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Second Circuit Court of Appeals Affirms Dismissal of Plaintiff's Employment Discrimination and Defamation Claims Arising From Her Termination

The U.S. Court of Appeals for the Second Circuit has affirmed a decision by the U.S. District Court for the Southern District of New York dismissing a plaintiff's employment discrimination and defamation claims.

The Case

On May 25, 2020, Amy Cooper, a White woman, encountered Christian Cooper (no relation), a Black man in Central Park, while she was walking her dog and he was birdwatching. Amy Cooper (the "plaintiff") alleged that Cooper confronted her, and that his "intentionally aggressive actions" caused her to "fear for her safety and the safety of her dog." She alleged that this fear caused her to warn Cooper that she would tell the police there was "an African-American man threatening [her] life," and then to place a 911 call to that effect.

The confrontation was recorded on a video that went viral. In the plaintiff's opinion, she was "characterized as a privileged white female 'Karen' caught on video verbally abusing an African American male with no possible reason other than the color of his skin."

Later that same day, Franklin Templeton, the plaintiff's employer, published the following statement on Twitter regarding the incident: "We take these matters very seriously, and we do not condone racism of any kind. While we are in the process of investigating the situation, the employee involved has been put on administrative leave." The plaintiff alleged that although Franklin Templeton did contact her that day, it did not seek to interview Cooper about the incident,

did not obtain a recording of the plaintiff's 911 call from the police, and did not take various other potential investigative steps.

The following afternoon, Franklin Templeton put out another statement on Twitter (the "May 26 Statement") that said: "Following our internal review of the incident in Central Park yesterday, we have made the decision to terminate the employee involved, effective immediately. We do not tolerate racism of any kind at Franklin Templeton."

Jenny Johnson, Franklin Templeton's president and chief executive officer, made two further public statements about the incident. In a June 2, 2020 interview with Bloomberg (the "June 2 Statement"), in response to questions about the plaintiff's termination, Johnson stated:

> I just have to commend [ ] our crisis management team, it was a holiday. Everybody got together. We needed to spend time getting the facts. Sometimes videos can get manipulated and so you have to make sure that you've reviewed all the facts. I think the facts were undisputed in this case, and we were able to make a quick decision.

Then, in a July 6, 2020 interview with Fortune (the "July 6 Statement"), Johnson stated that the Franklin Templeton companies "espouse zero tolerance for racism."

On May 25, 2021, the plaintiff filed suit in the U.S. District Court for the Southern District of New York against Johnson and several corporate entities under the Franklin Templeton umbrella, alleging that her termination constituted unlawful race discrimination in violation of Section 1981 of the Civil Rights Act of 1866 and race and gender discrimination in violation of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), and that the May 26, June 2, and July 6 Statements constituted defamation under New York common law.

The defendants moved to dismiss the plaintiff's suit for failure to state a claim. The district court granted the defendant's motion and dismissed the complaint in its entirety.

The plaintiff appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit affirmed.

In its decision, the circuit court explained that Section 1981 "outlaws discrimination" on the basis of race "with respect to the enjoyment of benefits, privileges, terms, and conditions of a contractual relationship, such as employment." Similarly, the circuit court continued, the NYSHRL makes it unlawful for an employer to discriminate on the basis of race or sex, as does the NYCHRL.

The Second Circuit then found that the plaintiff's employment discrimination claims fell "short" because the plaintiff failed "to allege facts giving rise to even a minimal inference of discriminatory motivation with respect to her termination." The circuit court added that, to the extent that the plaintiff contended that the defendants "implicated the race of their employee with each of [their] communications to the public, by repeatedly connecting [their] stated stance against racism with their termination of the [p]laintiff," that argument "fail[ed] as a matter of law."

The Second Circuit pointed out that the defendants' statements "made no mention" of the plaintiff's race, and it said that even to the extent that they could be read as accusing the plaintiff of being a racist, "a statement that someone is a 'racist,' while potentially indicating unfair dislike, does not indicate that the object of the statement is being rejected *because of h[er] race*. 'Racism' is not a race, and discrimination on the basis of alleged racism is not the same as discrimination on the basis of race."

Next, the Second Circuit addressed the plaintiff's appeal of the district court's decision dismissing her defamation claim.

The circuit court explained that, under New York law, a defamation plaintiff must establish five elements:

(1) A written defamatory statement of and concerning the plaintiff;

(2) Publication to a third party;

(3) Fault;

(4) Falsity of the defamatory statement; and

(5) Special damages or per se actionability.

The Second Circuit added that a court also must decide as a matter of law whether the challenged statement is opinion because the New York constitution provides for "absolute protection of opinions." A court making this determination, the circuit court said, had to consider factors including:

(1) Whether the specific language in issue has a precise meaning which is readily understood;

(2) Whether the statements are capable of being proven true or false; and

(3) Whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.

Applying these principles, the Second Circuit agreed with the district court that the plaintiff failed to allege actionable defamatory statements. According to the circuit court, to the extent that the defendants' statements were read as accusing the plaintiff of being a racist, the reasonable reader would have understood this to be an expression of opinion based on the widely circulated video of the plaintiff's encounter with Cooper. The Second Circuit concluded that the May 26, June 2, and July 6 Statements all would be understood by the reasonable reader "as being based on the publicly available video of the incident."

