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# New York Federal Court Decides That Plaintiff's Employment Discrimination Action Should Be Dismissed

A federal court in New York has ruled that all five causes of action in an employment discrimination lawsuit brought by a former employee of the New York City Department of Education ("DOE") should be dismissed.

**The Case**

The plaintiff filed a lawsuit against the DOE, the plaintiff's former principal, and the district superintendent, alleging that the defendants discriminated against her by overlooking her for a position and by transferring her to a different school.

The plaintiff alleged in her complaint that she was employed by the DOE from 1992 until she retired in 2019. She said that she originally was hired as a student aide before being promoted to a school aide in 1995 and then to a health aide in 2000. Until the final two months of her tenure with the DOE, the plaintiff worked at the High School for Health Careers and Sciences at the George Washington Educational Campus (the "GW Campus") which, she said, was accessible for her physical and medical condition. The plaintiff asserted that she suffered from "arthritis, epilepsy, hard of hearing, Brain tumors, leg brace, asthma, Type 2 diabetes, HTN, Bipolar, and MS." The GW Campus was one block from her home.

According to the plaintiff's complaint, on July 3, 2019, the principal of the GW Campus at the time sent the plaintiff an "excessing letter" informing her that she was being transferred to Park East High School ("PEH"). The plaintiff was scheduled to work fewer hours at PEH than at the GW Campus, but she asserted that she was "unable to continue her job at PEH because of the lack of disability accommodations, the distance from her home, stress, and mental anguish." Specifically, the plaintiff contended, PEH did "not have an elevator" or a "tunnel" and the "[t]raveling was physically challenging" for the plaintiff. The plaintiff resigned from PEH and the DOE after two months because, she asserted, she "could not keep up with the commute."

The plaintiff alleged in her complaint that the defendants "maintained an environment which ignored her disability, harassed her for practice of her 'Yoruba' religion and sought to undermine her humanity by refusing to acknowledge her professional excellency, tenure, seniority, and job performance based on that bias." The plaintiff contended that she "experienced discriminatory practices designed to hinder her career and subsequently to force her to resign." With respect to discrimination, the plaintiff alleged that, "[a]s a result of her religious practice and being a woman, she was subject to scorn, ridicule, and disparate treatment. At one time a co-worker told her to 'change her perfume because it was associated with witchcraft.'"

The plaintiff also alleged that she was "denied a promotion which she was qualified for" "in retaliation for reporting sexual harassment" at the GW Campus. She alleged that her reassignment to PEH was in retaliation for reporting sexual harassment and for complaints regarding disability accommodations.

Finally, the plaintiff alleged that the defendants created a "hostile and uncooperative environment, designed to *deprive, frustrate and humiliate* her as an employee." (Emphasis in original.) This discrimination was directed at the plaintiff, she contended, "because of her religion

and disability," and it "also took the form of sexual harassment, done in a manner which humiliated her." According to the plaintiff, while at the GW Campus, "she was the subject of sexual harassment, innuendo, and sexual jokes by KNOWN co-worker(s)."

The plaintiff asserted five causes of action under state and federal law. She alleged that the defendants discriminated against her on the basis of her sex and religion in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), and on the basis of her disability in violation of the Rehabilitation Act of 1973 and Title I of the Americans with Disabilities Act ("ADA") (Counts One and Two of her complaint, respectively). The plaintiff asserted in Count Three of her complaint that the defendants' actions violated the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL"). Count Four asserted a claim for sexual harassment, and Count Five was a claim for negligent infliction of emotional distress.

The defendants moved to dismiss the plaintiff's complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**The Court's Decision**

The court ruled that the defendants' motion should be granted.

In its decision, the court first addressed the plaintiff's discrimination causes of action. The court pointed out that the only specific facts that the plaintiff alleged as religious discrimination concerned an incident involving an unnamed co-worker on an unspecified date: "At one time a co-worker told [the plaintiff] to 'change her perfume because it was associated with witchcraft.'" In the court's view, this "isolated comment" by a non-party – which did "not obviously concern her religion" – was "insufficient to state a claim for religious discrimination" by the defendants. Otherwise, the court continued, the plaintiff's allegations of discrimination (for example, that the

plaintiff was "subject to scorn, ridicule, and disparate treatment" and that the plaintiff "experienced discriminatory practices") were "entirely conclusory and vague."

