

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. District Court for the Southern District of New York has dismissed claims under Title I, Title II, and Title III of the Americans with Disabilities Act and claims under the Rehabilitation Act against a non-profit corporation that provides job training to the public.
- In a different case, the same federal district court has dismissed an employment discrimination lawsuit asserting claims for, among other things, intentional discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964.

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 U.S. District Court for the Northern District of New York has dismissed a plaintiff's retaliation claim under Title VII of the Civil Rights Act of 1964, finding that the plaintiff failed to exhaust his administrative remedies.
- The same federal district court has granted the defendant's motion for summary judgment in a case in which the plaintiff asserted a failure-to-promote discrimination claim under Title VII of the Civil Rights Act of 1964.
- The U.S. District Court for the Southern District of New York has dismissed a plaintiff's employment discrimination complaint against her former employer asserting claims under the federal Fair Labor Standards Act and the Americans with Disabilities Act.
- The U.S. District Court for the Eastern District of New York has sent to arbitration employment discrimination and retaliation claims brought by a former employee against his former employer asserting that he was denied a promotion on the basis of race and then terminated in violation of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law.
- A trial court in New York has confirmed an arbitration award that found, among other things, that an individual was bound by restrictive covenants preventing his competition with two companies that were parties to the arbitration.

Federal District Court Rejects Plaintiff's Disability Discrimination Claims

The U.S. District Court for the Southern District of New York has dismissed claims under Title I, Title II, and Title III of the Americans with Disabilities Act and claims under the Rehabilitation Act against a non-profit corporation that provides job training to the public.

The Case

The plaintiff in this case, a paraplegic who requires the use of a wheelchair for all daily activities, alleged in the complaint he filed against STRIVE International, Inc., a non-profit corporation that provides job training to the public, that he attended an information session for a job training program held at STRIVE's Harlem office on April 30, 2018. The plaintiff alleged that, upon entering, he "found it very difficult" to access

the office in his wheelchair. Although the hallways were wide enough to accommodate wheelchair-bound individuals such as the plaintiff, the plaintiff contended that “the furniture in the lobby was arranged in such a manner that there was no clear or practical path for someone in a wheelchair to approach the reception desk.” The plaintiff also asserted that the tables and chairs in the lobby “did not provide sufficient passageway for wheelchair-bound individuals.” Further, according to the plaintiff, STRIVE employees did not “seem[] interested” in assisting the plaintiff to maneuver through the office, and the plaintiff relied on his caregiver to “remove and replace furniture obstacles” and to assist him around the office.

The application process for the job training program involved an examination and a group interview in front of a panel of interviewers. The plaintiff alleged that a person he identified as a “staff person” interrupted his exam, “made him very uncomfortable,” and yelled at him “to hurry up and finish the exam.”

After passing the exam, the plaintiff alleged that he returned to STRIVE on May 9, 2018, for the panel interview, and that STRIVE staff treated him with “an attitude of hostility and disparate treatment.” According to the plaintiff, he was asked to remain in the lobby while other interviewees were brought to a different location within the office, and when the plaintiff was brought to the location, he was placed in a space “that was confining,” which also made the plaintiff “feel uncomfortable because it was separate and away from the rest of the enrollees.”

The plaintiff also alleged that he was “separated out from the rest of the group based only on his status as a wheelchair-bound person.” When the plaintiff asked if he could be moved closer to the group, a staff person “waved her hands dismissively,” the plaintiff asserted.

The plaintiff alleged that the interviewers also “treated [him] differently from the other enrollees.” According to the plaintiff, the panelists posed follow-up questions to the other interviewees, but asked no follow-up questions to the plaintiff and he had two negative interactions with the interviewers.

The plaintiff was not admitted into the program because, according to a STRIVE staff member, the panelists believed that the plaintiff was “looking for a job, not a training program.”

Thereafter, the plaintiff sued STRIVE and a number of individuals associated with STRIVE, alleging claims of disability discrimination under Title I, Title II, and Title III of the Americans with Disabilities Act (ADA) and under the Rehabilitation Act.

The defendants moved to dismiss the plaintiff’s lawsuit.

The Court’s Decision

The court granted the defendants’ motion to dismiss the plaintiff’s lawsuit.

In its decision, the court first considered the plaintiff's Title I claim under the ADA.

