To be argued by:
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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Dated: August 13, 2020

Appellate Division, Second Department Docket No. 2017-00496
Dutchess County Supreme Court 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 to address the arguments raised in opposition by Defendant-Respondent Mobile Life Support Services, Inc. ("MLSS"). As explained below, MLSS's arguments are unavailing and should be rejected. Since Article 23-A of the Correction Law and Section 296(15) of the New York State Human Rights Law ("NYSHRL") apply where Sassi sought reemployment following his termination, as he amply alleges, his complaint, which asserts that he was denied such employment solely because of his criminal conviction in violation of these statutes, should be reinstated.

ARGUMENT

Sassi spent much of his opening brief analyzing the relevant statutory text and explaining why the relevant laws should be construed to apply to a person seeking reemployment with an employer that fired him after he was convicted of a crime during the term of his employment. MLSS finds this "bizarre," see Resp. Br. at 7, even though this is precisely the question this Court granted leave to consider.

Again, Article 23-A prohibits employers from denying employment to any applicant who has previously been convicted of one or more criminal offenses unless (1) there is a direct relationship between the offense(s) and the employment sought or (2) granting employment would pose an unreasonable risk to property or the safety

or welfare of specific individuals or the public. See N.Y. Correction L. § 752. Section 296(15) makes any violation of Article 23-A an unlawful employment practice under the NYSHRL. See N.Y. Exec. L. § 296(15).

The sole issue on appeal is whether the provisions of Article 23-A 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). As explained in his opening brief, Sassi alleges that, upon his conviction and incarceration, MLSS terminated his employment for "job abandonment" (R-15 ¶ 26). Then, after his release, he sought to be rehired (Id. ¶¶ 27-35). As he had already been terminated, and was therefore technically unemployed at the time, in so seeking reemployment with MLSS, Sassi should be deemed an applicant for employment under Article 23-A and entitled to the statute's protections.

In opposition, MLSS baselessly and unfairly accuses Sassi of intentionally "misleading" and "misguid[ing] the Court," see Resp. Br. at 2, and of "mischaracterize[ing] his own allegations to the Court of Appeals," id. at 6.

Respectfully, the Court should ignore these *ad hominem* attacks, which themselves ignore the plain language of Sassi's pleading, and find that, when viewed in the light most favorably to him, as it must at this procedural stage, Sassi's Verified Complaint amply alleges the circumstances described in his opening brief and to which the relevant statutes should be construed to apply – that is, an individual with a prior conviction seeking employment following a termination.

Focusing on paragraphs 28-29 and 31 of the 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, 6-8.

But this argument fails for the simple reasons that it ignores entirely Paragraph 26 of the Verified Complaint, which explicitly alleges that, upon his incarceration and *prior* to his release from jail [and, thus, prior to the meeting described in the complaint], MLSS "terminated plaintiff for 'job abandonment'" (R-18 ¶ 26). Thus, when Sassi contacted Longo after his release and, later, met with Jeffries and Smith to discuss coming back to MLSS (Id. ¶¶ 28-31), he had already been fired and was now seeking to be reemployed.[1]

[1] Indeed, though not specifically pled because, under New York's notice pleading regime, Sassi was not required to plead all of his evidence in his complaint, we note that MLSS terminated Sassi by letter dated May 24, 2016 just six days after he was incarcerated on May 18, 2016, and it was not until *after* he was released weeks later that he contacted the company to seek reemployment. This only further demonstrates that Paragraphs 28-31 of the complaint do not, as MLSS contends,

To be sure the Verified Complaint suggests that, at the meeting, the parties discussed the reason why MLSS terminated Sassi in the first instance and Sassi's disagreement with that decision. However, while Sassi may have expressed his disagreement for the basis of his termination, he *also* expressly sought reemployment and was denied based on his conviction, which had occurred *prior* to his so reapplying. While MLSS clearly seeks to raise a factual dispute about the nature of the meeting, such a dispute is not resolvable at the pleading stage, where the complaint must be construed in the light most favorably to Sassi. And, when read in this light, the complaint amply pleads that Sassi was an applicant for employment who had previously been convicted of a criminal offense and, thus protected under Article 23-A. See N.Y. Correction L. § 751.

