

# Employee Relations LAW JOURNAL

**From the Courts** \_\_\_\_\_

## **Discrimination and Non-Competition Developments in New York**

*By Kenneth A. Novikoff*

**T**his column discusses a number of recent employment discrimination cases and cases involving complaints stemming from non-competition agreements. All of the decisions analyzed in this column are by New York courts – federal and state. The courts’ decisions have broad applicability and illustrate key principles about federal and state employment discrimination laws as well as the enforceability of non-compete agreements under New York law.

### **SECOND CIRCUIT COURT OF APPEALS AFFIRMS DECISION DISMISSING EMPLOYMENT DISCRIMINATION CLAIMS AGAINST U.S. ATTORNEY’S OFFICE FOR THE WESTERN DISTRICT OF NEW YORK**

The U.S. Court of Appeals for the Second Circuit has affirmed a district court’s decision dismissing employment discrimination claims brought by a former victim witness coordinator against her former employer – the U.S. Attorney’s Office for the Western District of New York (the “Office”).

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### ***The Case***

The plaintiff in this case worked as a victim witness coordinator in the Office from 1996 until 2016. Her responsibilities included managing the victim witness program, handling witness management for trials, making witness travel arrangements, answering victim questions, notifying victims of case status and rights, accompanying victims to court proceedings and making referrals to victim assistance agencies.

The plaintiff asserted that, since approximately 2005, she had suffered from celiac disease and irritable bowel syndrome, and that she had undergone frequent treatment for kidney stones, which required surgical intervention. As the plaintiff's condition worsened, a series of incidents occurred during which the Office attorneys were unable to reach her after hours.

On June 24, 2015, the plaintiff filed a request for accommodation seeking "[r]emoval from on call" due to what she said was the worsening of her celiac disease.

The parties then began discussions regarding whether after-hours on-call availability was an essential function of the plaintiff's position and whether a reasonable accommodation could be provided.

On September 18, 2015, before the parties resolved the accommodation request and on-call availability issues, the plaintiff applied for leave under the Family and Medical Leave Act ("FMLA"), stating that she would be unable to work for an indefinite period of time. Before her FMLA leave was set to expire, she submitted a new FMLA form on December 8, 2015, seeking to continue her leave. Her medical certification included a letter from her treatment provider stating that the plaintiff could perform "[n]o work of any kind." The provider's letter also explained that "[t]hese conditions are NOT expected to improve and the date of possible partial recovery is 12 months from 12/7/2015."

A few days later, the Office informed the plaintiff that her extended absence "had a significant impact" on the Office and that her taking an additional six-month absence "without any indication of a possible return date" could warrant action.

The plaintiff subsequently applied for disability retirement. Ultimately, the Office denied the plaintiff additional leave without pay. Approximately seven months after taking what had become indefinite leave, the plaintiff was terminated.

The plaintiff filed suit against the Office, claiming that its insistence on continued after-hours availability represented a failure to accommodate her medical conditions, created a hostile work environment, and demonstrated that the Office was targeting her for removal because she was a woman and in retaliation for her Equal Employment Opportunity ("EEO") complaint with the U.S. Department of Justice and related activity. She asserted accommodation, sex discrimination, hostile work environment, and retaliation claims under the Rehabilitation Act of 1973 and under Title VII of the Civil Rights Act of 1964.

In response, the Office contended that after-hours availability always was an essential function of the plaintiff's position and that the process of finding reasonable accommodations for her was cut short by the escalating symptoms of her disability, which ultimately resulted in her treatment provider certifying that she could no longer perform work of any kind, even with an accommodation.

The Office similarly contended that her professed inability to work at all, not her gender, disability or any retaliatory motive, led to her termination, and that no hostile work environment existed.

The U.S. District Court for the Western District of New York dismissed the plaintiff's employment discrimination claims, and she appealed to the Second Circuit.

### ***The Second Circuit's Decision***

The Second Circuit affirmed.

In its decision, the circuit court first reviewed the law regarding reasonable accommodation claims.

