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The Dead Cannot Be Sued



In *Kim v. Smith*, Kim moved before the Nassau County Supreme Court for substitution of the administrators of the defendant decedent Smith's estate in an action in which Kim sought damages for personal injuries allegedly sustained by Kim in an auto accident. The problem was that Kim brought the action against Smith after Smith died. 2015 N.Y. Slip Op. 50001(U) (Sup. Ct. Nassau Cnty. 2015).

Smith died in 2009, and the complaint was filed after his death in 2011. The Court stated: “Upon reviewing the instant motion, the Court's Principal Law Clerk contacted ... the Plaintiff's counsel, to ascertain whether the Court was perhaps missing something since it appeared that this action was a nullity, having been commenced against a dead person.” The attorney “acknowledged that the action is a nullity but chose not to withdraw the motion and requested that the Court render a decision.”

The Court then decided: “That ‘the dead cannot be sued’ is a well-established principle of the jurisprudence of this state. It gives rise to the rule that a claimant may not bring a legal action against a person already deceased at the time of the commencement of such action, but instead, must proceed against the personal representative of the decedent's estate.

Distilled from these concepts is the rule that no action may effectively be commenced against a deceased person subsequent to his or her death and prior to the appointment of a personal representative.

The death of a named defendant prior to the commencement of an action has thus been held to render the action, insofar as asserted against the deceased defendant, a legal nullity from its inception which leaves the Court without jurisdiction to grant any requested relief.”

The motion was denied and the action was dismissed.

Attorney Not Welcome



Both State and federal law make it unlawful for an employer to fire, demote harass, or otherwise “retaliate” against employees because they filed a charge of discrimination, or complained to their employer about discrimination on the job. Clearly, these laws are designed to protect employees, but do they extend to an employee’s attorney, who bring a lawsuit against that employer for the complained of discrimination?

That was the question presented to the court in *Wigdor v. Soulcycle LLC*. The plaintiff is an attorney who filed an earlier discrimination suit against defendant Soulcycle LLC on behalf of a former employee who claimed that he was not paid proper wages. The attorney now alleges in a subsequent action in which he is the plaintiff, that after representing the former Soulcycle employee, Soulcycle banned *him* from personally entering any of Soulcycle’s locations because he filed the earlier lawsuit against the company. 2015 N.Y. Slip Op. 30546(U) (Sup. Ct. N.Y. Cnty. 2015).

The plaintiff-attorney brought this action on several grounds, including under New York’s Labor Law for unlawful retaliation. However, each of plaintiff’s causes of action were dismissed. The Court held that “Labor Law § 215 prohibits discharging an employee in retaliation for making a complaint that the employer has violated any provision of this chapter, or because such employee has caused to be instituted a proceeding under or related to this chapter.” “The clear intention was to provide a cause of action for an employee against current and former employers for discriminatory or retaliatory acts. Since plaintiff was not an employee of defendants, the [] cause of action shall be dismissed.”

It was a good try by the attorney, but it looks like after spinning his wheels in this action, he will have to find a new place to spin.

Vicarious Discrimination Protection Is Allowed



In a question of first impression, the State Appellate Division, Second Department, recently held that the New York State Human Rights law not only protects individuals who are actual members of a class protected by the statute, but also protects third persons with whom a member of the class associates.

In *Chiara v. Town of New Castle*, plaintiff, a Town machine equipment operator, alleged that as early as 1992 or 1993, he heard coworkers make anti-Semitic remarks in reference to the Jewish religion and Jewish beliefs. After asking them to stop, and informing them that he was married to a Jewish woman, the coworkers began aiming those remarks at him, calling him names such as “Jew lover,” among others. Plaintiff reported those coworkers to his supervisors, but the conduct persisted. Ultimately, one coworker was suspended for two weeks without pay, following a heated exchange with the plaintiff. 2 N.Y.S.3d 132 (2d Dept. 2015).

In 2005, plaintiff commenced this action against the Town, a coworker, the Town Commissioner of the Department of Public Works, and the Town Administrator, seeking to recover damages for, among other things, discrimination in employment and a hostile work environment.

During the pendency of this action, plaintiff continued to work for the Town. In March 2007, however, plaintiff was brought up on disciplinary charges, which alleged seven instances of misconduct and/or insubordination, including using profane language toward a supervisor, missing a departmental meeting, falsely calling in sick on two consecutive days, leaving work without permission, and visiting a bagel shop during working hours. Plaintiff was found guilty on five charges, and the hearing officer recommended that plaintiff be terminated from his employment; the Town adopted the recommendation.

The plaintiff sought judicial review of the hearing officer’s determination, contending that the disciplinary charges preferred against him were in retaliation for his commencement of this discrimination action, but the Supreme Court affirmed the hearing officer’s determination, stating that it was supported by substantial evidence.

Nevertheless, plaintiff sought leave in his suit against the Town, to amend the complaint to add a claim for retaliation based upon his termination from his employment. The Supreme Court denied plaintiff’s motion, and the Appellate Division affirmed that denial.

In October 2011, defendants then moved for summary judgment, on the ground that plaintiff could not establish a prima facie case of employment discrimination. Defendants argued that plaintiff was precluded from such protection, because he himself was not a member of a protected class, and there was no authority under the NYS Human Rights Law to proceed based upon a spouse’s religion. The Court denied this motion. In doing so, it borrowed jurisprudence from federal courts, noting that several have construed Title VII to “protect

individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate.” *See, e.g., Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, and GMC Trucks*, 173 F3d 988,994 (6th Cir. 1999).

The dissenting opinion argued that the complaint should be dismissed because plaintiff was ultimately terminated because of misconduct, not discrimination, as determined by the hearing officer and confirmed by the Supreme Court. However, the majority held that although defendant’s established, *prima facie*, that the plaintiff was not terminated under circumstances that give rise to an inference of discrimination, plaintiff nevertheless raised a triable issue of fact as to whether those charges were a pretext for discrimination or partly motivated by discrimination. The majority noted that two of the individuals accused of having made such remarks testified against plaintiff at that hearing.

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