The case is *Cooper v. Franklin Templeton Investments*, No. 22-2763-cv (2d Cir. June 8, 2023).

Doctrine of Intra-Military Immunity and Eleventh Amendment Bar Plaintiff's Employment Discrimination Claims, New York Federal Court Rules

The U.S. District Court for the Southern District of New York has ruled that a plaintiff's employment discrimination claims were barred by the doctrine of intra-military immunity and by sovereign immunity.

The Case

The plaintiff asserted in his employment action against the New York Guard (the "Guard"), the New York State Division of Military and Naval Affairs (the "DMNA"), the State of New York, Adjutant General Raymond F. Shields (the "Adjutant General"), and New York State Governor Kathy Hochul (the "Governor," and, collectively, the "Defendants"), that he was "a Jewish soldier born in Israel" who has served for "almost 20 years in the New York Guard." The plaintiff alleged, on information and belief, that the Guard "has discriminated against [him] by unfairly and unequally treating [him] in various matters and fields because of their displeasure, negative bias, anti-semitic predilections based" on his religion, national origin, and age.

The plaintiff alleged that the Defendants promoted other personnel in the Guard "in violation of NYG Directive 1305 (Promotions)" but did not promote the plaintiff who was equally qualified. The plaintiff similarly alleged that the Defendants allowed other personnel to earn certain qualifications even as they denied the plaintiff an opportunity to earn the same qualifications. This conduct had the effect of removing "potential competition in the higher ranks" of the Guard. The plaintiff further alleged that a colonel, who was not a Defendant in the case, "created 'a hostile work environment' over almost 20 years' time" by "always ha[ving] something negative to say" and having a "leadership methodology [that the plaintiff] would not countenance."

In addition to serving in the Guard, the plaintiff said that he was "a formerly self-employed solo attorney." He alleged that he "took time out" of his law practice to serve in the Guard and, as a result, he "missed a deadline" to file an answer in a lawsuit commenced against him by a former

client. According to the plaintiff, a judgment subsequently was entered against the plaintiff in favor of his former client, and the plaintiff lost his license to practice law in New York.

The plaintiff asserted employment discrimination claims under the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL") against all of the Defendants.

The plaintiff apparently claimed that, on the basis of his age and national origin, the Defendants terminated his employment, did not promote him, provided him with terms and conditions of employment different from those of similar employees, retaliated against him, and harassed him or created a hostile work environment during his time in the Guard. The plaintiff sought the following relief:

- Promotion to the rank of colonel;
- The approval and receipt of two "NYS Medals of Valor";
- The promotion, submission, and approval of "proposed Legislation drafted by Plaintiff and e-mailed to" the New York State Assembly;
- $10 million in damages;
- "Dismissal of and [s]triking [o]ut the [m]oney [j]udgment obtained by [the plaintiff's] former client against [him]";
- Reinstatement of the plaintiff's New York law license; and
- The costs incurred in his action.

The Defendants moved to dismiss on several grounds, including that the doctrine of intra-military immunity barred all of the plaintiff's claims and that, in addition, the Eleventh Amendment largely barred the plaintiff's ADEA, NYSHRL, and NYCHRL claims.

The Court's Decision

The court granted the defendants' motion to dismiss, concluding that the plaintiff's claims were barred by the doctrine of intra-military immunity and by the Eleventh Amendment.

In its decision, the court pointed out that all of the plaintiff's claims arose from his service as a member of the state militia, i.e., the Guard. The court noted that federal courts have long recognized that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian" community and that courts "must avoid unnecessary interference with state militias as well as the United States military" in suits by private litigants.

The court then explained that the doctrine of intra-military immunity barred a lawsuit if the injuries for which a plaintiff sought to recover arose out of or were in the course of activity "incident to the plaintiff's military service." This doctrine, the court added, protected internal personnel matters and shielded from judicial review the "composition, training, and equipping and control of a military force."

As a consequence, the court said, "many claims of employment discrimination brought by service personnel [are] non-justiciable," including claims brought under Title VII, the ADEA, and the New York human rights laws.

The court conceded that there were limited exceptions to intra-military immunity, such as "facial challenges to the constitutionality of military regulations," but it ruled that intra-military immunity applied "squarely to the facts alleged in this case." The court reasoned that all of the plaintiff's claims arose out of or were "in the course of activity incident to" the plaintiff's position in the Guard. The plaintiff's allegations that the Defendants "terminated his employment, provided him with terms and conditions of employment different from those of similar employees, retaliated against him, and/or harassed him or otherwise created a hostile work environment" with respect to his "almost 20 years in the New York Guard" were incident to the plaintiff's military service.

Accordingly, the court dismissed all of the plaintiff's employment discrimination claims as barred by the doctrine of intra-military immunity.

Additionally, the court agreed with the Defendants that the plaintiff's ADEA, NYSHRL, and NYCHRL claims also were barred in federal court by the Eleventh Amendment.

In this regard, the court explained that, as a general rule, "state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogated the states' Eleventh Amendment immunity." Because the Guard, DMNA, governor, and adjutant general were "arms of New York State" and New York's State's sovereign immunity had not been waived, the court decided that the plaintiff's ADEA, NYSHRL, and NYCHRL claims against the Guard, DMNA, and New York State had to be dismissed as barred by the Eleventh Amendment in federal court.