The court explained that ADA Title I plaintiffs, like plaintiffs under Title VII of the Civil Rights Act of 1964, must exhaust their administrative remedies before bringing a claim in federal court. That means, among other things, that they must receive a right-to-sue letter from the U.S. Equal Employment Opportunity Commission (EEOC). The court noted that the plaintiff conceded that he had not received a right-to-sue letter from the EEOC.

The court added that Title I is only applicable to employees and the discriminatory practices of their employers, but that the plaintiff was not a STRIVE employee.

Finding that the plaintiff failed to exhaust his administrative remedies and that the plaintiff failed to allege an employer-employee relationship, the court dismissed the plaintiff's ADA Title I claim.

The court then examined the plaintiff's ADA Title II claim. The court noted that, under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." As defined in the ADA, a "public entity" is "any State or local government," "any department, agency, special purpose district, or other instrumentality of a State or States or local government," or "any commuter authority." Thus, the court continued, Title II applies only to state and local governments, their instrumentalities, and commuter authorities.

The court found no support for the plaintiff's argument that STRIVE was an "instrumentality" of government because it was "a nonprofit contracted by government entities to provide job training that government entities would otherwise need to provide." According to the court, it is not enough to receive government funding and provide services that the government also or would otherwise provide to qualify as a "public entity."

Thus, as the plaintiff failed to adequately allege that STRIVE was a public entity, the court dismissed the plaintiff's Title II claim.

Next, the court examined the plaintiff's claim under Title III of the ADA, which prohibits discrimination against disabled individuals "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." Under Title III, a plaintiff must demonstrate that "(1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA." Discrimination under the third prong includes "a failure to make reasonable modifications in policies, practices, or procedures."

The court pointed out that injunctive relief is the only available remedy under Title III, yet the plaintiff sought only monetary damages. The court then ruled that because the plaintiff did not request specific injunctive relief, his Title III claim had to be dismissed for failure to request the proper relief.

Finally, the court reached the same conclusion with respect to the plaintiff's claims under the Rehabilitation Act. The court construed the plaintiff's Rehabilitation Act claim as arising under Section 504 of the Rehabilitation Act, which protects a "qualified individual with a disability" from being excluded from participating, from being denied benefits, or from being subject to discrimination based on the individual's disability "under any program or activity receiving Federal financial assistance." The court then explained that, to state a claim under Section 504 of the Rehabilitation Act, a plaintiff must establish that:

- (1) The plaintiff is a qualified individual with a disability;
- (2) The plaintiff was excluded from participation in programs or activities of an entity receiving federal financial assistance or was otherwise discriminated against; and
- (3) Such exclusion or discrimination was due to the plaintiff's disability.

The court then reasoned that although the plaintiff failed to establish that STRIVE was a public entity, it was possible that STRIVE could be covered by Section 504 if it received federal financial aid. The court noted that the plaintiff's complaint alleged that "STRIVE participates in several federal . . . programs" and that STRIVE receives "Government Grants." The court found that, liberally construing the allegations in the plaintiff's complaint to allege federal support received by STRIVE, at this stage of the lawsuit, the plaintiff sufficiently alleged that STRIVE was an entity governed by the Rehabilitation Act.

However, the court continued, the plaintiff's Rehabilitation Act claim failed because a plaintiff only is entitled to relief under the Rehabilitation Act if the plaintiff, "solely" by reason of her or his disability, was excluded from participating in, was denied the benefits of, or was subjected to discrimination under any program or activity receiving federal financial assistance. In the court's view, the plaintiff's complaint did not allege that the alleged violations of which the plaintiff complained had occurred solely because of the plaintiff's disability. In fact, the court added, the plaintiff alleged that STRIVE had informed him that STRIVE had rejected him because the panelists believed he was looking for a job, not for a training program. Accordingly, the court dismissed the plaintiff's Rehabilitation Act claim.

Finally, the court dismissed the plaintiff's claims against the individual defendants as there is no individual liability under Titles I and II of the ADA or under the Rehabilitation Act. The court added that under Title III of the ADA, "the question of whether a person is a proper defendant under the ADA turns [] on . . . whether the defendant owns, leases, or operates a place of public accommodation within the meaning of the ADA." Finding that the plaintiff had not alleged any facts demonstrating that any of the individual defendants "exerted any influence over [STRIVE]'s accommodation policies," or that it was an individual, rather than STRIVE, that had the power to make accommodations required by law, the court also dismissed the plaintiff's Title III claims against the individual defendants.

The case is *Askins v. Weinberg*, No. 19-CV-8793 (ALC) (S.D.N.Y. Sept. 29, 2022).

