

EASTERN DISTRICT ROUNDUP

NYLL Claims Dismissed, Judicial Estoppel Denied and Compassionate Release

Wednesday, May 10, 2023

This column reports on several significant representative decisions handed down recently in the U.S. District Court for the Eastern District of New York. Judge LaShann DeArcy Hall dismissed the plaintiff's New York Labor Law claims against the Great Neck Park District. Judge Joanna Seybert denied the plaintiff's pretrial motion to preclude the defendant from making arguments assertedly inconsistent with those it had successfully made in five prior litigations. And Judge Allyne R. Ross granted the defendant's motion for compassionate release.

Park District as Government Entity, Precluding NYLL Claims

In *Brown v. Great Neck Park District*, 22 CV 4778 (EDNY, Feb. 14, 2023), the plaintiff alleged violations of both the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). The defendant moved to dismiss the plaintiff's NYLL claims, and Judge DeArcy Hall granted the motion because the defendant is a political subdivision and governmental entity, exempt from the NYLL.

The defendant is a "special district" for the town of North Hempstead that operates and controls public facilities such as tennis courts, pools, skating rinks



By
**Thomas
Kissane**



And
**John
Moore**

and parks. The plaintiff worked for the defendant beginning in 2012, performing various duties, including serving as cashier and scheduler. The plaintiff alleged that she should have been paid at the rate a scheduler received when she served as a scheduler, but instead always received the lower cashier rate. Further, when the plaintiff worked in excess of 40 hours per week, she was not paid overtime.

While the NYLL is the state analogue to the FLSA and requires, inter alia, that employees be compensated at least 1.5 the regular rate of pay for any hours worked in excess of 40 per week, NYLL Section 190(3) provides that the "term 'employer' shall not include a governmental agency." Similarly, NYLL Section 651(5) exempts from its wage requirements those employed "by a federal, state or municipal government or political subdivision thereof."

The defendant argued that the plaintiff's NYLL claims must be dismissed because defendant is excluded from the statute's coverage under these provisions.

THOMAS KISSANE, a partner at Schlam Stone & Dolan, clerked for the late Charles L. Brieant, Chief Judge of the Southern District. JOHN MOORE, an associate of the firm, clerked for Judges Edward R. Korman of the Eastern District and Stanley Marcus of the 11th Circuit.

In an apparent matter of first impression for the court, DeArcy Hall considered whether a special district fell within the exemptions in Sections 190(3) and 651(5). Applying the test set forth in *Clark-Fitzpatrick v. Long Island Rail Road*, 70 N.Y.2d 382 (1987). DeArcy Hall looked first to the enabling legislation that created the special district to determine its purpose and then considered the source of the district's funds.

The purpose of a special district is to carry on, perform, or finance one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such district or to benefit the real property within such district. These are "essential government function[s]." As DeArcy Hall found, more than 60% of the defendant's funding in 2022 came from taxes imposed on North Hempstead residents. "The defendant, therefore, should be treated as the state for the purposes of the NYLL."

The court declined to apply a different test, set forth in *Massiah v. MetroPlus Health Plan*, 856 F. Supp. 2d 494

The plaintiff worked for the defendant beginning in 2012, performing various duties, including serving as cashier and scheduler.

(E.D.N.Y. 2012), because the *Massiah* factors were not derived from New York case law and the entity at issue in that case was distinguishable from defendant.

Additionally, instead of serving the statute's broad remedial purposes, "permitting NYLL liability for unpaid overtime wages would serve only to burden blameless taxpayers with liquidated damages."

Because the defendant was a political subdivision and a government entity under the NYLL, the court dismissed the plaintiff's NYLL claims.

Motion to Preclude Based on Judicial Estoppel Denied

In *RVC Floor Decor v. Floor and Decor Outlets of America*, New York, 18 CV 6449 (EDNY, Apr. 10, 2023),

Judge Seybert denied the plaintiff's pretrial motion to preclude the defendant from making arguments assertedly inconsistent with those it had successfully made in five prior litigations (the unrelated cases).

