Employee Relations
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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:

- A New York trial court has ruled that the purchaser of a medical practice could not enforce a noncompete provision contained in the purchase agreement after the purchaser breached the agreement by failing to make required payments.

- A New York trial court has refused to enforce the provisions of a noncompetition agreement that it determined was overbroad, but it granted a former employer's request that it bar its former employee from disclosing or using any of its confidential information with respect to it current clients and with respect to prospective clients who had signed non-disclosure agreements.

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- A trial court in New York has refused to enforce a noncompete provision that it found to be "overly broad" and where, in any event, the plaintiff's former employer was unable to allege any damages caused by the plaintiff's purported breach of the provision.

- The U.S. District Court for the Southern District of New York has ruled that the allegations in an employment discrimination complaint filed against a nursing home were "insufficient to state a claim for discrimination and retaliation" under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act of 1967.

- The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit filed against the Social Security Administration (SSA) and two individual SSA employees by a former SSA employee.

- The U.S. District Court for the Eastern District of New York has dismissed a plaintiff's employment discrimination complaint against two individuals and refused to allow the plaintiff to file an amended complaint naming her former employer, reasoning that such an amended complaint "would be futile."

- A federal district court in New York has dismissed a complaint filed by a lawyer against the New York City Transit Authority asserting equal pay claims under the federal Equal Pay Act and New York's Equal Pay Law and claims for employment discrimination on the basis of race and gender 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 federal district court in New York has dismissed a complaint for pregnancy discrimination brought by a former hotel front desk agent that arose after she was laid off due to the impact of the COVID-19 pandemic on the hotel industry.

Purchaser of Medical Practice May Not Enforce Noncompete Provision After Breaching Purchase Agreement, New York Trial Court Decides

A New York trial court has ruled that the purchaser of a medical practice could not enforce a noncompete provision contained in the purchase agreement after the purchaser breached the agreement by failing to make required payments.

The Case

On December 28, 2012, the plaintiff in this case, Craniofacial Surgery PC (Craniofacial Surgery), entered into a contract with George F. Hyman, M.D., and George F. Hyman M.D. PLLC (together, Hyman) to purchase Brooklyn Eye Medical Associates LLC from Hyman for $650,000 (the Purchase Agreement). Toward that end, Craniofacial Surgery paid an initial amount of $200,000.

Pursuant to the Purchase Agreement and accompanying promissory note, Craniofacial Surgery was required to pay half the outstanding amount by December 31, 2013, and the other half by December 31, 2014.

The remaining balance, however, was never paid and Hyman obtained a $450,000 judgment against Craniofacial Surgery in a trial court in Nassau County, New York.

During May 2015, Hyman began working in a nearby medical facility.

Craniofacial Surgery sued Hyman, alleging that Hyman violated a non-compete provision contained in the Purchase Agreement. Craniofacial Surgery also asserted that it was entitled to the return of the $200,000 it already paid plus attorneys' fees and indemnification.

The parties moved for summary judgment.

The Court's Decision

The court denied Craniofacial Surgery's requests for summary judgment and granted summary judgment in favor of Hyman.

In its decision, the court pointed out that Article 10.2 of the Purchase Agreement stated that "the seller shall, defend, indemnify, save and keep harmless, the Buyer . . . from all damages sustained or incurred . . . by virtue of . . . any inaccuracy in or breach of any representation and warranty made by Seller in this agreement." The court explained that Craniofacial Surgery asserted that Hyman made false representations concerning the fact that Brooklyn Eye Medical Associates LLC was in compliance with all state and federal laws and was compliant with all billing practices. However, the court found that Craniofacial Surgery failed to introduce "any evidence eliminating any questions of fact" as to whether Hyman made any such misrepresentations.

Moreover, the court continued, indemnification, according to the express terms in the Purchase Agreement, only applied to damages sustained or incurred as the result of any inaccuracies and did "not apply to the purchase price in any event." The initial payment of $200,000 "was not a damage sustained or incurred as a result of any inaccuracy," the court said.

The court also denied Craniofacial Surgery's motion seeking summary judgment on its claim to be indemnified for the costs associated

with the Nassau County action. The court reasoned that indemnification allows a party forced to pay for the wrongdoing of another to recover such payment from the actual wrongdoer, but that in this case Hyman did "not commit any wrongdoing" and, in fact, he "prevailed in that lawsuit." According to the court, Craniofacial Surgery could not seek indemnification for a lawsuit it lost on the grounds that Hyman acted in some improper manner. Hyman's victory in that case "forecloses any indemnification."

Next, the court also denied Craniofacial Surgery's summary judgment motion on its claim that it was entitled to lost profits because Hyman violated the noncompete provision of the agreement. The court explained that it is "well settled that a party that breaches an agreement" cannot thereafter assert any claims of breach of a restrictive covenant. "There really can be no question of fact the plaintiff breached the agreement by failing to tender the payments due," the court said. Craniofacial Surgery's breach foreclosed its right to thereafter pursue claims that Hyman violated the noncompete clause, the court concluded.

Having denied all of Craniofacial Surgery's requests for summary judgment, the court granted summary judgment in favor of Hyman.