National Origin Discrimination Claim Fails in Federal Court

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit against Summit Security Services, Inc., that asserted claims for, among other things, intentional discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964.

The Case

The plaintiff, of Haitian origin, began working in 2006 for Securitas Security, Inc. In May 2017, Summit assumed responsibility for security at a building in Manhattan to which the plaintiff had been assigned, and the plaintiff began working for Summit as a security supervisor on the 3:20 p.m. to midnight shift.

The plaintiff alleged that he received an "unjustified" disciplinary notice and then a "Final Warning" after which he was told that Summit no longer had work for him. The plaintiff claimed that the justifications for the Final Warning were "totally bogus," and that Summit was using a mere "pretext" to undermine the plaintiff's job standing "for no justified reason."

The plaintiff asserted that he was "treated differently and less well than his younger and non-Haitian coworkers with respect to terms, conditions, and benefits of employment." He also claimed that the "Final Warning was excessive," that he "was singled out and targeted for no justifiable reason," and that "[y]ounger and non-Haitian employees have committed similar or more egregious acts without consequence." The plaintiff, however, provided no examples of that "similar or more egregious" behavior, nor any descriptions of who those younger and non-Haitian

employees were, their job descriptions, whether they had the same supervisor, or whether they were in other respects similarly situated to him.

The plaintiff also alleged that Summit's site supervisor made comments and acted in certain ways evidencing Summit's discriminatory intent in firing him. The plaintiff alleged that he would often speak his native language in the workplace to fellow Haitians, and that the site supervisor "often overheard these conversations and asked 'What language is that? We just speak English here.'"

On other occasions, the plaintiff alleged, the site supervisor, referring to the plaintiff's accent, would state, "In Haiti, things aren't good." The plaintiff took these statements as evidence of discriminatory animus related to his national origin.

The defendants moved to dismiss.

The Court's Decision

The court granted the defendants' motion.

In its decision, the court first examined the plaintiff's national origin disparate treatment claim, explaining that a plaintiff relying on disparate treatment evidence to create an inference that discrimination motivated the plaintiff's adverse employment action must show that the plaintiff was similarly situated in all material respects to the individuals with whom the plaintiff sought to compare himself or herself. The court then found that the plaintiff alleged nothing about the type of conduct his purported comparators engaged in, the dates and times of their "similar or more egregious acts," whether they had the same supervisors or worked at the same site, or even their job descriptions. Indeed, the court continued, the plaintiff raised no claims about how these other employees were situated at all beyond their status as employees and their national origins. The court then ruled that the plaintiff's complaint failed to plead, as it must to withstand the defendants' motion to dismiss, that the employees who did not share his national origin were "similarly situated in all material respects." Accordingly, the court found that the plaintiff failed to raise an inference of discriminatory motivation on the basis of disparate treatment.

The court reached the same conclusion with respect to the site supervisor's alleged comments on the plaintiff's national origin. The court analyzed the four-factor test used by the U.S. Court of Appeals for the Second Circuit to determine whether allegedly offensive remarks suggest discriminatory bias or are merely "stray remarks" that "generally do not constitute sufficient evidence to support a case of employment discrimination." The test considers:

- (1) Who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker);

- (2) When the remark was made in relation to the employment decision at issue;
- (3) The content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and
- (4) The context in which the remark was made (i.e., whether it was related to the decision-making process).

Applying this four-step test to the alleged national origin-related comments in this case, the court concluded that the plaintiff failed to raise a plausible inference of discriminatory intent by reference to the site supervisor's comments. The court pointed out that the plaintiff failed to allege that the site supervisor, who allegedly made the discriminatory remarks referencing the plaintiff's Haitian origin, was in fact the decisionmaker with respect to his termination. It also found that the plaintiff provided no definite timeframe for the allegedly discriminatory remarks directed to his national origin, meaning that it could not find that they were either temporally or substantively related to any adverse employment action. After also ruling that it was "far from clear" that a reasonable jury could find that the content of Hackett's remarks was discriminatory, the court concluded that the plaintiff alleged no "causal connection" to his termination, and it decided that his attempt to allege national origin discrimination under Title VII had to fail.

The case is *Desrosiers v. Summit Security Services, Inc.*, No. 21-CV-10941 (JPO) (S.D.N.Y. Oct. 21, 2022).