The circuit court noted that, to establish a case of discrimination based on an employer's failure to accommodate a disability, under either the Americans with Disabilities Act ("ADA") or the Rehabilitation Act, a plaintiff must demonstrate that:

- The plaintiff is a person with a disability under the meaning of the statute in question;
- An employer covered by the statute had notice of the plaintiff's disability;
- With reasonable accommodation, the plaintiff could perform the essential functions of the job at issue; and
- The employer refused to make such accommodations.

In addition, the plaintiff also must show connections between the failure to accommodate the plaintiff's disability, the performance deficiencies, and the adverse employment action.

The Second Circuit then reasoned that it did not have to decide whether after-hours on-call availability was an essential function of the plaintiff's position because, while the plaintiff's request for a reasonable accommodation was under consideration in September 2015, "her treatment provider declared her medically unfit for *any* work." The circuit court noted that, on September 21, 2015, the plaintiff began an indefinite leave of absence because she could not work at all even with an accommodation.

The Second Circuit then ruled that, given the “uncontroverted fact” that the plaintiff could not perform the job at all – even with an accommodation – her accommodation claim failed as a matter of law and, therefore, that the district court had properly granted summary judgment on this claim.

Next, the Second Circuit addressed the plaintiff’s sex discrimination claim under Title VII, which alleged that the purported adverse actions she suffered – namely, the requirement that she be available to work after hours, the failure to accommodate her disability and her termination – were because she was a woman.

The Second Circuit explained that, to establish a case of sex discrimination, a plaintiff must demonstrate that:

- The plaintiff was within the protected class;
- The plaintiff was qualified for the position;
- The plaintiff was subject to an adverse employment action; and
- The adverse action occurred under circumstances giving rise to an inference of discrimination.

If a plaintiff demonstrated the existence of those elements and, in response, an employer offered through the introduction of admissible evidence a legitimate non-discriminatory reason for the discharge, then the plaintiff must produce evidence and carry the burden of persuasion that the proffered reason was a pretext.

Here, the circuit court pointed out, the plaintiff attempted to support her sex discrimination claim by noting that there was evidence that the Office allowed one male employee “with a very serious non-physical condition” to stay home for “quite a period of time.” The circuit court acknowledged that a showing of disparate treatment – that is, a showing that the employer treated the plaintiff less favorably than a similarly situated employee outside the plaintiff’s protected group – was a recognized method of raising an inference of discrimination for purposes of making out a sex discrimination case. However, the circuit court continued, a plaintiff “must show she was ‘similarly situated in all material respects’ to the individuals with whom she seeks to compare herself” in order to raise an inference of discrimination.

The Second Circuit then found that the plaintiff provided “no evidence regarding the circumstances surrounding the accommodation provided to the male employee” such that the difference in treatment supported “at least a minimal inference” that the difference in treatment might be attributable to discrimination. The circuit court added that, in any event, the Office articulated a legitimate, non-discriminatory reason for her termination – namely, that she was medically unable to perform her job at all for an unknown period of time.

Ruling that the plaintiff failed to put forth evidence from which a rational jury could find sex-discrimination, the Second Circuit agreed with the district court's grant of summary judgment on the plaintiff's sex discrimination claim.

The Second Circuit then turned to the plaintiff's hostile work environment claims based on disability and sex pursuant to the Rehabilitation Act and Title VII, respectively.

The circuit court explained that, to prevail on a hostile environment claim under those statutes, a plaintiff must show that the workplace was "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of [the plaintiff's] employment were thereby altered" as well as a "specific basis" for imputing the challenged conduct to the employer.

Additionally, an employee must prove both "objective and subjective elements" of the claim – first, that the employer created an environment that a reasonable person would find hostile or abusive, and, second, that the employee subjectively perceived the employer's conduct as hostile or abusive.

Finally, the employee must demonstrate a causal element: that the employer created a hostile environment because of a protected characteristic.