The case is *Craniofacial Surgery, P.C. v. Hyman*, No. 511542/2018 (N.Y. Sup. Ct. Kings Co. May 11, 2023).

Court Refuses to Enforce Overbroad Noncompete Agreement, But Does Bar Former Employee from Using Former Employer's Confidential Information

A New York trial court has refused to enforce the provisions of a noncompetition agreement that it determined was overbroad, but it granted a former employer's request that it bar its former employee from disclosing or using any of its confidential information with respect to it current clients and with respect to prospective clients who had signed nondisclosure agreements.

The Case

The plaintiff in this case, The Jordan, Edmiston Group, Inc. (JEGI), is an independent investment bank headquartered in New York City offering investment banking and consulting services. The defendant, Joshua Wong, formerly worked with JEGI as a managing director who had duties involving the development of business prospects and client relationships. As part of his employment with JEGI, Wong entered into an employee confidentiality and noncompetition agreement (the Agreement) dated June 4, 2018.

The Agreement contained a provision prohibiting Wong from working with other investment banks focused on the media, information, marketing, and/or technology sectors for a one-year period after the termination of Wong's employment with JEGI. The Agreement also contained provisions preventing Wong from sharing or using confidential information belonging to JEGI or its clients.

Wong resigned from JEGI on February 6, 2023. On February 27, 2023, Wong accepted an offer of employment with BrightTower, LLC (BrightTower) and soon thereafter commenced his employment there. According to JEGI, BrightTower is a direct competitor of JEGI located in New York City and many of its managing directors are former JEGI employees.

JEGI sued Wong, alleging that he violated the noncompete provision in the Agreement by joining BrightTower shortly after his employment with JEGI ended. JEGI also alleged that Wong brought confidential JEGI information (largely comprised of information regarding JEGI's prospective clients) to BrightTower in violation of the Agreement's confidentiality provisions. JEGI also sued BrightTower, alleging that BrightTower tortiously interfered with the Agreement between JEGI and Wong.

JEGI asked the court to issue a preliminary injunction against Wong and BrightTower that would:

(1) Bar Wong from performing any services for or having any involvement with BrightTower, LLC;

(2) Enjoin Wong from disclosing or using any JEGI confidential information or trade secrets;

(3) Order Wong to immediately return any and all JEGI documents or information in his possession, custody, or control;

(4) Order that Wong certify that he has returned any and all JEGI documents or information in his possession, custody, or control;

(5) Enjoin BrightTower from reviewing or in any way using any JEGI confidential information and/or trade secrets;

(6) Order that BrightTower turn over to JEGI any JEGI documents or information in its possession, custody, or control, including electronic versions of such documents contained within its systems;

(7) Order that BrightTower certify that it has not used, will not use, and has captured and turned over to JEGI all JEGI documents

> or information in its possession, custody, or control, including any and all electronic versions of such documents housed on or contained within its systems, including details regarding the steps that it has taken to do so; and
>
> (8) Order expedited discovery.

After holding an evidentiary hearing, the court issued its decision.

The Noncompete Restrictive Covenant

The noncompete restrictive covenant contained in the Agreement provides (with emphasis added):

> Employee hereby agrees to not: . . .
>
> for a period of one year after leaving the employment of Employer, become an owner, manager, operator, licensor, licensee, lender, partner, stockholder, joint venturer, director, officer, employee, consultant, partner, agent, independent contractor, in boutique investment banks in New York and/or identified below that focus on the media, information, marketing services and/or technology sectors, including but not limited to: AGC, Berkery Noyes, BMO Capital Markets, DCS Advisory, DeSilva & Phillips, Evercore Partners, GCA Savvian, GP Bullhound, Greenhill & Co., Harris Williams, Houlihan Lokey, Jefferies, KeyBanc Capital Markets, Lazard, LUMA Partners, Marlin & Associates, MHT MidSpan, Moelis & Company, PALAZZO Securities, Petsky Prunier, Piper Jaffray, Portico Capital, Qatalyst Partners, Robert W. Baird, Stephens, Vaquero Capital, Vista Point, and William Blair, *and such other boutique investment banks that may, from time to time, be identified as direct competitors and tracked by JEGI's Marketing Department in its reasonable and customary fashion*. . . .

The Court's Decision

The court barred Wong from disclosing or using JEGI's confidential information but denied JEGI's other requests.

In its decision, the court explained that, to prevail on its application for a preliminary injunction, JEGI had to demonstrate: (1) a likelihood of success of the merits of its underlying claims; (2) that it would suffer irreparable harm absent the injunction; and (3) that the balance of the equities tips in its favor.

First, the court considered JEGI's request to bar Wong from working at BrightTower, which it denied.

The court explained that restrictive covenants in an employment agreement generally are disfavored under New York law and only are enforced to the extent they are:

(1) Reasonable in time and area;

(2) Necessary to protect the employer's legitimate interests;

(3) Not harmful to the general public; and

(4) Not unreasonably burdensome to the employee.