The court also found that the plaintiff's allegations of disability discrimination were "even more bare." According to the court, the plaintiff did not allege any facts demonstrating that she was treated differently because of her disability and she did not identify any accommodation that she requested, received, or was denied while at the GW Campus or at PEH. The court noted that the plaintiff alleged that her commute to PEH was significantly longer than her one-block commute to the GW Campus, and that PEH did not have an elevator or tunnel, but she did "not allege that she was unable to perform her job because of this barrier or that she requested a reasonable accommodation."

Regarding the plaintiff's allegation that her transfer to PEH was in "retaliation for previous complaints" the plaintiff made regarding disability accommodations at the GW Campus, her religious practice, as well as sexual harassment at the GW Campus, the court noted that the plaintiff did "not identify a single complaint that she lodged at any time in her two-decade career with DOE," much less any evidence that the defendants transferred her "for a discriminatory purpose."

Therefore, the court decided, because the plaintiff had not alleged sufficient facts to allow it to draw the reasonable inference that the defendants had acted with discriminatory intent, Counts One, Two, and Three (brought under Title VII, the ADA, the Rehabilitation Act, the NYSHRL, and the NYCHRL) should be dismissed.

The court reached the same conclusion regarding the plaintiff's sexual harassment cause of action in Count 4 of her complaint. The court explained that, to be able to move forward on this cause of action, the plaintiff had to plausibly allege that her work environment "was permeated

with discriminatory intimidation that was sufficiently severe or pervasive." However, according to the court, the plaintiff "failed to do so" because the two incidents cited by the plaintiff by unidentified co-workers at unidentified times appeared to be "isolated instances" and were "not sufficient to establish a hostile workplace."

Next, the court observed that, under applicable New York law, a plaintiff alleging a claim for negligent infliction of emotional distress must show:

(1) Extreme and outrageous conduct;

(2) A causal connection between the conduct and the injury; and

(3) Severe emotional distress.

Moreover, the court said, to establish the first element, the plaintiff had to allege conduct that was "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."

The court ruled that the plaintiff did not address these elements in her complaint, given that she stated only that "[t]hrough defendants' negligent actions of ridicule, slurs, and hostile behavior towards plaintiff, [she] developed a second brain tumour, and her overall mental and physical health started to deteriorate because of her forced removal from [the GW Campus]." These allegations fell "fall far short of the standard for extreme and outrageous conduct," the court decided. Because the plaintiff offered no factual basis from which the court said that it could infer causation, or that would demonstrate emotional distress, it ruled that Count Five of the plaintiff's complaint also should be dismissed.

The case is *Veras v. New York City Dep't of Education*, No. 22-CV-00056 (JLR)(SN) (S.D.N.Y. Jan. 10, 2023).

## Court Rejects Employment Discrimination Claims Brought by Plaintiff Under New York Law

The U.S. District Court for the Southern District of New York has dismissed a lawsuit asserting employment discrimination claims under New York law, essentially finding that the plaintiff's allegations were too vague.

**The Case**

As she asserted in her complaint, the plaintiff, Isabelle Onana Ndongo, who self-identified as a "sixty (60) year-old black/African American woman of Cameroonian descent," was hired by the Bank of China Limited (the "Bank of China") in August 2017 as an assistant vice president in the Operational Risk Management Department. The plaintiff said that, "leading a team of four," she was "able to successfully develop two prototypes of a risk assessment tool," and that one of those prototypes was "deemed 'viable' and was scheduled to launch as a program for use" in January 2020.

According to the plaintiff, in August 2019, the Bank of China hired a "white, younger, male" named Gregory Leeser, who also occupied an assistant vice president role and who allegedly earned more money than the plaintiff. The plaintiff asserted that, one month later, while she was on a scheduled vacation, she discovered that the Bank of China had "eliminated her entire racially-diverse team in her absence."

Around the same time, according to the plaintiff, the Bank of China appointed Dongkun Chu as the new senior vice president of the Operational Risk Management Department. According to the plaintiff, Chu "levelled unfair and unwarranted criticism at [p]laintiff's previous, racially-diverse team, calling them 'incompetent.'" The plaintiff also contended that Chu informed the plaintiff that the Bank of China "decided to go a different route" with the plaintiff's risk

assessment tool, which, she asserted, “impl[ied] that the said program would no longer be launched, as scheduled, in January 2020, or at all,” even though the Bank of China “continued to use the said program that had been designed and created by [the plaintiff] and her team.”