Plaintiff's Retaliation Claim Is Dismissed by Federal District Court

The U.S. District Court for the Northern District of New York has dismissed a plaintiff's retaliation claim under Title VII of the Civil Rights Act of 1964, finding that the plaintiff failed to exhaust his administrative remedies.

The Case

The plaintiff in this case filed a lawsuit against SUNY Upstate Medical University/Upstate Healthcare Center, alleging that the defendant's hiring manager fired the plaintiff in retaliation for the plaintiff making complaints about sexual harassment, that the defendant failed to rehire him, and that the defendant gave negative referrals about him.

The defendant moved for summary judgment, arguing that the case should be dismissed based on the plaintiff's failure to exhaust administrative remedies.

The Court's Decision

The court granted the defendant's motion.

In its decision, the court explained that there are two prerequisites for filing a Title VII action in federal court. A plaintiff must (1) file a timely charge of employment discrimination with the Equal Employment Opportunity Commission, and (2) receive a right-to-sue letter.

The court added that, in New York, an aggrieved employee has 300 days from the time when he or she knew or should have known of an adverse employment decision to file a charge of discrimination with the EEOC. Therefore, the court continued, because the plaintiff filed his EEOC complaint against the defendant on November 22, 2019, he was limited to adverse employment decisions that he knew or should have known of within 300 days before that date. That date was January 26, 2019.

The court pointed out that the plaintiff claimed that on December 20, 2018, an agent of the defendant stated to the plaintiff that he would be terminating his employment. As such, the court ruled, the plaintiff filed his EEOC complaint outside the 300-day window and, therefore, he failed to exhaust his administrative remedies.

Next, the court considered the plaintiff's argument that the retaliation he suffered was not only the initial "terminat[ion] [of] his employment," but also the continuing failure to rehire and "providing a negative reference" to the plaintiff's future employers.

As the court explained, the continuing-violation exception "extends the limitations period for all claims of discriminatory acts committed under [an ongoing policy of discrimination] even if those acts, standing alone, would have been barred by the statute of limitations." However, the court added, claims for termination or failure to promote are based on "discrete acts," each giving rise to a separate cause of action. The law was "clear," the court said, that termination and promotion claims "may not be based on discrete acts falling outside the limitations period." As such, the court ruled, to the extent that the plaintiff was attempting to argue that the failure to rehire him at some unspecified later date constituted a continuing violation, "the argument must fail."

Finally, the court acknowledged that "[g]iving negative references or refusing to give positive references in retaliation for a protected activity has also been considered retaliation in violation of Title VII." The court ruled, however, that even assuming that the plaintiff had alleged that the defendant's alleged retaliatory conduct included providing him with negative references after his termination, "such retaliatory conduct would not revive his otherwise untimely retaliatory discharge claim." According to the court, as with a failure to promote or as with termination, the law is clear that "providing a negative reference is considered a discrete retaliatory act that is insufficient to invoke the continuing violation doctrine."

The court concluded that because the plaintiff failed to file his charge with the EEOC within 300 days of receiving notice of his forthcoming termination, and because the continuing-violation doctrine was inapplicable to his claimed retaliatory discharge, the defendant was entitled to summary judgment on plaintiff's retaliation claim.

The case is *Zaja v. SUNY Upstate Medical University/Upstate Healthcare Center*, No. 5:20-CV-337 (MAD/TWD) (N.D.N.Y. Nov. 9, 2022).

Federal District Court Grants Summary Judgment Against Plaintiff's Failure-to-Promote Employment Discrimination Claim

The U.S. District Court for the Northern District of New York has granted the defendant's motion for summary judgment in a case in which the plaintiff asserted a failure-to-promote discrimination claim under Title VII of the Civil Rights Act of 1964.

The Case

As the court explained, the plaintiff in this case, a non-Hispanic male residing in Rensselaer, New York, began working for the New York State Department of Labor (DOL) in 1988 as an Investigative Officer I in the Labor Standards Division. In that capacity, the plaintiff was responsible for conducting payroll audits and interviews concerning wage and hour issues at various locations throughout New York State.

In 2001, the plaintiff was promoted to the position of Investigator II, commonly known as Senior Labor Standards Investigator. His duties included those associated with the permit certification process for farm and industrial labor, as well as the training of other Labor Standards Investigators.

