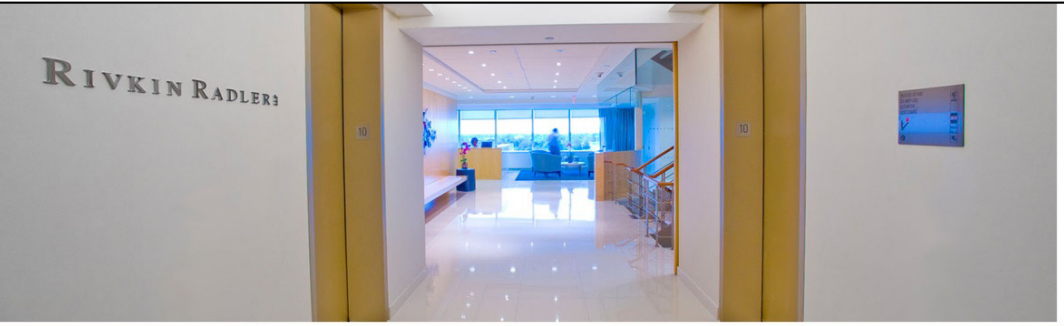

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Employers Violate Federal Law for Firing Employees Merely for Being Gay or Transgender, U.S. Supreme Court Rules

The U.S. Supreme Court, in a landmark decision by Justice Neil Gorsuch, has ruled that an employer that fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

The Case

The case involved three long-time employees who were fired shortly after revealing that they were homosexual or transgender, and allegedly for no reason other than their homosexuality or transgender status. As the Court explained:

- Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. After a decade with the county, he began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.
- Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, he mentioned that he was gay and, days later, was fired.
- Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan.

When she got the job, Stephens presented as a male. In her sixth year with the company, Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

All three of the employees brought suit against their former employers under Title VII, alleging unlawful discrimination on the basis of sex.

In Bostock's case, the U.S. Court of Appeals for the Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay, and so his suit could be dismissed as a matter of law.

In Zarda's case, the U.S. Court of Appeals for the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed.

In Stephens' case, the U.S. Court of Appeals for the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status.

During the course of their lawsuits, both Zarda and Stephens died, but their estates continued to press their causes for the benefit of their heirs.

The Supreme Court granted certiorari to resolve the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

The Supreme Court's Decision

The Court ruled, by a vote of 6-to-3, that an employer that fires an individual merely for being gay or transgender violates Title VII.

The majority opinion observed that Title VII outlaws discrimination in the workplace on the basis of race, color, religion, sex, or national origin. The Court explained that the question it had to decide was "whether an employer can fire someone simply for being homosexual or transgender."

The Court then declared that the answer was "clear." It stated:

An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

The Court reasoned that, from the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerged: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. The Court added that "[i]t doesn't matter if other factors besides the plaintiff's sex contributed to the decision." If an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee – put differently, if changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred.

Thus, the Court concluded, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions."

The case is *Bostock v. Clayton County*, No. 17-1618 (U.S. June 15, 2020).

Second Circuit Affirms Dismissal of All 19 of Plaintiff's Employment Discrimination Claims

The U.S. Court of Appeals for the Second Circuit has affirmed a decision by the U.S. District Court for the Eastern District of New York dismissing all 19 employment discrimination claims brought by a plaintiff against various defendants.

The Case

The plaintiff in this case sued a number of defendants, asserting claims ranging from unlawful discharge due to discrimination based on race, national origin, and sex in violation of Title VII of the Civil Rights Act of 1964 and unlawful discharge due to intentional discrimination based on race in violation of 42 U.S.C. § 1981 to unlawful discharge due to discrimination based on race, national origin, and sex in violation of the New York State Human Rights Law and unlawful retaliation in violation of the New York Labor Law, among other things.

The district court dismissed all of the plaintiff's claims, and the plaintiff appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit affirmed.

