In Dwares, the police allegedly
14 gave the green light for skinheads to assault a group of
15 flag-burners; in Hemphill, the police allegedly gave back a
16 robbery victim's gun and took him along on a chase after the
17 robber, who was shot by the robbery victim; in Pena, the
18 police allegedly encouraged drinking and driving by a fellow
19 officer who hit several pedestrians while under the
20 influence.

21 In this case, the defendants acted only after the
22 terrorists' criminal acts were complete; i.e., plaintiffs'
23 claims are based neither on any alleged encouragement of the

1 terrorists nor on any relationship between defendants and
2 the terrorists. Instead, plaintiffs appear to cast
3 environmental conditions as the wrongdoer. They submit that
4 the defendants, with knowledge of the serious health risks
5 posed by these conditions, falsely represented to the public
6 that it was safe from any such risks.

7 The closest analogy in other circuits' substantive due
8 process case law--and it is not particularly close--is to
9 cases in which statements by law enforcement officials give
10 an individual a false sense of security as to the necessity
11 of self-help. See, e.g., Kennedy v. City of Ridgefield, 439
12 F.3d 1055, 1062-63 (9th Cir. 2006) (holding that a complaint
13 adequately alleged state created danger where plaintiff
14 reported to police that her neighbor was a child molester
15 and the police violated promises to patrol the neighborhood
16 and to warn her before they talked to the neighbor); Gazette
17 v. City of Pontiac, 41 F.3d 1061, 1065-66 (6th Cir. 1994)
18 (holding that causation was too attenuated to support a due
19 process claim where daughter alleged she herself would have
20 found evidence at the site of her mother's disappearance--
21 and had a chance of saving her mother--but for the police's

1 false claim that they had found nothing after a search).⁴

2 Depending on the circumstances, these cases furnish
3 some support for the idea that a substantive due process
4 violation can be made out when a private individual derives
5 a false sense of security from an intentional
6 misrepresentation by an executive official if foreseeable
7 bodily harm directly results and if the official's conduct
8 shocks the conscience. Taking the allegations of the
9 complaint as true, as we must, we assume that a sufficient
10 causal connection exists between the defendants' optimistic
11 statements and the plaintiffs' exposure to toxic substances.
12 However, the point is fairly debatable; as the Supreme Court
13 cautioned in evaluating a substantive due process claim

⁴ Some circuits have rejected factually similar claims, reasoning that whether or not an officer has expressed an intent to protect a plaintiff, the failure to provide such protection is not a substantive due process violation unless the plaintiff is restrained from acting on his own behalf. See Bright v. Westmoreland County, 443 F.3d 276, 284 (3d Cir. 2006) (holding that, because the plaintiff's freedom to defend his family was not impaired, there was no substantive due process violation where his daughter was murdered by a person whom the police previously assured plaintiff they would arrest), cert. denied, 127 S. Ct. 1483 (2007); Pinder v. Johnson, 54 F.3d 1169, 1175-76 (4th Cir. 1995) (in banc) (rejecting due process claim where a policeman falsely assured plaintiff that her violent former paramour would be jailed overnight, because there was no "limitation imposed on her liberty"). Both Bright and Pinder rejected the argument that a citizen's reliance on an officer's promises could constitute a state created danger.

1 based on legislative action,

2 [a governmental] decision that has an incremental
3 impact on the probability that death will result
4 in any given situation . . . cannot be
5 characterized as state action depriving a person
6 of life just because it may set in motion a chain
7 of events that ultimately leads to the random
8 death of an innocent bystander.

9
10 Martinez v. California, 444 U.S. 277, 281 (1980). See also
11 Bright, 443 F.3d at 281 (a state created danger cause of
12 action is only cognizable where "the harm ultimately caused
13 was foreseeable and fairly direct") (quoting Kneipp v.
14 Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996)). We put aside
15 the vexed issue of causation⁵; instead, we decide the case

⁵ The complaint here raises difficult questions about causation and the reasonableness of reliance that would likely be obstacles for the plaintiffs if the complaint were to be reinstated. For example: (1) whether the plaintiffs actually read or believed the press releases on which their claims are based; (2) whether the press releases were specific and optimistic enough to induce reasonable reliance; (3) whether, absent the defendants' statements, the plaintiffs would have refused to work if adequate respiratory equipment was unavailable when they demanded it; (4) whether the plaintiffs' experience at the site gave them sufficient first-hand information that harmful substances were in the air; (5) whether the plaintiffs' use of the limited respiratory equipment that was made available to them would have abated the risk of illness; and (6) whether the defendants' statements were subjected to public challenges that would have alerted a prudent worker to the need for protective equipment. The complaint implicitly alleges that the absence of reassuring EPA press releases would in itself have saved the plaintiffs from working without adequate protection. But it is unclear when the plaintiffs read--or heard of--the defendants' statements; the well-hedged allegation is that the plaintiffs exposed

1 on the ground that the conduct alleged, even assuming
2 causation, does not shock the conscience.

