



**New York
Municipal Liability
Update 2019**

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ZONING ORDINANCES

Nowak v. Town of Southampton, 174 A.D.3d 901 (2d Dept. 2019)

In this case, the Second Department affirmed the Supreme Court's decision denying petitioner's request to set aside a determination of the Town of Southampton Zoning Board of Appeals.

The Town of Southampton Building Department denied respondent's application for a building permit to construct a single-family dwelling on two merged parcels of land since the parcels of land did not have 40-feet of road frontage as required by the Town Code. The parcels were landlocked lots, which only had access to a road by means of a 50-foot-wide deeded right-of-way, in existence since 1949, over neighboring properties. As such, respondent sought an area variance to allow for a minimum road frontage of zero feet since, although the right-of-way provided access to a road, it did not provide the parcels with "road frontage." Petitioner, an adjoining property owner, opposed the application on the grounds that the new construction would have a negative impact upon and interfere with her use and enjoyment of her own property and that the hardship was self-created.

The Town of Southampton Zoning Board of Appeals (ZBA) granted the application for a variance and the petitioner, thereafter, commenced a proceeding pursuant to CPLR Article 78 to annul the ZBA's determination. The Supreme Court denied the petition and dismissed the proceeding. The petitioner appealed.

The Second Department affirmed, explaining that the ZBA engaged in the required balancing test and considered the relevant statutory factors. Specifically, the evidence before the ZBA supported its findings that "the requested relief would not produce an undesirable change in the character of the neighborhood, have an adverse impact on the physical or environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community, even if the proposed variance was arguably substantial and the alleged difficulty was self-created." There was no evidence that the variance would adversely affect environmental conditions. Further, the ZBA rationally concluded that the benefit sought, a variance that would allow for the construction of a single-family dwelling, could not be achieved by a feasible alternative method.

PRIOR WRITTEN NOTICE

Hinton v. Village of Pulaski, 33 N.Y.3d 931 (2019)

Plaintiff commenced this action against the Village after he fell while descending an exterior stairway that connects a public road to a municipal parking lot. The Village moved for summary judgment on the grounds that it did not receive prior written notice of the alleged defective stairway condition. The Supreme Court granted defendant's motion and the Appellate Division affirmed.

The Court of Appeals also affirmed, relying on its holding in *Woodson v. City of New York*, 93 N.Y.2d 936 (1999), wherein it determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it “functionally fulfills the same purpose that a standard sidewalk would serve.” 93 N.Y.2d at 936. While many prior written notice statutes provide that no civil action shall be maintained against a municipality as a result of a defect in “any street, highway, bridge, culvert, sidewalk or crosswalk” unless prior written notice of the alleged defect was provided to the municipality, the Court in *Woodson* held that prior written notice statutes also apply to stairways, even though not specifically delineated in the statutes, where the stairway served the same functional purpose as a sidewalk. The Court rationalized that if the Legislature disapproved of the Court's interpretation in *Woodson*, it would have done something in the twenty years since the decision. Based on the same, the Court of Appeals relied on settled precedent in holding that defendant was entitled to summary judgment based on plaintiff's failure to plead or prove prior written notice.

The dissent criticized the majority's reliance on the “functional equivalence test.” The dissent explained that the staircase at issue was “steep, irregularly spaced, with the space between the nosings made of grasses and muddy strands with potholes and muddy clumps...The railings were rickety and wooden, and at a low height; there was also less railing on one side than the other.” *Hinton*, 33 N.Y.3d at 935. Accordingly, the dissent argued that the stairway down which plaintiff fell was not “integrated with, or a part of, a connected standard sidewalk” as was the case in *Woodson* and, therefore, *Woodson* should not determine the result in this case. The dissent further criticized the majority for what it perceived to be as a “rewriting” of the prior written notice statute. The dissent argued that as a result of the majority's decision declaring that stairs are a “sidewalk,” the Court deprives plaintiffs of the opportunity to prove whether a municipality is negligent in constructing or maintaining stairways that cause injuries, thereby giving municipalities less incentive to maintain potentially dangerous stairways.