In its decision, the circuit court:

- Affirmed the district court's dismissal of all of the plaintiff's Title VII claims as time barred;
- Affirmed the district court's dismissal of the plaintiff's claims for breach of contract, fraud, and intentional infliction of emotional distress because the plaintiff had "waived further judicial review of those claims";

- Affirmed dismissal of all of the plaintiff's employment discrimination claims governed by the pleading standard articulated in *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015), because the plaintiff failed to sufficiently plead facts that supported "a minimal inference of discriminatory motivation" or that indicated, either directly or by inference, that any of the allegedly adverse employment actions taken by any of the defendants were on the basis of the plaintiff's race, national origin, or gender;
- Affirmed dismissal of claims alleging that defendants had paid or had offered her less than they had paid or had offered similarly situated male employees, finding that she had "not alleged anything about her actual job duties or the actual job duties of her putative comparators";
- Affirmed dismissal of one unlawful retaliation claim, concluding that the plaintiff had not alleged that she had been retaliated against for engaging in protected activity;
- Affirmed dismissal of another unlawful retaliation claim, finding that the plaintiff had failed to adequately plead causation; and
- Affirmed dismissal of the plaintiff's claim alleging a breach of the implied covenant of good faith and fair dealing, observing that New York law does not recognize a separate cause of action for a good faith claim when a breach of contract claim also was pled based on the same facts.

The case is *Wu v. Good Samaritan Hospital Medical Center*, No. 19-2209-cv (2d Cir. May 20, 2020).

Second Circuit Upholds Dismissal of Employment Discrimination Claims Against New York City Transit Authority

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 rejecting employment discrimination claims brought by an employee of the New York City Transit Authority.

The Case

After the Transit Authority posted a job opening for a management position, six candidates – including Violet Montgomery and Robert Gorvetzian – were interviewed for the position by a four-person panel. Each member of the panel ranked Gorvetzian as his or her top choice for the position. Thereafter, Gorvetzian was offered and accepted the job.

Montgomery filed a complaint with the U.S. Equal Employment Opportunity Commission (the "EEOC") claiming that she had been discriminated against based on her gender and race. Specifically, she alleged that "a white male with less education, qualifications, and experience" had been given the job instead of her.

According to Montgomery, the EEOC found that there was probable cause to believe that she was a victim of unlawful workplace discrimination based on her race and gender, and she sued.

The district court granted the Transit Authority's motion for summary judgment and dismissed Montgomery's gender- and race-based employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, the New York State Human Rights Law (the "NYSHRL"), and the New York City Human Rights Law (the "NYCHRL"). The district court found that Montgomery had not presented evidence that would permit a reasonable factfinder to conclude

that the Transit Authority's reasons for promoting Gorvetzian were pretextual or that the Transit Authority had picked Gorvetzian over Montgomery more likely than not for a discriminatory reason.

Montgomery appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit affirmed.

In its decision, the circuit court first considered Montgomery's employment discrimination case under Title VII, Section 1981, and the NYSHRL.

The Second Circuit found that there was "ample, contemporaneous evidence that Gorvetzian was the best applicant for the promotion."

The circuit court also found that Montgomery had not presented "any concrete evidence that she was discriminated against because of her gender or race." The circuit court reasoned that, given the absence of evidence of discrimination and the "extensive evidence" that Gorvetzian was the better-qualified applicant, "no reasonable jury could find pretext or a discriminatory motive."

Finally, the Second Circuit agreed with the district court that Montgomery had failed to prove her NYCHRL claim, concluding that no reasonable juror could find that Montgomery had been treated "less well" because she belonged to a protected class or that discrimination had played any role in the application process.

The case is *Montgomery v. New York City Transit Authority*, No. 19-1036-cv (2d Cir. March 18, 2020).

District Court Refuses to Dismiss Plaintiff's Employment Discrimination Claim, But Rejects Her Hostile Work Environment Claim

The U.S. District Court for the Northern District of New York has refused to dismiss a plaintiff's employment discrimination claim against her former employer, a bank, but it did dismiss the plaintiff's hostile work environment claim.

The Case

Lilian Kiraka, a "black African" female from Tanzania, sued M&T Bank *pro se*, asserting claims for employment discrimination under Title VII and hostile work environment under Title VII. The bank moved to dismiss. It argued that Kiraka had failed to plead facts indicating that she was qualified for her employment role at the bank and failed to plead facts indicating that her termination had occurred under circumstances giving rise to an inference of discriminatory intent.

The Court's Decision

The district court denied the bank's motion.

In its decision, the court explained that a plaintiff asserting a claim under Title VII may establish a *prima facie* case by showing that:

(1) The plaintiff belonged to a protected class;

(2) The plaintiff was qualified for the position the plaintiff held;

(3) An adverse employment action occurred; and

(4) The adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent.

The court then analyzed these four elements as alleged in Kiraka's complaint.

First, the court said, Kiraka alleged that the bank discriminated against her based on her race, sex, national origin, and marital status. The court noted that Kiraka, a "black African" female from Tanzania, was a member of a protected class under Title VII.

