ORIGINAL

To be argued by
JONATHAN R. GOLDMAN, ESQ.
Time Requested: *15 minutes*

Appellate Division – Second Department Case No. 2017-00496

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

RICHARD J. SASSI, II,

Plaintiff-Appellant,

–against–

MOBILE LIFE SUPPORT SERVICES, INC.,

Defendant-Respondent.

DUTCHESS COUNTY CLERK'S OFFICE RECEIVED 2019 OCT 15 PM 2:59

APPELLANT'S REPLY BRIEF

Jonathan R. Goldman, Esq.
Michael H. Sussman, Esq.
SUSSMAN AND ASSOCIATES
Attorneys for Plaintiff-Appellant
1 Railroad Avenue, Suite 3
P.O. Box 1005
Goshen, New York 10924
(845) 294-3991 [Tel]
(845) 294-1623 [Fax]

RECEIVED 17 SEP 25 AM 11:21 APPELLATE DIVISION SECOND DEPARTMENT

Dutchess County Clerk's Index No. 51918/2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Plaintiff-Appellant Richard J. Sassi, II respectfully submits this reply brief in further support of his appeal and in response to Defendant-Respondent Mobile Life Support Services' ("MLSS") arguments in opposition.

ARGUMENT

The sole issue on this appeal is whether the provisions of Article 23-A of the New York State Correction Law ("Article 23-A") and Section 296(15) of the New York State Executive Law, also known as the New York State Human Rights Law ("NYSHRL"), apply to the circumstances alleged in Sassi's Verified Complaint. The statutory language is plain and unambiguous:

> The provisions of this article shall apply to *any application by any person* for . . . employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any . . . employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license . . . .

N.Y. Correction L. § 751 (emphasis added).[1]

As explained in his opening brief, Sassi alleges that, following his conviction and incarceration, MLSS terminated his employment for job abandonment (R-15 ¶

[1] Section 296(15) applies where Article 23-A is violated. See N.Y. Exec. L. § 296(15); Giffin v. Sirva, Inc., 29 N.Y.3d 174, 182 (2017).

26). Then, after his release, he sought reemployment (Id. ¶¶ 27-35). As he had already been terminated and was therefore unemployed at the time, in so seeking reemployment with MLSS, Sassi was an applicant for employment as contemplated by Article 23-A and, thus, entitled to the statute's protections.

In opposition, focusing on paragraphs 28-29 and 31 of the Verified Complaint, MLSS contends that Sassi's pleading describes a "termination meeting," and so Sassi is really challenging his termination from employment, which is not subject to Article 23-A's protections because his conviction did not precede such termination. See Resp. Br. at 2-3, 7-8. In other words, MLSS contends that Sassi was not terminated until he met with Jeffries and Smith following his release.

But this argument fails for the simple reasons that it ignores entirely Paragraph 26 of the Verified Complaint, which explicitly alleges that, after his incarceration, MLSS "terminated plaintiff for 'job abandonment'" (R-15 ¶ 26). Thus, when Sassi contacted Longo after his release and, later, met with Jeffries and Smith to discuss coming back to MLSS, he had already been fired and was now seeking to be reemployed – *i.e.*, he was an applicant looking to *obtain* employment.[2] The fact that

[2] This description of events is entirely consistent with, and is an accurate representation of, the allegations set forth in Sassi's Verified Complaint, which, as MLSS concedes, must "'be afforded a liberal construction'" and "'accord[ed] . . . the benefit of every favorable inference.'" See Resp. Br. at 3-4 (quoting Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994)). Accordingly, the Court should ignore MLSS' reckless accusations that Sassi has "misl[ed]," "misguide[ed]" and "mischaracterize[ed]" his complaint to this Court. See Resp. Br. at 2, 6.

he previously worked there is irrelevant because the plain language of the statute makes no distinction between first-time applicants and those previously employed – instead, it applies to "*any* application by *any* person for . . . employment at *any* . . . employer" so long as his or her conviction preceded the application. See N.Y. Correction L. § 751 (emphasis added).

That the parties may have also discussed [and Sassi protested] the reason MLSS terminated him is also irrelevant because the Verified Complaint amply alleges that, by the time of the meeting, MLSS no longer employed Sassi and, thus, his effort to seek reinstatement at that meeting constituted an application for employment. And, again, since his criminal conviction predated his application, the plain language of Article 23-A render it applicable. See N.Y. Correction L. § 751.

MLSS' statutory interpretation is also unavailing. The company contends that it would undermine the legislative intent of the statute if a person terminated because of his or her conviction could claim the protections of Article 23-A simply by immediately reapplying for the same job from which he or she had been fired. See Resp. Br. at 7. But this argument for fails for several reasons.

First, and most critically, MLSS' argument is unsupported by the statutory language, which is plain and unambiguous. As already noted, it applies to "any application by any person . . . for employment at any . . . employer" and makes no distinction between first-time applicants and those who may have previously worked

for the employer. This language was crafted to further the law's broad, remedial purpose – namely "to eliminate the effect of bias against ex-offenders which prevented them from obtaining employment," Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (1988), and to promote their "successful and productive reentry and reintegration into society," Matter of Acosta v. N.Y.C. Dep't. of Educ., 16 N.Y.3d 309, 314 (2011).

Nothing about these recognized purposes of the law suggests that the Legislature intended to exempt from its application ex-offenders seeking reapplication with their prior employers. Indeed, part of the law's justification was economic in nature – "the great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual's return to society his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination." Matter of Acosta, 16 N.Y.3d at 314-15 (quoting Governor's Approval Mem, Bill Jacket, L. 1976, ch. 931, 1976 McKinney's Sessions Laws of N.Y., at 2459) (alterations accepted).

