Employee Relations
LAW JOURNAL

From the Courts

Discrimination and Non-Competition Developments in New York

By Kenneth A. Novikoff

This 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.

In summary:

- The U.S. Court of Appeals for the Second Circuit has ruled that Title IX of the Education Amendments of 1972 affords a faculty member a private right of action against the faculty member's university for intentional gender-based discrimination.

- The Second Circuit also has affirmed a district court's decision granting summary judgment in favor of an employer on claims that it refused to hire one plaintiff on the basis of her gender and that it terminated a second plaintiff on the basis of her gender, but it reversed the district court's ruling on the second plaintiff's retaliation claim.

Kenneth A. Novikoff, a senior partner and trial attorney in Rivkin Radler LLP's Commercial Litigation and Employment & Labor Practice Groups, has over 30 years of experience in federal and state courts, as well as in alternative dispute resolution (ADR) forums, representing public and private corporations of all sizes, municipalities and individuals in varied and high-exposure complex commercial litigations, partnership disputes, non-compete/non-solicitation litigations, employment, housing and Americans with Disabilities Act of 1990 (ADA) discrimination litigation, and wage and hour litigation. Mr. Novikoff may be contacted at ken.novikoff@rivkin.com.

- The Second Circuit also has ruled that an employer was not obligated under Section 504 of the Rehabilitation Act of 1973 to provide accommodations such as an American Sign Language interpreter to a disabled individual who wanted to take a pre-employment exam but who did not show that he was otherwise qualified for the position he sought.

- A federal district judge in New York has ruled that an employment discrimination complaint should be dismissed where the defendant asserted that the plaintiff was a volunteer and not an employee.

- The U.S. District Court for the Western District of New York has ruled that a plaintiff's employment discrimination claims must be arbitrated as provided in a provision in the parties' employment agreement.

- A trial court in New York has dismissed a plaintiff's employment discrimination claim, finding that the plaintiff had not set forth "a plausible claim for relief."

- A New York trial court has issued a preliminary injunction enjoining the use of the plaintiff's proprietary or confidential information.

- A trial court in New York has denied the plaintiff's bid to enjoin a former employee from working for a competitor.

Second Circuit Rules That Faculty Member Can Assert Claim Under Title IX Against University for Intentional Gender-Based Discrimination

The U.S. Court of Appeals for the Second Circuit has ruled that Title IX of the Education Amendments of 1972 affords a faculty member a private right of action against the faculty member's university for intentional gender-based discrimination. The circuit court reversed the U.S. District Court for the Northern District of New York on this issue.

The Case

The plaintiff in this case, formerly an assistant professor at Cornell University, filed an employment discrimination lawsuit against Cornell, and other defendants. Among other things, the plaintiff alleged both overt and implicit manifestations of bias by Cornell against him on the

basis of his gender. He asserted a variety of claims, including under Title IX, which prohibits gender discrimination in an education program that receives federal funds.Cornell moved for judgment on the pleadings and/or for summary judgment dismissing the claims against it on various grounds. It argued principally that Title IX does not authorize a private right of action for discrimination in employment, and that, in any event, the plaintiff's complaint was insufficient to state a claim.

The district court dismissed the plaintiff's complaint. As to the plaintiff's Title IX claim of gender discrimination, the district court found that Title IX does not authorize a private right of action for an employee. It noted that although the Second Circuit had not addressed the question, "[a]n overwhelming majority of district courts in this Circuit have found that an implied private right of action does not exist[] under Title IX for employees alleging gender discrimination in the terms and conditions of their employment."

The plaintiff appealed to the Second Circuit, contending principally that the district court erred in ruling that Title IX does not afford a private right of action to a school employee.

The Second Circuit's Decision

The Second Circuit reversed the district court's ruling on the plaintiff's Title IX claim, concluding that Title IX allows a private right of action for a university's intentional gender-based discrimination against a faculty member and that the plaintiff's complaint sufficiently stated such a claim. The circuit court, therefore, vacated the dismissal of the plaintiff's Title IX claim.

In its decision, the circuit court noted that Title IX provides that (emphasis added):

> [n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The circuit court observed that Title IX's prohibition was patterned after the prohibition in Title VI of the Civil Rights Act of 1964, which provides that (emphasis added):

> [n]o person in the United States shall, *on the ground of race, color, or national origin*, be excluded from participation in, be denied the benefits of, or *be subjected to discrimination under any program or activity receiving Federal financial assistance.*

The Second Circuit then stated that although Title VI, applying to "any" program receiving federal financial assistance, specifies race, color,

and national origin as prohibited bases for discrimination, and Title IX, dealing with such programs in education, specifies only sex as a prohibited basis, "the goals of both of those Title IX and Title VI prohibitions are to prevent, on any basis specified, discrimination by an entity receiving federal government funding."