The court conceded that it appeared that Wong breached the non-competition provision of the Agreement. However, the court said, there were "issues as to the enforceability" of the noncompetition provision given that, if literally applied, it would preclude Wong "from pursuing his profession anywhere in the world." The court recognized that the provision did refer to "New York-based investment banks," but it found that "the overall restriction" did "not exclusively apply to New York." As the court explained, "Many of the specifically-listed firms have offices in several cities (including international offices) and the language of the provision does not specify that the restriction applies only to those firms' New York offices." Moreover, the court continued, the Agreement also generally permits JEGI to enforce the restrictive covenant against Wong's employment at other investment banks that JEGI deems to be a direct competitor, "regardless of location."

The court next decided that JEGI failed to establish that it would suffer any irreparable harm in the absence of an injunction granting that requested relief. JEGI emphasized the importance of developing key relationships with prospective clients and concerns about losing prospective clients to BrightTower as a result of Wong's employment at BrightTower, but the court reasoned that because there was "no guarantee" that any of these prospective clients would retain JEGI, any harm to JEGI was "speculative and, in any event, could be compensated by monetary damages."

The court reached a different result with respect to another of JEGI's requests: that the court enjoin Wong from disclosing confidential information.

Here, the court enjoined Wong from disclosing or using any of JEGI's confidential information with respect to JEGI's current clients and prospective clients who signed non-disclosure agreements with JEGI, as well as other confidential information belonging to these companies.

According to the court, JEGI demonstrated "a likelihood of success" on its claim that Wong violated the non-disclosure provision of the Agreement by sharing confidential information with BrightTower. The court noted that JEGI submitted as evidence an email exchange

between Wong and a BrightTower employee dated March 1, 2023, in which the BrightTower employee requested that Wong provide a "list of active prospects that you are in communication with and/or just tracking. Also, your key PE relationships," to which Wong responded: "I will have all those materials prepared." The court found this to be "significant."

The court observed that the fact that prospective clients entered into non-disclosure agreements with JEGI made it extremely likely that confidential information was disclosed to JEGI. Further, the court said, the very fact that JEGI entered into non-disclosure agreements with prospective clients might itself "be confidential information relating to JEGI's business." The court then found that JEGI demonstrated that it would suffer irreparable harm absent the court granting this prong of the requested injunction.

The court also ruled that the balance of the equities "clearly" tipped in JEGI's favor because JEGI sought to keep confidential third-party information private. The court found "no basis" to suggest that Wong would suffer any harm by the granting of an injunction requiring him to abide by the nondisclosure provisions to which he knew he was bound.

Next, the court considered JEGI's request that it order Wong to return confidential information to JEGI and/or to order Wong to certify that he has done so. The court reasoned that this requested relief was "not necessary at this time" given that the parties had entered into a stipulation pursuant to which Wong claimed and certified that he did not have any JEGI confidential documents, including information related to prospective clients, in his possession. BrightTower also certified that it never received any of JEGI's confidential information from Wong.

The court concluded by denying JEGI's request that it impose a preliminary injunction against BrightTower. The court explained that the elements of tortious interference with contract are:

(1) The existence of a valid contract between JEGI and Wong;

(2) BrightTower's knowledge of that contract;

(3) BrightTower's intentional procurement of the breach of that contract; and

(4) Damages.

The court reasoned that, assuming there was a valid contract, the testimony during the hearing did not support a finding that, but for BrightTower's conduct, Wong would not have left JEGI's employ.

The case is *Jordan, Edmiston Group, Inc. v. Wong*, No. 651416/2023 (Sup. Ct. N.Y. Co. May 1, 2023).

Court Denies Request to Enforce "Overly Broad" Noncompete Provision, Highlighting Failure of Former Employer to Allege Any Damages

A trial court in New York has refused to enforce a noncompete provision that it found to be "overly broad" and where, in any event, the plaintiff's former employer was unable to allege any damages caused by the plaintiff's purported breach of the provision.

The Case

As the court explained, Parkview Management, Inc., hired Benjamin Frances pursuant to an employment agreement dated February 16, 2016, for a number of tasks, "including but not limited to: accounting, management of property and construction projects, and related tasks." He was given a salary of $70,000, as well as other benefits. A noncompete provision was included in the agreement, purporting to prevent Frances from working for, or investing in, "any business in competition with the Company, or with any of its subsidiaries or affiliates," subject to certain exceptions, for a period of six months after Frances left Parkview. The agreement did not define the term "competition."

Parkview was the project manager for a project it referred to as the "329 Broadway Project." As part of that project, Parkview needed to obtain a status update letter (SUL) from the New York City Landmarks Preservation Committee because part of the work impacted a landmarked building next to the building located at 329 Broadway in Brooklyn, New York.

In June 2018, Parkview placed Frances in charge of the process for obtaining the SUL. Frances asserted that a Parkview representative promised him additional compensation upon successfully obtaining the SUL.

Frances performed the necessary work to obtain the SUL but the parties differed as to the course of the negotiations regarding his compensation. Frances asserted that the parties agreed on an amount of $250,000, but he conceded that the payment mechanism and when and how he would be paid remained open items. Parkview confirmed, at minimum, that $250,000 was the number being discussed but asserted that it never finally agreed that Parkview would pay him.

Frances resigned from Parkview without being paid the $250,000. After he filed suit against Parkview, Parkview counterclaimed for breach of contract, asserting that Frances breached the noncompete provision of the employment agreement by going to work for a competing real estate developer within six months of leaving Parkview.