Gori v. City of New York, 171 A.D.3d 1025 (2d Dept. 2019)

Plaintiff was injured when, while riding her bicycle, the front wheel of her bicycle got caught on a depressed manhole and she was thrown from her bicycle. Plaintiff filed this personal injury lawsuit against the City alleging that the City: (1) had prior written notice of the allegedly dangerous manhole cover, (2) was negligent in failing to maintain the accident site, and (3) violated its statutory duty to maintain the area pursuant to the Rules of the City of New York § 2-07(b). The City moved for summary judgment on the ground that it did not receive prior written notice. In opposition, plaintiff argued that the requirement of prior written notice was inapplicable as the City had a non-delegable duty under Section 2-07(b) of the Rules of the City of New York to maintain the accident location. The Supreme Court granted the City's motion and the Second Department affirmed.

In short, Section 2-07(b) of the Rules of the City of New York provides that the owners of covers on a street, such as manholes, are responsible for their repair and maintenance. The Court explained that, contrary to plaintiff's contentions, the City's duty to maintain city-owned street manhole covers in accordance with Section 2-07(b) does not obviate the requirement of prior written notice. The Court emphasized that the only two recognized exceptions to prior written notice are: (1) affirmative creation and (2) special use.

TRAFFIC CONTROL AND HIGHWAY PLANNING

Tyberg v. City of New York, 173 A.D.3d 1239 (2d Dept. 2019)

The infant plaintiff sustained injuries when, while crossing a roadway, he was struck by a vehicle. At the time of the accident, the infant plaintiff was crossing Avenue J, a two-way street with no traffic control device or crosswalk at its intersection with East 32nd Street, to go wait at a school bus stop located at that intersection. The bus stop was an informal bus stop location that a number of private schools routinely utilized. Plaintiff sued the City of New York for failing to install an appropriate traffic control device for Avenue J at the intersection. The City's motion for summary judgment was granted and plaintiff appealed.

The Second Department reversed the lower court's decision on the grounds that the City was not entitled to qualified immunity. The Court explained that "a governmental body may not be held liable for a highway safety planning decision unless its study of the traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan." In this case, the evidence established that the City had conducted studies of the subject intersection in 2005 and 2007 in response to citizen complaints and concluded that no traffic control device was warranted. However, the City failed to establish that these studies were conducted at times when the subject schools utilizing the bus stop were in session. Moreover, the City failed to establish that the studies addressed the specific concern of schoolchildren crossing Avenue J to reach awaiting buses. Accordingly, the City failed to establish that it had entertained and passed on the very same question of risk that was at issue in this case.

SPECIAL DUTY

Pozarski v. Brooklyn Bridge Park Corporation, 64 Misc.3d 1217(A) (Kings Cnty. 2019)

Plaintiff sustained injuries when he hit his head while swimming in a pool located at Brooklyn Bridge Park. Plaintiff briefly lost consciousness and did not recall how he got out of the pool. The next thing he remembered was lying on his back on the pool deck. Plaintiff testified that as he was lying on the deck, two people tried to lift plaintiff up, after which he felt more pain in his neck and his legs went apart. Among those that responded to the scene were FDNY EMTs.

Plaintiff commenced this suit alleging, among other things, that the City of New York and their EMTs failed to properly stabilize, aid, transport, move and render assistance to the plaintiff and that the City owed plaintiff a special duty of care. Defendants moved to dismiss the complaint for plaintiff's failure to adequately plead special duty and, in the alternative, for summary judgment on the grounds that even if a special duty was pled, it could not be proven and the EMTs actions were discretionary and, thus, could not form the basis of municipal liability.

It is well established that when a municipal entity provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it is performing a governmental function and cannot be held liable unless it owed a special duty to the injured party. Thus, the question was whether or not the City EMTs owed plaintiff a special duty of care.