Moreover, the circuit court continued, all of the bases of discrimination prohibited by Title IX and Title VI are among the bases of discrimination prohibited in Title VII of the Civil Rights Act of 1964, which provides that (emphasis added):

> *[i]t shall be an unlawful employment practice for an employer* . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*.

Thus, the Second Circuit reasoned, with respect to employment issues, Title VII's provisions – which are not limited to federally funded programs but apply generally to employers having 15 or more employees and affecting interstate commerce – prohibit employers from discriminating on any of the bases specified in Title VI and Title IX.

The Second Circuit then noted that because Title VII's discrimination prohibition overlaps Title IX's prohibition against sex discrimination in education programs, and because employment discrimination claims often have much in common with claims under Title IX, it has "long interpreted Title IX" by looking to "the caselaw interpreting Title VII." After explaining that a number of other circuit courts have ruled that an employee has an implied private right of action under Title IX and have found Title VII principles applicable, the Second Circuit held that, "Title IX allows a private right of action for a university's intentional gender-based discrimination against a faculty member" and that the plaintiff's Title IX claim "should not have been dismissed on the ground that he complained of such discrimination with respect to employment."

The Second Circuit concluded by finding that the factual allegations in the plaintiff's complaint were sufficient to permit his lawsuit to continue and, therefore, that his Title IX cause of action was not dismissible for failure to state a claim.

The case is Vengalattore v. Cornell University, 36 F.4th 87 (2d Cir. 2022).

Second Circuit Reinstates One Plaintiff's Retaliation Claim Against Employer

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

granting summary judgment in favor of an employer on claims that it refused to hire one plaintiff on the basis of her gender and that it terminated a second plaintiff on the basis of her gender. The circuit court, however, reversed the district court's ruling on the second plaintiff's retaliation claim, finding that the plaintiff's allegations were sufficient to allow that claim to move forward.

The Case

The plaintiffs, Valentia Villetti and Faiza Jibril, M.D., brought multiple causes of action against Guidepoint Global LLC under Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL), alleging that Guidepoint refused to hire Jibril on the basis of her gender, terminated Villetti on the basis of her gender, and discharged Villetti in retaliation for opposing Guidepoint's allegedly discriminatory practices.

The U.S. District Court for the Southern District of New York granted summary judgment to Guidepoint on all of the plaintiffs' claims, and the plaintiffs appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit first addressed Jibril's contention that genuine issues of material fact precluded summary judgment on her Title VII, NYSHRL, and NYCHRL claims for employment discrimination based on Guidepoint's alleged failure to hire her as a Healthcare Content Strategist because of her gender.

In its decision, the circuit court explained that, to move forward under Title VII and the NYSHRL for a failure-to-hire claim, Jibril had to prove that:

- She was a member of a protected class;
- She was qualified for the job for which she applied;
- She was denied the job; and
- The denial occurred under circumstances that gave rise to an inference of invidious discrimination.

The Second Circuit observed that Jibril's gender placed her in a protected class and that she was not hired for the position. However, the circuit court ruled, even assuming that Jibril also was qualified for the position, the district court had correctly decided that Jibril failed to establish the fourth element of her case.

Most notably, the circuit court observed, two other women interviewed for the same position that Jibril was allegedly denied because of her gender, and one of those women ultimately was hired to fill it. In fact, the circuit court pointed out, Guidepoint ended up hiring a total of 15 individuals – both men and women – "to perform aspects of the position sought by Jibril."

The circuit court also noted that Guidepoint later attempted to recruit Jibril for a different position.

In light of this context, the circuit court ruled that Jibril's allegations were "insufficient" to support her Title VII and NYSHRL claims against Guidepoint. It also rejected her allegations under the NYCHRL, even though the NYCHRL defines discrimination more broadly than Title VII and the NYSHRL. The circuit court reasoned that given that Guidepoint hired a woman for the same position that Jibril sought, "no reasonable juror could find that Guidepoint treated Jibril 'less well' based upon her gender" within the contemplation of the NYCHRL.

The Second Circuit reached the same conclusion with respect to Villetti's gender discrimination claims, finding that she offered no evidence affirmatively supporting her gender discrimination claim. The circuit court, however, ruled that triable issues of fact precluded summary judgment on her retaliation claims.

The Second Circuit noted that Villetti alleged that Guidepoint terminated her in retaliation for an email that she sent to the company's human resources department complaining of certain behavior and a series of what she considered adverse employment actions against female employees. According to the circuit court, Guidepoint was aware of this email and it later took adverse employment action against Villetti. In the circuit court's opinion, Villetti's complaint to human resources, construed most favorably to Villetti, "constituted protected activity." Additionally, the circuit court ruled, by putting forth evidence that she was terminated within such a short temporal proximity to making her complaint to human resources – approximately one week – Villetti adequately established that her termination was attributable to retaliation.

