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

APL-2020-00045

State of New York
Court of Appeals

RICHARD J. SASSI, II,

Plaintiff-Appellant,

–against–

MOBILE LIFE SUPPORT SERVICES, INC.,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

SUSSMAN AND ASSOCIATES
Attorneys for Plaintiff-Appellant
1 Railroad Avenue, Ste. 3
P.O. Box 1005
Goshen, New York 10924
(845) 294-3991 [Tel]
(845) 294-1623 [Fax]

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PRELIMINARY STATEMENT

The principle of equal employment opportunity is of paramount importance. So too are the goals of reducing criminal recidivism and promoting the successful reintegration of former offenders into society. To advance these objectives, our state boasts a strong and broad public policy prohibiting discrimination in the employment and licensure of individuals previously convicted of a crime. Article 23-A of the New York State Correction Law and Section 296(15) of the New York State Executive Law codify this policy. The latter provision denotes a violation of Article 23-A as an "unlawful discriminatory practice" under the New York State Human Rights Law ("NYSHRL").

Under this statutory scheme, except under certain circumstances, it is unlawful for an employer to deny employment to an applicant because he or she was previously convicted of a crime. But it is not unlawful for an employer to terminate the employee if convicted of a crime during his term of employment.

Plaintiff-Appellant Richard J. Sassi, II alleges here that, after he was convicted of a minor misdemeanor offense, his employer, Defendant-Respondent Mobile Life Support Services, Inc. ("MLSS"), terminated him; then, after his release from a short jail stint, MLSS refused to rehire him solely because of his conviction. He claims that MLSS's refusal to rehire him violated Article 23-A and the NYSHRL.

Supreme Court dismissed Sassi's complaint on the ground that these statutes are inapplicable and do not protect him from discrimination because he was convicted while already employed. The Appellate Division, Second Department summarily affirmed.

Respectfully, these Courts erred. The statutes plainly apply to "any application by any person" for employment. A previous employee of an employer falls into the category of "any person," and his request to be rehired falls into the category of "any application." As such, a previous employee's request to be rehired by an employer who had previously fired him is covered by the plain language of the statute. This reading also aligns with the broad public policy underlying these statutes – to provide equal employment opportunity to former offenders and to promote their successful reintegration into society, thereby reducing recidivism.

Since Sassi pleads that, after it fired him and he sought reemployment, MLSS denied his request solely on the ground of his prior criminal conviction, his Verified Complaint amply states his causes of action and its dismissal should be vacated.

QUESTION PRESENTED

This appeal presents the following question for review:

> Under Article 23-A of the New York State Corrections Law, it is unlawful for an employer to deny employment to an applicant because of that applicant's prior criminal conviction(s) and, under Section 296(15) of the New York State Executive Law, such a violation constitutes an unlawful discriminatory practice under the NYSHRL. When an employee, whose conviction occurs during the term of his employment, is fired and then later seeks reemployment with the same employer, do these statutes provide protection against unlawful discrimination?

JURISDICTIONAL STATEMENT

This matter originated in the Supreme Court of the State of New York, County of Dutchess, and the Appellate Division, Second Department's Order affirming dismissal of Sassi's Verified Complaint, which Order is not appealable as of right under CPLR § 5601, resulted in a complete and final determination of this action. Thus, this Honorable Court has jurisdiction under CPLR § 5602(a)(1) and, on March 26, 2020, granted Sassi's timely motion for leave to appeal (R-1).

Moreover, this Honorable Court has jurisdiction to review the question presented because the question of the scope of Article 23-A of the New York State Correction Law and Section 296(15) of the NYSHRL and whether Sassi's Verified Complaint amply ped his causes of action under these statutes were integral to Supreme Court's and the Appellate Division's Orders (R-2-3; R-13; R-16-20) and were the thrust of Sassi's arguments below (see App. Br. and App. Reply Br. below).

NATURE OF THE CASE

A. Statement of facts.

Sassi resides in Dutchess County and first applied for employment with MLSS in or about June 2014 (R-16 ¶¶ 1, 4). At his first interview, he advised MLSS's agents, John Miranda and Steven Longo, that he was facing a misdemeanor charge for having allegedly called in a false emergency to 911 while working as a police officer in August 2012 (Id. ¶¶ 5-6).

