

# Employee Relations LAW JOURNAL

## From the Courts

---

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

*By Kenneth A. Novikoff*

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

In summary:

- A federal district court in New York has dismissed employment discrimination claims brought under the Age Discrimination in Employment Act of 1967 and Title I of the Americans with Disabilities Act of 1990, finding that the plaintiff failed to meet the requirements for asserting claims under those statutes.
- The U.S. District Court for the Southern District of New York has dismissed claims brought by a disabled male veteran against the U.S. Secretary of Veterans Affairs and the Merit System Protection Board.

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](mailto:ken.novikoff@rivkin.com).

- The U.S. District Court for the Southern District of New York has dismissed a plaintiff's employment discrimination lawsuit asserting claims for violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution.
- A federal district court in New York has dismissed the federal employment discrimination claims brought against a college in New York by a former employee after she failed to demonstrate that she had complied with the college's COVID-19 booster mandate.
- The U.S. District Court for the Southern District of New York has ruled that the allegations in an employment discrimination lawsuit against Columbia University were inadequate and that the complaint should be dismissed unless the plaintiff filed a satisfactory amended complaint.
- Reversing a trial court's decision, an appellate court in New York has dismissed a plaintiff's claim for tortious interference with prospective business relations that arose after a dispute over a non-compete provision in an employment agreement.
- The New York Appellate Division, Second Department, has affirmed a trial court's decision dismissing claims for tortious interference with a business relationship and intentional infliction of emotional distress in a case involving an alleged breach of a non-competition agreement.
- In a case involving a dispute between golfer Jack Nicklaus and the company for which he received \$145 million to create and lead, Nicklaus Companies, LLC, the trial court found that the defendants should be preliminarily enjoined from infringing intellectual property rights that were conveyed to Nicklaus Companies, including various trademarks and the exclusive right to license Nicklaus' name, image, and likeness. After issuing that ruling, the trial court rejected the defendants' motion to vacate the preliminary injunction.

### ***Federal Trial Court in New York Dismisses Plaintiff's Employment Discrimination Claims***

A federal district court in New York has dismissed employment discrimination claims brought under the Age Discrimination in Employment

Act of 1967 (ADEA) and Title I of the Americans with Disabilities Act of 1990 (ADA), finding that the plaintiff failed to meet the requirements for asserting claims under those statutes.

### ***The Case***

The plaintiff alleged that he began working as a case manager at Hogar, Inc., on May 3, 2022. According to the plaintiff, two days later, a Hogar program director told him that he “was not a good fit and that [he] should apply for another job in another place.” Then, the plaintiff asserted, a clinical supervisor at Hogar “put a handwritten note on [the plaintiff’s] desk saying that [the plaintiff] will not be able to function as a case manager” even though the plaintiff asserted that he had “the qualifications and extensive experience in the [f]ield of social services[.]”

The plaintiff said that he then informed Hogar’s chief executive officer (CEO) about the handwritten note but that the CEO turned a blind eye to the situation, “[f]ailed to investigate [the plaintiff’s] complaint and also had the nerve . . . to ask [the plaintiff] if [he] had a mental health issue.”

During his Hogar employment, the plaintiff said, he “was absent a few times due to coronavirus symptoms.” He said that he complied with instructions issued by Hogar’s human resources department “not to show up for work if [he] had those medical conditions related to the coronavirus.” However, according to the plaintiff, when he informed the program director about the reason for his absences, he was told that since he was on probation, he was not allowed to take time off and he was “threatened” with “termination . . . if [he took] time off [while] on probation.” The plaintiff asserted that he was forced to return to work even though he was not supposed to and he “returned to work a little late plus [his] lateness was used against [him].”

On June 3, 2022, the plaintiff was terminated, allegedly being told “that the reason for [his] . . . termination was due to poor job performance.” The plaintiff contended that there was “no valid reason” to terminate his employment since his job performance was “outstanding.” He also asserted that he was terminated because of his age.

The plaintiff filed a lawsuit asserting claims against Hogar for age and disability-based employment discrimination, as well as claims of retaliation under the ADEA and the ADA.

### ***The Court’s Decision***

The court ruled that the plaintiff’s complaint failed to state a claim for relief.

In its decision, the court explained that the ADEA “prohibits discrimination in employment on the basis of age against persons aged 40 or older.” The court added that, to state a claim of employment

discrimination under the ADEA, a plaintiff must allege facts showing that the plaintiff's age was the "but-for" cause of the employer's adverse employment action against the plaintiff.

The court then pointed out that the plaintiff in this case did not indicate what his age was at the time of any of the alleged adverse employment actions. The court added that even if the plaintiff was 40 years of age or older at that time, he also did "not allege facts sufficient to state a claim of employment discrimination under the ADEA" and did "not allege facts showing that, but for his age (assuming that he was 40 years of age or older at that time), he would not have experienced any of the alleged adverse employment actions, including the termination of his employment from Hogar."

Next, the court considered the plaintiff's claim under Title I of the ADA, which prohibits employers from "discriminat[ing] against a qualified individual *on the basis* of disability in regard to . . . the hiring, advancement, or discharge of employees." The court explained that, to state a claim of employment discrimination under Title I of the ADA, a plaintiff must allege that:

(1) the employer is subject to the ADA; (2) the plaintiff is disabled within the meaning of the ADA or perceived to be so by [the] employer; (3) [the plaintiff] was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; (4) [the plaintiff] suffered an adverse employment action; and (5) the adverse action was imposed because of [the plaintiff's] disability.