Over the next few months, according to the plaintiff, she was subject to various “hostile and offensive” comments made by Chu. For example, she alleged that, in September 2019, Chu informed the plaintiff that another employee, an individual named John Lawrencelle, had complained about the plaintiff being “rude.” The plaintiff said that when she tried to resolve the matter by requesting a joint meeting, Chu refused to hold the meeting and “referr[ed] to [the plaintiff] as too ‘assertive.’” The plaintiff further alleged that Chu approached Leeser about Lawrencelle’s purported complaint, and when Leeser confirmed that the plaintiff “had not been rude to [Lawrencelle],” Chu “advised Leeser to ‘decide whose team you are on,’” while also warning Leeser that Chu had the Human Resources Department “wrapped around his fingers.”

The plaintiff also contended that, in another instance, when the plaintiff submitted requested analytics to Chu, he allegedly “berated her, subjecting her to a verbal onslaught of false and disparaging [sic] about her professional reputation.” According to the plaintiff, “similarly situated Asian and Chinese employees,” “white and Caucasian employees,” “male employees,” and “younger employees” were not subjected to the same “disparaging accusations and comments.”

The plaintiff also asserted that, in early October 2019, Chu promoted Leeser to head of the division over the plaintiff, even though the plaintiff had “significantly” more experience and “was more senior than Mr. Leeser.” The plaintiff said that she then was informed that “she would be stripped of her leadership role,” and that her leadership responsibilities would be transferred to Leeser. The plaintiff also said that Chu hired a “younger, Asian, male” named Henry Quach to serve

as vice president, and directed the plaintiff to report to him. The plaintiff alleged that she was "never offered the opportunity to apply for the role," and that "Mr. Quach had less experience than [the plaintiff] and was significantly less qualified for the role." Around the same time, the plaintiff said, the Bank of China "gave salary increases," but the plaintiff's salary was not increased.

As alleged by the plaintiff, on October 11, 2019, several days after the plaintiff allegedly was demoted, she met with Chu to "complain about the hostile work environment his discriminatory comments and conduct had created." In this meeting, according to the plaintiff, Chu made "spurious claims" that the plaintiff's team was "afraid of [her]" and called the plaintiff "abnormal." Chu allegedly "began to retaliate against" the plaintiff by "saddling her with disproportionate, excessive additional responsibilities tied to unreasonable deadlines, fabricating reasons for threatened and actual reprimands, disruptions to her work schedule, belittling her in front of colleagues, canceling meetings with her, excluding and alienating her, and unjustified and unwarranted negative evaluations." The plaintiff asserted the following as examples:

- On November 20, 2019, the plaintiff "was accused of violating [the Bank of China's] Code of Conduct policy for purportedly making an off-the-cuff joke with Leeser regarding her likely termination."
- On November 28, 2019, the Bank of China "scheduled closing at 3PM to allow [Bank of China] employees to leave work early in observance of Thanksgiving holiday celebrations," but it "deliberately prolonged" the plaintiff's workday, "causing her to stay until or about 6PM."
- When Chu went on paternity leave, he instructed Leeser and Quach to keep the plaintiff "under strict observation" while he was away, which, she said, "had the

purpose and effect of undermining" the plaintiff's professional reputation in the eyes of her co-workers.

- The plaintiff requested a promotion to vice president, and was told that "she would be in line for the promotion if she was able to produce an effective risk assessment tool." Chu and Quach then allegedly held a meeting with the Bank of China's risk partners, where they presented the risk assessment tool that the plaintiff "had already developed and produced," but "deliberately presented" the plaintiff's idea "as if it were their own" and denied the plaintiff "any credit or attribution." According to the plaintiff, although the risk assessment tool was "rebranded," it included "the same ideas, strategies and proposals" as the tool the plaintiff had developed. The plaintiff said that she was present at this meeting and felt "humiliated," and she did not receive the requested promotion.
- The plaintiff also asserted that she was assigned "sole responsibility to perform [the Bank of China's] quarterly risk control self-assessment," even though that was a task "normally performed by a team of at least four (4) people." She also said that she was assigned to perform the bank's enterprise risk assessment but that she was not provided the "necessary procedure manuals," even though the plaintiff normally did not perform that task. According to the plaintiff, she thus was "forced to work late most days in order to autodidactically learn the tools used to complete the said enterprise risk assessment."
- In March 2020, when the COVID-19 pandemic began, a "bankwide notification" was sent to everyone except the plaintiff, instructing employees to refrain from traveling to the office. The plaintiff said that she traveled to the office and was the only one there.