The Second Circuit then noted that, in addition to the temporal proximity between her complaint (March 12, 2018) and her subsequent termination (March 19, 2018), Villetti pointed to various inconsistencies in Guidepoint's proffered reasons for her termination.

The circuit court ruled that, viewing the evidence in the light most favorable to Villetti, as it had to at this stage of the litigation, "a reasonable juror could infer that the explanations given by [Guidepoint] . . . were pretextual, developed over time to counter the evidence suggesting" retaliation. Accordingly, it concluded that there was sufficient evidence to preclude summary judgment on Villetti's retaliation claims.

The case is Villetti v. Guidepoint Global LLC, No. 21-2059-cv (2d Cir. July 7, 2022).

Employer Did Not Have to Provide ASL Interpreter to Disabled Individual for Preemployment Exam, Second Circuit Rules

The U.S. Court of Appeals for the Second Circuit has ruled that an employer was not obligated under Section 504 of the Rehabilitation Act of 1973 to provide accommodations such as an American Sign Language interpreter to a disabled individual who wanted to take a preemployment exam but who did not show that he was otherwise qualified for the position he sought.

The Case

The plaintiff in this case was born hard of hearing and was entirely deaf in his right ear. His primary language was American Sign Language (ASL). The plaintiff applied for a position as an assistant stockworker at MTA Bus, a public benefit corporation that operates bus routes in New York City. MTA Bus is a subsidiary of New York's Metropolitan Transit Authority and an affiliate of the New York City Transit Authority (NYCTA). After he submitted his application, the plaintiff received a letter from MTA Bus assigning him a date and location to take a preemployment examination.

The letter directed that any requests for "special accommodations . . . be submitted in writing with documentation . . . by email." The plaintiff contacted the NYCTA to request that the NYCTA provide him with "an ASL interpreter to interpret the examination and its instructions."

The NYCTA informed the plaintiff that it did not make ASL interpreters available for the exams, but that, in light of his auditory impairment, it would give him a written version of the instructions about how to take the exam, which other exam-takers would be given verbally.

The plaintiff took the exam but did not pass. He contended that he "would have been able to pass the examination with the reasonable accommodation of an ASL interpreter to interpret the examination and its instructions."

The plaintiff thereafter sued MTA Bus, charging primarily that by failing to provide an ASL interpreter for the exam, it unlawfully discriminated against him based on his disability, thereby violating Section 504 of the Rehabilitation Act, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL). Among other relief, he sought a declaratory judgment that MTA Bus' "policies, procedures, and practices have subjected Plaintiff to unlawful discrimination"; an order enjoining MTA Bus "from implementing or enforcing any policy, procedure, or practice that discriminates against deaf and hard-of-hearing individuals" and requiring MTA Bus to provide in-person ASL interpreters to him for any examinations in written English; and damages.

Following the parties' cross-motions for summary judgment, the U.S. District Court for the Southern District of New York entered judgment for MTA Bus, ruling that the plaintiff had to show that he was "otherwise qualified" for the assistant stockworker position to maintain his Rehabilitation Act claim and that, at summary judgment, he had not met this requirement and, therefore, that he could not establish that MTA Bus discriminated against him on the basis of disability in violation of Section 504. Having so concluded, the district court declined to consider whether the accommodation the plaintiff requested for the examination was otherwise reasonable.

The plaintiff appealed to the Second Circuit. Among other things, the plaintiff contended that employers must provide an applicant with pre-employment testing accommodations regardless of whether the applicant is otherwise qualified, with or without accommodation, for the employment position at issue.

The Statutes

Section 504 of the Rehabilitation Act of 1973 provides:

(a) Promulgation of rules and regulations

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

(d) Standards used in determining violation of section

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Section 101 of the Americans with Disabilities Act of 1990 (ADA) provides:

(8) Qualified individual

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
>
> (9) Reasonable accommodation
>
> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and
>
> (B) job restricting, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Section 102 of the ADA provides (emphasis supplied):

> (a) General rule
>
> No covered entity shall discriminate against a *qualified individual* on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) Construction
>
> As used in subsection (a), the term "discriminate against a *qualified individual* on the basis of disability" includes—
>
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's *qualified applicant or employee* with a disability to the

discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a *qualified individual* because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an *otherwise qualified individual* with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an *otherwise qualified individual* with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out *an individual with a disability* or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or

> speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

The Second Circuit's Decision

The Second Circuit affirmed, ruling that a job applicant must be a "qualified individual" for the employment position held or desired to prevail in a failure-to-accommodate discrimination action.