The court noted that, as with a claim of employment discrimination under the ADEA, the causation standard for claims of employment discrimination brought under Title I of the ADA is a "but-for" standard; in other words, a plaintiff must allege that, but for his disability, the defendant would not have discriminated against him.

The court decided that the plaintiff in this case had not alleged any facts showing that Hogar imposed an adverse employment action on him because of any disability and had not alleged that, "but for" its alleged perception of the plaintiff as having a mental health condition and/or his suffering from coronavirus symptoms, Hogar would not have discriminated against him. Thus, the court ruled, the plaintiff failed to state a claim of employment discrimination under Title I of the ADA.

Finally, the court considered the plaintiff's retaliation claims under the ADEA and the ADA. The court observed that, under the ADEA's antiretaliation provision:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant

for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation. . . .

The court also noted that the ADA's antiretaliation provision provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful [under the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]."

The court explained that, to state a claim of retaliation under the ADEA, a plaintiff must allege facts showing that the defendant discriminated – or took an adverse employment action – against the plaintiff because the plaintiff "opposed any unlawful employment practice." It added that, for an adverse retaliatory action to be "because" a plaintiff opposed an unlawful employment practice, "the plaintiff must plausibly allege that the retaliation was a 'but-for' cause of the employer's adverse action. It is not enough that retaliation was a 'substantial' or 'motivating' factor in the employer's decision."

As the court explained, to state a claim of retaliation under the ADA, a plaintiff must show that:

- The plaintiff was engaged in protected activity;
- The alleged retaliator knew that the plaintiff was involved in protected activity;
- An adverse decision or course of action was taken against the plaintiff; and
- A causal connection existed between the protected activity and the adverse action.

Such a causal connection, the court continued, may be shown either: "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant."

The court then ruled that the plaintiff did not allege facts sufficient to show that he suffered an adverse employment action because he opposed an unlawful employment practice or otherwise participated in protected activity with regard to his claims of employment discrimination under either the ADEA or the ADA. In the court's view, the plaintiff merely alleged that a note was put on his desk stating that he would not

be able to function as a case manager, and that when he complained about the note, the company failed to investigate. The court also concluded that the plaintiff failed to state a claim of retaliation under either the ADEA or the ADA.

The case is *Rodriguez v. Hogar, Inc.*, No. 1:23-CV-7558 (LTS) (S.D.N.Y. Oct. 27, 2023).

### ***Disabled Service Member's Employment Discrimination Claims Are Dismissed by New York Federal District Court***

The U.S. District Court for the Southern District of New York has dismissed claims brought by a disabled male veteran against the U.S. Secretary of Veterans Affairs and the Merit System Protection Board (MSPB).

#### ***The Case***

As the court explained, the plaintiff in this case was a disabled male veteran and servicemember in the U.S. Navy Reserve who worked for the U.S. Department of Veterans Affairs (VA) as a contract specialist. On June 17, 2019, the plaintiff's supervisor sanctioned the plaintiff by placing an "improper conduct" report in the plaintiff's file; the decision to reprimand the plaintiff was affirmed by another supervisor. The plaintiff also was denied a within grade increase, meaning he was denied a periodic increase in pay. The plaintiff filed an appeal with the MSPB, which apparently was not resolved.

Because the plaintiff's supervisor "questioned [the plaintiff's] military duty" and his "reserve obligation requirements," the plaintiff believed that the plaintiff's supervisor did not want the plaintiff working for her due to the plaintiff's military status as a Navy Reservist. The plaintiff also contended that because management in his office was "composed of all females," his "gender of male played a role in actions and decisions" against the plaintiff.

The plaintiff said that he applied for other open positions within the VA, but that he was not interviewed or offered any of those positions, despite meeting the baseline qualifications.

The plaintiff filed a discrimination complaint with the VA and, thereafter, sued the U.S. Secretary of Veterans Affairs and the MSPB.

The defendants moved to dismiss.

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

The court granted the defendants' motion to dismiss.

In its decision, the court found that the plaintiff's complaint was "confused, ambiguous, vague, or otherwise unintelligible," and that

it failed to give the defendants “adequate notice” of his claims, the decision or decisions he challenged, and the basis for his challenges. Put differently, the court found that the plaintiff’s complaint was “rambling, convoluted, and internally contradictory,” such that the court could “not tell with any degree of certainty” what claims the plaintiff was asserting.

The court then ruled that, to the extent it could liberally construe the plaintiff’s complaint as asserting certain causes of action, the plaintiff “failed to state a plausible claim for relief” over which the court had subject matter jurisdiction.

The court explained that the Civil Service Reform Act (CSRA) establishes a comprehensive administrative scheme for addressing federal employee grievances and provides remedies for a federal civil service employee who alleged wrongful termination or challenged an adverse employment decision. The court added that the CSRA enumerates certain “prohibited personnel practices” and empowers the MSPB to review allegations of prohibited personnel practices. Covered personnel actions include decisions about appointments or promotions; disciplinary or corrective actions; details, transfers, or reassignments; reinstatement, restoration, or reemployment; performance evaluations; and decisions concerning pay.