- Around the same time, the Bank of China "refused and/or failed to provide" the plaintiff with a VPN token, which, the plaintiff asserted, "was required to login and to access the employee network." The plaintiff then was "deliberately assigned" time-sensitive tasks that "required access to the employee network" with the knowledge that she had not been provided a VPN token.
- "Shortly thereafter," according to the plaintiff, she was given "a bogus and unwarranted negative performance appraisal, drastically lowering her rating from B+ to D."

According to the plaintiff, these events created a "discriminatory, hostile, retaliatory, and intolerable work environment," that led the plaintiff to be "constructively discharged" in May 2020 from the Bank of China.

On June 3, 2022, the plaintiff sued the Bank of China and Chu in a New York state court, alleging claims under the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL") for discrimination based on age, gender, race, color, and national origin; hostile work environment; retaliation; aiding and abetting; and supervisory liability.

The defendants removed the case to the U.S. District Court for the Southern District of New York, and moved to dismiss the plaintiff's complaint.

**The Court's Decision**

The court granted the defendants' motion to dismiss, addressing the plaintiff's various theories of employment discrimination.

*Disparate Treatment*

The court explained that to succeed on her disparate treatment claim, the plaintiff had to show that she was "similarly situated in all material respects to the individuals with whom she

seeks to compare herself." The court added that employment characteristics that can support a finding that two employees are "similarly situated" included similarities in education, seniority, performance, and specific work duties, and similar requirements for skill, effort, and responsibility for jobs performed under similar working conditions.

The court then pointed out that the plaintiff "repeatedly" alleged that she was subject to mistreatment not experienced by coworkers who were younger, male, and not African-American or Black, but the court ruled that she did so "in purely conclusory fashion." The court found that the plaintiff failed to plead, in particular, any specific factual matter establishing that her co-workers were "similarly situated" to her "in all material respects." The court noted that the plaintiff asserted that she worked under the same supervisor as other assistant vice presidents and other employees within her department, but the court found it "unclear" who these other employees were, what qualifications they had, and what their job responsibilities entailed. Indeed, the court pointed out, the plaintiff did "not even identify her 'similarly situated' co-workers by name."

As the court noted, the only individuals the plaintiff identified in her complaint, other than Chu (a defendant), were Leeser (who had been promoted to "head of the division"), Quach (who had been hired as a vice president for the plaintiff to "report to"), and Lawrencelle (a "project manager") – and, the court found, none were "similarly situated" to the plaintiff.

Therefore, the court ruled, the plaintiff's "conclusory allegations of disparate treatment" did not plausibly raise an inference of discrimination.

*Failure to Promote*

With respect to the plaintiff's "failure-to-promote" claim, the court explained that she had to allege:

(1) That she was a member of a protected class;

(2) That she applied for a promotion to a position for which she was qualified;

(3) That she was rejected for the position; and

(4) That, after this rejection, the position was filled by someone outside the protected class who was similarly or less well qualified than the plaintiff.

The court then ruled that the plaintiff's failure-to-promote theory failed for two reasons.

First, the court found, the plaintiff did not clearly allege that she applied for the promotion to vice president and was formally rejected, only that she "requested" it and was "passed over."

Second, the court said, to the extent that the plaintiff's "request" for a promotion counted as an application, she did not allege that after this rejection, "the position was filled by someone outside the protected class who was similarly or less well qualified than the plaintiff."

*Ethnically Degrading Comments*

Next, the court considered the plaintiff's claim for allegedly "ethnically degrading comments." The court noted that the plaintiff pointed to four "harassing and offensive terms" that she claimed were used against her – "abnormal," "rude," "too assertive," and "incompetent" – and that, she argued, fed into "cruel and offensive stereotypes about older, black, African American women in the workplace."

The court stated that for each of these instances, the plaintiff did not "provide any allegations that would justify an inference that [these] facially neutral comments were actually related to [her] protected characteristics." For example, the court said, the plaintiff claimed that Chu called her "abnormal" in a meeting where she complained about his workplace conduct, but she provided "almost no detail as to what was discussed in that meeting, what she said to Chu, how he responded, and how the 'abnormal' comment arose." The court found that the plaintiff's

assertion, “in conclusory fashion,” that “abnormal” was a “clearly racist code word” used by the defendants to make Black and African American people feel as if they did not belong at the Bank of China due to their race, did “not plausibly raise an inference of discrimination.”