The approaching trial concerned plaintiff's claims of trademark infringement under Section 43(a) of the Lanham Act, New York common law, and New York General Business Law Section 360-l. In the unrelated cases, the defendant had presented facts and legal arguments, principally concerning the five-factor test for likelihood of confusion set forth in *Polaroid v. Polarad Electric*, 287 F.2d 492 (2d Cir. 1961) (the Polaroid factors), that were tailored to support its claims as a senior user seeking to enforce its trademark against junior users.

Seybert set out the factors governing judicial estoppel: "that 'a party's later position must be clearly inconsistent with its earlier position,' that 'the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled,' and that 'the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" Slip op. 11, quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

The court identified the eight Polaroid factors, three of which figured prominently in its analysis: the degree of similarity between the plaintiff's and defendant's marks (the second Polaroid factor); the competitive proximity of the products sold under the marks (third factor); and actual confusion (fifth factor).

The similarity of the trademarks, geographic proximity and proximity of goods and services are fact-specific inquiries. *Kelly-Brown v. Winfrey*, 717 F.3d 295, 307 (2d Cir. 2013). Disputed facts concerning the circumstances in the Unrelated Cases and those at bar—including whether defendant had represented itself as maintaining interior-design showrooms and offering primarily design services, as it contended but plaintiff disputed—prevented the court from finding the direct

and irreconcilable contradiction with defendant's prior arguments, as would be necessary to support estoppel. As to market proximity, defendant's prior characterizations had a common core with those it proposed to offer at trial, and "elaborating on its description when necessary to outline the various products it sells or the size of its store in comparison to other parties seems entirely appropriate when necessary based on the facts of the case." The plaintiff's request that defendant be estopped from arguing consumer confusion between the parties would, in the court's view, be inappropriate "given the fact-intensive inquiry required under the Polaroid factors."

Compassionate Release Granted

In *United States v. Monteleone*, 92 CR 351 (EDNY, Apr. 10, 2023), Judge Ross granted the defendant's motion for compassionate release under 18 U.S.C. Section 3582(c)(1)(A).

Although he was apparently not terminally ill, Monteleone was "clearly" experiencing deteriorating physical health due to aging.

On May 13, 1993, *Monteleone*, a member of the Colombo Family, was charged under a 15-count indictment with murdering members of a rival faction and related RICO offenses. After a 10-week trial alongside two co-defendants, Monteleone was convicted on all counts. In 1997, following a series of appeals, then-presiding Judge Charles Proctor Sifton sentenced Monteleone to concurrent life-terms plus a consecutive term of five years and supervised release.

On Jan. 3, 2023, after serving nearly 30 years, Monteleone filed a motion for compassionate release under 18 U.S.C. Section 3582. The principal issue presented was whether Monteleone demonstrated "extraordinary and compelling" reasons for early release that "were

not outweighed by the relevant statutory sentencing factors" set forth in Section 3553(a).

First, as to the reasons for early release, Ross found that "the sum of Mr. Monteleone's age, health conditions, and rehabilitation efforts constitute 'extraordinary and compelling reasons.'"

Monteleone is 83 years old, wheelchair-bound, and has aortic aneurysms that require high-risk surgery. Thus, although he was apparently not terminally ill, Monteleone was "clearly" experiencing deteriorating physical health due to aging.

Furthermore, Ross noted that "[d]espite serving a life sentence with little or no hope of release," Monteleone "has compiled a strong record while incarcerated, suggesting a motivation to improve himself." He earned a GED, completed 45 education courses, maintained a clear disciplinary record for nearly a decade, and was rated minimal risk of recidivism according to multiple letters written by BOP employees on his behalf.

Turning to the relevant statutory sentencing factors, Ross determined that while Monteleone had been convicted of "serious and violent crimes"—a factor weighing against compassionate release—several other Section 3553(a) factors weighed in favor of compassionate release. For example, Monteleone had made "impressive" rehabilitative efforts; had been incarcerated beyond the 20-year national average for a murder conviction; and, given his "advanced age and health condition," did not need further incarceration "to protect the public from further crimes."

Finally, Ross observed that one of Monteleone's co-defendants—who was younger, convicted of the same charges, and a leader of the Colombo Family—had been recently granted a sentence reduction. This created an "unwarranted sentence disparity" between the co-defendants, a factor also weighing "strongly in Monteleone's favor." Accordingly, Ross resentenced Monteleone to time served and imposed a lifetime term of supervised release.