The court reiterated that the plaintiff alleged that the VA engaged in prohibited personnel practices and that he filed an appeal with the MSPB. The court found, however, that the plaintiff did not make any allegations to the MSPB in his appeal that the VA had discriminated against him on the basis of his race, gender, disability, or any other protected class. The court then explained that unless an MSPB appeal alleged that an adverse employment action was partially the result of discrimination, final MSPB decisions only were appealable to the U.S. Court of Appeals for the Federal Circuit, not to courts within the U.S. Court of Appeals for the Second Circuit, which include the U.S. District Court for the Southern District of New York. In other words, the court concluded, it did not have jurisdiction to hear the plaintiff’s claims that the VA engaged in prohibited personnel practices, except insofar as the plaintiff alleged that the VA engaged in those violations as a way of discriminating against him as a member of a protected class.

Next, the court explained that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits employment discrimination on the basis of service in the uniformed services. The court pointed out that claims under the USERRA also only are appealable to the U.S. Court of Appeals for the Federal Circuit. Therefore, the court ruled, to the extent that the plaintiff was bringing a USERRA claim, the court did not have jurisdiction over that claim, either.

The case is *Ercole v. Wilkie*, No. 19-CV-11961 (VSB) (S.D.N.Y. Oct. 16, 2023).



### ***Southern District of New York Rejects Plaintiff's Employment Discrimination Suit Asserting Claims Under the Constitution***

The U.S. District Court for the Southern District of New York has dismissed a plaintiff's employment discrimination lawsuit asserting claims for violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

#### ***The Case***

The plaintiff in this case filed a lawsuit against a temporary staffing agency and an employer for whom he appeared to have done some work. The plaintiff asserted claims for violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

In particular, the plaintiff alleged that, on December 26, 2022, the Food Bank Company at Hunts Point in the Bronx (apparently referring to the Food Bank for New York City, a nonprofit organization in the Hunts Point Cooperative Market in the Bronx) accused the plaintiff of "smelling like alcohol" and declined "to provide the plaintiff with future work." The plaintiff argued that "[t]here was no toxicology report conducted on [him]," and that these allegations caused him "to be terminated from his job with bias, racial and discriminated intentions."

In June 2023, the plaintiff said that he returned to the temporary staffing agency, Vertex Global Solutions, to ask why he was sent back to the agency without work, presumably referring to the incident in December 2022. The plaintiff was told that the Food Bank Company did so because he "was smelling like alcohol." Vertex Global Solutions allegedly told the plaintiff that it "could no longer employ [him] with work."

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

The court ruled that the plaintiff's complaint should be dismissed.

In its decision, the court explained that because the plaintiff asserted violations of his constitutional rights, it would construe the complaint as bringing claims under 42 U.S.C. § 1983. The court then noted that a claim for relief under Section 1983 must allege facts showing that each defendant acted under the color of a state statute, ordinance, regulation, custom, or usage. As the court pointed out, private parties, therefore, generally are not liable under Section 1983. However, the court noted, a private entity can be deemed a state actor in three situations:



- (1) The entity acts using the coercive power of the state or is controlled by the state (the compulsion test);
- (2) The entity either willfully participates in joint activity with the state or performs functions that are entwined with state policies (the joint action or close nexus test); or
- (3) The state has delegated a public function to the entity (the public function test).

The court added that the “fundamental question” under each of these three tests was whether the challenged actions of the private entity were “fairly attributable” to the state. It then found that nothing in the plaintiff’s complaint suggested that the defendants, “in offering or denying” employment to the plaintiff, were engaged in state action. The court found “no allegations” that the defendants “used the coercive power of the state, were performing joint activity with the state, or that the state had delegated a public function to them in connection with offering employment.” Accordingly, the court ruled, because the defendants were private entities that could not be deemed state actors, the plaintiff could not state a claim under Section 1983 against the defendants for violating his constitutional rights.

Next, the court noted that the plaintiff’s complaint referred to racial discrimination and bias in employment. As the court explained, Title VII of the Civil Rights Act of 1964 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’s 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.

Although the plaintiff alleged that the Food Bank’s actions, in firing him for allegedly smelling like alcohol, without having a toxicology report or other proof, showed “bias, racial and discriminated intentions,” the court found that the plaintiff did “not plead any facts about his race or that of anyone else involved in these employment relationships” and did “not suggest that he was treated differently from employees of different races, or provide facts giving rise to an inference that his race played a role in this employment decision.” Accordingly, the court concluded, the plaintiff failed to plead facts showing that his race was a motivating factor in the employment decision.

Finally, the court explained that the antidiscrimination provision set forth at 42 U.S.C. § 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce

contracts . . . as is enjoyed by white citizens. . . .” To state a claim of discrimination under Section 1981, a plaintiff must allege facts showing:

- That the plaintiff is a member of a racial minority;
- The defendant’s intent to discriminate on the basis of race; and
- Discrimination concerning one of the statute’s enumerated activities.

Therefore, the court said, for a claim of discrimination under Section 1981, “it is insufficient to merely plead that race was a motivating factor in the discriminatory action.” Instead, “a plaintiff must initially plead and ultimately prove that, but for race, [the plaintiff] would not have suffered the loss of a legally protected right.”

The court ruled that the plaintiff’s allegation that his temporary employment was terminated for the stated reason that he “smelled like alcohol” was insufficient, absent further allegations, to allege that, but for his race, he would not have suffered the loss of his employment. The plaintiff, therefore, failed to state a claim for a violation of his rights under Section 1981, the court concluded.