The plaintiff applied for the DOL's Employment Service Monitor Advocate (ESMA) position when it became available in 2016. An ESMA works in the DOL's Agriculture Labor Program to ensure that migrant and seasonal farm workers (MSFWs) receive the same employment services as non-MSFWs. ESMAs travel to farms to interview workers, train employees who operate the DOL's local career centers, and make recommendations to change or develop programs "that are within federal parameters." ESMAs also ensure that housing is maintained throughout the season in a manner consistent with the DOL's requirements, draft New York State's Outreach Plan, meet with advocacy organizations, and assure that New York State complies with federal labor requirements.

After reviewing the application materials submitted by interested individuals for the ESMA position that became available in 2016, the DOL's personnel office determined that six candidates, including the plaintiff,

met the minimum qualifications required for the ESMA position. Once information concerning the six candidates was forwarded to the DOL's Division of Immigrant Policies and Affairs (DIPA) for further review, four candidates, including the plaintiff, were selected to be interviewed for further consideration. Three individuals conducted these interviews and noted their findings.

The resumes, letters, and recommendations concerning three of the four candidates were forwarded to the DOL's deputy commissioner for final review and selection following the conclusion of the interviews. The deputy commissioner had no knowledge of the age, race, or ethnicity of any candidate, and the DOL did not request information regarding any candidate's ethnicity, race, or age any time during the application process. The deputy commissioner determined which of the three candidates would receive an offer and forwarded his recommendation to the executive deputy commissioner.

After the interview process, the DOL concluded that the other candidates were more qualified for the ESMA position than the plaintiff. The DOL reasoned that these candidates were better qualified because they were more knowledgeable of "Employment Services" and had more recent experience with the laws and regulations relating to MFSWs.

Ultimately, the candidate selected for the position in 2016 was determined to be best qualified for several reasons.

First, she was considered "far more qualified" than the plaintiff "because she had run a program similar to DIPA in Michigan where she closely supervised" other individuals working in an ESMA capacity.

Second, she was more familiar with the relevant federal labor laws and regulations than the plaintiff.

Finally, unlike the plaintiff, she had experience implementing an entire state labor program, including the program that the DOL's ESMA was expected to administer.

The plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) and received a right-to-sue letter on January 26, 2017. He then sued the DOL under Title VII of the Civil Rights Act of 1964, claiming that the DOL failed to promote him for this position because of his gender and national origin, predicated on the assertion that the DOL only hired "Hispanic female candidates who had far fewer years of qualifying experience" for such senior level positions.

The DOL moved for summary judgment.

The Court's Decision

The court granted the DOL's summary judgment motion.

In its decision, the court explained that, to establish a case of discriminatory failure to promote under Title VII, a plaintiff ordinarily must demonstrate that:

- (1) The plaintiff is a member of a protected class;
- (2) The plaintiff applied and was qualified for a job for which the employer was seeking applicants;
- (3) The plaintiff was rejected for the position; and
- (4) The position remained open and the employer continued to seek applicants having the plaintiff's qualifications.

The court found that the plaintiff satisfied the first three factors. According to the court, the plaintiff, as a male and non-Hispanic individual, was a member of classes protected by Title VII; the plaintiff applied and was at least minimally qualified for a job for which the DOL sought applicants; and the plaintiff was rejected for the 2016 position for which he applied.

The court then ruled, however, that the plaintiff's claim faltered because the plaintiff could not satisfy the fourth factor. The court reasoned that although the position remained open after the plaintiff was rejected, the DOL did not seek someone with the plaintiff's qualifications but, instead, sought candidates with "superior" qualifications. Indeed, the court added, the plaintiff conceded that he "could see why [the candidate who was selected] was hired," and admitted that the successful candidate's prior experience overseeing a similar program rendered her "more qualified in certain areas" for the 2016 position.

The court then ruled that because the plaintiff did not allege facts that gave rise to an inference of discrimination, he failed to establish a case of failure-to-promote discrimination.

The court also concluded that, in any event, the DOL offered a legitimate, non-discriminatory reason for not hiring the plaintiff, namely that the DOL "found that the other candidates were more knowledgeable of Employment Services and had more recent experience with the laws and regulations." Additionally, the candidate the DOL selected for the ESMA position in 2016 was determined to have been "far more qualified" than the plaintiff "because she had run a program similar to DIPA in Michigan where she closely supervised" other individuals working in an ESMA capacity.

Given that the plaintiff failed to offer any evidence that this non-discriminatory purpose was pretextual, the court granted summary judgment in favor of the DOL.

The case is *Dacier v. New York State Department of Labor*, No. 1:17-CV-418 (LEK/CFH) (N.D.N.Y. Nov. 9, 2022).