The Court denied that portion of defendants' motion to dismiss based on plaintiff's failure to plead a special duty. While plaintiff's Complaint contained a mere statement that the City owed plaintiff a special duty but failed to allege facts which would demonstrate the elements of a special relationship, the affidavit submitted by plaintiff in opposition to the motion remedied this defect and preserved his cause of action. Moreover, the Court held that plaintiff properly pled the four elements of a special duty. Specifically, plaintiff pled the following:

- (1) that the ambulance responded to the scene to help him and it was obvious that they came to assist him, examine him and take him to the hospital, thereby *assuming an affirmative duty to act on behalf of the injured party*;
- (2) that plaintiff was quickly transported to the hospital upon the defendants' arrival, thereby *acknowledging that inaction could lead to harm*;
- (3) that interactions with EMTs went on for extended periods of time and, thus, there was *direct contact between the municipality's agents and the injured party*; and
- (4) that plaintiff reasonably believed that the EMTs would act properly and not injure him and that he reasonably relied on them to properly treat him

and assumed he did not need to call for further assistance and, thus, he *justifiably relied on the municipality's affirmative undertaking.*

With respect to defendants' motion for summary judgment, the Court held that the evidence established the second and third prongs: that defendants had knowledge that inaction could lead to harm and that the defendants and plaintiff had direct contact. With respect to the other prongs, the Court found a question of fact based on testimony that there was a language barrier between the plaintiff and the EMTs and, as such, there was a question as to whether assurances were made and justifiably relied upon.

EMERGENCY OPERATIONS

Levere v. City of Syracuse, 173 A.D.3d 1702 (4th Dept. 2019)

Plaintiffs brought this action seeking to recover for personal injuries sustained when their vehicle was struck in an intersection by a police vehicle operated by a police officer responding to an emergency call. Defendants moved for summary judgment on the grounds that the officer's conduct was to be measured by the reckless disregard standard of care pursuant to Vehicle and Traffic Law § 1104 and that the officer's operation of the police vehicle was not reckless as a matter of law. The lower court denied defendants' motion and the Fourth Department reversed.

The Fourth Department noted that plaintiffs' and the lower court's reliance on the case of *LoGrasso v. City of Tonawanda*, 87 A.D.3d 1390 (4th Dept. 2011) was misplaced. The Court explained that in *LoGrasso*, the officer had *complied with the rules of the road* and, thus, was not subject to the reckless disregard standard of care. The Court further explained that in the subject case, the police officer proceeded past a steady red light in violation of VTL § 111(d)(1), activity specifically exempted from the rules of the road under VTL 1104(b)(2). Thus, the Fourth Department reclarified that to be held to the reckless disregard standard of care, the operator of a police vehicle must be engaged in conduct that ordinarily constitutes a violation of the Vehicle & Traffic Law, but is specifically exempted from the rules of the road under VTL 1104(b).

In addition, the Court held that the officer's conduct did not rise to the level of recklessness. Specifically, the evidence established that the officer was responding to an emergency, he slowed down and looked both ways before slowly proceeding into the intersection against a red light, and he slammed on his brakes when plaintiffs' vehicle came into his peripheral vision. Accordingly, the defendant officer did not act with reckless disregard and was entitled to summary judgment.

NOTICE OF CLAIM

O'Dell v. County of Livingston, 174 A.D.3d 1307 (4th Dept. 2019)

Plaintiff commenced this action against the County and the Village asserting causes of action for false arrest and malicious prosecution. The Village's motion for summary judgment was denied, in part, and the Village appealed. The Fourth Department reversed.

With respect to plaintiff's claim for false arrest against the Village, the Court reiterated that the 90-day period in which one has to bring a false arrest claim accrues on the day that a claimant is released from custody. Here, plaintiff was released from custody on September 7, 2015 and, yet, he did not serve a notice of claim upon the Village until August 2016. As such, plaintiff's false arrest claim as against the Village was time-barred. Moreover, the Court held that plaintiff could not revive the time-barred false arrest cause of action against the Village by relying on the timely asserted malicious prosecution claim because: (1) the notice of claim expressly stated that the malicious prosecution claim was asserted against the County defendants only, and (2) the Village did not prosecute the plaintiff so the Village could not be sued for malicious prosecution.