The case is *Williams v. Food Bank Co.*, No. 23-CV-6933 (LTS) (S.D.N.Y. Oct. 10, 2023).

### ***New York District Court Dismisses Federal Employment Claims Arising Over COVID-19 “Booster Mandate”***

A federal district court in New York has dismissed the federal employment discrimination claims brought against a college in New York by a former employee after she failed to demonstrate that she had complied with the college’s COVID-19 booster mandate.

#### ***The Case***

As the court explained, before she was terminated, the plaintiff in this case was a tenured professor of accounting at Keuka College, in Keuka Park, New York. Her work during the 2021-2022 school year was governed by an employment agreement.

On December 21, 2021, Keuka College instituted a “booster mandate,” under which all faculty members were required to prove that they had received a “booster” shot against COVID-19 within 30 days. Faculty and staff could obtain religious and medical exemptions, and faculty who taught classes online were not subject to the mandate. The plaintiff alleged that Keuka College’s policy “called for the unconditional

termination of any faculty” who did not receive the booster shot within 60 days after the original notice.

The plaintiff contended that, when she learned of the mandate, she notified the college that, due to her medical conditions, she would first need to obtain a medical examination to confirm whether and which booster to take. However, according to the plaintiff, she could not obtain an appointment quickly given the lack of medical infrastructure in the area around the college. The plaintiff said that she requested extensions of the deadline in light of these extenuating circumstances, but that the college refused.

On March 10, 2022, Keuka College terminated the plaintiff’s employment. The plaintiff alleged that, in terminating her, Keuka College ignored her contractual rights to pre-termination due process.

Moreover, the plaintiff posited that the booster mandate was, in fact, a scheme to replace older, tenured faculty with “younger, less experienced and less expensive non-tenured and adjunct faculty.” She alleged that Keuka College replaced her with a “younger and untenured professor” who taught classes “mostly online” and enjoyed a “decreased teaching schedule.” The plaintiff also alleged that “others” were “given special consideration under the now defunct policy.”

For the 2022-2023 academic year, Keuka College eliminated its COVID-19 vaccination policy. The plaintiff asserted that this change should “come[] as no great surprise,” because the policy was shown to be “without rational basis” and “at best arbitrary and capricious.”

The plaintiff sued Keuka College, as well as a number of others associated with, or employed by, the college, in May 2023. She asserted federal law claims under Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA). The plaintiff additionally brought several state law claims, including for breach of contract, wrongful termination, and violation of New York’s Human Rights Law.

The defendants moved to dismiss.

### ***The Court’s Decision***

The court dismissed the plaintiff’s federal claims and decided that it should not exercise supplemental jurisdiction over the plaintiff’s state law claims.

In its decision, the court first addressed the plaintiff’s Title VII claims.

The court said that it understood that the plaintiff alleged that the defendants engaged in discrimination on the basis of “sex, age, [and] national origin,” in violation of Title VII, and that she was subjected to a hostile work environment in violation of Title VII. The court ruled that these claims “fail[ed] for several reasons.”

First, the court explained, age is “not a protected characteristic under Title VII,” and, therefore, an employer does not violate Title VII even if it discriminates on the basis of age. Rather, Title VII protects against employment discrimination arising from an employee’s “race, color, religion, sex, or national origin,” and the ADEA is the proper vehicle for an age discrimination claim.

Second, the court continued, with respect to any characteristics protected under Title VII, the plaintiff did not allege that the defendants terminated her employment – or otherwise engaged in any adverse employment action against her – because of her race, color, religion, sex, or national origin. Therefore, the court ruled, the plaintiff’s Title VII claims had to be dismissed for failure to state a plausible claim for relief.

Third, the court added, Title VII claims are subject to dismissal because they are “unexhausted.” The court pointed out that, “[b]efore filing a Title VII claim in federal court, a plaintiff must exhaust all available administrative remedies. An allegation not set forth in an administrative charge will be barred as unexhausted unless it is reasonably related to the allegations in the charge.” The court found that the plaintiff failed to provide the Equal Employment Opportunity Commission “with sufficient notice to investigate” the sex or national origin discrimination claims that the plaintiff referenced in her complaint.

Fourth, the court said, the plaintiff could not succeed on a Title VII claim against any of the individual defendants because “Title VII does not provide for individual liability.”

For these reasons, the court dismissed the plaintiff’s Title VII claims.

The court next addressed the plaintiff’s ADA claim, observing that it was “premised on her inability to obtain a medical appointment before the college’s booster-shot deadline.” The court acknowledged that, as a diabetic who had obtained the Johnson & Johnson vaccine, the plaintiff wanted to speak with her medical provider “before deciding if she should receive a booster and which booster to take.” The court explained that the plaintiff suggested that it was difficult to quickly obtain a medical appointment in the area surrounding Keuka College and the nearby town of Penn Yan, and, therefore, she was unable to obtain an appointment or speak to her provider by the deadline, which resulted in her violation of the college’s mandate and, consequently, her termination. The plaintiff argued that Keuka College violated the ADA when it failed to grant her an accommodation, that is, an extension to the mandate deadline.

The court accepted that the plaintiff had sufficiently alleged a disability – namely, diabetes. Nevertheless, the court ruled, the plaintiff failed to sufficiently allege a causal connection between that disability and the accommodations she requested.