Employment Discrimination Complaint Asserting Claims Under Fair Labor Standards Act and Americans with Disabilities Act Is Dismissed

The U.S. District Court for the Southern District of New York has dismissed a plaintiff's employment discrimination complaint against her

former employer asserting claims under the federal Fair Labor Standards Act (FLSA) and the Americans with Disabilities Act (ADA).

The Case

The plaintiff filed an employment discrimination lawsuit against her former employer, the Community Preservation Corporation (CPC), asserting claims under the FLSA and the ADA.

According to the plaintiff, in February 2022, she was “discriminated by CPC’s employees after disclosing [to] them my protected disability.” The plaintiff asserted that they failed to accommodate her needs and that she was discharged. The plaintiff also contended that the company’s human resources manager and the company’s chief executive officer discriminated against her.

The Court’s Decision

The court dismissed the plaintiff’s complaint.

In its decision, the court explained that the FLSA seeks to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” and that it does so, in part, by setting substantive wage, hour, and overtime standards. The FLSA requires that employers pay each of their employees “not less than” the prevailing minimum wage.

The court added that there is no administrative-exhaustion requirement for claims brought under the FLSA. It also noted that the limitation period in which to bring a claim under the FLSA is generally two years, but if the violation is willful, it is three years. As the court explained, a claim under the FLSA accrues “when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.”

The court then ruled that the facts alleged in the plaintiff’s complaint did not suggest that the CPC violated the FLSA with respect to the plaintiff’s employment. In fact, the court said, the plaintiff did not mention her wages or allege the CPC’s failure to pay her the required compensation. Therefore, the court ruled, the plaintiff’s complaint failed to state a claim under the FLSA.

The court reached the same conclusion with respect to the plaintiff’s ADA claim.

The court explained that the ADA prohibits discrimination against a “qualified individual on the basis of disability” in the “terms, conditions, and privileges of employment.” As the court observed, a person is disabled under the ADA if the person has “a physical or mental impairment that substantially limits one or more major life activities.” Discrimination under the ADA includes “a failure to make reasonable modifications.”

As the court noted, to state a claim for discrimination in violation of the ADA, a plaintiff must plausibly allege that the plaintiff suffered an adverse employment action and must provide facts suggesting that the plaintiff's disability was a motivating factor in the adverse employment action.

The court then ruled that the plaintiff had not stated a claim under the ADA for three reasons.

First, the court found, the plaintiff did not describe her disability or state facts suggesting that she was disabled within the meaning of the ADA. For example, she did not identify any "physical or mental impairment" or explain how any alleged impairment "substantially limits one or more major life activities."

Second, according to the court, the plaintiff did not describe the ways in which her employer failed to accommodate her disability.

Third, the court said, the plaintiff did not state facts suggesting that her disability was a motivating factor in the CPC's decision not to accommodate her disability, or to terminate her employment.

The court granted the plaintiff leave to file an amended complaint, although the court emphasized that as a precondition to filing suit under the ADA, the plaintiff first had to file a timely charge with the Equal Employment Opportunity Commission (EEOC). The court concluded that if the plaintiff proceeded with her action without first exhausting her ADA claim by filing with the EEOC, "that claim may be dismissed for failure to exhaust."

The case is *Calderon v. Community Preservation Corp.*, No. 22-CV-7806 (LTS) (S.D.N.Y. Nov. 7, 2022).

Federal District Court Grants Employer's Motion to Arbitrate Employment Discrimination Claims

The U.S. District Court for the Eastern District of New York has sent to arbitration employment discrimination and retaliation claims brought by a former employee against his former employer asserting that he was denied a promotion on the basis of race and then terminated in violation of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law.

The Case

As the court explained, the plaintiff began working for CVS Pharmacy in the late 1990s. In October 2014, CVS introduced an "Arbitration Policy" under which an employee and CVS "each waive the right to pursue employment-related claims in court, agreeing instead to submit such disputes to binding arbitration."

The same month that CVS introduced the Arbitration Policy, the company invited employees to participate in a training course to learn about the Arbitration Policy. The training course explained that CVS employees could opt out of the Arbitration Policy and how to do so. According to CVS records, the plaintiff “completed his training on the Arbitration Policy on January 4, 2015,” and entered into the arbitration agreement that day by “click[ing] ‘Yes’ on the fifth slide of the training” module. Furthermore, “CVS did not receive a timely notice from plaintiff indicating his desire to opt out of the Arbitration Policy.”