3
4 **C. Conscience-Shocking Conduct**

5 In order to shock the conscience and trigger a
6 violation of substantive due process, official conduct must
7 be outrageous and egregious under the circumstances; it must
8 be truly "brutal and offensive to human dignity"
9 Smith v. Half Hollow Hills Cent. School Dist., 298 F.3d 168,
10 173 (2d Cir. 2002) (quoting Johnson v. Glick, 481 F.2d 1028,
11 1033 & n.6 (2d Cir. 1973)) (internal quotation marks
12 omitted). Courts have "always been reluctant to expand the
13 concept of substantive due process because guideposts for
14 responsible decisionmaking in this unchartered area are
15 scarce and open-ended." Collins, 503 U.S. at 125.

16 In gauging the shock, "negligently inflicted harm is
17 categorically beneath the threshold," while "conduct
18 intended to injure in some way unjustifiable by any
19 government interest is the sort of official action most
20 likely to rise to the conscience-shocking level." County of

themselves to environmental contaminants "in direct or
indirect reliance upon" the defendants' statements, at least
in part through the "dissemination of such statements by
third parties." Compl. ¶¶ 1, 63 (emphasis added).

1 Sacramento v. Lewis, 523 U.S. 833, 849 (1998). In between,
2 the Supreme Court has recognized that conduct exhibiting
3 "deliberate indifference" to harm can support a substantive
4 due process claim, with a potent qualification that has
5 bearing here:

6 Deliberate indifference that shocks in one
7 environment may not be so patently egregious in
8 another, and our concern with preserving the
9 constitutional proportions of substantive due
10 process demands an exact analysis of circumstances
11 before any abuse of power is condemned as
12 conscience-shocking.

13
14 Id. at 850. The conscience recognizes the dilemma of
15 conflicting obligations. In the apparent absence of
16 harmless options at the time decisions must be made, an
17 attempt to choose the least of evils is not itself shocking.

18 In Lewis, the Supreme Court held that the "deliberate
19 indifference" of police officers who risk the lives of
20 suspects by engaging in high speed pursuit cannot be deemed
21 conscience-shocking, because they "have obligations that
22 tend to tug against each other" and because "[t]hey are
23 supposed to act decisively and to show restraint at the same
24 moment, and their decisions have to be made 'in haste, under
25 pressure, and frequently without the luxury of a second
26 chance.'" Id. at 853 (quoting Whitley v. Albers, 475 U.S.
27 312, 320 (1986)). Police conduct in such events does not

1 shock the conscience unless there is "intent to harm
2 suspects physically or to worsen their legal plight." Id.
3 at 854. By contrast, prison officials' deliberate
4 indifference to inmate welfare in non-emergency situations
5 can be conscience-shocking because the officials have "time
6 to make unhurried judgments, upon the chance for repeated
7 reflection, largely uncomplicated by the pulls of competing
8 obligations." Id. at 853. The duty of a prison official in
9 such a situation "does not ordinarily clash with other
10 equally important governmental responsibilities," Whitley,
11 475 U.S. at 320, because no "substantial countervailing
12 interest excuse[s] the State from making provision for the
13 decent care and protection of those it locks up"
14 Lewis, 523 U.S. at 851.

15 The plaintiffs do not allege that the defendants acted
16 with an evil intent to harm; but they argue that the
17 defendants' deliberate indifference shocks the conscience
18 because the defendants made their decisions in an
19 "unhurried" fashion with "hours, days, weeks and even months
20 to contemplate, deliberate, discuss and decide what to do
21 and say about the health hazards posed to thousands of
22 people who were coming onto and working at Ground Zero."
23 Appellants' Br. 39-40.

1 The decisions alleged were made by the defendants over
2 a period of time rather than in the rush of a car chase; but
3 the decisions cannot on that account be fairly characterized
4 as "unhurried" or leisured. The OIG Report (relied upon by
5 the complaint) shows that the defendants were required to
6 make decisions using rapidly changing information about the
7 ramifications of unprecedented events in coordination with
8 multiple federal agencies and local agencies and
9 governments. See OIG Report at i ("Responding to this
10 crisis required organizations from all levels of government
11 to coordinate their response efforts and to make critical
12 public health and safety decisions quickly, and without all
13 of the data that decision-makers would normally desire.");
14 cf. Kaucher v. County of Bucks, 455 F.3d 418, 426-27 & n.3
15 (3d Cir. 2006) ("We note defendants were under some pressure
16 to respond quickly to the spread of infection [at the jail
17 over a period of more than two years], and we question
18 whether deliberately indifferent conduct is truly conscience
19 shocking in this context.").