MLSS's argument also ignores other allegations in the complaint demonstrating that Sassi's meeting with Jeffries and Smith was not a "termination meeting," but rather a meeting to seek reemployment. For instance, Paragraph 30 alleges that, "[a]fter being unable to *regain* his job through Longo, plaintiff contacted Jeffries several times and was finally invited to meet with Jeffries and Smith" (R-18 ¶ 30 [emphasis added)]. The word "regain" demonstrates that, at the

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describe a "termination meeting," *i.e.*, a meeting at which MLSS contemporaneously notified Sassi of his termination, but rather a meeting *following* his termination at which Sassi was seeking [*i.e.*, applying for] reemployment. Certainly, MLSS was aware of this letter as its drafter.

time he contacted Longo, which preceded his meeting with Jeffries and Smith, Sassi was not employed and, thus, when he met with them, it was to seek rehiring, not to be not notified of his termination in the first instance as MLSS inaccurately contends.

Further, Paragraph 35 alleges that "[t]he only reason defendant has refused to *re-employ* plaintiff is his conviction and brief incarceration" and Paragraph 38 alleges that, "[b]y failing to *re-employ* plaintiff because of his conviction and sentence, defendant has . . . violated [S]ection 296.15 . . . and Article 23-A . . . ." (R-18 ¶¶ 35, 38 [emphasis added]). Had Sassi's claim truly consisted of a challenge to his termination, these paragraphs would have alleged that the "the only reason defendant *terminated* plaintiff . . ." and that "by *terminating* plaintiff because of his conviction . . . ." But that is not what Sassi alleges, and that is not what is described in his complaint.

MLSS also seems to suggest that an "application" for employment, as that term is used in Section 751, requires a certain degree of formality, such as a written application form or interview. See Resp. Br. at 8 ("At no point in the Verified Complaint does Plaintiff-Appellant make any allegation that he was applying for or interviewing for a position at Defendant-Respondent after his conviction"). But it fails to provide any reasoned explanation why this should be. Indeed, requiring such formality would be unworkable and frustrate the legislative intent – it is undeniable that many employers do not use formal hiring processes, and there is no reason to

believe the Legislature intended to leave unprotected persons seeking to fill such positions. And how much is enough formality? It cannot be that the Legislature would have required a specific level of formality without providing any guidance.

Rather, construing the statute liberally, as it must be, the phrase "any application" should be construed broadly to include *any* request for employment. Whether or not a form is completed or an interview had is irrelevant. If a person requests employment, Article 23-A [and the NYSHRL] applies. That is exactly what Sassi alleges happened here – after he was fired, he requested employment with MLSS, which denied his request because of his prior criminal conviction.

MLSS next argues that, "[i]f [Sassi] was to now be construed an applicant reapplying for a job simply because he was notified of his termination upon attempting to return to work following his incarceration, it would frustrate the purpose of Article 23-A and Section 296.15" because "it would in effect prevent employers from being able to terminate an employee who was convicted during their employment without analyzing the Article 23-A factors since such an employee would be entitled to return to his employment immediately upon release from jail simply by making a phone call and confirming the termination of his employment." Resp. Br. at 8-9.

This argument fails for several reasons. First, it is based on a faulty premise and inaccurately describes the situation Sassi alleges he was in and to which the laws

should apply. As already explained above, Sassi does not allege that he sought reemployment upon being notified of his termination. Rather, he alleges that, after he was already terminated, he then sought reemployment.

Second, MLSS's argument ignores the plain and unambiguous text of the statue, which applies to "*any application by any person* for . . . employment." N.Y. Correction L. § 751. It cannot be gainsaid that when a person who is not already employed by a specific employer asks to fill a position with that employer, such constitutes an "application" for employment. Here, when Sassi met with Jeffries and Smith following his release from jail, he had already been separated from employment and was asking for a job. As such, this was an "application" for employment to which Article 23-A applies.

Finally, it would not frustrate the legislative intent to apply the statute to applications made by those who previously worked for an employer, even if such application is made soon after – indeed, even immediately after – a permissible termination. As an initial matter, the legislative purpose in enacting the statute was not to provide employers in an at-will employment state extra protections; to the contrary, it was to protect prior offenders against bias, promote their reintegration and reduce recidivism. See Matter of Acosta v. New York City Dep't. of Educ., 16 N.Y. 309, 315-16; Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 612 (1988).