Finally, the court dismissed the plaintiff's ADEA, NYSHRL, and NYCHRL damages claims against the Governor and Adjutant General in their official capacities as similarly barred by the Eleventh Amendment.

The case is *Aris v. New York Guard*, No. 1:22-cv-05019 (JLR) (S.D.N.Y. Aug. 4, 2023).

Federal Court in New York Rejects Plaintiff's Employment Discrimination Claims Against the Internal Revenue Service and an IRS Supervisor

The U.S. District Court for the Southern District of New York has dismissed a plaintiff's employment discrimination claims under federal, state, and municipal laws against her former employer, the Internal Revenue Service ("IRS"), and against an IRS supervisor.

The Case

As the court explained, the plaintiff in this case alleged that she was an employee of the IRS who normally worked at an IRS office in New York City. The plaintiff asserted that she was "qualified to [t]elework from home." The plaintiff further contended that her supervisor reprimanded her for being absent without leave, although the plaintiff had been teleworking from home and "despite [the plaintiff's] disability to stay on [her] feet, . . . [and her physician's] notifications and RA [s]pecialists[']s indications." She alleged that "[e]veryone else in the department [has been] able to [t]elework from home."

The plaintiff also alleged that her supervisor was "retaliating because of a previous claim filed with the [Equal Employment Opportunity Commission ("EEOC")] against her."

The plaintiff further asserted that her supervisor's actions constituted a violation of the Americans with Disabilities Act ("ADA"). The plaintiff asserted that, during one week, her supervisor "deducted $1,054.00 from [her] salary[,] [then] deducted another $1,503" during the next week. She also stated that, for the week thereafter, she was not paid at all. The plaintiff further stated that her pay was reduced, and was ultimately suspended, "because of age and disability."

Asserting claims under the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, the ADA, and the New York State and New York City Human Rights Laws, the plaintiff sued the IRS and her supervisor. She sought backpay and she asked the court to order the IRS to reasonably accommodate her disability, to allow her to participate in "telework from home 5 days per week," and to transfer her supervisor away from her such that the supervisor would not have "access to [her] Seta Time keeping. . . ." The plaintiff also sought restoration of her debited annual and sick leave, the expungement of any mention of her being absent without leave from her employment record, and the expungement of any other reprimand that has been posted in her employment record.

The Court's Decision

The court dismissed the plaintiff's complaint.

In its decision, the court first addressed the plaintiff's claims under the New York State and the New York City Human Rights Laws.

The court explained that relief under the NYSHRL and the NYCHRL, which are state and municipal statutes, respectively, is unavailable to persons asserting claims of discrimination and retaliation arising from federal employment. The court then ruled that because the plaintiff asserted claims of discrimination and retaliation arising from her federal employment with the IRS, it had to dismiss her claims under those statutes.

The court then ruled that it also had to dismiss the plaintiff's claims under the Rehabilitation Act and the ADEA against the plaintiff's supervisor, explaining that these statutes do not provide for claims of discrimination or retaliation against individual employees.

Regarding the plaintiff's claims of disability discrimination and age discrimination, the court observed that the Rehabilitation Act, "prohibits discrimination on the basis of disability in employment decisions by the [f]ederal [g]overnment" and the ADEA "prohibits discrimination in employment on the basis of age against persons aged 40 or older."

To state a claim of failure to provide a disability accommodation under the Rehabilitation Act, the court said that a plaintiff must allege facts showing that:

(1) The plaintiff is a person with a disability under the meaning of the Rehabilitation Act;

(2) An employer covered by the statute had notice of the plaintiff's disability;

(3) With reasonable accommodation, the plaintiff could perform the essential functions of the job at issue; and

(4) The employer refused to make such accommodations.

Additionally, the court noted that, for a claim under the ADEA, a plaintiff must allege facts indicating that the plaintiff's age was the "but for" cause of the employer's adverse employment action.

The court then ruled that the plaintiff's complaint did not provide facts sufficient to state a claim of discrimination under the Rehabilitation Act or under the ADEA.

With respect to the plaintiff's claims under the Rehabilitation Act, the court found it "unclear" whether the plaintiff suffered from a disability as defined for the purpose of that statute given that the plaintiff merely alleged that she was "qualified to [t]elework from home" and that she had a "disability to stay on [her] feet." The court added that the plaintiff also did not allege facts showing that she ever notified her employer, the IRS, which the court said appeared to be covered by the Rehabilitation Act, of her disability but that she only stated that her supervisor reprimanded her for

being absent without leave, though she teleworked from home because of her disability and "d[e]spite [her physicians'] notifications and RA [s]pecialists[']] indications."

The court also observed that the plaintiff did not assert in her complaint that with a reasonable accommodation (in this case, teleworking from home), she could perform the essential functions of her position. Finally, the court said, it was "not entirely clear" that her employer had refused to allow her such an accommodation for her disability.

As to the plaintiff's claims of age discrimination under the ADEA, the court found that the plaintiff did not show that, at the time of the alleged discrimination, she was 40 years of age or older. She also did not allege facts showing that, but for her age, her employer would not have discriminated against her.