The Second Circuit ruled that the plaintiff's "sporadic conflicts over nearly four years" with her supervisors about her hours and work responsibilities were "insufficient under the circumstances present here, even if true, to establish a hostile work environment."

The circuit court added that, to the extent that the plaintiff also alleged that the reasonable accommodation process with the Office was itself hostile such that she was "subjected to intimidation on a daily basis," this also failed to establish a hostile work environment because "no rational jury could find that the accommodation negotiations were of such a hostile nature that they altered the conditions of [the plaintiff's] work environment."

Accordingly, the circuit court held, summary judgment was warranted on the hostile work environment claims.

Finally, the Second Circuit addressed the plaintiff's allegations that the Office retaliated against her under both the Rehabilitation Act and Title VII. The circuit court noted that, under the Rehabilitation Act, 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. (A causal connection may be shown either indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly, through evidence of retaliatory animus directed against the plaintiff by the defendant.)

The circuit court added that, to establish a retaliation case under Title VII, a plaintiff must show:

- Participation in a protected activity;
- That the defendant knew of the protected activity;
- An adverse employment action; and
- A causal connection between the protected activity and the adverse employment action.

The Second Circuit ruled that the plaintiff failed to show causation.

It explained that, when termination proceedings were initiated, the plaintiff already had exhausted all of her leave and had been out of the Office for months with no indication of if, or when, she would be able to return to work. Indeed, the circuit court reiterated, her treatment provider submitted a letter indicating that she would be “unable to work any job for at least 12 months starting 12/7/2015.” The Second Circuit ruled that the plaintiff’s “excessive and indefinite absence” served as a “legitimate, nondiscriminatory basis for termination.”

In the Second Circuit’s view, the plaintiff pointed to “insufficient evidence” from which a reasonable jury could conclude that the decision to remove her from employment was motivated by her requests for an accommodation or her EEO activity related to her disability. Accordingly, it concluded, summary judgment was warranted on the plaintiff’s retaliation claims.

The case is *Knope v. Garland*, No. 20-3274-cv (2d Cir. Nov. 9, 2021).

## **SPORTSCASTER’S DISCRIMINATION AND RETALIATION CLAIMS AGAINST FORMER EMPLOYER ORDERED TO ARBITRATION**

The U.S. District Court for the Southern District of New York has ruled that discrimination and retaliation claims brought by a sportscaster against his former employer must be arbitrated.

### ***The Case***

The plaintiff worked for SportsNet New York (“SNY”), owned and operated by Sterling Entertainment Enterprises, LLC (“Sterling” and, together with SNY, the “Company”), as a sportscaster from 2009 until 2021. During that time, some of the plaintiff’s employment contracts with the Company covered multi-year periods, but the last five contracts were each for a single year. The plaintiff’s final employment contract expired on December 31, 2020, although the plaintiff continued working at SNY until February 27, 2021.

Section 16 of the plaintiff’s final employment contract appeared with the heading “Governing Law; Venue” and stated: “Any litigation concerning this Agreement, if initiated by or on behalf of Performer, shall be brought only in a Federal or state court located in the Southern District of New York.”

Section 17 appeared with the heading “Dispute Resolution” and stated:

Performer acknowledges and agrees that Performer will abide and be bound by NBCUniversal Media, LLC’s alternative dispute resolution program known as Solutions, which has been adopted by Company and which includes an obligation to submit any Covered Claim (as such term is defined in the program) to mediation and final and binding arbitration. A copy of Solutions is attached hereto as Exhibit A. This paragraph shall survive termination or expiration of this Agreement and Performer’s employment.

Solutions provided that “Covered Claims” included, “all claims that arise out of or are related to an employee’s employment or cessation of employment (whether asserted by or against the Company), where a court in the jurisdiction in question would otherwise have the authority to hear and resolve the claim under any federal, state or local (e.g., municipal or county) statute, regulation or common law. Covered Claims do not include Excluded Claims. . . .”