Thus, even though the statute applies only to convictions that precede an application for employment and otherwise permits an employer permissibly to terminate an employee who is convicted during the term of his employment, to the extent there is any ambiguity in its interpretation, which we do not concede there is, such should be resolved in a manner that effects a liberal construction of this remedial statute and advances the legislative purpose of protecting the applicants/employees, as opposed to the employers. See Kimmel v. State of New York, 29 N.Y.3d 386, 396 (2017) (remedial statutes must be "liberally construed to carry out the reforms intended and to promote justice . . . and interpreted broadly to accomplish [their] goals."). Applying such a liberal construction requires applying the statute as Sassi seeks to do here.

Nor would it frustrate the legislative intent to require an employer to apply the Article 23-A factors upon an immediate reapplication after permissibly terminating an employee convicted during the term of his employment. Indeed, the fact that the statute allows an employer to terminate an employee for a conviction occurring on the job seems to reflect certain practical considerations – often times an on-the-job conviction involves conduct occurring at work that violates a company policy justifying termination or the conviction might entail a period of incarceration during which the employee would be unavailable to work. It makes sense to permit an

employer to terminate an employee in such circumstances without applying the Article 23-A factors.

Notably, in these cases, the statute's substantive exceptions permitting adverse action made solely on the basis of a conviction – *i.e.*, direct relationship between the offense and the job and unreasonable risk to property or safety, see N.Y. Correction L. § 752(1) and (2) – likely already apply. Thus, upon the former employee's re-application, the employer will likely have no trouble simply denying employment by application of the Article 23-A factors. For example: suppose a former employee, Mr. Smith, a cashier, is fired for stealing from the till and convicted of larceny; if he re-applies a day after his termination, his employer can likely justify denial under the direct relationship exception. Thus, applying Article 23-A does not thwart the employer's ability to terminate Mr. Smith in the first instance, and the adverse impacts MLSS decries are simply non-existent.

MLSS next seeks to distinguish Bonacorsa v. Van Lindt, 71 N.Y.2d 605 (1988), which Sassi had cited in his opening brief. See Resp. Br. at 10-11. But its attempt to do so is unavailing. First, the fact that Bonacorsa involved an application for a license, rather than employment, is entirely irrelevant as Article 23-A applies to both equally. 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."); N.Y. Correction L.

§ 751 ("The provisions of this article shall apply to any application . . . for a license *or* employment . . . and to any license *or* employment held . . . ." [emphasis added]).

Second, the fact that the petitioner in Bonacorsa re-applied for licensure eight years following his release from custody does not aid MLSS and only supports Sassi's argument. Indeed, if eight years is sufficient, what about seven, or five, or one, or six months or, for that matter, a few days? If the statute applies to re-applications, it must apply no matter how much time has passed, so long as the conviction precedes the application. As such, contrary to MLSS's argument, the fact that Sassi sought reemployment right after he was released from custody does not matter because he had already been terminated weeks earlier while incarcerated and, at the time he applied, had a prior conviction.

Finally, the fact that this Court upheld the denial of the license in Bonacorsa is of no moment because the agency made its determination after applying Article 23-A – that is, after the agency, considering the statutory factors set forth in Section 753, determined that one of the exceptions set forth in Section 752 applied, permitting it to deny licensure based on a prior conviction. In other words, Bonacorsa does not stand for the proposition that any time a person re-applies for a license or employment it is *always* proper to deny the application; rather it merely reflects that, under the particular circumstances presented in that case, the licensor did not act in an arbitrary or capricious manner in its application of Article 23-A and

ultimate denial. The upshot of Bonacorsa here is that Article 23-A applied to a re-application for the same license held at the time the applicant was previously convicted and lost his initial license; thus it should apply here, where Sassi re-applied to work for MLSS after he was convicted and lost his initial job.

MLSS next attacks Sassi's citation to Matter of Acosta v. New York City Dep't. of Educ., 16 N.Y. 309 (2011). See Resp. Br. at 11-12. Sassi did not cite Acosta as a factual analogue, however, but rather to demonstrate this Court's recognition of the policy rational underlying the statutory scheme and the manner in which the Legislature intended it to operate. See App. Br. at 14, 17, 18. Further, MLSS's critique also relies on its flawed assertion that Sassi failed to allege that he "applied" for employment following his conviction and termination and that his complaint actually pleads a claim of wrongful termination, as opposed to unlawful denial of an employment application. That assertion has already been refuted above.