In summary, the court ruled that the plaintiff failed to plausibly allege that her protected characteristics were the “motivating factor” of any adverse action, as required under the NYCHRL, or the “but-for” cause, as required under the NYSHRL, and it dismissed her discrimination claims.

*Retaliation*

Next, the court considered the plaintiff’s retaliation claims.

For this claim, the court explained, the plaintiff had to allege that the defendants discriminated, or took an adverse employment action, against her because she had opposed any unlawful employment practice.

Although the court decided that the plaintiff plausibly alleged that she engaged in protected activity when she complained to Chu about his “discriminatory comments and conduct” on October 11, 2019, it found that the plaintiff’s retaliation claim failed as she did not plausibly allege retaliatory acts that would be “reasonably likely to deter a person” from engaging in protected activity. The court reasoned that “petty slights or minor annoyances that often take place at work” were “not actionable retaliation.” Moreover, the court continued, the plaintiff alleged “no extenuating circumstances” that could transform the minor inconveniences she experienced into retaliatory actions “reasonably likely to deter a person” from engaging in protected activity.

In the court’s view, the only allegation that rose above the level of a trivial harm was the negative performance evaluation that the plaintiff received that “lower[ed] her rating from B+ to D.” The court noted, however, that the protected activity cited by the plaintiff allegedly occurred

on October 11, 2019, and the plaintiff received the negative performance evaluation sometime between April and May 2020. The lapse of time was "too long to establish a causal connection" to the plaintiff's protected activity, the court ruled.

Therefore, the court decided that the plaintiff failed to state a retaliation claim under the NYCHRL and the NYSHRL, and it dismissed her retaliation claims.

*Hostile Work Environment*

Addressing the plaintiff's hostile work environment claim, the court observed that the majority of the plaintiff's allegations amounted "solely" to "petty slights or trivial inconveniences" and could not form the basis of a hostile work environment claim. The court added that even assuming that the plaintiff was subjected to "inferior terms, conditions or privileges of employment," she still had to assert that these actions were taken "because of" her protected characteristics. However, the court reiterated, beyond conclusory allegations, the plaintiff offered "no specific factual matter that could raise a plausible inference of discriminatory animus."

Therefore, the court also dismissed her hostile work environment claim.

*Aiding and Abetting and Supervisory Liability*

Finally, the court dismissed the plaintiff's aiding and abetting and supervisory liability claims. The court reasoned that these claims required an "underlying violation," and because the plaintiff's complaint failed to plead an underlying violation, these claims could not stand.

The case is *Ndongo v. Bank of China Ltd.*, No. No. 22-cv-05896 (RA) (S.D.N.Y. Feb. 24, 2023).

## Volunteer’s Employment Discrimination Claims Fail to Survive Defendants’ Motion to Dismiss

A federal district court in New York has dismissed an employment discrimination action brought by a volunteer who was not an employee of the defendants.

**The Case**

In May 2019, the plaintiff applied for a field organization position with Andrew Yang, who then was running for president, and Friends of Andrew Yang (“FOAY”), Yang’s political campaign organization. Thereafter, the plaintiff said, on an online forum and organizing platform associated with the campaign known as Basecamp, she discussed allegedly discriminatory comments made by one of the volunteers who moderated the forum. The plaintiff applied to be a moderator for the Basecamp, but the campaign’s social media coordinator informed the plaintiff that she was not “a good fit” for the moderator role and her application was denied.

In July 2019, the campaign hired the plaintiff as a Yang Gang Regional Organizer (“YGRO”) and allegedly represented that she would be compensated in her role. In September, the plaintiff was removed from her position as a YGRO. Thereafter, according to the plaintiff, campaign volunteers and employees published personal information about the plaintiff, including her telephone number, email address and daily routines. The plaintiff asserted that the campaign subsequently hired male volunteers for “permanent” “full-time” positions with FOAY, including one person who had published the plaintiff’s personal information online.

The plaintiff sued Yang and FOAY, alleging violations of federal, state, and municipal employment law during the course of her “employment” by the defendants. The plaintiff alleged causes of action under Title VII of the Civil Rights Act of 1964 for employment discrimination in the form of a hostile work environment and wrongful termination. She also alleged retaliation in the

form of (1) criticizing the plaintiff on social media; (2) terminating her position as a YGRO on social media; and (3) publishing her contact information. The plaintiff alleged the same two causes of action under the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") respectively.