As the court explained, CVS decided to reduce its workforce as of December 31, 2016, and it offered the plaintiff a position at the CVS store in Staten Island as an operations manager. On January 9, 2017, the plaintiff received and accepted the offer for the operations manager position and he began working in that role on January 15, 2017. He worked in this position for the next four years, until he was terminated on February 27, 2021.

After receiving a right to sue letter from the Equal Employment Opportunity Commission, the plaintiff sued CVS, alleging retaliation and employment discrimination based on race “[f]rom 2017 until [his] termination” on February 27, 2021.

CVS moved to stay the action and to compel arbitration as provided by the Arbitration Policy.

The plaintiff argued, among other things, that he was not bound by the Arbitration Policy because it was not a validly created contract and that, even if it were a valid contract, his employment discrimination claims were not within the scope of the Arbitration Policy.

The Arbitration Policy

The Arbitration Policy provided:

1. *Mutual Obligation to Arbitrate.* Under this Policy, CVS Health (including its subsidiaries) and its Employees agree that any dispute between an Employee and CVS Health that is covered by this Policy (“Covered Claims”) will be decided by a single arbitrator through final and binding arbitration only and will not be decided by a court or jury or any other forum, except as otherwise provided in this Policy. This Policy is an agreement to arbitrate disputes covered by the Federal Arbitration Act (9 U.S.C. §§ 1-16). Employees accept this Policy by continuing their employment after becoming aware of the Policy.
2. *Claims Covered by this Policy.* Except as otherwise stated in this Policy, Covered Claims are any and all legal claims,

disputes or controversies that CVS Health may have, now or in the future, against an Employee or that an Employee may have, now or in the future, against CVS Health, its parents, subsidiaries, successors or affiliates, or one of its employees or agents, arising out of or related to the Employee's employment with CVS Health or the termination of the Employee's employment.

Covered Claims include but are not limited to disputes regarding... leaves of absence, harassment, discrimination, retaliation and termination arising under the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act . . . and other federal, state and local statutes, regulations and other legal authorities relating to employment.

Covered claims also include disputes arising out of or relating to the validity, enforceability or breach of this Policy, except as provided in the section below regarding the Class Action Waiver.

3. *Claims NOT Covered by This Policy.* This Policy does not apply to claims by an Employee for workers compensation, state disability insurance, unemployment insurance benefits or claims for benefits under an employee benefit plan. This Policy does not prevent or excuse an Employee (either individually or together with others) or CVS Health from using the company's existing internal procedures for resolution of complaints, and this Policy is not intended to be a substitute for the use of such procedures.

This Policy applies only to legal claims. Thus, it would not apply to a claim by an Employee that CVS Health acted improperly or unfairly or inconsistently, if the company's alleged actions did not also violate the Employee's rights under a particular law.

This Policy does not apply to claims raised in litigation pending as of the date an Employee first receives or views this Policy.

This Policy does not prohibit an Employee or CVS Health from filing: a motion in court to compel arbitration; a motion in court for temporary or preliminary injunctive relief in connection with an arbitrable controversy; or an administrative charge or complaint with any federal, state or local office or agency, including but not limited to the U.S. Department of Labor, Equal Employment Opportunity Commission or National

Labor Relations Board. Also excluded from this Policy are disputes that may not be subject to a pre-dispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act or any other binding federal law or legal authority.

The Arbitration Policy further provided:

- c. *Rules and Procedures.* The arbitration will be administered by the American Arbitration Association (“AAA”) and will be conducted in accordance with the Employment Arbitration Rules and Mediation Procedures of the AAA (“AAA Rules”) then in effect.

The Court’s Decision

The court granted the CVS motion to compel arbitration and to stay the proceeding until the conclusion of the arbitration.

In its decision, the court first ruled that the Arbitration Policy was a valid and enforceable contract under applicable New York law.

The court found that the plaintiff completed his training on the Arbitration Policy on January 4, 2015 and, as part of the training module, that:

- The plaintiff was required to click on a link that would display the Arbitration Policy;
- After opening the link, the plaintiff was required to click a “Yes” button on the fifth slide of the course, thereby “acknowledging and agreeing” that he had “carefully read” the Arbitration Policy and that he “underst[ood] that it applies” to him;
- The fifth slide also explained that by clicking the “Yes” button, the plaintiff was “acknowledging and agreeing” that he had a 30-day period to opt out of the Arbitration Policy, and that “by being covered by the Policy and not opting out,” he was “obligated to go to arbitration instead of court to resolve legal claims covered by the Policy”; and
- The fifth slide made clear that the plaintiff’s “click of the ‘Yes’ button create[d] an electronic signature that is legally binding.”