The Village also established its entitlement to summary judgment dismissing the causes of action for malicious prosecution, excessive force, assault and battery, and negligent training and supervision, as those causes of action were not set forth in the notice of claim and a Complaint may not assert new theories of liability that were not raised in the notice of claim.

§ 1983 STATUTE OF LIMITATIONS

McDonough v. Smith, 139 S. Ct. 2149 (2019)

In this case, the Supreme Court held that the statute of limitations period for fabricated evidence claims made pursuant to 42 U.S.C. § 1983 begins to run when the criminal proceedings are terminated in the claimant's favor.

By way of background, respondent was specially appointed to investigate and to prosecute a case of forged absentee ballots in a primary election in Troy, New York and the petitioner became his primary target. The respondent brought a case to trial and presented the allegedly fabricated testimony. The petitioner was ultimately acquitted. He then sued the respondent pursuant to 42 U.S.C. § 1983, asserting a claim for fabrication of evidence. The District Court dismissed the claim as untimely and the Second Circuit affirmed. The lower courts held that the 3-year limitations period began to run when: (1) the petitioner learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence. The Supreme Court reversed and remanded.

The Supreme Court held that the statute of limitations for petitioner's fabricated evidence claim began to run when the criminal proceedings against him terminated in his favor, i.e., when he was acquitted. The Court explained that accrual questions are often decided by referring to the common-law principles governing analogous torts. And, the Court noted that the most analogous common-law tort to a fabricated evidence claim is malicious prosecution, which accrues only once the underlying criminal proceedings have resolved in the plaintiff's favor. The Court further explained that malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter to avoid the possibility of conflicting civil and criminal judgments. The Court noted that the petitioner's claim implicated the same concerns and, as such, it made sense to adopt the same rule.

Accordingly, petitioner's claim for fabricated evidence was not time-barred.

QUALIFIED IMMUNITY

City of Escondido Cal. v. Emmons, 139 S. Ct. 500 (2019)

The issue in this case was whether two police officers were entitled to qualified immunity when they forcibly apprehended a man at the scene of a reported domestic dispute.

In April 2013, Escondido police received a call from Maggie Emmons regarding a domestic violence incident at her apartment. Police responded to the scene and Ms. Emmons' husband was arrested, but later released. Then, in May 2013, Escondido police received a call about a possible domestic disturbance at Maggie Emmons' apartment. Police proceeded to the scene to conduct a welfare check. Officer Craig was one of several officers who responded to the scene. Once at the house, the officers knocked on the door, but no one answered. The police were able to speak with Maggie Emmons through the window. A man, who police were not able to identify, told Maggie to back away from the window. A few minutes later, a man opened the apartment door and came outside. He shut the door behind him, against police orders. Officer Craig then stopped the man, took him quickly to the ground and handcuffed him. Officer Craig did not hit the man or display any weapon - the incident was caught on body cameras. The man was arrested for a misdemeanor offense of resisting and delaying a police officer. The man turned out to be Marty Emmons, Maggie Emmons' father.

Thereafter, Marty brought suit alleging, in part, excessive force in violation of the Fourth Amendment. Officer Craig moved for summary judgment with respect to the excessive force claim, arguing that he was entitled to qualified immunity. The District Court granted defendant Craig's motion on the ground that the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The District Court explained that the officers were responding to a domestic dispute and that the encounter had escalated when the officers could not enter the apartment to conduct a welfare check. The District Court also noted that when the plaintiff exited the apartment, the officers did not know if he was armed or dangerous, or whether he had injured any individuals inside the apartment.

Plaintiff appealed and the Court of Appeals reversed and remanded based on the following: "The right to be free of excessive force was clearly established at the time of the events in questions."

