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COURT OF APPEALS
STATE OF NEW YORK

SASSI,

Appellant,

-against-

NO. 55

MOBILE LIFE SUPPORT SERVICES, INC.,

Respondent.

20 Eagle Street
Albany, New York
September 1, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 55 on the
2 calendar, Sassi v. Mobile Life.

3 Counsel?

4 MR. GOLDMAN: Thank you, Your Honor. May it
5 please the court, my name is Jonathan Goldman, from the law
6 office of Sussman & Associates, on behalf of the appellant,
7 Richard Sassi.

8 I'd like to reserve one minute of time, please,
9 if I may?

10 CHIEF JUDGE DIFIORE: Of course you may.

11 MR. GOLDMAN: Thank you.

12 Dismissal of the complaint here was erroneous and
13 should be reversed because the complaint amply sets forth a
14 prima facie violation of Article 23-A of the Correction Law
15 and Section 296 of the New York State Human Rights Law.
16 Specifically, the complaint pleads that, one, plaintiff was
17 an applicant seeking employment with a private employer
18 where he did not then work; second, he had a criminal
19 conviction that predated that application; and third, he
20 was denied employment because of that prior criminal
21 conviction.

22 JUDGE GARCIA: Counsel, can I ask you something?
23 So let's say different facts, not your case, different
24 facts. Someone is convicted while they're working for the
25 employer. They do five years in prison. And they come out



1 and they say I'd like you to hire me now, and the employer
2 says no. Is that enough?

3 MR. GOLDMAN: I'm sorry, is that - - -

4 JUDGE GARCIA: Is that enough? Do you have a
5 claim?

6 MR. GOLDMAN: I - - - I believe you do, Your
7 Honor.

8 JUDGE GARCIA: I mean, assuming they need to go
9 through the factors and all of that.

10 MR. GOLDMAN: That - - - that's correct, Your
11 Honor. Exactly. Because again - - -

12 JUDGE GARCIA: What - - - what if they filled
13 your job in those five years?

14 MR. GOLDMAN: Well, again so going to Your
15 Honor's prior hypothetical, I - - - I would assume that
16 there was a position open to apply to, so I agree.

17 JUDGE GARCIA: Isn't that the assumption you're
18 also asking us to make here based on your complaint?
19 Because as I read it, in a fair - - - you know, and I
20 understand our rules for generous reading of - - - of a
21 complaint - - - read it, I think it's close, at - - - at
22 best, to say it really reads to me as almost, okay,
23 suspension or - - - li - - - you know, arguing over whether
24 I can come back, but nowhere in here does it say there's an
25 opening that I applied for. And I think without that then



1 isn't it the case where five years later and I filled the
2 job and I come back - - - the person comes back and says,
3 hey, you know, I really want my job back, don't you have to
4 allege that there is an opening?

5 MR. GOLDMAN: I - - - I - - - I agree there needs
6 to be an opening, but I would - - - I would submit, Your
7 Honor, that the complaint liberally read amply satisfies
8 that. At least the inference of that. He was gone for a
9 few weeks on a sixty-day sentence, he came back, it's
10 alleged in the complaint, there were discussions, some
11 people did want him to come back.

12 JUDGE GARCIA: But it says, regain his job,
13 return to work, reassume the work. It says reemploy.

14 MR. GOLDMAN: It does say - - -

15 JUDGE GARCIA: But - - -

16 MR. GOLDMAN: - - - reemploy, Your Honor. It
17 says, regain, reemploy. It doesn't say - - - we don't
18 allege that the respondent unlawfully terminated him. We
19 allege that the respondent unlawfully denied his
20 application for employment. And again, the complaint does
21 not say that he was denied because there wasn't a position.
22 It says he was denied because of the conviction.

23 JUDGE GARCIA: Well, you certainly wouldn't
24 allege he was denied because there wasn't a position, but
25 do you have to allege that there was a position open? I



1 think that's the question I'm having.

2 MR. GOLDMAN: Well, a - - - again, Your Honor,
3 and - - - and that specific question, you know, wasn't
4 really dealt with in the briefs because it wasn't the basis
5 upon which the court dismissed below. The court dismissed
6 below because it said that the statute does not apply
7 because it interpreted this as an unlawful termination
8 claim.