The circuit court explained that it had to look to the provisions of the ADA when adjudicating Section 504 claims of employment discrimination. Under the ADA, only "qualified individual[s]" can establish a disability discrimination claim. A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The circuit court then found no basis to infer that Congress – in identifying particular types of discrimination faced by job applicants – intended to permit individuals who were not qualified for their desired employment positions to maintain actions for employment-related discrimination.

Moreover, the circuit court continued, Section 504 of the Rehabilitation Act provides that only an "otherwise qualified individual" can sustain a discrimination claim under that section. Thus, the circuit court said, the plaintiff's proposed reading – which would effectively nullify the "qualified individual" requirement for certain categories of discrimination under both Acts – did "not jibe with the scheme of the Rehabilitation Act and the ADA."

The Second Circuit added that its interpretation agreed with guidance from the Equal Employment Opportunity Commission (EEOC), which states in "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA" that, "[a]n employer must provide a reasonable accommodation to a *qualified* applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job." (emphasis added). The circuit court said that it read this language as it read the statute: to prevail on a discrimination claim based on an employer's failure to provide accommodations during the application process, a plaintiff must show that he or she was qualified for the employment position at issue.

Therefore, the circuit court held that the plaintiff's proposed reading was "incorrect" and that he had to be a "qualified individual" in order to be afforded an accommodation.

Next, the Second Circuit rejected the plaintiff's argument that the definition of "qualified individual" included individuals who may be qualified to take preemployment exams but who were not qualified for the position applied for. The circuit court reasoned that "test-taker" was not an "employment position." In other words, preemployment "test-taker" was not an "employment position" for which the plaintiff was a "qualified individual" and an applicant cannot successfully sue a potential employer "when the individual is facially not qualified for the position sought at the time of the preemployment test."

Finally, the Second Circuit concluded that the plaintiff had not demonstrated that he was "otherwise qualified" for the assistant stockworker position at MTA Bus, and it ruled, therefore, that he could not make out a disability discrimination claim under the Rehabilitation Act against MTA Bus.

The case is Williams v. MTA Bus Co., No. 20-2985 (2d Cir. Aug. 12, 2022).

Employment Discrimination Complaint That Failed to Allege Employment Relationship Should Be Dismissed, Court Decides

A federal district judge in New York has ruled that an employment discrimination complaint should be dismissed where the defendant asserted that the plaintiff was a volunteer and not an employee and the plaintiff failed to allege that he was an employee of the defendant.

The Case

The plaintiff filed an employment discrimination lawsuit alleging that North Collins Emergency Squad, Inc. (NCES) discriminated against him based on his race and sex, retaliated against him in violation of Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law (NYSHRL), and subjected him to discrimination and retaliation in violation of Title I of the Americans with Disabilities Act of 1990 (ADA). The plaintiff's claims stemmed from his work as an emergency medical technician (EMT) with NCES.

NCES moved to dismiss. It argued that most of the plaintiff's allegations of employment discrimination and retaliation occurred outside the applicable statutes of limitations and, thus, were time-barred.

Additionally, NCES argued that employment discrimination and retaliation claims must be predicated on an employment relationship between the plaintiff and the defendant, yet the plaintiff was not an employee of NCES but was merely a volunteer such that NCES could not be held liable on the plaintiff's claims.

The Court's Decision

The court granted the NCES motion.

In its decision, the court explained that as a prerequisite to filing an employment discrimination lawsuit under Title VII and the ADA, a plaintiff must exhaust administrative remedies by presenting the claims forming the basis of the suit (the "administrative charge) to the Equal Employment Opportunity Commission (EEOC) (or the equivalent state agency – in this case, the New York State Division of Human Rights), and obtaining from the EEOC a Notice of Right to Sue.

Further, the administrative charge must be filed within 300 days of the alleged discriminatory act.

Here, the court noted, the plaintiff filed the requisite administrative claim with the EEOC on October 24, 2017, rendering any alleged discriminatory or retaliatory conduct occurring more than 300 days earlier, i.e., prior to December 28, 2016, time-barred for purposes of Title VII and the ADA. Thus, the alleged violations cited in the plaintiff's complaint that occurred in 2014 and 2015, and before December 2016, were time-barred, the court ruled.

The court then observed that the plaintiff's employment discrimination and retaliation claims under the NYSHRL were subject to a three-year limitations period, with such limitations period tolled pending resolution of an administrative charge filed with the EEOC. The court ruled that, given the plaintiff's commencement of his lawsuit on June 22, 2018, and allowing for 150 days tolling of the limitations period while the administrative charge was pending from the time it was filed on October 24, 2017 until the EEOC issued the right to sue letter on March 23, 2018, any claim occurring prior to January 23, 2015 was time-barred.