Solutions also provided that Covered Claims “may include,” among other things, employment discrimination claims “based on, for example, age, race, . . . or other characteristic protected by law” and “[r]etaliatio[n] claims for legally protected activity.”

Excluded Claims were defined as claims that alleged concerns such as Employment Retirement Income Security Act (“ERISA”), workers’ compensation, or unemployment benefits claims; intellectual property claims; and claims under the National Labor Relations Act (“NLRA”).

Solutions also set forth the procedure for arbitrating Covered Claims. It provided that the arbitrator would decide all Covered Claims, and it delegated further authority to the arbitrator: “The Arbitrator, and not any court or agency, shall have exclusive authority to resolve any dispute

relating to the applicability, interpretation, formation or enforceability of this [Solutions] Agreement including, but not limited to, any claim that the entirety or any part of this Agreement is voidable or void” (the “Delegation Clause”).

After the plaintiff sued the Company, alleging employment discrimination and retaliation in violation of 42 U.S.C. § 1981, the New York State Human Rights Law (“NYSHRL”), and the New York City Human Rights Law (“NYCHRL”), the Company moved for an order compelling the plaintiff to arbitrate his claims and staying the plaintiff’s action until arbitration concluded.

The Company argued that, by signing his employment contract, which contained an arbitration clause, the plaintiff agreed to arbitrate his discrimination and retaliation claims against the Company.

### ***The Court’s Decision***

The court granted the Company’s motion, ordered the parties to arbitration and stayed the plaintiff’s lawsuit pending arbitration.

In its decision, the court explained that pursuant to the Federal Arbitration Act (“FAA”), parties may contract to arbitrate their disputes, and such agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Moreover, where a party to an arbitration agreement refuses to comply with that agreement, and instead attempts to proceed in litigation, “the other party may move to stay the litigation . . . and compel arbitration.”

The court added, however, that “an agreement to arbitrate” was a creature of contract and a party could not be forced to submit to arbitration any dispute that it had not agreed to submit. Therefore, the threshold question facing any court considering a motion to compel arbitration was “whether the parties have indeed agreed to arbitrate.”

Here, the court found, the plaintiff and Sterling validly formed an agreement to arbitrate. The court rejected the plaintiff’s contention that there was no agreement to arbitrate because (1) Solutions was not validly incorporated by reference into the 2020 employment contract, and (2) Section 16 and Section 17 of the 2020 employment contract were in conflict, so the court should construe the contract against the Company and find that there was no agreement to arbitrate.

First, the court found, Solutions was properly incorporated by reference into the 2020 employment contract. That was so, the court added, even if Solutions was never attached to the 2020 employment contract because it was “undisputed” that the plaintiff had a copy of Solutions long ago and was able to access that copy after a dispute arose between the plaintiff and the Company. In the court’s opinion, the plaintiff could “not seriously contend that he had no notice of Solutions’ terms or that he was unable to access Solutions.” Given that the plaintiff did not claim



any duress, fraud or other wrongdoing by the Company, he was “conclusively presumed to have known of and assented to the terms” of the 2020 employment contract and Solutions, and to the extent that the plaintiff remained ignorant of them, he had to bear the cost of that ignorance, the court said.

The court then turned to Section 17 of the arbitration agreement, finding it both “broad and plain.” The court said it was “broad” because it obligated the plaintiff to submit “any” Covered Claim to arbitration (and Solutions broadly defined Covered Claims). The court added that the arbitration agreement was “plain” because it clearly stated that Covered Claims, as defined in Solutions, were subject to “final and binding arbitration.”

Next, the court said, to the extent that Sections 16 and 17 could be read to conflict, that conflict was reconcilable and did not affect the formation of the arbitration agreement in Section 17. The court found these provisions “plainly complementary” because, read together (and with reference to Solutions), they permitted the plaintiff to bring “Excluded Claims” and litigation to confirm or vacate an arbitral award concerning the 2020 employment contract in federal or state court within the Southern District of New York and required the plaintiff to arbitrate Covered Claims.