Defendant Craig appealed this decision to the Supreme Court of the United States. The Supreme Court reversed, being dissatisfied with the Court of Appeals' simple and general analysis. The Supreme Court explained that a clearly established right must be defined *with specificity*. Specifically, the Supreme Court noted that the Court of Appeals defined the clearly established right at a high level of generality by saying only that the right to be free of excessive force was

clearly established. The Supreme Court noted that the Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. As such, the case was remanded to the Court of Appeals for a proper analysis of whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons as he exited the apartment.

Relf v. City of Troy, 169 A.D.3d 1223 (3d Dept. 2019)

In this case, the plaintiff was bit by a K-9 dog after the dog was released by patrol officer defendant Justin Ashe following a robbery in an attempt to track suspects. Plaintiff brought various claims, including one for excessive force. Defendant was denied summary judgment with respect to plaintiff's claim for excessive force. Defendant appealed and the Third Department affirmed.

The Court found a triable issue of fact as to whether a reasonable police officer, who was aware that the dog had previously bit innocent bystanders and could not differentiate a suspect from an innocent bystander, would allow the dog to search off leash and out of sight of the handler.

In addition, the Court concluded that defendant Ashe failed to establish that he was entitled to qualified immunity. The Court explained that it has been clearly established that an innocent person should not be seized, as happened to plaintiff when the police dog bit and held him. Thus, there were questions of fact as to whether an objective officer would reasonably believe that these rights were violated by defendant Ashe when the dog was released from her leash to conduct a search despite having knowledge that she had previously bitten two innocent people.

Scozzafava v. State, 174 A.D.3d 1109 (3d Dept. 2019)

In this case, the Third Department held that the New York State Thruway Authority's (NYSTA) action of dispatching or failing to dispatch police constitutes a quintessential government function, thereby warranting immunity from liability.

Plaintiff brought this action against the NYSTA after his truck struck a couch that had been left on a highway. Prior to plaintiff's accident, the NYSTA had received a call reporting the presence of the couch on the highway. Within three minutes of receiving the call, a dispatcher contacted a maintenance facility to assign a maintenance crew to respond to the scene. Approximately seven minutes later, radio dispatchers received a call regarding plaintiff's accident and State Police were dispatched to the scene. Shortly thereafter, the maintenance crew arrived on scene, followed by the State Police. Plaintiff claimed negligence on the part of the NYSTA by failing to dispatch State Police after receiving the call about the couch on the highway. Defendants

moved for summary judgment claiming that at the time of the claimed negligence, defendants were engaged in traffic control, a governmental function and, thus, were immune from liability. The Court of Claims partially granted defendants' motions and plaintiff appealed. The Third Department affirmed the Court of Claims' decision, but on different grounds.

The Third Department noted that the threshold issue to be determined was whether the NYSTA was engaged in a proprietary function, for which ordinary rules of negligence would apply, or a governmental function, where the NYSTA would be immune from liability unless there was a special duty.

Plaintiff claimed that at the time of the alleged negligence, the NYSTA's radio dispatchers were engaged in a road maintenance, i.e., removing debris and maintaining the roadway in a reasonably safe condition, a quintessentially proprietary function. The Third Department disagreed. The Court explained that while radio dispatchers perform varied functions that can be characterized as both proprietary and governmental, on the afternoon of the accident they were involved in the assignment of resources to deal with a reported foreign object on the highway that posed an immediate risk to the health and safety of the public. The Court found that it was irrelevant whether the State Police ever actually engaged in traffic control, as the conduct of dispatching or failing to dispatch the police is an inseparable component of providing the very police resources that claimants assert should have been dispatched in the first instance. The Court held that the provision of dispatching services by the NYSTA constituted a quintessential governmental function that entitled defendants to immunity.