In addition, the plaintiff alleged discriminatory failure to hire under Title VII.

The defendants moved to dismiss.

**The Court's Decision**

The court granted the defendants' motion.

In its decision, the court explained that all of the plaintiff's claims alleged discrimination during the course of the plaintiff's "employment" by the defendants. The court found, however, that these claims had to be dismissed because the plaintiff had "not adequately pleaded an employment relationship."

The court found that the plaintiff had not shown that she had "received remuneration in some form for [her] work." Although the plaintiff alleged that the defendants "represented" that the plaintiff "would be compensated for her role," her complaint did not include any allegations regarding the plaintiff's "actually receiving this compensation in the three-month period of her alleged employment." The court also pointed out that the plaintiff had not even alleged receiving "in-kind benefits that might qualify as compensation." Accordingly, the court ruled, because the plaintiff's complaint did not allege that the plaintiff actually had received any compensation, there was no employment relationship necessary to bring employment discrimination claims under Title VII, the NYSHRL, or the NYCHRL.

Similarly, the court rejected the plaintiff's claim for discriminatory failure to hire, finding that the plaintiff's allegations did "not support such a claim."

The court explained that, to establish a case of discriminatory failure to hire, a plaintiff must demonstrate that:

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

The court then declared that the plaintiff's allegations failed "to meet this standard." The court explained that the plaintiff alleged that she applied and was qualified for an executive assistant position, but did not state how she was qualified and whether that was a paid position. The court added that the plaintiff also alleged that, following her termination from the unpaid YGRO position, the defendants hired five "male volunteers" into "full-time positions" and "permanent roles." According to the court, the plaintiff, however, did not specify whether a man or woman was hired into the executive assistant position, how that person's qualifications compared with the plaintiff's, what relevance these five males and their new positions had to the executive assistant position, "or even whether their new positions were paid positions."

The court concluded that, in the absence of a viable failure to hire claim under federal law, it would not exercise supplemental jurisdiction over the plaintiff's NYSHRL and NYCHRL claims.

Accordingly, the court ruled that the defendants' motion to dismiss should be granted with respect to all of her claims.

The case is *Lee v. Yang*, No. 21 Civ. 7934 (LGS) (S.D.N.Y. Jan. 26, 2023).

## Federal Court Says "Speculative" Employment Discrimination Complaint "Devoid of Any Factual Allegations" Should Be Dismissed

A federal court in New York has ruled that an employment discrimination action should be dismissed where the plaintiff's complaint was "completely devoid of any factual allegations" that the defendant discriminated against the plaintiff on the basis of the plaintiff's race, color, or age or that the plaintiff suffered emotional distress due to harassment on the job.

**The Case**

The plaintiff, a former warehouse worker for Aclara Smart Grid Solutions LLC, filed an employment discrimination lawsuit against Aclara on October 26, 2021. The plaintiff alleged that he was subjected to discrimination based on his race, color, and age in February and December 2020 and on January 21, 2021, the date he was terminated. The plaintiff asserted claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 ("ADEA").

Aclara moved to dismiss.

**The Court's Decision**

The court granted the motion.

In its decision, the court first explained the elements the plaintiff had to prove to succeed on his claims.

The court pointed out that Title VII requires a plaintiff asserting a discrimination claim to allege two elements: (1) the employer discriminated against the plaintiff, (2) because of the plaintiff's race, color, religion, sex, or national origin. To establish a case of discrimination, the court continued, a plaintiff must proffer some admissible evidence of circumstances that would be

sufficient to permit an "inference of discriminatory motive," and a plaintiff cannot meet the burden through "reliance on unsupported assertions."

Similarly, the court said, to establish a case of age discrimination under the ADEA, a plaintiff must show that:

(1) The plaintiff was within the protected age group (at least 40 years old);
(2) The plaintiff was qualified for the position;
(3) The plaintiff experienced an adverse employment action; and
(4) The adverse employment action occurred under circumstances giving rise to an inference of discrimination.

In addition, the court said, with respect to an ADEA claim, a plaintiff must prove "by a preponderance of the evidence" that age was the "but-for" cause behind the employer's adverse decision, and not merely one of the motivating factors.