He then interviewed with Director of Human Resources, William Jeffries, and disclosed the pending charge to him as well (Id. ¶ 7). Jeffries viewed the legal matter as minor and compared it to a domestic squabble (Id. ¶ 8). Thereafter, MLSS hired Sassi as a *per diem* communications specialist and, after he completing his required training, quickly promoted Sassi to a full-time dispatcher (Id. ¶ 9).

Sassi also trained as an EMT and, after passing the requisite courses, worked in that role as well (JA-17 ¶¶ 10-13). As he continued working for MLSS, Jeffries reiterated to Sassi that his legal matter should not impact his employment and noted that that he considered the issue "off limits" (Id. ¶ 14). He told Sassi to report to him any employee who gave him a hard time about it (Id.).

Sassi was scheduled to go to trial in early 2016 and, in the weeks before the scheduled start date, apprised Jeffries, who, by then, was serving as MLSS's Vice President and Chief Operating Officer, as well as Emily Smith, who replaced Jeffries

as HR Director, of his legal status (Id. ¶ 15-16). In February 2016, Sassi was convicted of the charged offense and, prior to sentencing, the probation department completed a pre-sentence investigation ("PSI") report, which recommend that he not be incarcerated (Id. ¶¶ 17-19).

Before sentencing, Sassi spoke with Jeffries and Smith, who told him he was a good employee and that, in the unlikely event he was incarcerated, they would place him on leave, allow him to use accrued benefit time and reinstate him upon his release (Id. ¶ 22). On May 18, 2016, Sassi was sentenced to sixty-days' incarceration and, given his unavailability to provide notice, his wife advised Smith of the sentence (Id. ¶ 23-24). Smith reiterated to Mrs. Sassi what she and Jeffries had already advised her husband – that he would be placed on leave, allowed to use his accrued benefits, and then return to work upon his release (R-18 ¶ 25). But, contrary to these representations, after Sassi began his sentence, MLSS terminated his employment for "job abandonment" (Id. ¶ 26).

Upon completion of his jail term and release from custody, Sassi contacted Longo, who advised that he wanted Sassi to return and that the supervisors were split on the issue, with some favoring his return and some opposing it (Id. ¶ 28-29). After being unable to regain employment through Longo, Sassi contacted Jeffries several times and finally was invited to meet with him and Smith (Id. ¶ 30). Jeffries told

Sassi that MLSS had previously terminated other employees who had been incarcerated and had to be consistent with him, hence his termination (Id. ¶ 31).

Sassi argued that it was unfair to hold against him the incident underlying his conviction, which had occurred nearly four years prior and had nothing to do with his job duties, particularly where he had kept his employer fully apprised of the situation throughout and its agents had initially agreed to allow him to return to work following his brief incarceration, which he remained fully qualified to do so (Id. ¶¶ 33-34). Despite his protestations, MLSS refused to rehire and re-employ Sassi in his former position, the only reason underlying this determination being his prior conviction and brief incarceration (Id. ¶ 35).

B. Procedural history.

On August 4, 2016, Sassi commenced this action against MLSS, claiming that, by refusing to re-employ him in his former position based solely upon his prior conviction, MLSS violated Article 23-A of the New York State Correction Law and Section 296(15) of the New York State Executive Law (R-15-20). On October 7, 2016, MLSS filed a pre-answer motion to dismiss (R-21-34).

By Decision and Order dated December 14, 2016, Supreme Court (Hon. James V. Brands, J.S.C.) granted MLSS's motion and dismissed Sassi's complaint (R-11-13). MLSS served the Decision and Order with Notice of Entry on December

19, 2016 (R-10-14) and, on January 11, 2017, Sassi timely filed and served his Notice of Appeal (R-4-9).

By Decision and Order dated October 9, 2019, the Appellate Division, Second Department summarily affirmed Supreme Court's dismissal of the complaint (R-2-3). Thereafter, Sassi timely sought leave to appeal to this Court, which granted his application on March 26, 2020 (R-1). He now timely perfects his appeal.