20 Hurried or unhurried, the defendants were subjected to
21 the "pull of competing obligations." The complaint concedes
22 that the alleged wrongs to the plaintiffs were committed in
23 aid of competing public goals that were not insubstantial:

1 Defendants caused to be made the aforesaid
2 misleading statements and omissions . . . in order
3 to insure that Plaintiffs and Class Members
4 immediately began to perform search, recovery,
5 clean-up and other work at the Ground Zero site
6 immediately after the September 11, 2001 attacks,
7 and to create the overall impression that it was
8 safe for people residing and working in areas near
9 Ground Zero to return to their normal lives.

10
11 Compl. ¶ 62. The complaint thus recognizes what everyone
12 knows: that one essential government function in the wake of
13 disaster is to put the affected community on a normal
14 footing, i.e., to avoid panic, keep order, restore services,
15 repair infrastructure, and preserve the economy.

16 In previous cases in which we recognized a state
17 created danger, government officials were not subject to the
18 pull of competing obligations. As to Pena, there is
19 certainly no countervailing public benefit to the
20 encouragement of drunk driving. See Pena v. DePrisco, 432
21 F.3d 98, 114 (2d Cir. 2005) ("Not condoning egregious drunk
22 driving 'does not ordinarily clash with other equally
23 important governmental responsibilities.'" (quoting Lewis,
24 523 U.S. at 852). And the active incitement of private
25 violence against demonstrators in Dwares served no
26 conceivable public interest; Dwares emphasized that the
27 officers allegedly intended to punish the victims because of
28 their political opinions. See Dwares v. City of New York,

1 985 F.2d 94, 99 (2d Cir. 1993) (the allegations in the
2 complaint "would easily permit the finder of fact to infer
3 that the officers intended the flag burners qua flag burners
4 to suffer the injuries inflicted").

5 Beyond our own precedent, the plaintiffs direct us to
6 two recent district court decisions that found conduct to be
7 conscience-shocking on facts that are in one case somewhat
8 similar, and in the other, identical. In Briscoe v. Potter,
9 355 F. Supp. 2d 30 (D.D.C. 2004), aff'd, 171 F. App'x 850
10 (D.C. Cir. 2005), postal employees who had contracted
11 anthrax alleged that their supervisors had falsely told them
12 that it was safe to return to work after anthrax had been
13 discovered at their facility. The district court held that
14 the supervisors' conduct was conscience-shocking: the
15 supervisors were "commendable for their dedication to
16 getting the mail out but deplorable for not recognizing the
17 potential human risk involved. . . . [T]hese alleged actions
18 demonstrated a gross disregard for a dangerous situation in
19 which 'actual deliberation [was] practical.'" Id. at 46
20 (quoting Butera v. Dist. of Columbia, 235 F.3d 637, 652
21 (D.C. Cir. 2001)). The shock to the conscience
22 notwithstanding, the due process claim was dismissed on
23 qualified immunity, see 355 F. Supp. 2d at 48, and a

1 substantive due process claim arising from the same incident
2 was dismissed in Richmond v. Potter, No. 03-00018, 2004 U.S.
3 Dist. LEXIS 25374, at *19-29 (D.D.C. Sept. 30, 2004), aff'd
4 on other grounds, 171 F. App'x 851 (D.C. Cir. 2005).

5 Plaintiffs here allege harm similar to that suffered in
6 Briscoe, but we need not decide whether Briscoe was
7 correctly decided, because there is a salient ground for
8 distinction: the need to process the mails at a single
9 postal facility cannot be compared with the need to restore
10 the residential, economic, educational and civic life of an
11 entire community.

12 In Benzman v. Whitman, No. 04 Civ. 1888, 2006 WL
13 250527 (S.D.N.Y. Feb. 2, 2006), the district court
14 considered substantive due process claims arising from the
15 same press releases at issue in this case. Citing Briscoe,
16 Benzman held that if the reassuring statements made by EPA
17 officials were made with knowledge of their falsehood, they
18 were unquestionably conscience-shocking based on the nature
19 of the EPA's mandate:

20 The EPA is designated as the agency in our country
21 to protect human health and the environment, and
22 is mandated to work for a cleaner, healthier
23 environment for the American people. The agency
24 enforces regulations regarding pollution in our
25 environment and the presence of toxic and
26 hazardous substances, and has endorsed and

1 promulgated regulations for hazardous and toxic
2 materials, such as asbestos and lead. As head of
3 the EPA, Whitman knew of this mandate and took
4 part in and directed the regulatory activities of
5 the agency. Given this responsibility, the
6 allegations in this case of Whitman's reassuring
7 and misleading statements of safety after the
8 September 11, 2001 attacks are without question
9 conscience-shocking.