Next, the court said, to establish a hostile work environment claim under Title VII or the ADEA, a plaintiff must show (1) that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and to create an abusive working environment, and (2) that a specific basis existed for imputing the objectionable conduct to the employer.

Finally, the court observed, a retaliation claim required showing that:

(1) The plaintiff participated in a protected activity;
(2) The plaintiff suffered an adverse employment action; and
(3) There was a causal connection between the plaintiff engaging in the protected activity and the adverse employment action.

With that set forth, the court found that the plaintiff had pleaded no facts that raised the likelihood of his claims "beyond a speculative level." Indeed, the court continued, the plaintiff's

complaint was “completely devoid of any factual allegations, other than the conclusory and vague assertions that [Aclara] discriminated against plaintiff on the basis of his race, color, and age, and that plaintiff suffered emotional distress due to harassment on the job.”

In the court’s view, the plaintiff did not allege any facts that would create an inference that any adverse employment action taken by Aclara was based on a protected characteristic or activity. The court decided that Aclara’s motion should be granted because the plaintiff had “not alleged sufficient facts to allow the court to draw the reasonable inference that [Aclara] acted with discriminatory intent.”

The case is *Burgher v. Aclara Smart Grid Solutions LLC*, No. 21 CV 6045 (DG)(RML) (E.D.N.Y. Feb. 13, 2023).

## Plaintiff’s Employment Discrimination Complaint Is Dismissed by New York Federal Court

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination lawsuit after finding, among other things, that the plaintiff’s complaint failed to state “any facts” suggesting that the defendants violated any federal antidiscrimination statute by treating the plaintiff differently because of his protected characteristics, or that he was retaliated against after he allegedly opposed discriminatory practices.

**The Case**

As the court explained, the plaintiff was employed by Breaking Ground Housing Development Fund Corporation (“Breaking Ground”) at a building in Upper Manhattan. According to the plaintiff, on March 25, 2022, he was falsely accused of improperly touching a woman and violating Breaking Ground’s sexual harassment policy; he was later fired from his job. The plaintiff

contended that the false accusation made it harder for him to find employment and constituted "character assassination" and an "attempt to destroy [him]."

The plaintiff sued Breaking Ground, a building manager, and a supervisor. He sought severance pay and other damages.

The plaintiff's complaint contained few factual allegations, but he submitted multiple attachments, including documents he had filed with the New York State Department of Labor for unemployment benefits and a charge of discrimination and letters he had submitted to the New York State Division of Human Rights ("NYSDHR"). In the complaint he filed with the NYSDHR, the plaintiff asserted that he was subject to discrimination, retaliation, and wrongful termination of his employment. He claimed that his accuser subjected him to sexual harassment by making "unwarranted terms of endearment" to him, such as "Good morning Love. Honey. Baby for almost two [] months," and that when he reported the conduct to a building manager, the building manager said that the accuser was "just kidding around." The plaintiff argued that, because the building manager was a "good friend" of the accuser, she covered up the accuser's unlawful sexual harassment of him.

**The Court's Decision**

The court dismissed the plaintiff's complaint, although it granted the plaintiff 60 days to file an amended complaint.

In its decision, the court found that the plaintiff failed to state "any facts" suggesting that the defendants violated any federal antidiscrimination statute by treating him differently because of his protected characteristics, or that they retaliated against him after he opposed discriminatory practices. The court added that although the plaintiff stated that he was fired after he was falsely

accused of sexual harassment, he did not allege that the unfair treatment occurred because of a protected characteristic.

With respect to the plaintiff's claims against the two individual defendants, the court pointed out that individuals "are not subject to liability under Title VII, the ADA, or the ADEA." However, the court noted, an individual "who actually participates in the conduct giving rise to the discrimination claim may be held personally liable" under a state law, such as the New York State Human Rights Law. Therefore, the court added, if the plaintiff decided to pursue state law claims against the two individual defendants, or any other individual defendant, for employment discrimination, the plaintiff "must allege facts explaining how each named individual defendant actually participated in the conduct giving rise to his discrimination claims in violation of state law."

Finally, the court noted that, before filing suit under Title VII or the ADA, a plaintiff must file a timely charge with the Equal Employment Opportunity Commission ("EEOC") and obtain a Notice of Right to Sue. The court then pointed out that a plaintiff suing under the ADEA may file suit in federal court at any time from 60 days after filing the EEOC charge until 90 days after the plaintiff receives notice from the EEOC that the EEOC proceedings are terminated. The court said that if the plaintiff decided to file an amended complaint, he would have to explain if he had exhausted his administrative remedies with the EEOC.