C. Supreme Court's Decision and Order.

In dismissing his complaint, Supreme Court held that neither Article 23-A nor Section 296(15) applied to Sassi's claims because his conviction did not pre-date his initial employment with MLSS (R-12). Specifically, the court stated:

> Section 751 of Article 23-A of the Corrections Law specifically states that the statute "shall apply . . . to any . . . employment held by any person whose conviction of one or more criminal offenses *precedes* such employment" the statute continues stating that "no employment . . . held by an individual . . . shall be denied or accepted [sic] upon adversely by reason of the individual's having been *previously* convicted of one or more criminal offenses." Likewise, Section 296.15 of the Executive Law states that the statute only applies to convictions that occurred prior to employment, stating that "it shall be an unlawful discriminatory practice for any person . . . to deny . . . any . . . employment to any individual by reason of his or her *having been* convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of Article 23-A of the Correction Law."
>
> Based on the expressed language of the foregoing statutes, plaintiff's complaint is dismissed as a matter of law since the alleged statutory violation is belied by the facts as

> asserted in the verified complaint. The aforementioned statutes only apply to convictions that occur prior to one's employment, whereas plaintiff alleges he was first employed by defendant, after which he was convicted of a crime and incarcerated for 60-days, after which plaintiff sought to resume his employment with defendant.

(R-12 [emphases in original]).

D. Appellate Division, Second Department's Decision and Order.

After setting forth the applicable standard for reviewing the sufficiency of a pleading under CPLR 3211(a)(7), the Appellate Division, Second Department summarily affirmed Supreme Court's dismissal, concluding: "Applying this standard, we agree with the Supreme Court's determination to grant the defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint." (R-2-3).

STANDARD OF REVIEW

In reviewing a motion to dismiss for failure to state a cause of action, the Court must construe the complaint liberally, see CPLR § 3026, and its "well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." See Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 318 (1995) (quotations & citations omitted). Further, the Court must "accord plaintiff[] the benefit of all favorable inferences which may be drawn from [the] pleading, without expressing [its] opinion as to whether [he] can ultimately establish the truth of [his] allegations before the trier of fact." Id.

The Court must "determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). And "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one." Id. at 88. Thus, "a complaint is deemed to allege whatever can be imputed from its statements by fair and reasonable intendment." Condon v. Associated Hospital Service of New York, 287 N.Y. 411, 414 (1942) (quotations & citations omitted).

"[I]f from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion will fail." See Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). Thus, if the plaintiff is "entitled to relief on any reasonable view of the facts stated . . . [the court] must declare the complaint legally sufficient" and deny the motion to dismiss. Campaign for Fiscal Equity, 86 N.Y.2d at 318.

ARGUMENT

Point I

Article 23-A and Section 296(15) apply where a former employee, whose conviction occurs during the term of his employment, is fired and then later seeks reemployment with the same employer.

Article 23-A and Section 296(15) were enacted at the same time as part of the same statute. See L. 1976, ch. 931, 1976 McKinney's Session Laws of N.Y., at 1965-69. To determine the meaning of these statutory provisions, the analysis must begin

with their text. See Colon v. Martin, ___ N.Y.3d ___, No. 26, 2020 N.Y. LEXIS 868, at * 3-*4 (May 7, 2020). "This is because the primary consideration is to ascertain the legislature's intent, of which the text itself is generally the best evidence." Id. at *4 (quotation marks & citations omitted). In so proceeding, the Court should "construe unambiguous language to give effect to its plain meaning." Id. (quotation marks & citations omitted). It should also construe the statute "as a whole and [consider] its various sections . . . together and with reference to each other." Id. (quotation marks & citations omitted) (ellipses in original omitted).

It is well accepted that "statutory language is generally given its natural and most obvious meaning . . . and . . . if there is nothing to indicate a contrary intent, terms of general import will ordinarily be given their full significance without limitation." Price v. Price, 69 N.Y.2d 8, 15 (1986). Finally, the "circumstances surrounding the statute are a useful aid in understanding its meaning. Colon, 2020 N.Y. LEXIS 868 at *4 (quotation marks & citations omitted). Indeed, "a particular construction of a statute should be preferred which furthers the statute's object, sprit and purpose." Price, 69 N.Y.2d at 16.