10
11 Id. at *18 (footnote and citation omitted). We disagree
12 with this reasoning, which focuses too narrowly on the
13 mission of a single agency without considering the other
14 substantial government interests at stake.⁶

15 If anything, the importance of the EPA's mission
16 counsels against broad constitutional liability in this
17 situation: the risk of such liability will tend to inhibit
18 EPA officials in making difficult decisions about how to
19 disseminate information to the public in an environmental
20 emergency. Knowing that lawsuits alleging intentional
21 misconduct could result from the disclosure of incomplete,
22 confusingly comprehensive, or mistakenly inaccurate
23 information, officials might default to silence in the face
24 of the public's urgent need for information. This is

⁶ The EPA's mandate is perhaps relevant to a determination of whether the defendants' conduct complied with the statutes and regulations governing that agency's operation, and we express no opinion on whether the defendants' conduct was appropriate or legal in this respect.

1 because, as the Supreme Court held in Collins v. City of
2 Harker Heights, 503 U.S. 115, 125-29 (1992), a government
3 official's failure to warn of a known danger, without more,
4 does not violate substantive due process.

5 Collins also instructed that, at least in the § 1983
6 context, courts should operate from a "presumption that the
7 administration of government programs is based on a rational
8 decisionmaking process that takes account of competing
9 social, political, and economic forces." Id. at 128. While
10 § 1983 implicates issues of federalism that are not relevant
11 here, the Court's instruction has force nonetheless:

12 substantive due process liability should not be allowed to
13 inhibit or control policy decisions of government agencies,
14 even if some decisions could be made to seem gravely
15 erroneous in retrospect. Cf. United States v. Varig
16 Airlines, 467 U.S. 797, 814 (1984) (Federal Tort Claims Act
17 discretionary function exception is designed to prevent
18 "judicial 'second-guessing' of legislative and
19 administrative decisions grounded in social, economic, and
20 political policy through the medium of an action in tort").

21 Can the goals of a government policy possibly outweigh
22 a known risk of loss of life or bodily harm? The EPA and
23 other federal agencies often must decide whether to regulate

1 particular conduct by taking into account whether the risk
2 to the potentially affected population will be acceptable.
3 Such decisions require an exercise of the conscience, but
4 such decisions cannot be deemed egregious, conscience-
5 shocking, and "arbitrary in the constitutional sense,"
6 Collins, 503 U.S. at 129, merely because they contemplate
7 some likelihood of bodily harm.

8 Moreover, mass displacement, civil disorder and
9 economic chaos in an urban area also can result in bodily
10 harm and loss of life. The relative magnitude of such risks
11 cannot be reliably computed, and they are in any event
12 incommensurable. Accepting as we must the allegation that
13 the defendants made the wrong decision by disclosing
14 information they knew to be inaccurate, and that this had
15 tragic consequences for the plaintiffs, we conclude that a
16 poor choice made by an executive official between or among
17 the harms risked by the available options is not conscience-
18 shocking merely because for some persons it resulted in
19 grave consequences that a correct decision could have
20 avoided. "[T]he touchstone of due process is protection of
21 the individual against arbitrary action of government,"
22 which in the substantive manifestation of due process is
23 exhibited by "the exercise of power without any reasonable

1 justification in the service of a legitimate governmental
2 objective." Lewis, 523 U.S. at 845-46 (internal quotation
3 omitted). When great harm is likely to befall someone no
4 matter what a government official does, the allocation of
5 risk may be a burden on the conscience of the one who must
6 make such decisions, but does not shock the contemporary
7 conscience.

8 These principles apply notwithstanding the great
9 service rendered by those who repaired New York, the heroism
10 of those who entered the site when it was unstable and on
11 fire, and the serious health consequences that are plausibly
12 alleged in the complaint.

13
14 * * *

15 Because the conduct at issue here does not shock the
16 conscience, there was no constitutional violation. We
17 therefore need not decide whether the conduct alleged
18 violated law that was then clearly established, or whether
19 any special factors counsel hesitation in the recognition of
20 a Bivens action against the defendants. For the foregoing
21 reasons, we affirm.