For all of these reasons, the court ruled that the plaintiff failed to state a claim on which relief could be granted as to her claims of disability discrimination under the Rehabilitation Act and as to her claims of age discrimination under the ADEA.

Finally, the court considered the plaintiff's retaliation claims under the ADEA and the Rehabilitation Act.

Regarding a claim of retaliation under the ADEA, the court said that a plaintiff must allege facts showing that the defendant discriminated – or took an adverse employment action – against the plaintiff because the plaintiff opposed any unlawful employment practice.

To state a claim of retaliation under the Rehabilitation Act, the court said, a plaintiff must show that:

- The plaintiff was engaged in protected activity;
- The alleged retaliator knew that the plaintiff was involved in protected activity;
- An adverse decision or course of action was taken against the plaintiff; and
- A causal connection existed between the protected activity and the adverse action.

Applying these principles, the court decided that, with respect to her claims of retaliation brought under the ADEA, the plaintiff did not allege facts sufficient to show that she suffered an

adverse employment action because she opposed an unlawful employment practice. As to her claims of retaliation under the Rehabilitation Act, the court found that the plaintiff did not allege facts sufficient to show that there was a causal connection between any protected activity she performed against her supervisor and any adverse employment action that she suffered because of it.

Thus, the court concluded, the plaintiff failed to state a claim on which relief could be granted as to her claims of retaliation under the ADEA and under the Rehabilitation Act.

The case is *Bennett v. Hall*, No. 7:23-CV-6006 (CS) (S.D.N.Y. Aug. 3, 2023).

Court Finds Plaintiff's Employment Discrimination Complaint Insufficient

A federal district court in New York has rejected a plaintiff's employment discrimination complaint in which he alleged that his former employer discriminated against him on the basis of his race, his sex, and his age in violation of a variety of federal laws.

The Case

In his complaint, the plaintiff alleged that his employer, BronxCare Health System ("BronxCare"), discriminated against him on the basis of his race (Black), sex (male), and age (born in 1962), in violation of federal law. He also asserted claims under the Family and Medical Leave Act ("FMLA") of 1993.

The plaintiff worked as a patient care technician at BronxCare. On August 22, 2021, an incident occurred at BronxCare in which a minor child receiving psychiatric care alleged that the plaintiff physically abused him. An investigation of the incident – the findings of which the plaintiff disputed – resulted in his firing. As a result of the investigation, conducted by the New York State Justice Center for the protection of People with Special Needs ("Justice Center"), the Justice Center found that the allegations of excessive force and physical abuse were unsubstantiated, but that neglect was substantiated. With respect to the incident, the plaintiff alleged that the minor child who accused him of abuse had become aggressive and that, in response, the plaintiff had

attempted to restrain the child. After another employee intervened and restrained the child, the employee informed the plaintiff that the child had accused the plaintiff of choking him. The plaintiff denied that he choked the child.

The Court's Decision

The court dismissed the plaintiff's complaint.

In its decision, the court explained that Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [the individual's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." The court added that Title VII also prohibits an employer from retaliating against an employee who opposed unlawful employment practices, or who made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation of those practices.

As the court noted, these antidiscrimination provisions prohibit employers from mistreating an individual because of the individual's protected characteristics or retaliating against an employee who has opposed any unlawful practice. However, the court continued, mistreatment at work that occurred for a reason other than an employee's protected characteristics or opposition to unlawful conduct "is not actionable under Title VII."

Here, the court found, the plaintiff's allegations did not give rise to a plausible inference of discrimination based on his race or sex because the plaintiff's complaint did not include facts suggesting that the plaintiff's race or sex were factors in BronxCare's decision to terminate him.

Rather, court reasoned, the allegations suggested that (1) the plaintiff and his employer disagreed about the final findings regarding the incident that took place on August 22, 2021, and (2) BronxCare fired him because of the incident. According to the court, the plaintiff's complaint did not include facts suggesting that BronxCare's proffered reason for firing the plaintiff was a pretext or that BronxCare fired him because of his race or sex. Thus, the court found, the plaintiff's

complaint did not give rise to a plausible inference that the plaintiff's race or sex were factors in BronxCare's decision to fire him.

Next, the court considered the plaintiff's claims under the Age Discrimination in Employment Act of 1967 ("ADEA"). As the court explained, the ADEA makes it unlawful for an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The ADEA protects workers who are at least 40 years old from discrimination because of their age.

The court added that, to state a claim under the ADEA, a plaintiff must allege that an employer took adverse action because of the plaintiff's age; that is, that the plaintiff's age was the reason the employer took an adverse action.

In the court's view, the plaintiff did not allege facts suggesting that the plaintiff's age was the reason BronxCare fired him. Even construing the plaintiff's contention that his nearing retirement factored into the decision to fire him, the court found that the plaintiff's complaint and accompanying information indicated that his employer fired him because of the incident that occurred on August 21, 2021. Therefore, the court ruled, the plaintiff's complaint did not give rise to a plausible inference that the plaintiff's age was the "but for" cause of his firing.