Here, the operative provision of Article 23-A is Section 752, which provides, in pertinent part:

> *No application* for *any* license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having

> been previously convicted of one or more criminal offenses . . . .

N.Y. Correction L. § 752 (emphasis added). And Section 751 sets forth the applicability of Article 23-A as follows:

> The provisions of this article shall apply to *any application by any person* for a license or 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 license or 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).

The applicable NYSHRL provision provides, in pertinent part: "It shall be an unlawful discriminatory practice for any person . . . to deny *any* license or employment to *any individual* by reason of his or her having been convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of article twenty-three-A of the correction law." N.Y. Exec. L. § 296(15) (emphasis added).

The plain language of the statute could not be clearer – it applies to *any* application for employment by *any* person, who at the time of application has a prior criminal conviction. As this Court has recognized before, "the word 'any' means 'all' or 'every' and imports no limitation." Zion v. Kurtz, 50 N.Y.2d 92, 103-04 (1980); See also Randall v. Bailey, 288 N.Y. 280, 285(1942); In re Estate of Beach,

154 N.Y. 242, 247 (1897). Thus, other than the qualification that the applicant have a prior criminal conviction at the time of application, the statute imposes no limitation on the category of applicants to which it applies and provides no exception for a person previously employed by the entity to which he is applying. See Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 611 (1988) ("[T]he statute sets out a broad general rule that employers and public agencies cannot deny employment or a license to an applicant solely based on status as an ex-offender."). Nor is there a basis for reading such an exception into the statute.

This interpretation is further compelled when the statute is a read as a whole and in conjunction with its other sections. See Colon, 2020 N.Y. LEXIS 868, at *4 (statutory provisions should be construed in light of entire statute and with reference to its other provisions). For instance, Article 23-A defines the term "employment" as "any occupation, vocation or employment, or any form of vocational or educational training," except that, "'employment' shall not, for the purposes of this article, include membership in any law enforcement agency." N.Y. Correction L. § 750(5).

By using the term "any," this provision confirms the especially broad sweep intended for the statute. This is particularly so given the one explicit exception the Legislature chose to carve out – that is, "membership in any law enforcement agency." Indeed, two critical conclusions are drawn from the inclusion of this

express limitation. First, seeing the need for an express exception, the Legislature recognized and understood the otherwise broad and all-encompassing scope of this definition and the statute generally. And second, the Legislature knew how to include a limitation if it wanted to and, by not expressly limiting the definition of "employment" or the overall applicability of Article 23-A to exclude applications by those previously employed by those entities to which they are applying, the Legislature plainly did not want to so limit the statute.

These same conclusions can be drawn by the inclusion of explicit exceptions to the law's general rule written into Section 752. There, after stating the broad and general rule prohibiting discrimination as to applications for "*any* license or employment," N.Y. Correction L. § 752 (emphasis added), the Legislature added two specific limitations: (1) where "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual" and, (2) where employment or licensure "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public," see id. § 752 (1)-(2). It could have added a third – "unless the applicant previously worked for the employer before his conviction" – but it did not. And its decision, especially in light of its otherwise broad and general language, demonstrates that it intended no such limitation.

The statute's overall structure and operation also support this interpretation. Indeed, there may be situations where an organization is justified in refusing to re-hire a former employee, especially when that employee was convicted during his prior term of employment. But the statute addresses this not by excluding wholesale from its coverage all prior employees re-applying for employment, but rather through application of its existing exceptions and the factors an employer is required to assess in determining whether one of these exceptions applies. See N.Y. Correction L. §§ 752-753; Bonacorsa v. Van Lindt, 71 N.Y.2d 605 (1988); Matter of Acosta v. New York City Dep't. of Educ., 16 N.Y. 309 (2011).

Thus, if a company's former bookkeeper re-applies for that same position the day after his employer fires him for being convicted of embezzling money from it, that employer will no doubt be able to justify denying that application on the ground that, after applying the Section 753 factors, the conviction has a "direct relationship" on the employment sought or such employment would pose an "unreasonable risk" to the employer's property, *i.e.*, its money. But if a telemarketer, who works remotely, is fired after being convicted of a DWAI [occurring after work hours] and then, showing substantial rehabilitation, reapplies to the same position ten years later, the employer will likely have a harder time justifying a denial based on one of the express exceptions.