Thus, the court ruled, by clicking “Yes” on the fifth slide, the plaintiff entered into a valid arbitration agreement with CVS.

The court was not persuaded by the plaintiff’s arguments that the Arbitration Policy was not a validly formed contract because he had

not been provided a copy, finding no relevant court decision requiring that he be provided a copy of the policy and that, in any event, the training program that the plaintiff completed provided him the ability to print a physical copy of the Arbitration Policy – at no cost to him. Moreover, the court continued, even if the plaintiff did not print out a copy when he completed the training program, he could obtain copies of the Arbitration Policy from his supervisor, as the fifth slide of the training program pointed out.

The court also rejected the plaintiff's contention that he was unaware that he consented to arbitration. The court reasoned that New York law allows courts to infer that a party acted knowingly when entering into an online agreement to arbitrate when the party "takes some action demonstrating that [he] has at least constructive knowledge of the terms of the agreements." As the court recognized, CVS records indicated that the plaintiff clicked "Yes" on the fifth slide of the Arbitration Policy training program, and by doing so he "acknowledg[ed] and agree[d]" that had read, understood, and agreed to the Arbitration Policy, including his right to opt-out of the agreement within 30 days of the training.

Accordingly, the court found that the Arbitration Policy was validly formed.

The court next examined whether the plaintiff's discrimination and retaliation claims fell within the scope of the Arbitration Policy, and it ruled that this this was an issue of arbitrability that had to be decided by an arbitrator. The court reasoned that the Arbitration Policy that the plaintiff agreed to be bound by was "clear and unmistakable" in delegating issues of arbitrability to the arbitrator.

The court found that none of the claims carved out of the Arbitration Policy by Subsection 3 were vague or significantly narrowed the scope of the Arbitration Policy; instead, they delineated "a rather broad universe of claims that should be arbitrated." Accordingly, the court ruled, the language of this section did not suggest that the parties consented to arbitrate only a limited subset of disputes, rather than "all aspects of all disputes." Thus, the court concluded, the "broadly worded Arbitration Policy" and the incorporation of the AAA Rules demonstrated the parties' "clear and unmistakable intent to delegate arbitrability issues to the arbitrator."

The court then granted the CVS motion to compel arbitration, and it stayed the lawsuit pending the conclusion of arbitration.

The case is *Kassim v. CVS Albany, LLC*, No. 21-CV-2927 (PKC) (TAM) (E.D.N.Y. Sept. 20, 2022).

Court Confirms Arbitration Award Finding Individual Bound by Restrictive Covenants Preventing Competition with Parties to the Arbitration

A trial court in New York has confirmed an arbitration award that found, among other things, that an individual was bound by restrictive

covenants preventing his competition with two companies that were parties to the arbitration.

The Case

The arbitrator in *Bruderman Bros., LLC & Bruderman Asset Management LLC v. Gary M. Goldberg, GMG2 Corp., & GMG1 Corp.*, JAMS Reference No. 1425030879, found that the individual party had been discharged by the companies for cause and that he was bound by certain restrictive covenants preventing him from competing with those companies or soliciting their business. The arbitrator also awarded damages to the companies.

The companies asked Supreme Court, New York County, to confirm the arbitration award.

The Court's Decision

The court granted the companies' motion to confirm the arbitration award.

In its decision, the court explained, under New York law, judicial review of arbitration awards "is extremely limited" and "[a]n arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached."

The court then rejected the individual party's contention that the arbitration award had no basis in the factual record before the arbitrator. The court found that the "detailed, extensive, and thoughtful decision of the arbitrator" was "well supported" by the arbitration record.

Moreover, the court added, a court determining whether to confirm, modify, or vacate an arbitration award "is not empowered to reassess the evidence heard by the arbitrator." Thus, the court said, even if it accepted the individual party's position that the arbitrator did not properly weigh and interpret the companies' expert evidence, that would not be a basis for it to vacate the award given that there was "a more than colorable justification for the arbitrator's decision."

Finding "no meritorious ground" upon which to modify or vacate the award, the court confirmed the award in favor of the companies.

The case is *Goldberg v. Bruderman Brothers, LLC*, No. 159280/2019 (Sup. Ct. N.Y. Co. Dec. 9, 2022).

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