The case is *Williams v. Breaking Ground Housing Development Fund Corp.*, No. 22-CV-8715 (LTS) (S.D.N.Y. Feb. 17, 2023).

## Former Employee’s Violation of Nondisclosure Covenant Entitled Company to Terminate Stock Option Plan

An appellate court in New York, rejecting a trial court’s decision, has ruled that a company could terminate a former employee’s vested stock options where he violated the stock option plan’s nondisclosure covenant.

**The Case**

After the plaintiff left his employment with InterEnergy Holdings, the company terminated his vested stock options, claiming, among other things, that the plaintiff had violated the stock option plan’s nondisclosure covenant, which prohibited the “unauthorized disclosure of confidential information relating to the Company.”

The plaintiff sued InterEnergy, which moved for summary judgment.

The Supreme Court, New York County, denied InterEnergy’s summary judgment motion, and InterEnergy appealed.

**The Appellate Court’s Decision**

The appellate court ruled that InterEnergy was entitled to summary judgment.

In its decision, the appellate court acknowledged that the stock option plan did not specifically define what constituted “confidential information relating to the Company.” The appellate court found, however, that the term “unambiguously” included the plaintiff’s “unauthorized disclosure to a third party of a memorandum he obtained in his employment capacity with [InterEnergy].”

According to the appellate court, the memorandum was provided to InterEnergy, as a potential deal partner, by another party pursuant to a nondisclosure agreement and deemed by that party as containing confidential information concerning the development of a project, the

disclosure of which revealed InterEnergy's interest in and the details concerning an investment opportunity.

The appellate court concluded that this finding "of a violation of the nondisclosure covenant" entitled InterEnergy to terminate the plaintiff's vested stock options. Therefore, the appellate court concluded, the trial court should have granted InterEnergy's summary judgment motion.

The case is *Bax v. InterEnergy Holdings*, No. 2022-00107 (N.Y. App. Div. 1st Dep't Feb. 23, 2023).

## Allegedly False Statements Regarding Noncompete Clause's Enforceability Did Not Support Fraud Action, New York Appellate Court Decides

An appellate court in New York has affirmed a trial court's opinion dismissing a lawsuit seeking damages for fraud based on alleged statements by a defendant regarding the enforceability of a restrictive noncompete clause in an employment contract.

**The Case**

In 2017, Liliah Cantor, a former employee of Boston Children's Health Physicians, LLP ("BCHP"), sued BCHP. She sought to recover damages for breach of an employment contract she had entered into with BCHP's predecessor in October 2011. After a nonjury trial, the Supreme Court, Westchester County, determined that BCHP had breached the contract and awarded the plaintiff damages.

The plaintiff thereafter filed suit against BCHP and Gerard Villucci, BCHP's chief executive officer, to recover damages for fraud, alleging that Villucci made false statements to her regarding her obligations under the employment contract and the enforceability of a restrictive noncompete

clause in the contract. The defendants moved to dismiss the complaint and the trial court granted the motion.

The plaintiff appealed.

**The Appellate Court's Decision**

The appellate court affirmed.

In its decision, the appellate court explained that, to recover damages for fraudulent misrepresentation or fraudulent inducement, the plaintiff had to prove:

(1) A misrepresentation or an omission of material fact that was false and known to be false by the defendant;

(2) That the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it;

(3) Justifiable reliance of the plaintiff on the misrepresentation or material omission; and

(4) Injury to the plaintiff.

The appellate court added that, with respect to fraudulent concealment, the plaintiff must prove, among other things, that there was a fiduciary or confidential relationship between the parties that would impose a duty to disclose material information.

The appellate court then found that the trial court had properly determined that the plaintiff's complaint failed to state a cause of action alleging fraudulent misrepresentation, fraudulent inducement, or fraudulent concealment against the defendants.

The appellate court concluded that the alleged misrepresentations cited by the plaintiff, consisting of alleged statements by Villucci that the plaintiff's salary increase was "discretionary" and that the noncompete clause in the contract was enforceable, amounted to "nothing more

than nonactionable opinions” or “prediction[s] of something which is hoped or expected to occur in the future,” which could “not sustain a fraud cause of action.”

The case is *Cantor v. Villucci*, 212 A.D.3d 765 (N.Y. 2d Dep’t 2023).

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