This is how the Legislature intended for the statute to work. Apart from law enforcement jobs, which the Legislature explicitly carved out, the statute applies to *any* application to *any* employer by *any* person who has a previous criminal conviction. Whether the applicant previously worked there or was convicted during his prior employment are factors the employer can consider in making a reasoned judgment as permitted under the statute – but a reasoned judgment it still must make.

This Court's decision in Bonacorsa is instructive on this point. There, the petitioner had been licensed as an owner-trainer-driver of harness racehorses but had his license revoked when he was convicted of federal crimes. See 71 N.Y.2d at 608. He later reapplied for a new license and, after he was denied, commenced an Article 78 proceeding challenging the denial. See Id. This Court ultimately held that the Racing and Wagering Board's application of Article 23-A and denial of his application was not arbitrary and capricious. See Id. at 614-15.

The import of Bonacorsa for our case is that Article 23-A applied to a former licensee applying anew for the same license revoked when he was convicted of a crime during his initial licensure. Although the precise legal question presented here does not appear to have been raised or litigated there, the holdings below in our case, which involves a former employee applying anew for the same job from which he

was fired after he was convicted of a crime during his prior employment, are inconsistent with the application of Article 23-A in Bonacorsa.[1]

The inclusion of former employees in its coverage also aligns with the statute's underlying policy objectives. See Price, 69 N.Y.2d at 16 ("[A] particular construction of a statute should be preferred which furthers the statute's object, sprit and purpose."). Indeed, Article 23-A and Section 296(15) of the NYSHRL, enacted together as part of the same statute, are remedial in nature – they are "designed to correct imperfections in the prior law, or which provide a remedy for a wrong where none previously existed." See Mlodozeniec v. Worthington Corp., 9 A.D.2d 21, 23 (3d Dep't. 1959), aff'd. without opinion by 8 N.Y.2d 918 (1960). As such they must be "liberally construed to carry out the reforms intended and to promote justice . . . and interpreted broadly to accomplish [their] goals." Kimmel v. State of New York, 29 N.Y.3d 386, 396 (2017). Further, "it is the duty of courts to make sure that the Human Rights Law works and that the intent of the Legislature is not thwarted by a combination of strict construction of the statute and a battle with semantics." City of Schenectady v. State Div. of Human Rights, 37 N.Y.2d 421, 428 (1975).

[1] The fact that Bonacorsa involved a license and the instant matter involves employment is of no moment because the statute applies equally to both and makes no relevant distinction in its application to either. See Noble v. Career Educ. Corp., 375 F.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.").

This Court has previously recognized the statute's broad policy goals of eliminating bias against ex-offenders, promoting their reintegration into society and reducing recidivism. See Matter of Acosta, 16 N.Y.3d 315-16; Bonacorsa, 71 N.Y.2d at 612. As Governor Hugh L. Carey stated in his memorandum approving this legislation: "Providing a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime." Governor's Approval Mem., Bill Jacket, L. 1976, ch. 931, 1976 McKinney's Session Laws of N.Y., at 2459.

Excluding entirely from its coverage those applicants who have previously worked for an organization and were fired therefrom before or contemporaneous with their conviction(s) is inconsistent with the statute's underlying remedial policy objectives and requires an unduly narrow, rather than a broad and liberal, construction. It would also lead to absurd results inconsistent with the plain and unambiguous language of the statute.

For example, suppose two individuals apply for a job with the same company, both of whom have the same prior criminal conviction at the time of application but one of whom was convicted while previously employed by that company five years ago and is now reapplying. With its broad and all-encompassing reach of "any application by any person," the statute's plain language makes no distinction between these applicants – they are both covered. Nor does treating them differently

serve its underlying policy objectives as both ex-offenders deserve to be treated equally in their pursuit of gainful employment.

By way of further example, suppose a person with a prior criminal conviction applies for employment at two different companies, one for which he previously worked at the time he was convicted and was then fired. It would make no sense to apply the statute to only one of these applications and not the other.