For the same reason, MLSS's reliance upon Martino v. Consolidated Edison Co. of N.Y., Inc., 105 A.D.3d 575 (1st Dep't. 2013) is entirely inapposite. See Resp. Br. at 12. Contrary to MLSS's assertion, the facts of our case are *not* similar to those in Martino, where the plaintiff was fired because of his on-the-job conviction and explicitly challenged that termination, arguing that Article 23-A "protects current employees against adverse actions by employers based on convictions and arrests incurred while they are employed with the employers." Martino, 105 A.D.3d at 575.

Sassi does not make the same argument – he does not contend that the law prohibited MLSS from firing him in the first instance and does not challenge that termination. Rather, again, the gravamen of his claim is that, after he was fired, he reapplied for employment and was denied because of his prior conviction, and it is the denial of his application for reemployment he claims is protected and which he challenges.

Finally, MLSS cites the First Department's recent decision in Matter Hodge v. New York City Tr. Auth., 180 A.D.3d 490 (1st Dep't. 2020). But that case is distinguishable and, in any event, certainly not binding on this Court.

In Hodge, the petitioner was fired after an arbitrator found he engaged in "conduct that, if proven in court, would have constituted a felony." Id. at 490. He commenced an Article 75 proceeding, challenging the arbitration decision as contrary to the public policy of Article 23-A and a separate Article 78 proceeding challenging his employer's denial of his request for reinstatement following the arbitrator's decision. See Id. The First Department affirmed Supreme Court's denial of both petitions, holding that the employer was permitted under Article 23-A to terminate the petitioner based upon his on-the-job conviction and that its refusal to reinstate him was not arbitrary and capricious. See Id. at 490-91.

The first holding is irrelevant here because, unlike the petitioner in Hodge, Sassi does not challenge his termination under Article 23-A; rather he challenges MLSS's denial of his application for reemployment based solely on his conviction.

Nor does the second holding undermine Sassi's argument here. In affirming the employer's decision to deny the petitioner's request for reinstatement, the First Department did not expressly hold that Article 23-A did not apply to this request. Rather, it reasoned: "It was not irrational for respondent to conclude that in seeking reinstatement, petitioner merely sought to relitigate issues presented approximately six weeks before his reinstatement request, and decided three weeks beforehand by a neutral arbitrator in the grievance proceeding pursuant to a collective bargaining agreement, which resulted in his termination." Id. at 491.

This reasoning seems to recognize that it was not the timing of the request for reinstatement or the mere fact that such request followed a termination that was dispositive, but rather simply that the issues relevant to the Article 23-A analysis were the same as those already decided at arbitration and which justified the petitioner's separation from employment and, thus, considered by the employer in denying reapplication.

Our case is different. First, it is not an Article 78 proceeding to which the arbitrary and capricious standard applies. Second, Sassi's conviction did not arise from conduct occurring during his employment with MLSS and he was not fired because of such on-the-job conduct. Rather, his conviction arose from conduct occurring about four years earlier, which was about two years before he even came to work for MLSS. Thus, unlike in Hodge, the issues relevant to Sassi's Article 23-

A analysis are not identical to those that informed MLSS's decision to fire him in the first instance; that is, in seeking reemployment, Sassi was not looking to relitigate the facts underlying his conviction [which occurred years earlier] or his termination [which, per MLSS, was based on "job abandonment" not his criminal conduct].

In short, Hodge is factually distinct and does not control the outcome here. And, even if it were analogous and the First Department's holding applicable to Sassi's situation, for all of the reasons Sassi has presented on this appeal, the Court should refuse to adopt the First Department's holding, which, if applied in this matter, would contravene the plain language and underlying policy of Article 23-A.

CONCLUSION

For all of the reasons set forth above and in Sassi's opening brief, the Appellate Division's Order should be reversed and vacated, Sassi's complaint reinstated and the matter remanded so that Sassi may pursue his claims on the merits.

Dated: Goshen, New York
August 13, 2020

Respectfully Submitted

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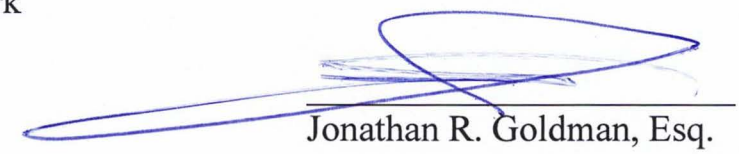
Dated: Goshen, New York
August 13, 2020



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