SEX DISCRIMINATION

Sanderson-Burgess v. City of New York, 173 A.D.3d 1233 (2d Dept. 2019)

Plaintiff brought this action to recover damages for employment discrimination on the basis of sex and unlawful retaliation in violation of Admin. Code of the City of New York § 8-107. Plaintiff was a civilian employee of the New York City Police Department. She claimed that a fellow employee, defendant Brown, sexually harassed her by making comments about her appearance and by touching her inappropriately. In addition, plaintiff claimed that her supervisors aided and abetted the harassment in violation of the New York City Human Rights Law and/or retaliated against her for her complaints regarding defendant Brown's conduct.

With respect to plaintiff's claims for sexual harassment and aiding and abetting by her supervisors, plaintiff failed to raise a triable issue of fact in opposition to defendants' motions for summary judgment. The Court reiterated that methods to demonstrate same-sex harassment include "showing that: (1) the harasser was homosexual and motivated by sexual desire; (2) the harassment was framed in such sex-specific and derogatory terms...as to make it clear that the harasser [was] motivated by general hospitality to the presence of a particular gender in the workplace; or (3) direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Matter of Arcuri v. Kirkland*, 113 A.D.3d at 914-15. Here, defendants demonstrated that there was no evidentiary route that could allow a jury to find that Brown was motivated by sexual desire or by general hostility to the presence of women in the workplace, or that she treated male and female coworkers differently. Furthermore, the evidence established that, in response to plaintiff's complaint, the NYPD took prompt remedial action.

With respect to plaintiff's claim for retaliation, the Supreme Court also properly granted defendants' motions for summary judgment. Specifically, the defendants demonstrated that plaintiff could not establish that her employer was aware of such alleged activity, or that there was a causal connection between the activity and the alleged acts of retaliation. In opposition, plaintiff failed to raise a triable issue of fact.

EMPLOYMENT DISCRIMINATION

Fort Bend County, Texas v. Davis, 139 S. Ct. 1843 (2019)

In this case, the Supreme Court was presented with the question of whether Title VII's charge-filing precondition to sue is a "jurisdictional" requirement that can be raised at any stage of a proceeding or is a procedural prescription mandatory if timely raised, but subject to forfeiture if tardily asserted. As will be discussed in greater detail below, the Supreme Court held that they are procedural prescriptions that must be timely raised to come into play.

Respondent Davis worked for Fort Bend County. In 2010, she informed human resources that her co-worker was sexually harassing her. After an investigation, this co-worker resigned. Thereafter, however, Davis alleged that her manager, who was well acquainted with her former co-worker, retaliated against her by curtailing her work responsibilities. Seeking redress for the harassment and retaliation, in February 2011 Davis submitted an "intake questionnaire" and, then, in March 2011 she filed a charge with the EEOC. While her charge was pending, Davis was asked to work on an upcoming Sunday, but Davis responded that she was unable to do so because of a Church commitment. Davis was told that she would be subject to termination if she did not work that Sunday. Davis went to church on that Sunday and thereafter was fired. In an attempt to supplement the allegations in her EEOC charge, she handwrote "religion" on the "Employment Harms or Actions" section of her intake questionnaire but made no changes to the formal EEOC charge document.

In January 2012, Davis commenced a civil action alleging discrimination on account of religion and retaliation for reporting sexual harassment. The District Court granted Fort Bend's motion for summary judgment. The Court of Appeals for the Fifth Circuit affirmed as to Davis' retaliation claim but reversed as to her religion-based claim. Fort Bend filed a petition for certiorari, which the Supreme Court denied.

When the case returned to the District Court on Davis' claim of discrimination on account of religion, Fort Bend moved to dismiss the complaint on the grounds that the District Court lacked jurisdiction to adjudicate Davis' religion-based discrimination claim because she had not stated such a claim in her EEOC charge. This was the first time Fort Bend raised this defense. This issue made its way to the Supreme Court.

The Supreme Court explained that whereas subject matter jurisdictional challenges may be raised at any point in the litigation and must be considered by the Court, non-jurisdictional claim-processing rules can be forfeited if the party asserting the rule waits to long to raise the point. Ultimately, the Court held that Title VII's charge-filing requirement "is not a jurisdictional case." Rather, Title VII's charge-filing provisions "speak to...a party's procedural obligations. While

Title VII's charge-filing requirement is a mandatory processing rule, it is not a jurisdictional prescription delineating the adjudicatory authority to the Courts. And, while the charge-filing requirement is mandatory, if a party fails to promptly object, the defense is waived.