Part of the law's justification is also 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).

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 existing exceptions could justify denial, see N.Y. Correction L. §§ 752-753, and so long as the former 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.

It is expected that, as it did below, MLSS will argue here that construing the statute as Sassi urges will frustrate the legislative intent because any person permissibly fired after a conviction occurring during his term of employment could immediately reapply and then challenge a denial under Article 23-A and Section 296(15). But this argument is misplaced.

To be sure, in some cases, a reapplication might occur quickly, as it did here – Sassi was jailed for about only 60 days before he sought to be re-hired. But in other cases, the delay could be much longer. Imagine a person sentenced to a much longer term of incarceration or someone who simply decides to wait longer to reapply. If the person reapplies two, five or ten years after being fired, would it really frustrate the legislative intent to apply the statute to their application? Certainly not, especially in light of the plain language making the statute applicable to "any application by any person" and its goal of eliminating bias and promoting successful reintegration of ex-offenders.

And, if the statute applies to such longer delays, then it must apply to shorter ones, including so-called "immediate" re-applications. A contrary standard would be unworkable – how long is long enough? 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.

In short, the statute's plain and unambiguous text, when read in light of its overall structure and underlying legislative goals, requires that it be applied to an individual, such as Sassi, seeking re-employment to a previously-held position from which he was terminated after being criminally convicted.

Point II

Sassi's Verified Complaint amply alleges his causes of action under Article 23-A and Section 296(15).

The sole ground upon which Supreme Court dismissed Sassi's complaint (and, indeed, the sole ground upon which MLSS sought dismissal) is that the relevant statutes do not apply to Sassi because he was convicted during his initial term of employment (R-11-12; R-24-27).[2] Respectfully, this reasoning is erroneous because, by dint of its plain language, the statute expressly applies to Sassi under the specific circumstances alleged in his Verified Complaint.

[2] Since the Appellate Division summarily affirmed on the ground that Sassi's complaint failed to state a cause of action, we focus here primarily on Supreme Court's reasoning, with which it appears the Appellate Division agreed.

As he alleged in his complaint, MLSS terminated Sassi for "job abandonment" after he was convicted and sentenced to a sixty-day jail term (R-17-18 ¶¶ 17-26). Following his release from jail, Sassi then contacted MLSS and sought reemployment, but the company refused because of his conviction (R-18 ¶¶ 28-36). Since, as discussed in Point I above, the plain and unambiguous language of Section 751 renders Article 23-A applicable to "*any application by any person* for . . . employment at any . . . private employer," N.Y. Corrections L. § 751 (emphasis added), and Sassi alleges he sought reemployment with MLSS, a private employer, the provisions of Article 23-A apply and protect him against discrimination on the basis of his prior conviction.

In holding otherwise, Supreme Court erroneously viewed Sassi's claim as one for wrongful termination of employment as opposed to one for wrongful failure to hire. Indeed, in quoting from Section 751, the Court omitted that the statute applies to *applications* for employment and, instead, focused on the prong which makes it applicable to "any . . . employment held by any person whose conviction of one or more criminal offenses *precedes* such employment" (R-12 [quoting N.Y. Corrections L. § 751] [emphasis and ellipsis in original]).

Likewise, in quoting from the operative provision [Section 752], the Court again omitted the language regarding *applications* for employment and, instead, focused on the proscription that "no employment . . . held by an individual . . . shall

be denied or [acted] upon adversely by reason of the individual's having been *previously* convicted of one or more criminal offenses" (Id. [quoting N.Y. Corrections L. § 752] [emphasis and ellipsis in original]).

