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SECOND CIRCUIT REVIEW

Expert Analysis

Individuals Not Subject to Suit Under ADA's Anti-Retaliation Provision

This month we discuss *Spiegel v. Schulmann*,[1] in which the U.S. Court of Appeals for the Second Circuit affirmed a decision by the District Court for the Eastern District of New York holding that there was no basis for individual liability in employment-related retaliation claims under the Americans with Disabilities Act (ADA), but remanded for a determination as to whether obesity is a disability under the New York City Human Rights Law.

The per curiam decision addressed these two issues of first impression in the context of a wrongful termination suit brought by two former karate instructors. In barring the ADA retaliation suit against the individual defendant, the Second Circuit acknowledged some ambiguity in the statute, but ruled that the ADA does not provide remedies beyond those provided in Title VII, which limits claims to those against entities defined as employers.

In vacating and remanding the claim under the New York City Human Rights Law, the Second Circuit also held that, because of an erroneous evidentiary ruling, the district court should have considered the question of whether obesity is a disability. The Second Circuit noted, however, that the district court could decline to exercise supplemental jurisdiction in favor of adjudication by a state court.

Procedural History

Plaintiffs are Elliot Spiegel and Jonathan Schatzberg, two former employees of Tiger Schulmann Karate School, who were also friends and roommates. Defendants are Daniel "Tiger" Schulmann, the founder of the karate schools, and UAK Management Company Inc., the entity through which plaintiffs alleged Mr. Schulmann owned and operated the schools.[2]

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Plaintiffs' claims related to three different terminations. First, Mr. Spiegel was terminated from one of the karate school's franchises in Connecticut. Then, shortly after being rehired at a franchise in Brooklyn, he was terminated again. Mr. Spiegel alleged that both employment actions related to his being overweight and, in particular, that the second action followed an incident in which he discovered that defendants had used a photograph of his torso in an unflattering manner in advertisements for one of Mr. Schulmann's nutritional programs. Following his second termination, Mr. Spiegel filed a discrimination claim with the Connecticut Commission on Human Rights and Opportunities. Several days later, Mr. Schatzberg was terminated from his position at one of the karate school's franchises in Queens.[3]

The Second Circuit remands on the question of whether obesity is a 'disability' under the New York City Human Rights Law.

Plaintiffs brought suit in the Eastern District of New York alleging, among other things, that defendants violated the ADA and New York State and New York City Human Rights Laws by terminating Mr. Spiegel on account of his weight. In an amended complaint, plaintiffs further alleged that defendants violated anti-retaliation provisions in the ADA and New York law by terminating Mr. Schatzberg and taking certain other actions against Mr. Spiegel. Plaintiffs' other claims included a state law charge of invasion of privacy relating to the unflattering photograph.

The defendants filed a motion for summary judgment, which was granted in its entirety. In granting the motion, the district court (Townes, J.) first found that UAK was not subject to personal jurisdiction in New York because plaintiffs' claims did not relate to any transactions involving UAK in New York.[4] With respect to Mr. Schulmann, the district court found that the ADA retaliation claims could not be sustained because Mr. Schulmann was an individual who was not plaintiffs' employer and, as such, could not be held liable under the ADA.[5]

In so holding, the district court did not address the ambiguity in the language of the relevant ADA provision, 42 USC §12203, and instead cited *King v. Town of Wallkill*, a 2004 Southern District of New York decision that dismissed an ADA retaliation claim on similar grounds. [6] *King* relied on two earlier Southern District cases, both of which addressed claims of discrimination, not retaliation.

In evaluating the discrimination claims under the ADA, New York State and New York City laws, the district court applied a burden shifting analysis that required plaintiffs to establish a prima facie case and then to present evidence contradicting a well-presented legitimate explanation for the employment action by defendants. The district court found that plaintiffs failed to plead a claim under the ADA and New York State Human Rights Law because obesity, in and of itself, is not a disability under either of those statutes.[7]

While the district court recognized that the definition of "disability" under the New York City Human Rights Law was broader than under the ADA and state law, it found that plaintiffs still failed to meet their burden of presenting evidence of discrimination. Specifically, the district court ruled that Mr. Spiegel's testimony about comments from Mr. Schulmann and a karate school supervisor—in which Mr. Spiegel recalled being told that he was being fired because of his weight—was speculative and, in any case, inadmissible hearsay.[8] The

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district court dismissed all of plaintiffs' other claims as well.

The Second Circuit Decision

The Second Circuit affirmed the district court's decision in large part, including the novel issue under the ADA.

The court began its analysis by succinctly affirming the decision below that UAK was not subject to personal jurisdiction, as well as the district court's rulings on the state law privacy claim and certain other issues raised on appeal.[9] The court next turned to the issue of whether Mr. Schulmann could be liable under 42 USC §12203—the ADA's anti-retaliation provision—as an individual. The court noted that the Second Circuit had never ruled on this question.

The court's analysis of remedies available under the ADA's anti-retaliation provision involved a number of statutory cross-references. It started with the language of 42 USC §12203(a), which provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."

The court acknowledged that the "[n]o person shall" language suggests the possibility that individuals, not just employers, could be liable for unlawful retaliation under the ADA.[10] With respect to remedies for retaliation in the employment context, however, the statute refers to another section of the ADA, 42 USC §12117, which is the general enforcement provision for the subchapter on employment. That provision, in turn, refers to the remedial provisions of Title VII of the Civil Rights Act of 1964 at 42 USC §2000e-5.