With respect to the plaintiff's claims under 42 U.S.C. § 1981, the court explained that Section 1981 protects the equal right of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. The court noted that a plaintiff bringing a Section 1981 claim for employment discrimination must plausibly allege sufficient facts to demonstrate that:

- The plaintiff is a member of a protected class;
- The plaintiff was qualified for the plaintiff's position;
- The plaintiff suffered an adverse employment action; and

- The adverse action took place under circumstances giving rise to the inference of discrimination.

The court found that the plaintiff alleged facts indicating that he (1) was a member of a protected class; (2) was qualified for his position; and (3) suffered an adverse employment action. The court ruled, however, that the plaintiff did not state any facts "plausibly suggesting that his race was a 'but for' cause for" BronxCare's actions. Because the plaintiff's assertions of race-based discrimination were not supported by specific facts, the court decided that they could not support an inference that race was the "but for" cause for the alleged actions taken against him and the termination of his employment.

Finally, the court addressed the plaintiff's FMLA claims.

The court explained that the FMLA provides that certain eligible employees are "entitled to a total of 12 work weeks of leave during any 12-month period" for any one of several reasons enumerated in the FMLA. The court noted that the FMLA covers, among other things, leave that is necessary "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee."

The court then simply concluded that the plaintiff did not state any facts suggesting that BronxCare violated the FMLA.

The case is *Lee v. Bronx Care Hospital*, No. 23-CV-4069 (LTS) (S.D.N.Y. July 27, 2023).

Plaintiff's Employment Discrimination Claims Were Untimely, Federal Court Concludes

A federal district court in New York has ruled that a plaintiff's claims in an employment discrimination lawsuit were untimely where the plaintiff filed a complaint with the New York State Division of Human Rights ("NYSDHR") more than two years after the termination of his employment. The court also decided that an Equal Employment Opportunity Commission ("EEOC")

form that the plaintiff filed was not a charge of discrimination and, therefore, that his submission of that form to the EEOC did "not make his claim timely."

The Case

The plaintiff, Edward Kirkwood, worked at the Buffalo & Erie County Naval & Military Park ("Buffalo Naval Park") from 1987 until he was fired in May 2019. He alleged that during his time there, he was subjected to "neglect, racism, and numerous other illegal and immoral practices."

For example, Kirkwood said that in December 2017, he was "put in charge of most of the responsibilities" in connection with a "party for the commissioning of the new Little Rock" ship. According to Kirkwood, "[m]any of the white employees at the [Buffalo] Naval Park referred to it as a 'whites only' [p]arty." Kirkwood said that he was not "allowed to bring guests [] on the ship, despite numerous other white employees being able to" and that by the end of the party, "a derogatory term was written on one of the museum's bathroom stalls." Kirkwood said that he was asked to clean that stall "nearly a year later" because "there was going to be an investigation" and Kirkwood's supervisor "didn't want it to affect [Buffalo Naval] Park's image."

According to Kirkwood, after the investigation concluded in October 2018, he was "forced [] to sign a document [that he] was unable to read by [himself]" because of a "learning disability." Although he "request[ed] a reading assistant for the document, [he] was told [that] if [he] didn't sign" the document, he "would no longer have a job." Kirkwood said that he also "was unable to seek any legal counsel" before signing the document. Kirkwood's coworkers were "completely aware of [his] learning disability and took advantage of it to get what they wanted," he said.

Kirkwood also said that he faced several "unsafe working condition[s]" at Buffalo Naval Park. According to Kirkwood, on one occasion, his supervisor made him "clean asbestos without any equipment or training." He said that he had to "buy [his] own [equipment] with the promise of a refund, which was only pa[id] in half with Canadian money."

Kirkwood asserted that he suffered several work-related injuries at Buffalo Naval Park. On October 19, 2017, for example, he said that he "slipped in the showers at work and ended up

breaking one of [his] toes," but his supervisor "would not let [Kirkwood] take any time off" after that injury. About a year-and-a-half later, on March 27, 2019, Kirkwood said, he "fell through the floorboards on the submarine" at Buffalo Naval Park. Multiple employees, including his supervisor saw Kirkwood fall, he said, but no one "filed an accident report." On April 30, 2019, Kirkwood said that he had to "call off of work" because of the injury, and "[o]n the weekend after April 30[, 2019]" Kirkwood "was feeling very ill still and could not work" at an "unscheduled party" at Buffalo Naval Park.

Although Kirkwood saw a doctor after his March 2019 injury and obtained a doctor's note, on May 6, 2019, Kirkwood was fired. Kirkwood said that he was told that he was fired "for not calling in" sick, "even though [he] called in beforehand." Buffalo Naval Park then "lied about the day [Kirkwood] was fired in order to make sure [he] did not receive unemployment benefits."

The day after he was fired, Kirkwood contacted the Equal Employment Opportunity Commission ("EEOC"). Kirkwood said that, shortly afterwards, he "received [F]orm 290A," which he then completed and which he "hand delivered to [the] Buffalo local office" of the EEOC on May 14, 2019. After Kirkwood submitted the completed form, he said that the EEOC "start[ed] to ignore [him]," and he "was told to keep in mind that the [EEOC] process takes time."

In August 2021, Kirkwood filed a discrimination complaint with the New York State Division of Human Rights ("NYSDHR"), and on December 16, 2021, he filed a charge of discrimination with the EEOC. The EEOC and the NYSDHR both dismissed Kirkwood's claims as untimely.