But, again, read in the light most favorably to him, Sassi's Verified Complaint does not allege that MLSS unlawfully terminated him because of his conviction. Rather, it alleges that, after it already terminated him for "job abandonment" and he sought reemployment, MLSS refused to rehire him (R-18 ¶¶ 26-38). Notably, in framing his cause of action, Sassi does not allege that defendants violated the law by "terminating" him; but rather, that they acted unlawfully "[b]y *failing to re-employ him* because of his conviction and sentence" (R-18 ¶ 38 [emphasis added]). Again, this is after he already alleged that, upon his confinement, MLSS "terminated plaintiff for 'job abandonment.'" (R-18 ¶ 26).[3]

That he may have previously worked there is immaterial. Again, the statute applies to "*any* application by *any* person." N.Y. Corrections L. § 751 (emphases added). Having already been terminated, Sassi's attempt to regain employment was

[3] For the same reason, Supreme Court's reliance upon the First Department's decision in Martino v. Consolidated Edison Co. of N.Y., Inc., 105 A.D.3d 575 (1st Dep't. 2013) is unpersuasive and does not support its holding (R-12). There, the plaintiff "allege[d] that his termination violated" Article 23-A and "contend[ed] that Correction Law § 752 protects current employees against adverse actions by employers based on convictions and arrests incurred while they are employed with the employers." Id. at 575. Again, by contrast, here Sassi does not challenge his termination, but rather his request for reemployment some sixty-days or so after he had already been terminated.

plainly an "application" for employment as contemplated by the statute. Thus, its provisions apply and provide Sassi its protections as set forth therein.

The same analysis applies with respect to Sassi's Section 296(15) claim. That section provides, in pertinent part:

> It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association . . . to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . . when such denial is in violation of the provisions of article twenty-three-A of the correction law.

N.Y. Exec. L. § 296(15). By alleging that MLSS denied him employment – *i.e.*, denied his application for rehiring – in a manner that violated Article 23-A, Sassi amply alleges that MLSS denied him employment because he had been convicted of a criminal offense and, thus, amply pleads this claim.

In holding otherwise, Supreme court again focused on Sassi's prior employment and misconstrued his complaint as one challenging his termination rather than his re-application (R-12). And, to the extent the court, in quoting from Section 296(15), emphasized the words "having been" in reasoning that the past tense requires the conviction to have pre-dated the employment at issue, that reasoning fails to account for the fact that the proscription against denying employment to any person who has been convicted of a criminal offense includes a prohibition against denying an employment *application*, as such a denial plainly has

the effect of denying someone employment. Thus, as in the case of Article 23-A, the provisions of which are expressly incorporated into Section 296(15) by reference, in the case of an employment application, the criminal conviction need only predate the application, which it did here.

In short, liberally read, Sassi's complaint does not allege that he was terminated in violation of the law, but rather that, after already being terminated, his request for reemployment – *i.e.*, his reapplication – was unlawfully denied. Thus, he amply stated his causes of action under Article 23-A and Section 296(15).

CONCLUSION

By its plain and unambiguous terms, Article 23-A of the New York State Correction Law applies, *inter alia*, to any application by any person for employment and, with narrow exceptions, prohibits employers from denying employment applications on the basis of the applicant's prior criminal conviction(s). Section 296(15) prohibits employers from denying employment to any person previously convicted of a crime where such denial also violates Article 23-A. These remedial provisions codify New York's logical and clear public policy that a prior criminal conviction should not, in itself, preclude employment.

Here Sassi alleges in his Verified Complaint that, after MLSS had already terminated him for "job abandonment" and he completed his sixty-day sentence, he sought reemployment with the company and was denied solely on the ground of his

prior criminal conviction. These allegations fall squarely within the plain language of the relevant statutes and their underling policy goals. Accordingly, Supreme Court erred in holding that the statutes are inapplicable, the Appellate Division erred in affirming and this Court should vacate those Orders, reinstate Sassi's Verified Complaint and remand the matter for further proceedings.

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Respectfully Submitted

SUSSMAN AND ASSOCIATES
Attorneys for Plaintiff-Appellant

By: _____
Jonathan R. Goldman, 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.
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. § 500.13(c)(1)

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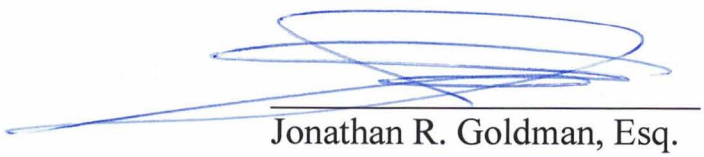

Jonathan R. Goldman, Esq.