The court found “no natural reading of Section 16” that granted the plaintiff “an indisputable right to bring ‘any litigation’ in the New York courts.”

Accordingly, the court ruled as a matter of law that the plaintiff and Sterling formed an agreement to arbitrate under New York law and that the agreement (found in Section 17 of the 2020 employment contract) incorporated Solutions by reference. It then granted the Company’s motion to compel arbitration and stayed the plaintiff’s action pending arbitration.

The case is *Schwartz v. Sterling Entertainment Enterprises, LLC*, No. 21-cv-01084-PAC (S.D.N.Y. Sept. 23, 2021).

## **FEDERAL JUDGE IN NEW YORK ORDERS PLAINTIFF TO ARBITRATE HER EMPLOYMENT DISCRIMINATION CLAIMS AGAINST HER FORMER EMPLOYER**

A federal judge in New York has granted a defense motion to compel arbitration under the Federal Arbitration Act (“FAA”) of the plaintiff’s employment discrimination claims.

### ***The Case***

The plaintiff began working at Horizon Media, Inc., in August 2019, following her graduation from college. During the onboarding

process, the plaintiff signed Horizon's "Employment Understanding" form, which stated that the plaintiff was "bound by Horizon Media's Mutual Agreement to Arbitrate Disputes unless [she] opt[ed]-out within 30 days of receiving the agreement." Horizon provided the plaintiff with a copy of the arbitration agreement (the "Arbitration Agreement") and informed her of the opt-out. The plaintiff did not opt out of the Arbitration Agreement.

The Arbitration Agreement required the arbitration of "any claim, dispute, or controversy arising out of or relating to [the plaintiff's] employment with [Horizon] or the termination of [the plaintiff's] employment with [Horizon.]" In particular, the Arbitration Agreement covered:

claims for employment discrimination, harassment[,] or retaliation (whether on the basis of . . . race . . . disability . . . or any other protected category) under any and all federal, state, or local statutes . . . , including but not limited to Title VII of the Civil Rights Act of 1964 . . . [and] the Americans with Disabilities Act of 1990.

The Arbitration Agreement stated that it was "governed by the Federal Arbitration Act," and that it was "the exclusive means of resolving any dispute between [the plaintiff] and [Horizon] covered by [the] Agreement."

The plaintiff worked for Horizon until February 2020. She asserted that during her employment she was subject to discrimination because of her race, color and disability.

On February 14, 2020, the plaintiff went on medical leave for "emotional distress at work," which continued until February 25, 2020, when the plaintiff said that she "was terminated while [she] was still out on medical leave."

The plaintiff filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") on March 18, 2020, and she received an EEOC Notice of Right to Sue on September 16, 2020. She filed her complaint three months later, on December 16, 2020.

Horizon moved to compel arbitration under the FAA.

### ***The Court's Decision***

The court granted the motion.

In its decision, the court explained that the FAA reflected "a strong federal policy favoring arbitration as an alternative means of dispute resolution." The court observed that the FAA "requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation."

The court then pointed out that, as the U.S. Court of Appeals for the Second Circuit has explained, a court considering a motion to compel arbitration of a dispute:

- First, must determine whether the parties agreed to arbitrate;
- Second, must determine the scope of that agreement;
- Third, if federal statutory claims are asserted, must consider whether Congress intended those claims to be nonarbitrable; and
- Fourth, if the court concludes that some, but not all, of the claims in the case were arbitrable, must decide whether to stay the balance of the proceedings pending arbitration.

The court then applied the four-part test, and concluded that the plaintiff's claims were subject to arbitration.

First, the court found that the plaintiff and Horizon had “mutually assented to arbitrate [the plaintiff's] claims.” The court reasoned that the plaintiff had signed Horizon's Employment Understanding form and, in doing so, had expressly agreed to be bound by Horizon's Arbitration Agreement unless she opted-out within 30 days of receiving it – which she did not do. According to the court, by signing the Employment Understanding form and by declining to opt out of the Arbitration Agreement, the plaintiff manifested a “clear and definite intention” to be bound by its terms.