Next, the court addressed the issue of the parties' employment relationship. It noted that the "existence of an employer-employee relationship is a primary element of Title VII claims." Similarly, the court continued, "[v]olunteers constitute employees under . . . the ADA *only if* they receive some kind of direct or indirect financial benefit or promise thereof from an employer."

Here, the court pointed out, not only did the plaintiff fail to allege that he was an employee of NCES, but the plaintiff also failed to allege that he received any benefits, either directly as salary, or indirectly as remuneration for the EMT services he performed for NCES.

Accordingly, the court ruled that the NCES motion to dismiss the plaintiff's employment discrimination and retaliation claims under Title VII, the ADA, and the NYSHRL based on the plaintiff's failure to allege the requisite employment relationship between the plaintiff and NCES should be granted.

The case is Waterman v. North Collins Emergency Squad, Inc., No. 18-CV-00706A(F) (W.D.N.Y. Aug. 2, 2022).

Federal District Court Grants Defendant's Motion to Send Employment Discrimination Claims to Arbitration

The U.S. District Court for the Western District of New York has ruled that a plaintiff's employment discrimination claims must be arbitrated as provided in a provision in the parties' employment agreement.

The Case

Plaintiff Daniel M. Shumway filed an employment discrimination action against Cellular Sales Services Group, LLC, alleging that he was subjected to unlawful sex and disability discrimination during his employment as a sales representative with Cellular.

Cellular moved to compel arbitration of the plaintiff's claims pursuant to an arbitration provision in the parties' employment agreement. The plaintiff countered that the requested relief should be denied because (1) he presented credible evidence that he did not execute the employment agreement, and (2) regardless, the doctrine of laches precluded enforcement of the arbitration provision.

The Court's Decision

The court granted Cellular's motion.

In its decision, the court explained that evidence introduced by Cellular demonstrated that the parties' employment relationship was governed by an agreement that contained an arbitration clause that stated:

> Any controversy or dispute (whether pre-existing, present, or future) between [the employee)] and [Defendant] arising from or in any way related to [the employee's] work with [Defendant] or the termination thereof, including, but not limited to . . . any claim of employment discrimination or retaliation, including, but not limited to, discrimination based on age, disability, national origin, race, or sex . . . [and] any claim under the Americans with Disabilities Act . . . or any related state law or regulation . . . must be resolved exclusively by final and binding arbitration under the Employment Dispute Resolution Rules of the American Arbitration Association (AAA) then applicable to the dispute. . . .

The court noted that the Federal Arbitration Act (FAA) provides that "a written provision in a contract to settle by arbitration a controversy thereafter arising out of the contract shall be valid, irrevocable, and enforceable." It added that the U.S. Supreme Court has "repeatedly instructed" that the FAA embodies a national policy favoring arbitration, although

the FAA does not require parties to arbitrate when they have not agreed to do so.

The court then stated that to determine whether a dispute should be arbitrated, it had to answer two questions: (1) whether there is a valid agreement to arbitrate, and, if so, (2) whether the subject of the dispute is within the scope of the arbitration agreement.

With respect to the first question, the court explained that the party seeking arbitration must prove by a preponderance of the evidence that all the elements necessary to form a valid contract have been met, namely offer, acceptance, consideration, mutual assent and intent to be bound. Significantly, the court added that, "a party may be bound by an agreement to arbitrate even in the absence of a signature." Under applicable New York law governing the formation of contracts, the court continued, "the conduct of the parties may lead to the inference of a binding agreement: A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the presumed intention of the parties as indicated by their conduct. It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct."

The court found that it was "undisputed" that the plaintiff had several opportunities to review the employment agreement containing the arbitration provision – and that, as a condition of his employment, the plaintiff was required to execute the employment agreement through Cellular's online portal and that he had done so.

In the court's opinion, these "undisputed facts" established that the plaintiff received notice of the employment agreement and its arbitration provision and that he was aware that his execution of the employment agreement was a condition of his continued employment. Consequently, the court ruled, he manifested his intent to be bound by continuing his employment with Cellular.

Accordingly, the court ruled, the plaintiff could not avoid application of the arbitration provision on the theory that he never actually executed the employment agreement.

Finally, the court rejected the plaintiff's only other argument – that is, that laches precluded application of the arbitration provision, insofar as Cellular did not raise the issue of arbitration during administrative proceedings before the New York Division of Human Rights. The court ruled that the applicability of laches was itself an issue for arbitration.

The court concluded that the plaintiff could properly be compelled to arbitrate his employment discrimination claims pursuant to the employment agreement. It then stayed the case pending the outcome of the arbitration.

The case is Shumway v. Cellular Sales Services Group, LLC, No. 21-CV-6509-FPG (W.D.N.Y. June 28, 2022).