On September 16, 2022, Kirkwood filed a lawsuit against the Buffalo Naval Park and a Buffalo Naval Park employee in a federal district court in New York. He raised claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the New York State Human Rights Law ("NYSHRL").

The defendants moved to dismiss the complaint, asserting that Kirkwood's claims were time barred.

The Court's Decision

The court ruled that Kirkwood's complaint was untimely.

In its decision, the court explained that plaintiffs asserting claims under Title VII, the ADEA, and the ADA must first file a complaint with the EEOC or an equivalent state agency within 300 days of the allegedly discriminatory action.

The court pointed out that Kirkwood filed a complaint with the NYSDHR in August 2021 and a charge of discrimination with the EEOC on December 16, 2021. The court added that because "a complaint filed with the NYSDHR is considered to be cross-filed with the EEOC," Kirkwood's claims would be timely if they related to conduct that occurred no more than 300 days before he filed his August 2021 complaint with the NYSDHR.

The court then ruled that Kirkwood's claims all related "to conduct that occurred before or when his employment was terminated in May 2019" and, therefore, that took place "more than two years before he filed his NYSDHR complaint." For that reason, the court said, those claims appeared to be time barred.

The court recognized that Kirkwood maintained that his claims nevertheless were timely because he submitted Form 290A to the EEOC in May 2019. The court ruled, however, that Form 290A was "not a charge of discrimination," and, therefore, that Kirkwood's submission of that form did "not make his claim timely."

The court reasoned that Form 290A was not a charge of discrimination because it could not be "reasonably construed as a request for the [EEOC] to take remedial action." Moreover, the court said, Form 290A included several explicit warnings – repeated on the bottom of each page – that it was "not a charge of discrimination," and it advised anyone completing the form that he or she still "must file a charge of job discrimination within 180 days from the day [he or she] knew about the discrimination, or within 300 days from the day [he or she] knew about the discrimination if the employer is located where a state or local government agency enforces job discrimination laws on the same basis as the EEOC's laws."

Accordingly, the court concluded that because Kirkwood's Form 290A was not a charge of discrimination, and because Kirkwood filed his complaint with the NYSDHR more than two years after the termination of his employment, his claims were untimely on their face.

The case is *Kirkwood v. Buffalo & Erie County Naval & Military Park*, No. 22-CV-703-LJV (W.D.N.Y. Aug. 3, 2023).

ESI Stipulation Barred Plaintiff's Motion to Compel Social Media Discovery in Case Involving Non-Compete Agreements, Trial Court Decides

A trial court in New York has denied a plaintiff's motion to compel discovery of certain of the defendants' text, social media, and LinkedIn messages in a lawsuit in which the plaintiff alleged that the defendants violated certain non-disclosure, non-solicitation, and non-compete agreements.

The Case

As the court explained, Thomas Mallon joined Latin Markets Brazil, LLC d/b/a Markets Group in 2014 and William McArdle joined Markets Group in 2015. When Mallon and McArdle (together, the "defendants") left Markets Group, they consented to post-employment restrictive covenants relating to non-disclosure of confidential information, non-solicitation of employees and clients, and a non-compete clause.

Mallon's non-solicit and non-compete agreements lasted from July 24, 2020, to July 24, 2021, and McArdle's lasted from July 27, 2020, to July 27, 2021.

During the COVID-19 pandemic, Markets Group transitioned to organizing virtual conferences and created confidential materials in connection with these conferences. In the lawsuit that Markets Group brought against the defendants, Markets Group alleged that the defendants violated their non-competes by using this information to compete with Markets Group and to tortiously interfere with its business relationships. Markets Group brought claims against the defendants for misappropriation of trade secrets, breach of contract, unfair competition, tortious interference, breach of fiduciary duty, and conversion.

Markets Group moved to compel discovery of the defendants' text, social media, and LinkedIn messages for the three-month period before and after they formed their competing company in July 2020.

Markets Group submitted that these communications were patently relevant to the prosecution of their case and were narrowly tailored to the needs of the case. These communications, Markets Group argued, likely would reveal which clients the defendants contacted and attempted to solicit, as well as any other discussions of improperly removing and using Markets Group's confidential materials. Markets Group contended that the three-month scope of its demand was limited in nature and did not constitute a fishing expedition.

The defendants opposed Markets Group's motion to compel, arguing that, with respect to their electronically stored information (ESI), the parties had reached a stipulation (the "ESI stipulation") that prohibited disclosure. The defendants submitted that Markets Group's counsel agreed to not request text messages in the ESI stipulation, and they argued that Markets Group's demand was untimely given that it came more than a year following execution of the ESI stipulation.

The Court's Decision

The court denied the motion filed by Markets Group.

In its decision, the court explained that New York law provides for the "full disclosure" of all matter that is material and necessary in the prosecution or defense of an action. Under this standard, the court continued, disclosure was required "of any facts which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."

However, the court continued, the ESI stipulation, "like any contract," requires the court to adhere to its terms absent fraud, collusion, mistake, or accident. Here, the court pointed out, Markets Group was represented by counsel and consented to a voluntary waiver of discoverable materials when it stipulated that "the following sources of ESI information do not warrant collection,

search, review or production: (a) Voicemail, text messages, personal phones or tablets and instant messages."