Next, on the issue of scope, the court said that the plaintiff's claims were “obviously subject” to the Arbitration Agreement. The court observed that the Arbitration Agreement contained a “broad” clause covering “any claim, dispute, or controversy arising out of or relating to [the plaintiff's] employment with [Horizon] or the termination of [the plaintiff's] employment with [Horizon.]” Moreover, the court continued, it also contained a clause that explicitly covered the “precise claims at issue” in this case: that is, “claims for employment discrimination, harassment[,] or retaliation (whether on the basis of . . . race . . . disability . . . or any other protected category) under any and all federal, state, or local statutes . . . , including but not limited to Title VII of the Civil Rights Act of 1964 . . . [and] the Americans with Disabilities Act of 1990.” The plaintiff's claims, the court found, were “on [their] face within the purview of [this] clause.”

As to the third factor, the court simply explained that, as other courts have ruled, “Congress did not intend that Title VII or ADA claims be nonarbitrable.”

Finally, the court said that the FAA mandated “a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested.” Having concluded that all of the plaintiff's claims must be arbitrated, and because Horizon requested a stay of the lawsuit pending the arbitration, the court stayed the case pending the outcome of the arbitration proceeding.

The case is *LeDeatte v. Media*, No. 20 Civ. 10752 (ER) (GWG) (S.D.N.Y. Nov. 23, 2021).

**NEW YORK FEDERAL DISTRICT COURT DISMISSES PLAINTIFF'S DISCRIMINATION CLAIMS, CITING HIS FAILURE TO SHOW THAT HE HAD BEEN TREATED DIFFERENTLY FROM OTHER EMPLOYEES**

The U.S. District Court for the Southern District of New York has granted summary judgment in favor of two supervisors in a lawsuit brought by a maintenance worker alleging employment discrimination, finding that the plaintiff failed to demonstrate that he had been treated differently from other employees.

***The Case***

The plaintiff, a maintenance worker, filed a lawsuit asserting employment discrimination claims against two of his supervisors at City University of New York – John Jay College (“John Jay”). In particular, the plaintiff’s complaint asserted claims of discrimination, hostile work environment and retaliation under both federal and New York State law stemming from allegations that (i) on May 3, 2019, his supervisor assigned him the task of cleaning elevator door tracks, and (ii) on December 5, 2019, his supervisor required that he work alone on a ladder above 20 feet. Both of these claims were premised on an assertion that the defendants discriminated against the plaintiff on account of his race. (The plaintiff and both defendants identified themselves as African American.)

The defendants moved for summary judgment.

***The Court’s Decision***

The court granted the defendants’ motion.

In its decision, the court first addressed the plaintiff’s federal discrimination claim. It found that the plaintiff had not offered evidence that any of the work assignments of which he complained constituted a materially adverse employment action and that he had not identified evidence supporting an inference of discrimination in connection with his work assignments.

For instance, the court said, although the plaintiff pointed to 10 work orders in which he was required to change light bulbs, none of those work orders indicated that he should use a ladder or dictated any particular equipment or method for accomplishing the assignment. The court found that the plaintiff offered no evidence that he or any other maintenance worker ever was denied a request to erect scaffolding, and neither defendant was aware of any such instance. Finally, the court said, contrary to the plaintiff’s assertion, there were work orders in which other maintenance workers classified by the plaintiff as white were required

to change light bulbs in stairwells where the ceiling height was 14 feet or higher.

Next, the court turned to the plaintiff's federal hostile work environment claim. The court found that the plaintiff failed to offer evidence to show that any of his assignments constituted a "sufficiently severe event or was part of a pervasive pattern sufficient to create a hostile work environment."

Moreover, the court continued, the plaintiff also failed to offer evidence from which a jury could determine that these assignments were given to him because of his race. In any event, the court said, "[c]omplaints about work assignments" generally did "not give rise to a successful hostile work environment claim."