Plaintiff Failed to Assert Plausible Employment Discrimination Claim, New York Trial Court Decides

A trial court in New York has dismissed a plaintiff's employment discrimination claim, finding that the plaintiff had not set forth "a plausible claim for relief."

The Case

The plaintiff in this case sued Patrick Stryker, the chief executive officer of A.B.C. Employment Agency (Stryker), the A.B.C. Employment Agency (the Agency), and Woodcrest Estates (Woodcrest) for employment discrimination, asserting claims under Title VII of the Civil Rights Act of 1964 and other unspecified federal, state, and city or county laws. He alleged that his temporary job placement as a maintenance mechanic at Woodcrest was terminated "because of [his] African American status," that he suffered unequal terms and conditions of his employment, and that the defendants retaliated against him on account of his race and color. According to the plaintiff's complaint, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) on or about December 21, 2020 and he received a notice of right to sue on February 14, 2022.

The Court's Decision

Finding that the plaintiff had not set forth a plausible claim for relief, the court dismissed his complaint.

In its decision, the court explained that Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against any individual with respect to employment because of the individual's race, color, religion, sex, or national origin. It added that, in order to state a claim for employment discrimination under Title VII, a plaintiff must allege:

- That the plaintiff is a member of a protected class;
- That the plaintiff was qualified for the position at issue;
- That the plaintiff suffered an adverse employment action; and
- That the circumstances give rise to an inference of discriminatory motivation.

The court added that the "sine qua non of a . . . discriminatory action claim under Title VII is that the discrimination must be *because of*" the

employee's protected characteristic. Accordingly, the court continued, a claim for discrimination under Title VII should be dismissed where the plaintiff fails "to plead any facts that would create an inference that any adverse action taken by any defendant was based upon" the protected characteristic.

In this case, the court ruled, the plaintiff had "not alleged any facts" from which it could reasonably construe circumstances surrounding the termination of the plaintiff's employment "that give rise to an inference of discrimination." Indeed, the court continued, the plaintiff acknowledged that his employment was "temporary" and it found that he alleged "no facts" suggesting that any of the defendants' actions were motivated at all by the plaintiff's race.

Given the absence of any facts suggesting that the termination of the plaintiff's temporary employment was motivated, even in part, by discriminatory animus, the court concluded that he had "not alleged a plausible claim for relief," and the court dismissed his complaint.

The case is Chisholm v. Stryker, No. 22-CV-2705 (JMA) (SIL) (E.D.N.Y. Aug. 24, 2022).

Rivkin Comment

Courts in the Second Circuit Court of Appeals routinely dismiss discrimination claims where the plaintiff's allegations, as in Chisholm, fail to suggest discriminatory intent. See, e.g., Patane v. Clark, 508 F.3d 106 (2d Cir. 2007) (per curiam) (finding that district court correctly noted that "[p]laintiff failed to allege even the basic elements of a discriminatory action claim); Lucas v. Apple Food Serv. of New York, LLC, No. 15-CV-4007(SJF)(AKT) (E.D.N.Y. Oct. 27, 2015) (finding "the complaint fails to plead any facts linking defendant's conduct, i.e., the suspension of plaintiff without pay for two (2) weeks and termination of her employment, to plaintiff's race, color, gender, religion or pregnancy, or supporting a reasonable inference that defendant discriminated against plaintiff because of those protected characteristics) (citing Hedges v. Town of Madison, 456 F. App'x 22 (2d Cir. Jan. 13, 2012) (summary order) (affirming dismissal, among other things, of plaintiff's ADA claim on the basis that he "ha[d] not adequately pleaded discrimination on the basis of disability" because he "alleg[ed] not a single fact in support of his claims of discriminatory treatment which might conceivably give notice of the basis of his claims to the defendants); Berkery v. Archdiocese of Hartford, 352 F. App'x 487 (2d Cir. 2009) (summary order) (affirming dismissal of plaintiff's ADA claim because complaint presented no allegations linking defendant's employment decision to plaintiff's disability or supporting an inference of disability discrimination); Samuel v. Bellevue Hosp. Ctr., 366 F. App'x 206 (2d Cir. Feb. 17, 2010) (summary order) (affirming dismissal of plaintiff's employment discrimination claim on basis that he "failed to allege sufficient facts to render plausible his conclusory assertion that