Second, the court continued, Kiraka worked for the bank prior to her termination, which was sufficient to satisfy that she was qualified for the position.

Third, the court added, Kiraka alleged that she had been terminated, which qualified as an adverse employment action, and she also alleged that her job responsibilities were diminished.

Next, the court pointed out that Kiraka claimed that a co-worker "told [her that] she does not like the way [she] talk[s]," and that the following week she was not allowed to leave even though her work day was finished. The court noted that Kiraka additionally alleged that a "black African male" had been hired one month after she had been hired and that he had been given vacation time, but that she had not been given time to find daycare for her child.

The court then held that, for these reasons and in deference to Kiraka's *pro se* status, Kiraka had pleaded enough facts for it to plausibly infer that she had suffered an adverse employment action because of her membership in a protected class. Therefore, the court denied the bank's motion to dismiss Kiraka's employment discrimination claim under Title VII.

The court, however, reached a different conclusion regarding Kiraka's hostile work environment claim under Title VII.

The court explained that a plaintiff asserting a hostile work environment claim under Title VII could establish a *prima facie* case by showing that the conduct complained of was objectively severe or pervasive; created an environment that the plaintiff subjectively perceived as hostile or abusive; and created such an environment because of the plaintiff's sex, race, or any other characteristic protected by Title VII.

The court found that Kiraka had not stated a plausible claim under Title VII. The court said that even if it were true that a co-worker "told [her that] she does not like the way [she] talk[s]," this comment was "insufficient to state a plausible hostile work environment claim."

The court also decided that Kiraka's "conclusory allegations" failed to demonstrate that she had been subjected to hostility because of her membership in a protected class. Thus, the court concluded, although Kiraka argued that the bank's behavior could "reasonably be considered to adversely affect[] [her] work environment," she failed to set forth allegations sufficient to survive a motion to dismiss that claim.

The case is *Kiraka v. M&T Bank*, No. 6:18-cv-1264 (GLS/TWD) (N.D.N.Y. March 18, 2020).

Federal Court Rejects Plaintiff's Employment Discrimination Action Against Dollar Tree Stores

The U.S. District Court for the Eastern District of New York has granted an employer's motion for summary judgment in an employment discrimination lawsuit brought by its former employee.

The Case

The plaintiff in this case, proceeding *pro se*, filed an employment discrimination action against his former employer, Dollar Tree Stores. He alleged that he had been fired by Dollar Tree from his position as an assistant manager because of his race and national origin.

The plaintiff demanded judgment against Dollar Tree in the amount of $5 million, including back pay, plus costs or other disbursements.

Dollar Tree moved for summary judgment on all claims.

The District Court's Decision

The court granted Dollar Tree's motion for summary judgment.

In its decision, the court explained that the plaintiff had failed to bring any administrative proceeding against Dollar Tree before the Equal Employment Opportunity Commission. Therefore, the court stated, the plaintiff's "claims [that could have been] brought in an administrative proceeding or be reasonably related to those brought in such a proceeding" – that is, the plaintiff's claims under Title VII of the Civil Rights Act of 1964 – were foreclosed.

The court nevertheless analyzed these claims on their merits, concluding that the plaintiff failed to sufficiently allege a claim under Title VII.

The court pointed out that the plaintiff's allegations of racial or discriminatory animus were "largely about his co-workers," but that none of these co-workers had been involved in the decision to terminate him. Moreover, the court continued, the only evidence for alleged animus was the plaintiff's own deposition testimony. This testimony was "insufficient to survive summary judgment," according to the court.

The court then found that even if the plaintiff had established a *prima facie* case of discrimination, Dollar Tree had met its burden in providing a legitimate, non-discriminatory reason for the plaintiff's termination.

Finding that the plaintiff had provided no evidence that Dollar Tree's reasoning was pretextual, the court concluded that the plaintiff had "failed to show he was fired based on his race, national origin, or any other protected characteristic" and that he had "no employment discrimination claim."

The case is *Taylor v. Dollar Tree Stores*, No. 18-CV-1306-SJB (E.D.N.Y. May 13, 2020).

Plaintiff Requested $6.7 Million in Attorneys' Fees and Costs;

Court Awards $1.5 Million

The U.S. District Court for the Southern District of New York has issued a decision explaining how it calculated the award of attorneys' fees and costs to a plaintiff who had obtained a judgment in an employment discrimination case.