The court then explained that it rejected the plaintiff's federal retaliation claim because the plaintiff had "not shown a causal connection between a protected activity and an adverse employment action." According to the court, neither of the 2019 events occurred "sufficiently close in time" to the plaintiff's filing of his lawsuit to support an inference of retaliation. "[T]emporal proximity must be very close," the court said, adding that the U.S. Court of Appeals for the Second Circuit had suggested that a period of five months was at the outer edge of what was acceptable to establish an inference of causation. Here, the court noted, the time gap was "eight months."

Moreover, the court continued, the plaintiff failed to offer any evidence that he was treated differently from any other worker – including workers who were not members of his protected class and who did not engage in any protected activity. Put another way, the court added, to survive summary judgment on this theory, the plaintiff would have to provide evidence that his supervisors were shirking their duty to inspect potential work sites before assigning tasks to maintenance workers with respect to the plaintiff alone, as opposed to shirking their duty with respect to all of the maintenance workers.

Because the plaintiff failed to show that he was treated differently than any other worker with respect to the assessment of potential tasks, he failed to demonstrate that the defendants treated him differently than other workers in an effort to retaliate against him for protected activity, the court concluded.

Finally, the court rejected the hostile work environment and retaliation claims the plaintiff brought under New York State law. It explained that because the defendants were entitled to summary judgment on the plaintiff's federal hostile work environment and retaliation claims, they also were entitled to summary judgment on his parallel claims under the New York State Human Rights Law.

The court declared that even under the broader standard under which claims under the New York City Human Rights Law ("NYCHRL") must be analyzed, the defendants were entitled to summary judgment on the plaintiff's NYCHRL hostile work environment and retaliation claims

because the plaintiff failed to show that he was treated differently from any other workers.

The case is *James v. Stewart*, No. 19cv644 (DLC) (S.D.N.Y. Nov. 16, 2021).

## **FORMER UN EMPLOYEE'S EMPLOYMENT DISCRIMINATION LAWSUIT IS DISMISSED BY FEDERAL DISTRICT COURT IN NEW YORK**

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit filed by a former employee of the United Nations (“UN”) Office of Counter-Terrorism (“OCT”), holding that the defendant enjoyed “functional immunity from suit” for the plaintiff’s claims.

### ***The Case***

The plaintiff alleged in her complaint that she met Peter Smith in 2004, when they both worked for the United Nations (“UN”); that in January 2018, Smith told the plaintiff about a vacant position in the UN Office of Counter-Terrorism (“OCT”); and that the plaintiff applied for and was offered a six-month position as a management assistant with the OCT, beginning on March 1, 2018.

The plaintiff said that she informed the OCT that she had a work permit valid for two years, from February 2018 to February 2020 and that she had renounced her Moroccan citizenship and applied for political asylum from Morocco. According to the plaintiff, Smith “bec[a]me obsessed with [the plaintiff’s] U.S. Work Permit when she . . . informed him that she had obtained it through her [a]sylum” application. The plaintiff asserted that Smith “invent[ed] an issue with [the plaintiff’s] U.S. Work Permit, with [the] intention [of] impeding [her] recruitment.” She said that he asked “questions about [the plaintiff’s] asylum [request,] demanding to see both [her] asylum application and residency applications.”

The plaintiff said that she eventually discovered that Smith “had a Plot-Plan with Morocco to approach [the plaintiff] in order to find out about [her] Political Asylum against Morocco and get [her] out of the UN.”

According to the plaintiff, at the first OCT meeting that she attended in her new temporary position, the OCT’s deputy director introduced her to the 30 meeting participants as Moroccan. Immediately after the meeting, the plaintiff said she sent an email to all OCT employees “informing everybody about her true identity.”