In *Tomka v. Seiler Corp.*, the Second Circuit previously held that Title VII does not provide for individual liability.[11] Working through the statutory references, the court therefore concluded that 42 USC §12203 does not provide a remedy in suits against individuals for unlawful retaliation in the employment context. Notably, the court commented that a literal reading of the anti-retaliation provision's "[n]o person shall" clause would present a "rare case in which a broader consideration of the ADA, in light of the remedial provisions of Title VII, indicates that this interpretation of the statutory language does not comport with Congress's clearly expressed intent."[12]

While the court did not refer to cases from any other circuits, the *Spiegel* decision brings the Second Circuit in line with a growing consensus on the applicability of the ADA's anti-retaliation provision to suits against individuals. Those that have considered the issue, including the Fourth, Sixth and Eleventh circuits, have applied a similar analysis to that in *Spiegel* and arrived at the same conclusion.[13] While the Ninth Circuit has not yet ruled on the issue, district courts in that circuit have also moved toward a consensus in favor of the approach endorsed in *Spiegel*.[14]

The court next turned to plaintiffs' discrimination claims under New York state and municipal law. The court agreed with the general analysis of the district court, namely, that plaintiffs had the burden of pleading a prima facie case and then, if defendants proffered some legitimate non-discriminatory reason for the termination, plaintiffs would be required to demonstrate by a preponderance of the evidence that the reason offered was actually pretext for discrimination. In affirming dismissal of the New York State Human Rights Law claim, the court also agreed with the district court's conclusion that Mr. Spiegel had failed to proffer evidence suggesting that he was incapable of meeting his employers' weight requirements due to some cognizable medical condition.[15]

The Second Circuit's decision in 'Spiegel' reinforces the already-growing consensus in the circuits that claims for retaliation under the ADA may not be brought against individuals, as opposed to employers as defined by that statute.

Addressing the claim under the New York City Human Rights Law, the court found error. It held that the district court had improperly excluded Mr. Spiegel's testimony about comments made to him by Mr. Schulmann and his supervisor because they were non-hearsay admissions of a party opponent and his agent.[16] The court found that, had the district court considered the evidence—which it should have—it would have had to consider whether plaintiffs satisfied their prima facie case. That inquiry would have led the district court to another novel question of whether obesity alone constitutes a disability under the New York City Human Rights Law—a question that no New York Court of Appeals or any intermediate New York court has addressed.[17]

Because of the evidentiary error, the court remanded to the district court for a determination on the prima facie case. But it did so with a suggestion. The court noted that "[o]n remand, the district court may also decide whether to exercise supplemental jurisdiction over this claim; it may determine that this area of law would benefit from further development in the state courts and therefore dismiss the claim without prejudice to refiling in state court."[18]

Conclusion

The Second Circuit's decision in *Spiegel* reinforces the already-growing consensus in the circuits that claims for retaliation under the ADA may not be brought against individuals, as opposed to employers as defined by that statute. To the extent that courts elsewhere have yet to consider the issue, they are likely to follow suit. On the other novel question, whether obesity may constitute a disability under New York City law, the decision contains a fairly strong suggestion to the district court that this question is better addressed in the first instance by the state courts.

1. Docket No. 06-5914-cv, 2010 WL 1791417 (2d Cir. May 6, 2010).
2. *Spiegel v. Schulmann*, Docket No. 03-CV-5088, 2006 WL 3483922 at *3 (EDNY Nov. 30, 2006).
3. Id. at *2-*3.
4. Id. at *10-*11.
5. Id. at *20.
6. *King v. Town of Wallkill*, 302 F.Supp.2d 279, 295 (SDNY 2004) citing *Menes v. City Univ. of N.Y.*, 92 F.Supp.2d 294, 306 (SDNY 2000) (employment discrimination claim) and *Yaba v. Cadwalader, Wickersham & Taft*, 931 F.Supp. 271, 274 (SDNY 1996) (same).
7. *Spiegel v. Schulmann*, Docket No. 03-CV-5088, 2006 WL 3483922 at *3 (EDNY Nov. 30, 2006) citing *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (ADA); *Delta Air Lines v. New York State Div. of Human Rights*, 91 N.Y.2d 65, 73 (1997) (NYSHRL).
8. Id. at *15.
9. *Spiegel v. Schulmann*, Docket No. 06-5914-cv, 2010 WL 1791417 at *2 (2d Cir. May 6, 2010).
10. Id. at *5.
11. 66 F.3d 1295, 1313-14 (2d Cir. 1995) abrogated on other grounds by *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).
12. *Spiegel v. Schulmann*, Docket No. 06-5914-cv, 2010 WL 1791417 at * 5 (2d Cir. May 6, 2010) (internal citations omitted).
13. See *Albra v. Advan Inc.*, 490 F.3d 826, 832 (11th Cir. 2007); *Baird v. Rose*, 192 F.3d 462, 471 (4th Cir. 1999); *Hiler v. Brown*,177 F.3d 542, 545-46 (6th Cir. 1999). Cf. *Shotz v. City of Plantation*, 344 F.3d 116, 1179-80 (11th Cir. 2003) (individuals may be liable under 42 USC §12203 in the context of the ADA's provisions concerning public services).
14. Just last month, a Northern District of California decision declined to follow *Ostrach v. Regents of Univ. of Cal.*, 957 F.Supp. 196, 199-200 (E.D. Cal. 1997), the leading district court case in the Ninth Circuit that took the contrary position that the plain language of the ADA anti-retaliation provision did permit suits against individuals. See *Ross v. Independent Living Resource of Contra Costa County*, Docket No. C08-00854, 2010 WL 1266497 at *4 (N.D. Cal. April 1, 2010).
15. *Spiegel v. Schulmann*, Docket No. 06-5914-cv, 2010 WL 1791417 at *6 (2d Cir. May 6, 2010).
16. See Fed. R. Evid. 801(d)(2).
17. *Spiegel v. Schulmann*, Docket No. 06-5914-cv, 2010 WL 1791417 at *8 (2d Cir. May 6, 2010).
18. Id.