the defendants discriminated against him on the basis of his membership in a protected class); see, also, Maldonado v. George Weston Bakeries, 441 F. App'x 808 (2d Cir. 2011) (summary order) (affirming dismissal of complaint where plaintiff alleged that other employees involved in similar altercations were given preferential treatment but did not allege that this preferential treatment was due to race or age); Kouakou v. Fideliscare N.Y., 920 F. Supp. 2d 391 (S.D.N.Y. 2012) (dismissing complaint where comments alleged in complaint did "not create an inference that the denial of [p]laintiff's requested transfer were motivated by his race or national origin, particularly where [p]laintiff [did not allege that employer granted transfer requests of similarly situated employees outside of plaintiff's racial group]); Palmer v. Safetec of Am., Inc., No. 11-CV-702 (W.D.N.Y. May 31, 2012) (report and recommendation) (dismissing complaint where plaintiff "fail[ed] to allege any facts that could plausibly be construed as establishing [that] Plaintiff's discharge was based on his membership in any of the protected classes [at issue]," and noting that plaintiff failed "to identify or to otherwise specify" employees outside of plaintiff's protected classes who received preferential treatment or engaged in similar misconduct), adopted by W.D.N.Y. July 20, 2012.

New York Trial Court Issues Preliminary Injunction Enjoining Use of Plaintiff's Proprietary or Confidential Information

A trial court in New York has granted the motion of Roc Capital Holdings LLC for a preliminary injunction against Civic Financial Services and its agents, servants, employees and anyone acting for or on its behalf, in concert with or at its direction, enjoining them from using Roc Capital's proprietary or confidential information.

The Court's Decision

In its decision, the court found that Roc Capital had demonstrated a likelihood of success on the merits of its claims against Civic that Civic and a former Roc Capital employee now employed by Civic have used Roc Capital's proprietary confidential information.

The court noted that it previously had denied without prejudice Roc Capital's application for a preliminary injunction based on Civic's representation that its employee was not using proprietary confidential information of Roc Capital and Civic's representation that its employee would only be working on Civic's "pre-existing customers." The court also noted that it previously had ordered Civic to produce a client list being used by its employee.

Now, the court decided that, based on the record, it was "clear that this representation was not true." According to the court, Civic's employee

"was soliciting both Equus Capital and Flip Funding – accounts that he had worked on while at Roc Capital." According to the court, this was "undisputed" and demonstrated "a likelihood of success on the merits."

In addition, the court added, while at Roc Capital, Civic's employee had participated in weekly planning and strategy meetings where leads were discussed and strategies to generate business based on those leads were devised. According to the court, given the time in which two other businesses were solicited (that is, on or about the time Civic's employee joined Civic), there also was evidence "of further use" of Roc Capital's confidential information by Civic and its employee.

The court declared that it did "not matter" that Civic's employee himself may not have picked up the telephone to call the two other businesses "if he participated substantially, as is alleged, in the planning of how these client relationships were to be explored."

Moreover, the court added, it did not matter whether he himself made the calls at Civic. "What matters is that this confidential proprietary information likely came from Roc Capital," the court said.

The court then ordered that Civic produce "on an attorney's eyes only basis" its entire client list with names and addresses (and dates which the relationships were formed) so that Roc Capital could determine the scope of the misappropriation and unfair competition.

The court decided that the "balance of the equities clearly favors granting the injunction as to Roc Capital's proprietary information." It ordered Roc Capital to post an undertaking in the amount of $20,000.

The court, however, denied Roc Capital's request to preliminarily enjoin Civic from employing its employee until March 2023, finding that the restrictive covenant he signed was "overbroad in its geographic scope."

The case is ROC Capital Holdings LLC v. Civic Financial Services, 2022 N.Y. Slip Op. 31870(U) (Sup. Ct. N.Y. Co. June 14, 2022).

Court Denies Plaintiff's Bid to Enjoin Former Employee from Working for Competitor

A trial court in New York has rejected a plaintiff company's request for an injunction blocking a former employee from working for a competitor for 18 months, concluding that the plaintiff failed to "establish the reasonableness of the non-compete provision" signed by its former employee.

The Case

In September 2021, the plaintiff filed a lawsuit alleging that, on or about December 20, 2014, it hired Kyle Gordon as a salesperson and that Gordon subsequently was promoted to several other positions, including

senior key account manager, group director, and sales director. Upon his employment, Gordon allegedly signed an employment agreement with a non-compete provision providing that, for a period of 18 months following cessation or termination of his employment with plaintiff, Gordon would not perform "restrictive services" for any person or entity, including any of the plaintiff's direct competitors, including Global Data Publications Inc. The agreement defined restricted services as "any services that both (x) include or consist of any services that are the same or similar to any of the services that you performed for [plaintiff] during your employment by the Company and (y) are being or will be performed as part of the same business or similar business being engaged in, or being planned or proposed by, such person (including you) or entity." Gordon also was required to provide three months' written notice prior to termination of the employment agreement.