The plaintiff also contended that Smith became upset and started calling the plaintiff on the phone and yelling at her, and that he eventually “launched his campaign to get rid of her.” Smith “built a false image about [the plaintiff] in OCT as a Moroccan,” the plaintiff asserted. His

“suspicious actions started worrying [the plaintiff], especially [the fact that] he sent [her] a video of ICE deporting an illegal alien.” The plaintiff said that she “ordered [Smith] to refrain from his harassment [of her] and demanded that he . . . keep [his] distance from [her] and not interfere [with her] U.S. work permit.”

The plaintiff said that OCT “advertised the post [that the p]laintiff was filling and hired a similarly qualified applicant” for the position that the plaintiff held on a temporary contract and that an applicant was selected for the fixed-term position before the plaintiff had a chance to apply for it.

In November 2018, before “the end of [the] business day on her last day of the contract” and before the plaintiff had “completed all of her tasks,” Smith allegedly sent a letter to all security officers informing them that the plaintiff no longer had a contract with the UN and “needed to be escorted [on] UN premises if [she] want[ed] to enter.” According to the plaintiff, Smith also “restrict[ed the plaintiff’s] access to [her] office, [her] computer, and [her] email” and “ordered his friend . . . in the Department of Safety and Security (DSS) to issue a Public Derogatory Notice with [the p]laintiff’s name, picture and Moroccan citizenship that she renounced . . . to [the] entire UN Secretariat.”

The plaintiff said that this subjected her “to ridicule, contempt, hatred, shame, disgrace and racism as [the plaintiff] started noticing UN Staff Members running away from her and her husband whenever they cross them on the streets. . . .” The plaintiff said that she “had to hire a Body Guard” to access her personnel file at the UN because she knew “that U.S. Authorities would never intervene should she face an attack at the UN.”

On November 27, 2018, the plaintiff brought a UN Dispute Tribunal Proceeding in connection with the non-renewal of her temporary contract. On May 1, 2019, the Dispute Tribunal rejected the plaintiff’s application, finding that she failed to substantiate that the reason for non-renewal of her temporary appointment was unlawful. By decision dated March 27, 2020, the UN Appeals Tribunal affirmed the Dispute Tribunal’s decision and dismissed the plaintiff’s appeal.

The plaintiff sued, asserting employment discrimination claims against Smith under Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and New York state law. The plaintiff sought damages, to be reinstated to employment at the United Nations and for the DSS notice identifying her citizenship as Moroccan to be retracted.

### ***The Court’s Decision***

The court dismissed the plaintiff’s complaint.

In its decision, the court first explained that no claim under Title VII could be brought against an individual defendant; therefore, it dismissed the plaintiff’s Title VII claim against Smith for failure to state a claim on

which relief could be granted. The court added that it would be futile to grant the plaintiff leave to amend her complaint to assert Title VII discrimination claims against her employer because the UN was immune from suit.

The court then turned to the plaintiff's claims against Smith for race discrimination under Section 1981. It explained that although senior executives of the UN – including the UN Secretary General and UN Under Secretaries-General and Assistant Secretaries-General – enjoyed full diplomatic immunity, other UN employees did not. Nevertheless, the court added, UN employees were shielded by “functional immunity” under the Convention on the Privileges and Immunities of the United Nations (“CUPIN” or “General Convention”) for “all acts performed . . . in [the employee's] official capacity.”

The court pointed out that the UN, as an international organization, was subject to the International Organizations Immunities Act (“IOIA”), so that, in addition to the functional immunity available to UN employees under the General Convention, under Section 7(b) of the IOIA, UN officers and employees were immune from suit and legal process “relating to acts performed by them in their official capacity and falling within their functions as [] officers or employees, except insofar as such immunity may be waived by the [UN].”

The court then ruled that because the plaintiff's allegations arose from the plaintiff's employment at the UN and related to acts allegedly performed by Smith within his official capacity as a UN employee, Smith enjoyed “functional immunity from suit” for the plaintiff's claims.

Accordingly, the court dismissed the plaintiff's Section 1981 claims against Smith in connection with her employment and any other UN matters.

The case is *Nouinou v. Smith*, No. 20-CV-8682 (LLS) (S.D.N.Y. Sept. 22, 2021).

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