Parkview moved for summary judgment on its counterclaim.

The Court's Decision

The court denied Parkview's motion.

In its decision, the court found that Parkview's reading of the noncompete provision was "overly broad" as it sought to bar Frances from working anywhere in the real estate industry in New York City, asserting that the company Frances went to work for competed with Parkview because that company had an office in Brooklyn and was in the real estate business.

The court observed, however, that a Parkview representative testified that he could not recall any projects or jobs that Parkview had lost out on because of Frances going to work for the other company. Accordingly, the court ruled, Parkview could not allege damages caused by the purported breach by Frances of the noncompete provision. After pointing out that noncompete clauses in employment contracts were "not favored" and only would be enforced "to the extent reasonable and necessary to protect valid business interests," the court concluded that Parkview failed to identify any valid business interest protected by the noncompete provision, or any damages arising therefrom.

The case is *Frances v. Klein*, No. 151000/2020 (Sup. Ct. N.Y. Co. March 28, 2023).

Federal District Court in New York Rejects Plaintiff's Employment Discrimination Complaint

The U.S. District Court for the Southern District of New York has ruled that the allegations in an employment discrimination complaint filed against a nursing home were "insufficient to state a claim for discrimination and retaliation" under Title VII of the Civil Rights Act of 1964 (Title VII) or the Age Discrimination in Employment Act of 1967 (ADEA).

The Case

The plaintiff in this case sued her employer, Archcare at Mary Manning Walsh Nursing Home, asserting claims under Title VII and the ADEA.

In particular, the plaintiff, who identified herself as an American born in 1982, claimed that a co-worker and nurse who sometimes acted as a supervisor at the nursing home, bullied and harassed her while she was at work because of her national origin and age.

The plaintiff's complaint described a series of incidents that allegedly took place at the nursing home involving the co-worker. According to the plaintiff, the first incident occurred on December 22, 2022, when the co-worker, who was blocked from the plaintiff's personal cellphone, called that cellphone while the plaintiff was at work.

The plaintiff also contended that days later, on January 3, 2023, the co-worker yelled and cursed at the plaintiff to answer the "call bells" in the nursing home's hallways.

A few weeks later, on January 19, 2023, the plaintiff said, she walked by the nursing station and her co-worker made an offensive comment, stating, "I don't believe someone who is skinney and has nothing (body shaming) has a man."

Next, on February 2, 2023, the co-worker allegedly called security on the plaintiff after she failed to respond to the call bells while providing a patient with care.

The plaintiff asserted that she reported the alleged harassment to the nursing home's Human Resources Department and met with that department.

On February 14, 2023, the co-worker called the police on the plaintiff after she arrived at the nursing home, the plaintiff asserted.

The plaintiff contended that her co-worker's actions caused her anxiety and she "became depressed" and did not want to go to work.

After receiving a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission, the plaintiff filed her lawsuit against the nursing home. She sought money damages.

The Court's Decision

The court rejected the plaintiff's employment discrimination complaint.

In its decision, the court first discussed claims under Title VII and the ADEA.

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

As the court pointed out, the ADEA makes it unlawful for an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." It also makes it unlawful to retaliate against employees who oppose discriminatory practices barred by the ADEA. The statute protects workers who are at least 40 years old from discrimination because of their age.

In total, the court explained, these antidiscrimination provisions prohibit employers from mistreating an individual because of the individual's

protected characteristics or retaliating against an employee who has opposed any practice made unlawful by those statutes.

Next, the court explained that, at the pleading stage in a Title VII employment discrimination action, "a plaintiff must plausibly allege that (1) the employer took adverse employment action against [her], and (2) [her] race, color, religion, sex, or national origin was a motivating factor in the employment decision." A plaintiff "may do so by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination." Similar allegations are required to plead a cause of action under the ADEA, and a plaintiff must allege that her age was the but-for cause of the employer's adverse employment action, the court explained.

The court then ruled that the plaintiff's allegations were "insufficient to state a claim for discrimination and retaliation under Title VII or the ADEA." The court said that although the plaintiff asserted that her co-worker, who sometimes acted as a supervisor, bullied and harassed her, she did not allege facts suggesting that her American nationality or age played any role in her co-worker's alleged harassment of her. Without such facts, the court concluded, the plaintiff's assertions of discrimination were not sufficient to "to nudge[] [her] claims . . . across the line from conceivable to plausible to proceed."

The case is *Powell v. Archcare at Mary Manning Walsh Nursing Home*, No. 23-CV-1799 (LTS) (S.D.N.Y. May 30, 2023).

New York District Court Dismisses Plaintiff's Title VII, ADEA, ADA, and Rehabilitation Act Claims Against Former Federal Employer

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit filed against the Social Security Administration (SSA) and two individual SSA employees by a former SSA employee.

The Case

The plaintiff filed a lawsuit asserting claims of race, color, national origin, disability, and age-based employment discrimination, as well as claims of retaliation, under Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (ADA), and the New York State and New York City Human Rights Laws (respectively, the NYSHRL and NYCHRL). The plaintiff sued:

(1) Her former employer, the SSA;

(2) Her former SSA supervisor; and

(3) An SSA Operations Support Branch Chief.