As the court pointed out, a plaintiff’s failure “to establish a nexus between her qualifying disability and her request for an accommodation is fatal to a claim for failure to accommodate.” In addition, a plaintiff’s proposed accommodation must “flow[] directly from the disability itself,” such

that the employer's refusal to accommodate can reasonably be found to be "because" of the disability. This requirement, according to the court, emanates from the purpose of the ADA, which is to put "people with disabilities . . . on an even playing field with the non-disabled." Its purpose, the court said, is not to "authorize a preference for disabled people generally."

In the court's view, the plaintiff's requested extension could be said to arise from, and be related to, her diabetes, insofar as she decided to seek a medical appointment because of her condition. Nevertheless, the court ruled, the nexus was "too indirect," as the plaintiff's diabetes did not prevent her from obtaining a medical appointment (and therefore timely complying with the college's booster mandate). Rather, the court said, the only reason the plaintiff required an extension was because of the difficulty that residents in the area around the college faced to obtain a timely medical appointment.

As the court said, the plaintiff did not allege that this difficulty was unique to diabetics or to those with physical or mental disabilities more generally. In other words, according to the court, the impediment that the plaintiff faced did not flow "directly" from her disability, and the plaintiff failed to plausibly allege an unlawful failure to accommodate under the ADA.

The court then considered the plaintiff's ADEA claims. It explained that, to survive a motion to dismiss, a plaintiff asserting an employment discrimination claim under the ADEA must plausibly allege that adverse action was taken against her by her employer, and that her age was the "but-for" cause of the adverse action.

Here, the court found, the plaintiff failed to plausibly allege that her age was a "but-for" cause of her termination. According to the court, the only nonspeculative, nonconclusory allegation that the plaintiff proffered in support of this claim was that she was replaced by a "younger and untenured professor." However, the court said, "[t]he replacement of an older worker with a younger worker or workers does not itself prove unlawful discrimination." The court added that, setting that fact aside, the plaintiff's complaint included no allegation that would support even a "minimal inference of the requisite discriminatory causality."

Finally, the court found that the plaintiff failed to articulate how the vaccination policy – which she referred to as "draconian," "ill-conceived," and unscientific – supported an inference of age discrimination. The court said that, to the extent that Keuka College imposed an irrational, strictly enforced vaccination policy, it was an irrational policy that applied to all employees working in person – young and old, untenured and tenured – and the ADEA "does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age."

Accordingly, the court dismissed all of the plaintiff's federal law claims.

The case is *Mirnaviciene v. Keuka College*, No. 23-CV-6233-FPG (W.D.N.Y. Nov. 30, 2023).

## ***Southern District of New York Decides That Employment Discrimination Complaint Against Columbia University Should Be Dismissed***

The U.S. District Court for the Southern District of New York has ruled that the allegations in an employment discrimination lawsuit against Columbia University were inadequate and that the complaint should be dismissed unless the plaintiff filed a satisfactory amended complaint.

### ***The Case***

The plaintiff sued Columbia University, alleging that its negligence “caused psychological trauma” and contending that it terminated his employment and failed to accommodate his disability. He also provided a hand-written statement of facts in support of his claims, which the court found to be “virtually illegible.”

### ***The Court’s Decision***

The court ruled that the plaintiff’s complaint should be dismissed unless the plaintiff filed a satisfactory amended complaint.

In its decision, the court explained that federal antidiscrimination statutes prohibit employers from discriminating against an individual based on certain protected characteristics. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of an individual’s race, color, religion, sex or national origin.” The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of an individual’s disability. And the Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer to discriminate against an individual because of the individual’s age.

These antidiscrimination provisions, the court continued, 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. The court added that mistreatment at work that occurs for a reason other than an employee’s protected characteristic or opposition to unlawful conduct “is not actionable under these federal antidiscrimination statutes.”

As the court explained, at the pleading stage in an employment discrimination action, “a plaintiff must plausibly allege that (1) the employer took adverse employment action against [the plaintiff], and (2) [the plaintiff’s] race, color, religion, sex, or national origin was a motivating factor in the employment decision.” A plaintiff can meet that standard “by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination.”

Here, the court stated, if the plaintiff wants to pursue an employment discrimination action against Columbia University, he must submit an amended complaint invoking one of the federal antidiscrimination statutes, and alleging facts suggesting that adverse employment actions were taken against the plaintiff because of a protected characteristic such as race, color, religion, sex, national origin, age, or disability.

That information, the court concluded, should include:

- The names and titles of all relevant people;
- A description of all relevant events, including what each defendant did or failed to do, the approximate date and time of each event, and the general location where each event occurred;
- A description of the injuries the plaintiff suffered; and
- The relief the plaintiff seeks, such as money damages, injunctive relief, or declaratory relief.

The case is *Xue v. Columbia University*, No. 23-CV-7502 (LTS) (S.D.N.Y. Oct. 10, 2023).

### ***New York Appellate Court Rejects Plaintiff's Contention That Former Employees Violated Non-Compete Clauses***

An appellate court in New York, affirming a trial court's decision, has ruled that defendants did not violate non-compete provisions in employment contracts that they refused to sign after the plaintiff purchased the salon at which they worked.

#### ***The Case***

The plaintiff in this case, a salon owner, sued a number of the salon's former employees and Ashley Nicole Salon LLC, seeking to recover damages for breach of contract. According to the plaintiff, the former employees were bound by contracts that they entered into while employed by a prior owner of the plaintiff's salon, Gemmette Hair Studio Inc. The plaintiff further alleged that, by leaving its employ and going to work for Ashley Nicole Salon, the former employees violated non-compete clauses contained in those contracts.