In that same vein, from an economic standpoint, it makes sense for a former employee to seek reemployment to a previously-held job. So long as the conviction was unrelated to that employment and does not pose an unreasonable risk to safety, in which case the statute's exceptions would apply and permit denial, see N.Y. Correction L. § 752, and so long as the employee had no performance issues, it is a

wise and economically efficient allocation of societal recourses for a person to go back to a job he or she presumably knows well and is good at. In considering the broader economic justifications for the law, the Legislature presumably understood this when it drafted language rendering the law applicable to "any application by any person . . . for employment at any . . . employer." See Id. § 751.

Further, precedent recognizes the statute's applicability to reapplications to previously-held employment. Indeed, MLSS concedes in its brief that Bonacorsa involved a previously-convicted man seeking to re-obtain a license he previously held. See Resp. Br. at 9. And its attempts to distinguish the case are unavailing. Contrary to MLSS' suggestion, the fact that Bonacorsa sought a license, not employment, is irrelevant as the statute makes no distinction between the two and treats them the same in its application. See Noble v. Career Educ. Corp., 375 Fed.App'x. 102, 104 (2d Cir. 2010) (summary order) ("To the extent these cases involve licenses not employment, . . . the statute draws no relevant distinction between the two.").

Nor does the gap in time following conviction provide a basis to distinguish the case or warrant an exception to the statute's plain language, as MLSS suggests. See Resp. Br. at 9.[3] Indeed, it is this aspect of MLSS' argument that is most

[3] MLSS asserts that, "despite the gap of time, the New York Court of Appeals in Bonacorsa held that the denial of the license application at issue did not violate article 23-A." Resp. Br. at 9 (emphasis in original). But the Court did not rest its decision on the fact that the plaintiff had been

troubling. The company suggests that the law might apply to a person re-applying to a position from which he was previously terminated because of his conviction so long as enough time has passed. But this position is not only entirely unsupported by the statutory text, it is unworkable. How long is long enough? If immediate reapplication does not qualify, how long must a prior employee wait before his or her reapplication would be subject to the law's protections?

It cannot be that, by using the words "any application by any person . . . for employment at any . . . employer," the Legislature, without providing any guidance whatsoever, intended to grant a kind of dissipating immunity by exempting re-applications to previously-held employment unless "enough" time has passed. Respectfully, it is MLSS' position, not Sassi's, that would undermine and frustrate the statute's legislative intent as clearly expressed by its plain language.

Finally, MLSS' concern about an employee reapplying "immediately" after being notified of his termination and, thus, invoking the law's protections, see Resp. Br. at 7-8, is easily addressed. As an initial matter, for whatever its worth, that argument is inapplicable here as Sassi did not immediately reapply at the same time

---

convicted while previously licensed. Rather, recognizing that the law, in fact, applied to the plaintiff under these circumstances, the Court simply held that, after considering all of the enumerated statutory factors and determining that one of the statutory exceptions applied to permit denial based on the prior conviction, the respondent did not act arbitrarily or capriciously. See Bonacorsa, 71 N.Y.2d at 614-15.

he was terminated, as MLSS suggests. Rather, as alleged in his Verified Complaint, Sassi was terminated while still incarcerated, and he did not seek to reapply until after his release (R-15 ¶¶ 26-35). Thus, his situation squares perfectly with that envisioned by the Legislature that enacted Article 23-A. See Bonacorsa, 71 N.Y.2d at 611; Matter of Acosta, 16 N.Y.3d at 314.

But there is also a more practical reason why MLSS' argument is unavailing. Typically, a person convicted of a crime will be unavailable to work because of an imposed sentence. Thus, the person would not be in a position to reapply upon notification of termination and, even if he or she did, the employer could rightly refuse to hire someone who is not physically present and unable to do the work – such a denial would not be based on the person's conviction, but rather his or her physical unavailability. But if a person approaches his or her prior employer upon release from incarceration and applies to obtain new employment, the plain language of the law renders it applicable to the same extent it would if the person applied to an employer with whom he or she had not previously worked.

CONCLUSION

Since Article 23-A plainly applies to all applicants for employment and Sassi amply alleges he was such an applicant, the statute applies here. Accordingly, Supreme Court's order should be vacated, Sassi's complaint reinstated and the matter reinstated for further proceedings.

Dated: Goshen, New York
September 22, 2017

Respectfully Submitted

SUSSMAN AND ASSOCIATES
Attorneys for Plaintiff-Appellant

By:

Jonathan R. Goldman, Esq.
Michael H. Sussman, Esq.
1 Railroad Avenue, Ste. 3
P.O. Box 1005
Goshen, New York 10924
(845) 294-3991 [Tel]
(845) 294-1623 [Fax]

TO: Keith Gutstein, Esq.
Matthew Cohen, Esq.
KAUFMAN, DOLOWICH & VOLUCK, LLP
Attorneys for Defendant-Respondent
135 Crossways Park Drive, Suite 201
Woodbury, New York 11797
(516) 681-1100 [Tel]
(516) 681-1101 [Fax]

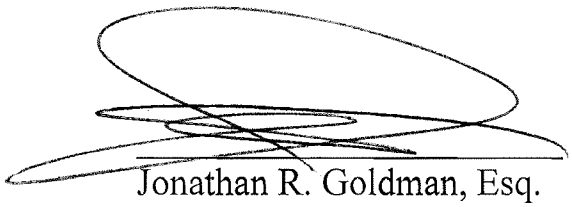
CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 N.Y.C.R.R. § 670.10.3(F)

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface:	Times New Roman
Point size:	14-point
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 1,783 words.

Dated: Goshen, New York
September 22, 2017



Jonathan R. Goldman, Esq.