The plaintiff's claims arose from the alleged discrimination and retaliation she experienced while she was employed at an SSA facility in Jamaica, New York. She filed her lawsuit after receiving a letter from the SSA Operations Support Branch Chief informing her that she was being terminated during her probationary period due to her "discourteous conduct" and her absences without leave.

The Court's Decision

In its decision, the court first addressed the plaintiff's claims under Section 1981, the ADA, the NYSHRL, and the NYCHRL.

The court ruled that because the plaintiff asserted claims of discrimination and retaliation arising from her federal employment with the SSA, her claims under Section 1981, the ADA, and the NYSHRL and NYCHRL had to be dismissed. The court explained that Title VII is the exclusive judicial remedy for claims of race or color-based discrimination in federal employment, and that Section 1981 was not available as a remedy for such discrimination in federal employment. It said that the same was true with respect to related claims of retaliation under Section 1981.

Moreover, the court said, relief under the NYSHRL and the NYCHRL – state and municipal statutes, respectively – also was unavailable to persons asserting claims of discrimination and retaliation arising from federal employment.

Accordingly, the court dismissed the plaintiff's claims under Section 1981, the ADA, and the NYSHRL and NYCHRL for failure to state a claim on which relief may be granted.

The court next considered the plaintiff's claims under Title VII, the Rehabilitation Act, and the ADEA against her former supervisor and the SSA Operations Support Branch Chief.

The court explained that Title VII "does not provide for claims against individual employees," and that the "same is true as to claims under the Rehabilitation Act and the ADEA." The court, therefore, dismissed the plaintiff's claims under Title VII, the Rehabilitation Act, and the ADEA against her former supervisor and the SSA Operations Support Branch Chief for failure to state a claim on which relief may be granted.

After noting that the proper defendant for such claims brought by a current or former federal employee is the head of the relevant agency, the court dismissed the plaintiff's claims against the SSA under the doctrine of sovereign immunity.

Next, the court turned to the plaintiff's claims of discrimination under Title VII. The court ruled that the plaintiff alleged "no facts showing that

her race, color, religion, sex, or national origin was a motivating factor in any adverse employment action taken against her by her employer, including her termination."

With respect to the plaintiff's claims of discrimination brought under the Rehabilitation Act, the court ruled that, even assuming that the plaintiff was a person with a disability, the plaintiff did not allege facts sufficient to show she could only have performed the essential functions of her job if her employer had provided her with a reasonable disability accommodation.

In addition, as to her claims of discrimination under the ADEA, the court found that the plaintiff alleged no facts showing that, but for her age, she would not have suffered an adverse employment action, including her termination.

Finally, the court considered the plaintiff's claims of retaliation under Title VII, the Rehabilitation Act, and the ADEA. With respect to her claims of retaliation brought under Title VII and the ADEA, the court ruled that the plaintiff alleged "no facts showing that she suffered an adverse employment action because she opposed an unlawful employment practice." As to her claims of retaliation under the Rehabilitation Act, the court concluded that the plaintiff did not allege facts "sufficient to show that there was a causal connection between her protected activity and any adverse employment action she suffered."

The case is *Williams v. Social Security Administration*, No. 1:23-CV-2348 (LTS) (S.D.N.Y. May 30, 2023).

Plaintiff's Rehabilitation Act and ADA Claims Fail Against Two Individuals as Court Denies Plaintiff Leave to Amend Her Complaint to Sue Her Former Employer

The U.S. District Court for the Eastern District of New York has dismissed a plaintiff's employment discrimination complaint against two individuals and refused to allow the plaintiff to file an amended complaint naming her former employer, reasoning that such an amended complaint "would be futile."

The Case

The plaintiff filed an employment discrimination lawsuit asserting claims under the Americans with Disabilities Act (the ADA) and the Rehabilitation Act of 1973 against an employee of her former employer and an attorney who represented the plaintiff's former employer during an administrative proceeding that the plaintiff commenced with the Equal Employment Opportunity Commission (the EEOC).

The plaintiff alleged that her claims were based on her former employer's termination of her employment and failure to accommodate her

alleged disability. The plaintiff alleged that she suffered from a "learning disability," attention-deficit/hyperactivity disorder "ADHD), and "depressive disorder."

The plaintiff sought multiple forms of relief. She demanded that her employer re-hire her, accommodate her disabilities, and pay $20,000 in damages attributable to the "mental anguish" that the plaintiff allegedly suffered because of her termination and subsequent eviction from her residence. The plaintiff sought an additional $7,500 in damages attributable to a period of time in which her employer was allegedly "withholding [her] from work" during a dispute related to her identification badge and a drug test.

The Court's Decision

The court dismissed the plaintiff's complaint.

In its decision, the court explained that the plaintiff could not assert her Rehabilitation Act or ADA claims against individuals, so her claims against the defendants had to be dismissed.

The court then denied the plaintiff the opportunity to amend her complaint to assert Rehabilitation Act and ADA claims against her former employer, finding that an amended complaint would be futile.