The plaintiff moved for summary judgment on the issue of liability against the former employees, and the defendants moved for summary judgment dismissing the complaint. The Supreme Court, Richmond County, denied the plaintiff's motion and granted the defendants' motion. The plaintiff appealed to the Appellate Division, Second Department.



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

The appellate court affirmed.

In its decision, the appellate court explained that where employment contracts do not establish a fixed duration, the “employment relationship is presumed to be a hiring at will, terminable at any time by either party.” The appellate court added that when there is an at-will employment relationship, “the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable.”

In this case, the appellate court said, after purchasing the salon from Gemmette, the plaintiff told the former employees that they must sign new contracts, changing the terms of their employment, if they wished to continue their employment at the salon. According to the appellate court, the former employees refused to sign the new contracts and left the plaintiff's employ. The appellate court then ruled that, under these circumstances, the contracts signed by the former employees while working for Gemmette were terminated and no new employment contracts were created.

Thus, the appellate court ruled, the defendants established that there were no valid contracts between the plaintiff and the former employees and no non-compete provisions that they could have violated.

The appellate court also concluded that, inasmuch as there were no valid contracts between the plaintiff and former employees, the defendants established that Ashley Nicole Salon did not tortiously interfere with any contract.

The case is *Meraki NYC, LLC v. Iervasi*, No. 2020-05958 (N.Y. App. Div. 2d Dep't Nov. 22, 2023).

### ***New York Appellate Court Rejects Plaintiff's Claim for Tortious Interference with Prospective Business Relations***

Reversing a trial court's decision, an appellate court in New York has dismissed a plaintiff's claim for tortious interference with prospective business relations that arose after a dispute over a non-compete provision in an employment agreement.

### ***The Case***

In 2018, Verizon hired the plaintiff as head of North American sales. The plaintiff's counsel and Verizon negotiated over, among other things, a non-compete provision. The plaintiff ultimately signed that provision in exchange for a restricted stock unit award – with a target value of

\$2,000,000, vesting in equal parts over three years – in addition to his annual salary and various bonuses.

In February 2020, the plaintiff received a job offer from Warner Media LLC, which Verizon contended was a competitor.

In a letter dated March 13, 2020, Verizon warned the plaintiff that moving to WarnerMedia might result in legal action against him.

In a follow-up letter dated April 13, 2020, Verizon reiterated its legal position and expressed the hope that the plaintiff would remain a Verizon employee.

On May 8, 2020, the plaintiff resigned from Verizon.

On June 5, 2020, WarnerMedia informed the plaintiff that it would not hire him if he did not resolve the matter with Verizon by June 30, 2020.

On July 1, 2020, WarnerMedia stated that its offer had expired.

The plaintiff sued Verizon for tortious interference with prospective business relations.

The Supreme Court, New York County, denied Verizon's motion for summary judgment dismissing the plaintiff's claim for tortious interference with prospective business relations.

Verizon appealed.

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

The appellate court reversed the trial court and directed that judgment be entered in favor of Verizon.

In its decision, the appellate court ruled that Verizon established as a matter of law that the plaintiff could not sustain his cause of action for tortious interference with prospective business relations, as the record presented no evidence that Verizon used "wrongful means" to interfere with a business relationship or that its actions arose solely from malice – "a necessary element of the cause of action."

The appellate court explained that although the plaintiff contended that Verizon wrongfully threatened litigation against him to enforce the non-compete provision, the "wrongful means" element of the cause of action is satisfied "only where the threatened lawsuit is frivolous."

The appellate court found that there was an "objectively reasonable basis" to believe that the non-compete provision in Verizon's agreement with the plaintiff was enforceable. The appellate court added that the record also did not support the plaintiff's argument that Verizon took its legal position "solely out of a personal dislike" for the plaintiff, or solely by a desire to harm him. On the contrary, the appellate court concluded, the record showed that Verizon's actions "were motivated by economic self-interest."

The case is *Lucas v. Verizon Communications, Inc.*, No. 652529/20 (N.Y. App. Div. 1st Dep't Oct. 12, 2023).

## ***New York Appellate Court Affirms Dismissal of Claims in Suit Alleging Breach of Non-Competition Agreement***

The New York Appellate Division, Second Department, has affirmed a trial court's decision dismissing claims for tortious interference with a business relationship and intentional infliction of emotional distress in a case involving an alleged breach of a non-competition agreement.

### ***The Case***

The plaintiff in this case, Lynch Development Associates, Inc. (LDA), which offers capital management and fund-raising services to religious institutions, filed a lawsuit against Bartholomew W. Johnson, a former employee, to recover damages for the alleged breach of a non-competition agreement. Johnson asserted counterclaims to recover damages for tortious interference with a business relationship and intentional infliction of emotional distress. Johnson also filed a third-party action against LDA's president, Kevin Lynch, to recover damages for those same alleged torts.

LDA and Lynch jointly moved for summary judgment dismissing Johnson's counterclaims and third-party causes of action.

The Supreme Court, Suffolk County, granted the motion, and Johnson appealed to the Appellate Division, Second Department.

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

The appellate court affirmed.