Markets Group made no showings of fraud, duress, coercion, or mistake that warranted overturning the ESI stipulation, the court added. Accordingly, it denied Markets Group's motion to compel.

The case is *Latin Markets Brazil, LLC v. McArdle*, 79 Misc. 3d 1224(A) (N.Y. Sup. Ct. N.Y. Co. 2023).

New York Trial Court Grants Plaintiff's Motion to Compel Defendants to Disclose Documents in Case Involving Non-Compete Agreement

In a lawsuit alleging that a former employee violated non-compete and non-solicitation agreements, a trial court has granted the plaintiff's motion to compel the disclosure of documents held by the defendants.

The Case

As the court explained, in July 2018, plaintiff Tact Corporation of New York City, which specialized in the placement of healthcare professionals in healthcare facilities, hired Douglas Larson as a travel-nurse recruiter. The plaintiff promoted Larson to director of client services in March 2019. As a condition of his employment, the plaintiff required Larson to sign agreements containing non-compete, non-solicitation, and confidentiality provisions.

In the lawsuit that the plaintiff subsequently filed against Larson, the plaintiff alleged that, during his employment with the plaintiff, Larson formed Selected Healthcare, which also provided healthcare professionals to medical facilities. The plaintiff alleged that it terminated Larson's employment in May 2022 after determining "that Larson was, most likely, assisting a competitor."

The plaintiff alleged that Larson violated the non-compete and non-solicitation provisions of his agreements, and that he breached fiduciary duties that he owed to the plaintiff. The plaintiff

also asserted claims against Selective Healthcare, including for unfair competition and unjust enrichment.

The defendants counterclaimed for breach of contract and unjust enrichment. They alleged that the plaintiff failed to pay Larson for employee referrals that he had made to it.

The plaintiff moved to compel the defendants to disclose four separate categories of documents.

The plaintiff's first category of documents that it sought included "documents and communications concerning defendants' solicitation of individuals employed by or associated with Tact." The plaintiff argued that these documents were material and necessary to the question of whether the defendants were "actively soliciting employees and candidates about whom Larson learned while employed by Tact in violation of the Covenant Agreement and Non-Solicitation and Confidentiality Agreement."

The defendants interpreted the first category of the plaintiff's document requests as including information concerning Selective Healthcare's employment of "any person." The defendants argued that the scope of this request was irrelevant and overly broad, "as Larson may communicate with individuals who have no connection to Tact." The plaintiff, however, asserted that, communications between the parties in November 2022 put the defendants on notice that the plaintiff only sought documents pertaining to individuals with a current or prior association with the plaintiff. Further, the plaintiff claimed that although the defendants did ultimately submit to the plaintiff documents included in this first category, they only submitted documents that were relevant to "the first three months of Selected Healthcare's approximately 17 months in operation."

The plaintiff's second and third categories of document requests concerned the defendants' alleged solicitation and/or business with healthcare professionals and medical facilities associated with the plaintiff. The plaintiff argued that these categories of documents were relevant to "establish[ing] that Larson violated the Agreements."

The defendants argued that these categories, too, were overbroad, because they placed "no limitation as to the subject matter of said communications." In response, the plaintiff claimed that, as with the first category of document requests, the defendants' communications to the plaintiff in November 2022 proved that they understood the limits of the plaintiff's requests.

The defendants also argued that the plaintiff's request for Larson's communications with any of the plaintiff's "prospective" healthcare professionals would require the defendants to "produce virtually all of [Larson's] communications with any candidate," because the defendants would be unable "to determine whether an individual could be a *prospective* Tact healthcare professional." The plaintiff responded that its use of the word "prospective" only included those healthcare professionals "about whom Larson learned while employed at Tact," eliminating any need for speculation.

The plaintiff's fourth category of document requests included "documents and communications concerning defendants' financial earnings" from November 2021 through the present. The plaintiff argued that documents concerning the defendants' financial earnings were necessary to calculate damages.

The defendants again argued that the plaintiff's request was overbroad and irrelevant, but the plaintiff claimed that its request only sought those documents pertaining to revenue that defendants received from current, former, or prospective Tact clients. The defendants also contended that they should not be required to disclose any documents relating to the period following Larson's termination, because the restrictive covenants were unenforceable.

The Court's Decision

The court granted the plaintiff's motion with respect to all four categories of documents the plaintiff sought.

First, the court ruled that because the non-solicitation and confidentiality agreements remained enforceable for two years from the termination of Larson's employment, the plaintiff's first category of document requests sought "potentially relevant information." Accordingly, the court

granted the branch of the plaintiff's motion seeking disclosure of the first category of documents, as narrowed (or clarified) by the plaintiff's representations on its motion about the scope of that category.

With respect to the second and third categories, the court reasoned that because the underlying agreements explicitly referred to "prospective" clients and customers, this information was "material" to the plaintiff's claims. The court also clarified that, based on the plaintiff's representations, that the plaintiff only sought the defendants' documents that concerned their communications with clients who also were associated with Tact. "These documents," the court said, were "material and necessary" to establishing whether the defendants breached the parties' agreements. The court then granted the branch of the plaintiff's motion seeking disclosure of the second and third categories of documents, narrowed as the court described.