According to the plaintiff, on or about August 3, 2021, Gordon notified the plaintiff that he intended to resign and that he was accepting employment at Global. The plaintiff asserted that it reminded Gordon of his obligations under the employment agreement and the non-compete clause. The plaintiff asserted that, on September 3, 2021, Gordon responded that the job he accepted was different from his prior position with the plaintiff.

The plaintiff asked the court to enjoin Global's employment of Gordon for 18 months and any violation of the non-compete provisions of the employment agreement between Gordon and the plaintiff. The plaintiff contended that it had established the requisite elements for entitlement to a preliminary injunction. Specifically, the plaintiff maintained that it had established a likelihood of success on the merits as the non-compete clause was reasonable and enforceable under New York law, insofar as the restrictions on subsequent employment, limited only to 18 months and a 30 mile radius, were reasonable and necessary to protect the plaintiff's interest. The plaintiff argued that if Gordon's knowledge of the plaintiff became accessible to its direct competitors, such as Global, it would be irreparably harmed. The potential damages, the plaintiff claimed, were difficult to quantify and could not be compensated with money given that Gordon had "access not only to the proprietary processes that [p]laintiff uses to compile statistics but also to customer lists built over years, as well as marketing materials, sales pitches, expansion goals and other confidential and proprietary sales related materials, as well as his unique role as a top earning salesperson clearly will lead to irreparable harm." Additionally, the plaintiff argued that the balance of the equities favored the granting of its motion since Gordon agreed to the terms of the non-compete agreement and could not claim to be harmed by its enforcement.

In opposition to the motion, Gordon affirmed that his position at Global was different from his prior position with the plaintiff. Specifically, he asserted that the focus of his work at Global was in consumer products while at the plaintiff it was in the technology sector. He further

claimed that the consumer products sector was not competitive with the plaintiff's technology sector. According to Gordon, "[w]hile I had some general knowledge of clients, other than arguably the identity of certain clients (which I have not and will disclose [sic]), I do not believe that I was exposed to any confidential information or trades secrets while employed at Statista. While I had been briefly promoted at one point to a more managerial team leader role at Statista, I quickly went back to a sales role to focus exclusively on sales. . . . In a sales role, my exposure to larger business decisions and information which arguably may be confidential was non-existent or quite limited." According to Gordon, the plaintiff terminated him in August 2021 when he expressed his intent to join Global and the plaintiff never offered to pay him three months' notice or three months of "garden leave." He further affirmed that "[w]hile employed by Global Data, [he] ha[s] not solicited any of the former clients or customers that [he] worked with at Statista, and [he] ha[s] never used any Statista confidential information (to the extent any even exists)."

The Court's Decision

The court denied the plaintiff's motion for a preliminary injunction.

In its decision, the court explained that a non-compete clause or restrictive covenant will only be subject to specific enforcement to the extent that it is "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." The court added that the breach of a non-compete clause does not, in and of itself, warrant injunctive relief because there are "powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood, the courts will subject a covenant by an employee not to compete with his former employer to an overriding limitation of reasonableness."

The court then found that the plaintiff failed to establish a likelihood of success on the merits as a matter of law. The court explained that although non-compete provisions limited to a 30-mile radius and for a time period beyond 18 months have, in certain circumstances, been found to be enforceable, the plaintiff "failed to demonstrate to this court that said limitations on a mid-level employee, such as Gordon, are reasonable."

In the court's opinion, the plaintiff's general statements regarding Gordon's employment, his involvement with the plaintiff's clients, and his purported access to confidential information were "insufficient to establish the reasonableness of the non-compete provision." Moreover, the court continued, the plaintiff failed to show that the language of the non-compete agreement, indicating that Gordon was prevented from any "restrictive activities" consisting of "*any* services that are *the same or similar* to any of the services that [Gordon] performed for [plaintiff]

during [his] employment by the [c]ompany," was not broader than necessary to protect its stated interest.

The court also found that the plaintiff failed to establish irreparable harm but instead relied on "conclusory and unsupported claims" that Gordon, being privy to confidential information about the plaintiff during his employment, will share with Global confidential information in his current position that will result in irreparable harm. According to the court, the plaintiff failed to identify any specific information that has been disseminated by the plaintiff to establish that Gordon's continued employment with Global would result in imminent harm. In addition, the court noted that Gordon affirmed that his position in Global was, in fact, not similar to the work he performed for the plaintiff and that he has not and will not reveal any confidential information about the plaintiff to Global.

Finally, the court said that the plaintiff's argument was, in essence, that Gordon's knowledge obtained during his employment with Statista would result in a loss of sales, and it concluded that that was "insufficient to establish irreparable harm for a preliminary injunction."

The case is Statista Inc. v. Gordon, 2022 NY Slip Op 31505(U) (Sup. Ct. N.Y. Co. May 9, 2022).