Natofsky v. City of New York, 921 F.3d 337 (2d Cir. 2019)

In this case of first impression, the Second Circuit was tasked with deciding the issue of whether Section 794(d) of the Rehabilitation Act requires courts to use the causation standard as defined in the Americans with Disabilities Act's for claims alleging employment discrimination under the Rehabilitation Act.

In brief, the plaintiff-appellant brought this action alleging violations of the Rehabilitation Act and state and city law, claiming that during his tenure working for the City, he experienced several adverse employment actions because of his hearing disability, including his eventual demotion. The district court held that no reasonable jury could conclude that plaintiff had experienced any adverse employment action "solely by reason of" his disability and further held that plaintiff failed to establish a failure-to-accommodate or retaliation claim. Plaintiff appealed, arguing that the district court erred in relying on a sole-cause standard because the Rehabilitation Act makes a distinction between employment discrimination claims, which requires Courts to adopt the more lenient causation standard used in the Americans with Disabilities Act (ADA). The Second Circuit affirmed the lower court's decision, but on different grounds.

The Second Circuit explained that the Rehabilitation Act provides that no individual shall be subject to discrimination in any program or activity receiving federal financial assistance "solely by reason of her or his disability." 29 U.S.C. § 794(a). However, in 1992, Congress amended the Rehabilitation Act to add a provision which states that "the standards used to determine whether this section has been violated in a complaint alleging *employment* discrimination... shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d) (emphasis added). Given the same, the Second Circuit held that when a plaintiff alleges an employment discrimination claim under the Rehabilitation Act, the causation standard that applies is the same one that would govern a complaint alleging employment discrimination under the ADA.

Pursuant to the ADA, it is unlawful for an employer to discriminate against an individual "on the basis of disability." 42 U.S.C. § 12112(a). Plaintiff argued that a "mixed-motive standard" applied and that he presented sufficient evidence for a factfinder to conclude that his disability was a "motivating factor" in the adverse employment actions taken against him. Defendants, however, argued that the standard to be applied is the "but for" the disability, the adverse action would not have been taken.

The Second Circuit explained that the “mixed-motive” test originated from Title VII, which prohibits employment discrimination “because of” an individual’s race, color, religion, sex or national origin. The Court then analyzed the statutory language and the time of amendments to the same. Ultimately, because there is no express instruction from Congress in the ADA that the “motivating factor” test applies, it rejected the motivating factor test. Instead, the Court joined the conclusion reached by the Fourth, Sixth and Seventh Circuits that the ADA requires a plaintiff alleging a claim of employment discrimination to prove that the discrimination was the but-for cause of any adverse employment action.

Burke v. New York City Transit Authority, 758 Fed. Appx. 192 (2d Cir. 2019)

Plaintiff, an employee of the City, brought suit against the New York City Transit Authority (“NYCTA”), including claims of disparate treatment discrimination under Title VII, the Americans with Disability Act, and retaliation. Plaintiff alleged that he wears eyeglasses as an accommodation for his myopia and photophobia, his disability. The Second Circuit found that the District Court properly dismissed plaintiff’s disparate treatment claim because plaintiff failed to allege any resulting adverse employment action from the events alleged. While plaintiff claimed that two of the defendants ordered NYCTA supervisors to harass the plaintiff over a two-day period, plaintiff failed to allege that he was ever disciplined or had his job responsibilities or benefits reduced because of his disability. With respect to plaintiff’s retaliation claims, the District Court also properly dismissed these claims as plaintiff failed to show the causal relationship of his termination with the protected activity to which he was allegedly discriminated for. Specifically, the Court noted that the fourteen months between the filing of plaintiff’s original complaint and his termination was too long of a gap to show causation.