The court also agreed with the plaintiff regarding the fourth category of documents and granted its motion. Notably, the court rejected the defendants' contention that they should not be required to disclose any documents relating to the period following Larson's termination on the ground that the restrictive covenants were unenforceable. The court ruled that the enforceability of the parties' agreement "should be decided *after* the parties engage in discovery."

The case is *Tact Corp. of New York City v. Selected Healthcare Staffing, LLC*, No. 656349/2022 (N.Y. Sup. Ct. N.Y. Co. Aug. 1, 2023).

Plaintiff Awarded Judgment on Promissory Note Signed By Former Employer as Part of Separation Agreement Despite Former Employer's Contention That Plaintiff Breached His Fiduciary Duty to the Former Employer

A New York trial court has ruled that a former director of a company may enforce a promissory note signed by the company as part of a separation agreement notwithstanding that the company alleged that the former director fraudulently induced the company into signing the note by

concealing that, before the separation, he was using the company's proprietary information and other resources to create a competing business.

The Case

The plaintiff, a former corporate director of defendant M3dicine Holdings, Inc., and its two subsidiaries, sued M3dicine Holdings to recover on a promissory note executed by M3dicine Holdings in February 2021, which the plaintiff claimed imposed an unconditional and unequivocal obligation on M3dicine Holdings to pay the plaintiff past due compensation for his services.

M3dicine Holdings pointed out that the promissory note was an exhibit to an agreement (the "Master Agreement") between the plaintiff and M3dicine Holdings that also was executed in February 2021, on the date the plaintiff separated from M3dicine Holdings' employment. M3dicine Holdings claimed that the plaintiff fraudulently induced M3dicine Holdings into both agreements by concealing that, before the separation, he was using M3dicine Holdings' proprietary information and other resources to create a competing business, Medaica, LLC.

The plaintiff asked the court to grant summary judgment in his favor on the enforceability of the promissory note.

The Court's Decision

The court granted summary judgment in favor of the plaintiff.

In its decision, the court explained that the parties did not dispute that the plaintiff during his employment with M3dicine Holdings acquired access to M3dicine Holdings' business plan, trade secrets, and other confidential information regarding the design, development, and commercialization of medical devices, diagnostic medical software, and web-based telemedicine platforms. The court pointed out that although a M3dicine Holdings' witness attested that during negotiation of the Master Agreement and promissory note the plaintiff misrepresented that he did not intend to compete with M3dicine Holdings, neither contract prohibited the plaintiff from competing. Moreover, the court continued, the Master Agreement's release and merger provisions

barred M3dicine Holdings' reliance on the plaintiff's representations before the agreement's execution.

In particular, the court explained that in Section 8(b) of the Master Agreement, M3dicine Holdings released the plaintiff from all "contracts, agreements and obligations and liabilities . . . including without limitation such claims and defenses as fraud, mistake," except obligations under the promissory note, Master Agreement, and any contemporaneous agreement. Section 11 of the Master Agreement, the court continued, provided that the Master Agreement "constitutes the entire agreement among the Parties . . . and supersedes all prior agreements and undertakings, both written and oral, among the Parties." Therefore, the court ruled, M3dicine Holdings failed to demonstrate justifiable reliance on any alleged misrepresentations to support a claim by M3dicine Holdings for fraudulent inducement.

As the court reasoned, if M3dicine Holdings was relying on the plaintiff's promise that the plaintiff had no competing interest with M3dicine Holdings while it employed him or that he would refrain from competing, as a condition for payment under the promissory note, "it was incumbent on [M3dicine Holdings] to include such a provision in the note or Master Agreement."

The court also was not persuaded by M3dicine Holdings' contention that the note was not payable because the plaintiff breached the fiduciary duty he owed to M3dicine Holdings. According to the court, any such breach of the plaintiff's fiduciary duty did "not invalidate the Master Agreement, let alone the promissory note." The court ruled that the note was enforceable "independent of plaintiff's breach of other obligations," and that "[n]either the note nor the Master Agreement" was conditioned on the plaintiff "performing other duties or refraining from tortious conduct."

The court stated that the plaintiff's alleged breach of his fiduciary duty and any other torts that the defendant sought to interpose as counterclaims to payment of the promissory note, such as misappropriation of intellectual property or tortious interference with M3dicine Holdings' contracts or business relations with nonparties, could be asserted and brought forth by M3dicine

Holdings “in a separate action.” The court noted that M3dicine Holdings did not show that it would suffer any prejudice by pursing those claims in a separate action.

Consequently, the court granted summary judgment in favor of the plaintiff for the principal amount of the promissory note, $287,500, with interest at 9% per year from March 7, 2022, seven days after the note became due, as the note provided. The court added that the note also provided for the plaintiff’s recovery of his reasonable attorneys’ fees and expenses for the lawsuit to enforce the note, and it referred the issue of the amount of attorneys’ fees to be awarded to the plaintiff to a judicial hearing officer or special referee to hear and determine.

The case is *Rivas v. M3dicine Holdings, Inc.*, No. 651725/2022 (N.Y. Sup. Ct. N.Y. Co. July 21, 2023).