In its decision, the appellate court explained that tortious interference with a business relationship requires proof of more culpable conduct than that required to demonstrate tortious interference with a contract. The appellate court added that to establish a case of tortious interference with a business relationship, the complaining party must prove, among other things, either that the allegedly offending party "acted solely out of malice" – that is, "for the sole purpose of inflicting intentional harm" on the complaining party – or "used improper or illegal means" that constituted "a crime or independent tort" or other "egregious wrongdoing."

As the appellate court explained, the "wrongful means" supporting a cause of action for intentional interference with a business relationship may include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure," but do not include "persuasion alone," even where it was "knowingly directed at interference with the contract." Conduct "motivated by economic self-interest cannot be characterized as solely malicious," the appellate court declared.

Applying that standard to this case, the appellate court ruled that LDA and Lynch demonstrated that their actions were “not solely malicious, as they were motivated by economic self-interest.” Similarly, the appellate court continued, LDA and Lynch demonstrated that their actions did not constitute “a crime or independent tort” or other “egregious wrongdoing” that would constitute wrongful means.

Accordingly, the appellate court decided that the trial court properly granted that portion of LDA’s and Lynch’s motion for summary judgment dismissing Johnson’s counterclaim and third-party cause of action alleging tortious interference with a business relationship.

Next, the appellate court explained that the tort of intentional infliction of emotional distress requires a plaintiff to establish:

- Extreme and outrageous conduct;
- Committed with the intent to cause, or with disregard of a substantial probability of causing, severe emotional distress;
- A causal connection between the conduct and injury; and
- Severe emotional distress.

The appellate court added that liability would be imposed only when the conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Here, the appellate court found, LDA and Lynch established that their conduct in seeking to clarify Johnson’s employment relationship and to enforce the non-competition agreement could “not be characterized as so ‘extreme and outrageous’ that it exceeds ‘all possible bounds of decency.’”

Accordingly, the appellate court concluded, the trial court properly granted that portion of LDA’s and Lynch’s motion for summary judgment dismissing Johnson’s counterclaim and third-party cause of action alleging intentional infliction of emotional distress.

The case is *Lynch Development Associates, Inc. v. Johnson*, 195 N.Y.S.3d 784 (2d Dep’t 2023).

### ***New York Trial Court Denies Motion to Vacate Preliminary Injunction in Case Involving Jack Nicklaus’ Intellectual Property Rights***

In a case involving a dispute between golfer Jack Nicklaus and the company for which he received \$145 million to create and lead, Nicklaus Companies, LLC (the Plaintiff), the trial court found that the defendants should be preliminarily enjoined from infringing intellectual property

rights that were conveyed to the Plaintiff, including various trademarks and the exclusive right to license Nicklaus' name, image, and likeness. After issuing that ruling, the trial court rejected the defendants' motion to vacate the preliminary injunction.

### ***The Case***

As the court explained, the case arose in 2007, when the Plaintiff entered into a transaction (the 2007 Transaction) to purchase the assets of GBI Investors, Inc. The 2007 Transaction involved several interrelated agreements, including a purchase and sale agreement (PSA), a limited liability company agreement, an executive employment agreement, and a non-competition agreement.

Pursuant to the PSA, GBI transferred to the Plaintiff "all rights, title and interests in certain assets, properties and rights owned or held by GBI or its Subsidiaries in connection with the operation of the Business." The "Business" was defined broadly to include "among other things, golf course design and management, licensing of certain intellectual property, designing, manufacturing and distributing golf equipment and marketing personal service contracts related to the personal endorsement and other publicity rights of Jack W. Nicklaus."

Annex A to the PSA listed the "Transferred Assets," including:

All of the intangible rights and property of GBI, including all of the publicity and related commercial rights held by GBI to use and/or license the use of the endorsement, name, nickname, likeness, signature and/or other identifying characteristics of Jack W. Nicklaus and biographical information related to his career, all Intellectual Property owned by or licensed to GBI, and all related rights as a licensor of such Intellectual Property (other than the Excluded Intellectual Property), going concern value, goodwill, telephone, telecopy and e-mail addresses and listings.

Moreover, Annex D to the PSA described the Excluded Intellectual Property in the transaction as: "None."

Nicklaus resigned from the Plaintiff and sought to compete in his own right in several aspects of the Business defined in the PSA, including golf course design and personal endorsements. The Plaintiff went to court and moved for a preliminary injunction restraining GBI and Nicklaus (together, the Defendants) from, among other things, "authorizing the promotional use of Mr. Nicklaus's name or likeness. . . ."

Following targeted discovery and a three-day evidentiary hearing, the trial court granted the portion of the Plaintiff's motion that sought to enjoin the Defendants (and related entities) during the pendency of its lawsuit from (i) using or authorizing the use of Transferred Intellectual

Property (as defined in the PSA) without the Plaintiff's written consent, and (ii) licensing Nicklaus' "name, image, and likeness [(NIL)] for commercial endorsements without [the Plaintiff's] written consent," with a carve-out permitting the Defendants to use Nicklaus' "name, image and likeness to identify Mr. Nicklaus as a professional golfer, or for other personal, investment, and charitable purposes."

The trial court, however, denied the portion of the Plaintiff's motion that sought to enforce against the Defendants "any non-compete and non-solicitation provisions contained in the PSA, the Amended and Restated Limited Liability Company Agreement . . . and Non-Competition Agreement," confirming that the Defendants were "free from contractual restrictions on competition and solicitation with respect to the Company *other than* the restrictions contained in the immediately preceding paragraph of this Order [i.e., the PSA-based intellectual property rights referenced above]."