The Case

Enrichetta Ravina, a former junior faculty member at Columbia Business School, sued Geert Bekaert, a tenured member of the faculty, and Columbia University, alleging, among other things, gender discrimination and retaliation in violation of the New York City Human Rights Law (the "NYCHRL").

After a 15 day trial, a jury found that Ravina had failed to prove that either Bekaert or Columbia had discriminated against her, but that Bekaert had retaliated against her for accusing him of sexual harassment. The jury found that Columbia was not liable for any retaliatory acts of its own but that it was nonetheless strictly liable under the NYCHRL for Bekaert's retaliatory conduct.

The jury awarded Ravina $750,000 in compensatory damages against Bekaert and Columbia and $500,000 in punitive damages against Bekaert only, which the court later remitted to $500,000 in compensatory damages and $250,000 in punitive damages.

The NYCHRL provides for an award of reasonable attorneys' fees and costs to a prevailing plaintiff, and Ravina moved for attorneys' fees and costs. She sought $5,880,360.56 in attorneys' fees for the services of her law firm and $736,840.34 in costs, as well as $101,753.85 for her out-of-pocket legal costs for her prior counsel.

Columbia proposed awarding Ravina's law firm $973,342.68 in attorneys' fees and $39,533.03 in costs.

The District Court's Decision

The court awarded attorneys' fees in the amount of $1,336,861.63 and costs in the amount of $222,390.08, for a total award of $1,559,251.71.

In its decision, the court explained that Ravina, as the party seeking fees, had the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. It noted that Ravina sought hourly rates of $850 to $1,200 for her law firm's partners and one senior litigation counsel; $750 for other senior litigation counsels; $425 to $475 for associates; $300 for summer associates; and $150 for 15 different legal assistants.

For its part, Columbia proposed hourly rates of $575 for partners, $375 for associates, and $150 for legal assistants.

To decide the hourly rates it would use, the court considered factors including the time and labor required, the novelty and difficulty of the questions, Ravina's lawyers' attorneys' customary billing rates, the fact that the fees were contingent, the amount involved in the case and the results obtained, the experience and ability of Ravina's attorneys, and awards in similar cases. It then held that Ravina's proposed rates were excessive, but that Columbia's proposed rates for some of Ravina's attorneys were unreasonably low.

Accordingly, it applied an across-the-board 35 percent reduction to Ravina's proposed rates for all partners, senior litigation counsel, associates, fellows, and summer associates. Noting that Columbia did not dispute Ravina's proposed hourly rate of $150 for legal assistants, the court accepted this hourly rate as reasonable in light of the rates that courts in the Southern District of New York had recently approved in similar cases.

The court then observed that Ravina sought attorneys' fees for approximately 13,284 hours of work. The court ruled that the total number of hours for which Ravina sought reimbursement was "excessive" and that her law firm had "overstaffed the case." Therefore, the court reduced the number of billed hours by 35 percent. After concluding that the majority of the entries on the firm's time sheets were appropriately detailed, it decided that only a "modest reduction" of compensable hours by a further five percent was appropriate on that basis.

Finally, the court reduced Ravina's hours by an additional 35 percent for hours worked on unsuccessful claims.

In sum, therefore, the court reduced Ravina's hours by 75 percent in total: 35 percent to account for "the excessive hours expended and inefficient staffing," five percent to account for "the vague time entries and block billing," and 35 percent to account for "Ravina's lack of success on her claims based on Columbia's conduct."

Next, the court reduced reimbursement of all of Ravina's costs by 35 percent for the same reasons it reduced Ravina's fee award, denied in full Ravina's request for reimbursement of legal fees and costs she paid to her prior counsel (finding that they "did not contribute meaningfully to Ravina's success on the merits of her retaliation claim"), and concluded by awarding Ravina a total award of $1,559,251.71.

The case is *Ravina v. Columbia University*, No. 16-CV-2137 (RA) (S.D.N.Y. March 6, 2020).

District Court Dismisses All Claims Asserted by Plaintiff in Employment Discrimination Suit

The U.S. District Court for the Eastern District of New York has issued a decision dismissing all claims brought against two defendants by a plaintiff in an employment discrimination lawsuit.

The Case

Benjamin Stathatos filed an employment discrimination lawsuit, *pro se*, on June 6, 2018. He alleged multiple claims against two defendants: the company where he was last employed, William Gottlieb Management ("WGM"), and a senior investigator with the Special Victim's Bureau of the New York County District Attorney's Office, Lauren Liebhauser.