The court explained that, to assert a claim under the Rehabilitation Act, a plaintiff must allege: (1) that he or she is a person with disabilities under the Rehabilitation Act, (2) who has been denied benefits of or excluded from participating in a federally funded program or special service, (3) solely because of his or her disability.

The court noted that the plaintiff's original complaint did not allege that her former employer, a private company, received federal funds of any kind that would bring the company within the scope of the Rehabilitation Act. Accordingly, the court ruled that allowing the plaintiff to assert Rehabilitation Act claims against her former employer would be futile.

Next, the court declared that it would not permit the plaintiff to file an amended complaint asserting ADA claims against her former employer because those claims "would be barred by the statute of limitations."

The court explained that the plaintiff was required to exhaust her ADA claims by presenting them to the EEOC, or an analogous state or local agency, within 300 days of the acts she challenged as unlawful, and that she was required to commence a lawsuit related to those claims within 90 days of receiving a right-to-sue letter from the EEOC. According to the court, the plaintiff's own allegations "unambiguously" demonstrated that her ADA claims were untimely. The court reasoned that:

- The plaintiff filed a charge of discrimination with the New York State Division of Human Rights and the EEOC, which resulted

in the plaintiff receiving a right-to-sue letter from the EEOC dated April 20, 2022;

- The plaintiff's complaint alleged that she received her right-to-sue letter the same day it was issued;

- The letter informed the plaintiff that she was required to commence a lawsuit within 90 days of receiving the letter; and

- Although the plaintiff's complaint was dated July 19, 2022 – the last day of the 90-day statute of limitations period – she did not file the complaint with the federal district court in the Southern District of New York until August 3, 2022, rendering the plaintiff's ADA claims untimely.

Concluding that it would not exercise supplemental jurisdiction over any state or local law claims, the court dismissed the plaintiff's claims against the individuals the plaintiff named as the only defendants in the plaintiff's complaint, and it denied the plaintiff leave to amend her complaint to assert claims against the company that previously employed her because such an amendment "would be futile."

The case is *Hogan v. Mahabir*, No. 22-CV-07858 (HG) (CLP) (E.D.N.Y. May 24, 2023).

Lawyer's Equal Pay and Employment Discrimination Claims Against New York City Transit Authority Are Dismissed

A federal district court in New York has dismissed a complaint filed by a lawyer against the New York City Transit Authority asserting equal pay claims under the federal Equal Pay Act and New York's Equal Pay Law and claims for employment discrimination on the basis of race and gender 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

The plaintiff, a Black female lawyer admitted to practice law in New York in 2001, said that she was approached by a member of the Metropolitan Transportation Authority (MTA) in 2011 regarding a position in its Law Department. At that time, the plaintiff was working in the private sector as a civil litigator, had 10 years of experience, and was earning a salary of approximately $115,000.

Martin Schnabel, then-general counsel, and other executives from the New York City Transit Authority (NYCTA), a part of the MTA, interviewed the plaintiff for an executive agency counsel (EAC) position. The plaintiff was offered the EAC, Nonmanagerial, Grade A (EAC-A) position at a salary of $105,000 annually.

On November 28, 2011, the plaintiff accepted the offer and began working in the NYCTA Torts Division. At the time the plaintiff was hired, there were six lawyers in the Torts Division who also held the title of EAC-A and were paid an average salary of $94,377 annually.

Joseph Brown served as the NYCTA's director of human resources (HR) for the Law Department. Brown's responsibilities included facilitating compliance with HR policies regarding hires and promotions. Pursuant to the NYCTA's HR policy, the Law Department did not provide merit-based pay raises. Instead, general wage increases (GWIs) were granted agency wide pursuant to the NYCTA's collective bargaining agreements with certain unions. GWIs were usually between two and three percent of an employee's current salary. Lawyers in the Law Department were not represented by a union, and were not subject to any collective bargaining agreement. However, the NYCTA typically gave lawyers and other non-union employees the same GWIs as those represented by a union.

The HR policy also provided for two types of promotions: (i) promotions that resulted from the posting of a job vacancy notice (JVN), and (ii) promotions in place (PIP), which were available to employees who advanced within the same or adjacent titles. Both JVNs and PIPs would lead to a salary increase of 10 percent or an increase to the minimum salary range for the respective position.

In early 2013, Schnabel began developing a new salary structure (the Salary Plan) in order to make Law Department lawyers' salaries more competitive. The final version of the Salary Plan set forth target salary levels for Law Department lawyers based on their respective bar admission dates. Thus, the key factor in setting a lawyer's salary was the number of years the lawyer was admitted to the bar.

In addition to setting salary targets to be used for future hires, the Salary Plan also recommended adjusting the salaries of current Law Department lawyers who were performing satisfactorily. The Salary Plan's target for lawyers with 10 years of bar admission was $100,000 annually, and the target for lawyers with 15 years of bar admission was $115,000 annually.

On November 5, 2013, Schnabel sent the HR Department a list of attorneys who were eligible for up to a seven percent salary adjustment pursuant to the Salary Plan. At this time, the plaintiff was 12 years post bar admission and was paid a salary of $109,200. Before any salary adjustments, the plaintiff's salary was higher than that of any other lawyer in the Torts Division who had been admitted to the bar the same year as her, 2001. Thus, the plaintiff did not receive a salary adjustment at that time. The plaintiff said that she was told, however, that she would be part of the "second wave" of salary adjustments.