The trial court concluded that, based on the evidence presented, the Plaintiff had established a likelihood of success in showing that the PSA conveyed to the Plaintiff the exclusive rights to license Nicklaus' NIL, subject to certain veto rights Nicklaus retained to object to uses of his name he considered to be inappropriate:

The [PSA], as has been pointed out by the plaintiffs quite ably, makes clear that the intention was to convey all intellectual property necessary to conduct the Business, with a capital B. I believe that plaintiff has established a reasonable likelihood of success in showing that it did, in fact, convey that. The evidence during this hearing I think strongly supports the argument that GBI had at the time and thereafter, the exclusive right to license Mr. Nicklaus' personal name and likeness rights. I think that is acknowledged elsewhere in the agreement. I think it's acknowledged in subsequent agreements with customers. Again, I'm not making a final finding on the merits, this isn't a trial. But I think that plaintiffs have satisfied their burden of showing a likelihood of success, that whatever else may be true under the noncompetition agreements, the plaintiffs own this [intellectual] property and that is not something that expires.

The trial court declared that, in the 2007 transaction, Nicklaus bestowed his name on the Plaintiff, without expiration or restriction. In the transaction agreements, Nicklaus reserved the right to determine whether certain proposed uses of his name, image or likeness by the Plaintiff would not be appropriate, but the court found that there was no carve-out (at least, at a minimum, not an explicit one) suggesting that he could independently license his name, image, or likeness in a way that undermined the Plaintiff's Business. The trial court made no final determination on the merits of that question but found that there was sufficient evidence for a preliminary injunction.

The Defendants moved to vacate the preliminary injunction, relying primarily on a 1994 Consent (Consent) that they said that they had “uncovered” after the hearing. They contended that the Consent established that Nicklaus did not convey his exclusive NIL rights to GBI and, therefore, that GBI could not have conveyed those rights to the Plaintiff in the 2007 Transaction. The Consent provided:

I, Jack Nicklaus, a United States citizen with a mailing address of 11780 U.S. Highway #1, North Palm Beach, Florida 33408, hereby consent to the use and registration of my name, likeness, signature, and all nicknames associated with me, including “Golden Bear”, by Golden Bear International, Inc., a Florida corporation, for all of the goods and services with which said corporation, its assigns or successors now or hereafter uses such name, likeness, signature and/or nicknames

The Defendants also relied on correspondence and a proposed agreement from 2020 suggesting that the Consent needed to be updated. Then, on March 20, 2023, in the midst of the dispute, Nicklaus provided notice that he revoked the Consent.

In opposition to the Defendants’ motion, the Plaintiff relied on a variety of documents, including a trademark license, consulting and promotional service agreement from 1992, a trademark license agreement from 1996, and various corporate documents filed with the Securities and Exchange Commission (SEC) that, it claimed, confirmed its ownership of Nicklaus’ NIL.

### ***The Trial Court’s Decision***

The trial court denied the Defendants’ motion to vacate the preliminary injunction.

In its decision, the trial court explained that, under New York law, “[a] defendant enjoined by a preliminary injunction may move at any time, on notice to the plaintiff, to vacate or modify it.” A motion to vacate or modify “is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable or upon failure to proceed expeditiously.”

Here, the trial court found, the documents provided by the Defendants were not “new” evidence but, instead, constituted evidence that the Defendants did not recall or locate in advance of the preliminary injunction hearing. The trial court nevertheless considered all of the evidence and decided that the Defendants had not established a “change in circumstances” that rendered the continued enforcement of the preliminary injunction inappropriate.



The court decided that the inclusion of the NIL language in the preliminary injunction was “supported by several factors.”

First, it said, the PSA conveyed to the Plaintiff all rights necessary to run the Business as it had been run, which included exclusive licensing of Nicklaus’ NIL rights and associating the Nicklaus name with the Plaintiff without restriction, limitation, or expiration.

Second, the court added, the evidence introduced at the evidentiary hearing demonstrated that Nicklaus confirmed to third parties that GBI held the exclusive right to grant his NIL rights for commercial purposes. The court found “no suggestion in any of the documents presented” that Nicklaus claimed to hold vestigial or residual NIL rights that he could exploit in competition with GBI or the Plaintiff. Instead, the court said, the 2007 Transaction “broadly conveyed” to the Plaintiff all of the “Transferred Assets” of GBI, “including all of the publicity and related commercial rights held by GBI to use and/or license the use of the endorsement, name, nickname, likeness, signature and/or other identifying characteristics of Jack W. Nicklaus and biographical information related to his career” without any temporal limitation.

The court conceded that the documents upon which the Defendants relied in support of their motion to vacate the preliminary injunction “may be relevant to the ultimate determination of the parties’ respective rights and obligations with respect to NIL and other intellectual property rights.” However, it concluded, they were not conclusive and did not undermine its determination that preliminary injunctive relief was appropriate based on the record that had been presented.

The case is *In re Nicklaus Co., LLC*, No. 656284/2022 (N.Y. Sup. Ct. N.Y. Co. Nov. 6, 2023).

Copyright © 2024 CCH Incorporated. All Rights Reserved. Reprinted from *Employee Relations Law Journal*, Autumn 2024, Volume 50, Number 2, pages 61–83, with permission from Wolters Kluwer, New York, NY, 1-800-638-8437, [www.WoltersKluwerLR.com](http://www.WoltersKluwerLR.com)