The plaintiff's first claim was for religious discrimination against WGM. His second claim was for conspiracy against Liebhauser. The third set of the plaintiff's claims were for various state criminal law violations allegedly committed by both defendants. Finally, the plaintiff also brought a claim of defamation against WGM..

The defendants moved to dismiss.

The Court's Decision

The court granted the defendants' motions to dismiss.

In its decision, the court first considered the plaintiff's religious discrimination claim. The court pointed out that the plaintiff had filed his action "1,183 days after the last purportedly discriminatory act." It then ruled that the claim was untimely. The court also noted that the plaintiff had failed to exhaust his administrative remedies because he had not filed with the Equal Employment Opportunity Commission within the mandated 300 day window.

In addition, the court continued, even if the plaintiff's claim had been timely, his complaint had not provided "any facts" that addressed his claim of religious discrimination.

The court next ruled that this "factual deficiency" extended to the plaintiff's conspiracy claim against Liebhauser.

Then, the court decided that the plaintiff did not have standing to assert the criminal charges contained in his complaint.

Finally, the court ruled that the plaintiff's defamation claim had to be dismissed because the one year statute of limitations for a defamation claim had passed.

The case is *Stathatos v. William Gottlieb Management*, No. 18-CV-03332(KAM)(RER) (E.D.N.Y. April 6, 2020).

Court Rejects Disability Discrimination Claim Stemming from Application Process

The U.S. District Court for the Southern District of New York has granted summary judgment to a defendant in an employment discrimination lawsuit alleging that it had unlawfully discriminated against the plaintiff on the basis of his disability.

The Case

The plaintiff in this case alleged that the Metropolitan Transit Authority Bus Company ("MTA Bus") had unlawfully discriminated against him on the basis of his disability, in violation of Section 504 of the Rehabilitation Act of 1973 (the "Rehab Act"); the New York State Human Rights Law (the "NYSHRL"); and the New York City Human Rights Law (the "NYCHRL").

In particular, the plaintiff alleged that he was born hard of hearing, was fully deaf in his right ear, and primarily communicated in American Sign Language ("ASL"), but that he took an

employment examination for a job with MTA Bus without an ASL interpreter and that he failed the exam.

MTA Bus moved for summary judgment. It argued that the plaintiff was not qualified for the position he applied for and that he had been provided with a reasonable accommodation by being given the oral instructions for the exam in writing.

The Court's Decision

The court ruled that MTA Bus was entitled to summary judgment.

In its decision, the court found that the plaintiff had not provided evidence capable of demonstrating that he was qualified for the position he applied for. Because the plaintiff failed to demonstrate a genuine issue of fact as to whether he was qualified for the position, the court ruled, summary judgment for MTA Bus on the plaintiff's disparate-treatment claims – under the Rehab Act, the NYSHRL, and the NYCHRL – therefore was appropriate.

The court next rejected the plaintiff's argument that the MTA Bus policy of not providing ASL interpreters as an accommodation to any examinee had a "disparate impact" on deaf and hard-of-hearing individuals. Among other things, the court concluded that the plaintiff had not pointed to "any evidence in the record" to support his contention that the policy had a "disparate impact on deaf and hard-of-hearing applications."

The case is *Williams v. Metropolitan Transit Authority Bus Co.*, No. 17cv7687 (DF) (S.D.N.Y. April 20, 2020).

New York Court Enforces Non-Recruitment Clause

A New York trial court has granted summary judgment in favor of the plaintiffs in a case in which they alleged that the defendants had violated a non-recruitment clause following the sale of a company.

The Case

In February 2014, First American Financial Corporation, Interthinx, Inc., Verisk Analytics, Inc., and Insurance Services Office, Inc. ("ISO") entered into a purchase agreement under which First American agreed to purchase 100 percent of the shares of Interthinx from Verisk and ISO. Pursuant to the purchase agreement, Verisk and ISO agreed, among other things, that they would not "solicit" or "hire" certain specified key employees from Interthinx for two years after the closing.

First American asserted, however, that before the two year period had expired, Verisk and ISO had hired back one of the named key employees who First American had expected would continue working with Interthinx.

In response, Verisk and ISO denied soliciting the employee, asserted that First American had failed to show that they had used wrongful means to hire him, and argued that First American had waived its right to enforce the non-recruitment clause because it had done nothing to stop the employee from rejoining Verisk after learning of his hiring.

First American and Interthinx sued Verisk and ISO, and the parties moved for summary judgment.

The Court's Decision

The court granted summary judgment in favor of First American and Interthinx.