In July 2015, the plaintiff learned that some of her colleagues had received raises and promotions. The plaintiff approached her superiors and HR personnel inquiring as to why she had not received a raise. HR liaisons Helen Smart and Theresa Murphy explained to the plaintiff that some of her colleagues' raises resulted from the Salary Plan and that the plaintiff's salary was too high to receive a salary adjustment. Murphy told the plaintiff that she was making more than most EAC-As and thus did not qualify for a raise pursuant to the Salary Plan.

On July 15, 2015, the plaintiff spoke to her supervisor, Lisa Hodes-Urbont, and informed her that she wanted a PIP to EAC Grade B (EAC-B). Hodes-Urbont responded that she would submit the plaintiff's name for a PIP and asked the plaintiff to "prepare language" for the request. The plaintiff also was informed that both Lawrence Heisler (head of the Torts Division) and Jim Henley (general counsel) would need to approve the request and that the approval would not be immediate. That same day, the plaintiff provided the draft language to Hodes-Urbont, who in turn sent the plaintiff's PIP request to Heisler on August 25, 2015.

Hodes-Urbont re-sent the plaintiff's PIP request to Heisler on October 23, 2015, May 25, 2016, June 7, 2016, and August 5, 2016. On November 4, 2016, Heisler's deputy, Gail Goode, sent an updated version of the plaintiff's PIP request to Henley. Henley acted on some PIP requests for other attorneys on or about December 6, 2016, and his approved requests were sent to HR for processing.

In February 2017, the plaintiff was promoted from EAC-A to EAC-B, with a corresponding $11,588 (ten percent) salary increase. The increase in pay was made retroactive to December 2016. At least two other attorneys received PIPs in December 2016.

In addition, between November 2013, when salary adjustments were made pursuant to the Salary Plan, and December 2016, four non-managerial attorneys received PIPs. Before their respective promotions, each of the employees earned less than the plaintiff.

The plaintiff resigned from the NYCTA effective April 14, 2017, to pursue a position as a federal administrative law judge. She sued the NYCTA alleging claims for:

- Wage discrimination in violation of the Equal Pay Act (EPA) and New York's Equal Pay Law (EPL);

- Employment discrimination on the basis of race and gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII), the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL); and

- Racial discrimination in violation of 42 U.S.C. § 1981.

The NYCTA moved to dismiss.

The Court's Decision

The court granted the NYCTA's motion to dismiss.

In its decision, the court explained that the EPA prohibits employers from discriminating among employees on the basis of sex by paying higher wages to employees of the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." To establish a prima facie case of wage discrimination under the EPA, a plaintiff must demonstrate that: "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions."

The court then held that the plaintiff failed to make a prima facie showing of discrimination. The court ruled, with respect to the first element of an EPA claim, that the plaintiff failed to demonstrate that the NYCTA paid male employees more than female employees.

The court also decided, with respect to the last two elements of an EPA claim, that the plaintiff failed to establish that higher-paid men performed equal work on jobs requiring equal skill, effort, and responsibility, and that the jobs were performed under similar working conditions.

The court reached the same result with respect to the plaintiff's employment discrimination claims under Title VII and Section 1981.

First, the court explained that these claims required that a plaintiff show that: "(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." Similarly, the court continued, to establish a prima facie case of discriminatory failure to promote, a plaintiff must demonstrate that: "(1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she 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 then found that the plaintiff had "not adduced any evidence of circumstances giving rise to an inference of discrimination."

The court was not persuaded by the plaintiff's contention, in support of her discrimination claims, that "non-Blacks and men" received raises and promotions while she was repeatedly denied the same raises and promotions. The court observed that the plaintiff did not identify these non-Black colleagues by name or even title and did not provide any evidence supporting her claim that they were similarly situated to her in all material respects. Indeed, the court noted, the plaintiff's failure to adduce evidence in this regard was "compounded by the uncontroverted evidence that, among the attorneys who received salary adjustments, 11 were men, 19 were women, and 10 were Black."

In sum, the court said, the plaintiff "has failed to demonstrate that she was in fact similarly situated in material respects to her non-Black, male comparators."

The court concluded by declining jurisdiction over the plaintiff's claims under New York law given that all of the plaintiff's federal claims had been dismissed.

The case is *Moore v. New York City Transit Authority*, No. 16-CV-69 (LDH) (CLP) (E.D.N.Y. March 28, 2023).

Federal District Court in New York Dismisses Plaintiff's Pregnancy Discriminations Claims

A federal district court in New York has dismissed a complaint for pregnancy discrimination brought by a former hotel front desk agent that arose after she was laid off due to the impact of the COVID-19 pandemic on the hotel industry.

The Case

The plaintiff in this case worked as a front desk agent at the Courtyard and Residence Inn by Marriott (the Courtyard Inn), a hotel acquired by AAM 15 Management, LLC (AAM) in November 2019 and located in Yonkers, New York. The plaintiff worked part-time on Friday evenings and Saturday mornings.