In its decision, the court explained that although the employee was not bound by any restrictive covenant as an at-will employee, First American had "bargained explicitly to protect itself" from the loss of key employees to Verisk after its purchase of Interthinx.

The court then ruled that the non-recruitment clause was enforceable because it was "reasonable in scope" and imposed "no meaningful burden on Verisk." According to the court, hiring the employee from Interthinx, "even without solicitation," violated the purchase agreement.

The court concluded that the defendants' assertions that First American had waived its rights under the restrictive covenant and that the restrictive covenant was unenforceable lacked merit and were insufficient to defeat summary judgment. It concluded that the amount of the loss incurred by First American as a result of the breach warranted a trial on that issue.

The case is *First American Financial Corp. v. Verisk Analytics, Inc.*, No. 650850/15 (Sup. Ct. N.Y. Co. April 19, 2020).

Court Issues Preliminary Injunction Enjoining Business Seller from "Enticing Away" His Former Officers or Employees

A New York trial court has issued a preliminary injunction barring the seller of a business from hiring, offering to hire, or enticing away former employees subject to a non-solicitation clause, for his own account or for other companies.

The Case

The purchase agreement under which a subsidiary of Ascential Group Limited purchased the shares of OneClickRetail.com, LLC ("OCR") from Spencer Millerberg and others contained a non-solicitation clause applicable to Millerberg, among others, for a period of six years from the

closing date. The employment agreement Millerberg signed also contained a non-solicitation clause.

Ascential subsequently sued Millerberg. In its lawsuit, Ascential moved for, among other things, a preliminary injunction enjoining Millerberg from hiring or "enticing away" any Ascential officers or employees.

The Court's Decision

The court granted the preliminary injunction.

In its decision, the court explained that, to obtain a preliminary injunction, Ascential had to "demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor."

The court then observed that, in claiming that Millerberg had violated the non-solicitation provisions of the purchase and employment agreements, Ascential focused on Millerberg's alleged solicitation of Hugh Hinkson, a former OCR employee who left OCR to join Pattern, an alleged competitor of Ascential. The court added that, as acknowledged by Millerberg, Millerberg had a meeting with Garrett Bluhm, a Pattern employee, at Bluhm's request; that Bluhm had brought a "stack of printed LinkedIn profiles" for employees he was considering hiring and had asked Millerberg about the individuals in the profiles, including Hinkson; and that Millerberg had told Bluhm that Hinkson was among the top three people Bluhm "should steal from" OCR.

The court found that Millerberg's actions went "far beyond merely answering questions honestly or giving a reference." In this context, the court continued, Millerberg's provision of advice to Hinkson about interviewing and negotiating a job offer with Pattern could "not be dismissed as advice to a friend" but, rather, supported Ascential's claim that Millerberg had facilitated Pattern's hire of Hinkson away from Ascential.

Accordingly, the court ruled, Ascential had demonstrated "at least indirect solicitation." Irreparable harm was presumed, the court concluded, because the anti-solicitation covenant arose in connection with Millerberg's sale of his business.

The case is *Ascential Group Ltd. v. Millerberg*, No. 657340/2019 (Sup. Ct. N.Y. Co. May 28, 2020).

Court Refuses to Enforce Geographically Overbroad Non-Compete Clause

A New York trial court has refused to enforce a non-compete clause contained in an employment agreement after finding that its geographical scope was overbroad.

The Case

Stone Source, LLC, sued a former employee, Jennifer Hubbard, alleging that Hubbard had breached a restrictive covenant in her employment agreement with Stone Source when she left to work for Soho Studio LLC a/k/a Tilebar. Stone Source sought a permanent injunction enforcing the non-compete clause.

Hubbard moved to dismiss Stone Source's cause of action for the permanent injunction.

The Court's Decision

The court granted Hubbard's motion.

In its decision, the court explained that a restrictive covenant only would be upheld to the extent that it was "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."

Here, the court said, the "critical issue" that "torpedoe[d]" the non-compete clause was that its geographic scope was "unreasonable and unenforceable" because its restricted territory –

throughout all of the United States and Canada – was "broader than the area that [Hubbard] covered during her employment."

The court concluded that because the territory was "undeniably beyond the area she covered during her active employment period" and because she was "not being compensated for this amount of forbearance," the restriction was not enforceable and Stone Source was not entitled to a permanent injunction.

The case is *Stone Source, LLC v. Hubbard*, No. 657224/2019 (Sup. Ct. N.Y. Co. April 13, 2020).