On January 10, 2020, the plaintiff sent an email to AAM's human resources director, Kelly Correia, notifying her that the plaintiff was pregnant, waiving any potential rights to maternity leave because the plaintiff had paid leave from her full-time employer, and inquiring about returning to work after being out on leave.

According to the plaintiff, Correia responded that the plaintiff did not qualify for maternity leave but failed to address her return to work. The plaintiff responded to Correia and again asked about her return to work and said that she received no response. The plaintiff said that, on January 17 and 20, 2020, she reached out to Courtyard Inn's assistant general manager, Jamie Masterson, and inquired about her return to work after maternity leave. According to the plaintiff, after her second inquiry to Masterson, she received a response from Correia on January 21, 2020.

On March 17, 2020, the plaintiff met with Masterson and Steve Brooks, an AAM corporate representative, and was informed that she was being laid off due to the impact of COVID-19 on the hotel industry. At the time, the plaintiff was in the eighth month of her pregnancy and visibly pregnant. The plaintiff said that she asked Brooks whether a lay off for an extended period of time would result in termination, and Brooks informed the plaintiff that she would not be terminated under those

circumstances. The plaintiff said that Brooks also informed her that she would be "one of the first people called to return back to work."

During the first two weeks of July, Courtyard Inn posted listings for front desk agents on multiple job search websites, and General Manager Ron Czulada also sent out weekly updates that cited a need for front desk agents. The plaintiff said that on July 16, 2020, she sent an email to Masterson inquiring about her return to work and that Masterson replied that there was not a need to bring back all the staff. The plaintiff alleged that, as of July 16, she was "the only employee being told [AAM] didn't need her to return." The plaintiff further alleged that "[a]ccording to the [Courtyard Inn] schedules, there was a high rate of turn-over in the following months as the company hired and struggled to retain [f]ront [d]esk agents."

Thereafter, the plaintiff filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that she was discriminated against in violation of Title VII on the basis of her pregnancy and terminated for the same reason. On June 9, 2021, AAM responded to the EEOC that the plaintiff had not been recalled because of her availability and that she had been terminated.

The EEOC provided the plaintiff with a right-to-sue letter, and she sued AAM. The plaintiff asserted claims under Title VII of the Civil Rights Act of 1964 (Title VII) and the New York State Human Rights Law (NYSHRL), alleging failure to accommodate and wrongful termination of employment on the basis of pregnancy.

The plaintiff sought damages in the form of the "pay that [she] missed while [AAM] did not return [her] to [her] position." She also requested injunctive relief requiring AAM to "remove[] her from [its] work records as 'terminated' and . . . return[] [her] to a 'laid off' status [so she is] eligible for rehire in [its] system" and to "undergo discrimina[tion] and bias trainings to prevent this from happening to anyone else."

AAM moved to dismiss. It argued that the plaintiff failed to state a claim for employment discrimination because she did not adequately allege any evidence of discriminatory intent and her own factual allegations foreclosed a retaliation claim.

The Court's Decision

The court granted AAM's motion to dismiss.

In its decision, the court first found that the plaintiff adequately alleged that she was a pregnant person at the time of the relevant events and that she requested an accommodation to work on a modified schedule in the final month of her pregnancy. However, the court ruled, the plaintiff failed to allege that AAM refused to accommodate her. According to the court, at no point did AAM "explicitly deny" the plaintiff's requested accommodation, and the plaintiff alleged no facts that supported an inference that AAM was attempting to deny the accommodation surreptitiously.

Similarly, the court continued, the plaintiff failed to allege that AAM provided accommodations to other employees who were similar in their ability to work. Although the plaintiff alleged that by July 16, 2020, all other employees had returned to work except for her, the court noted that the plaintiff did not allege that any of the other employees were similar in their ability to work or that they requested or received accommodations of any sort, including schedule modifications, while returning.

Accordingly, the court dismissed the plaintiff's claim that AAM failed to accommodate her pregnancy.

The court next addressed the plaintiff's wrongful termination claims.

The court found that the plaintiff adequately alleged her protected status, plausibly alleged that she was qualified for her position, and adequately asserted that she experienced an adverse employment action: the termination of her position.

However, the court continued, the plaintiff failed to meet her minimal burden to establish discriminatory intent because her complaint was "devoid of *any* facts" giving rise to the suggestion that AAM or its personnel were motivated by discriminatory animus in their interactions with her. The court added that the plaintiff failed to allege that AAM "criticized her performance or made any invidious comments based on her pregnancy or her gender." The court reasoned that although the plaintiff did allege that all other employees were allowed to returned to work except for her, she did not allege that any of these employees were pregnant or whether they were treated differently than non-pregnant employees. Moreover, the court continued, the plaintiff did not allege that she was replaced by a non-pregnant employee and her allegations did not concern the timing of her termination, which, the court noted, occurred more than six months after she informed AAM of her pregnancy.

The court concluded that because the plaintiff failed to establish AAM's discriminatory animus, her wrongful termination claim had to be dismissed.

The case is *Medina v. AAM 15 Management, LLC*, No. 21-CV-7492 (KMK) (S.D.N.Y. March 27, 2023).