9 I think if you read the complaint in its
10 totality, in the light most favorable to the plaintiff, it
11 amply alleges at least the inference that there is an
12 opening that he was seeking to fill. And it was denied
13 solely because of the conviction, which therefore violates
14 the statute.

15 JUDGE RIVERA: I just want to clarify. I - - -
16 and you can correct me if I'm wrong on my recollection of
17 the complaint. I - - - I thought the complaint alleged
18 facts which we assume as true for purposes of the motion,
19 that he was told that he was not coming back, and they
20 would not hire him, not because of Judge Garcia's
21 hypothetical, which is a very interesting and - - - and
22 complex one, but because of his criminal record?

23 MR. GOLDMAN: That - - - that's correct, Your
24 Honor. The - - -

25 JUDGE RIVERA: You - - - you have the factual



1 basis that is asserting that the grounds are not a - - - a
2 lack of a vacancy in an employment position.

3 MR. GOLDMAN: That - - - that's correct, Your
4 Honor. It's explicitly pled that the denial was not based
5 on the lack of an opening, but because of the conviction.
6 Which I think you could reasonably infer there was a con -
7 - - there was an opening to deny because of whatever
8 reason.

9 JUDGE RIVERA: Yeah. But in response to Judge
10 Garcia, you're conceding that if indeed there was no
11 opening, that he would have no claim? I just want to be
12 clear on your argument.

13 MR. GOLDMAN: I - - - I - - - again, that wasn't
14 an issue that we've addressed, but - - - but I think as I'm
15 hearing it now from Your Honor, I think we'd have to
16 concede that if you're applying for a job, you have to be
17 applying for something that is there. You're not
18 automatically entitled to something if it doesn't exist.
19 The statute protects against people applying for
20 employment.

21 JUDGE RIVERA: Yeah. Let me ask you this. When
22 he first applied, and then he gets hired - - - when he
23 first applied, was he applying for a targeted position or
24 was he applying to work for the company, and then they put
25 him in a particular position that they thought was



1 appropriate?

2 MR. GOLDMAN: I - - - I don't know the specific
3 answer except to say as pled in the complaint, he applied
4 and was - - - applied for the position, was hired into the
5 position - - -

6 JUDGE RIVERA: Um-hum.

7 MR. GOLDMAN: - - - of - - - that's alleged in
8 the complaint, and then was promoted to a dispatcher
9 position. Which is the position - - - by the way, I should
10 also highlight, and I think this is one of the key
11 important facts in the complaint, is that it specifically
12 alleges, at paragraph 26, he was terminated for job
13 abandonment. At that time he was separated, he no longer
14 worked there. He comes back weeks later after he finishes
15 serving his term, he asks for to - - - to be employed
16 again. Which we submit, respectfully, under the plain
17 language, unambiguous language of the statute, any
18 application by any person for employment, his request to be
19 employed, whether it's to his position that he left or any
20 other position that may be - - -

21 JUDGE RIVERA: Let me ask you this. How far does
22 the liberal interpretation of the complaint go? Let - - -
23 let - - - let's say you characterize it as you do, but the
24 only way to actually understand the complaint is an
25 unlawful termination. Can - - - can we do that, or does



1 our law foreclose that?

2 MR. GOLDMAN: I'm sorry, I want to say - - -
3 you're saying is the only way to interpret - - -

4 JUDGE RIVERA: What - - - whatever you - - -
5 whatever you may be calling it, whatever you may assert, if
6 the only reading one can have of - - - of the complaint is
7 that in essence this always boils down to challenging the
8 termination, not an actual reapplication. Even if you
9 called it that. Does our - - - does our jurisprudence
10 allow for us to say - - - it doesn't matter the label you
11 put on it. This is only about an unlawful termination.

12 MR. GOLDMAN: I - - - I - - - I think I
13 understand Your Honor's question. I - - - I would respond
14 that I think your jurisprudence requires you to look at all
15 of the facts alleged in the complaint in their entirety and
16 take the most favorable and liberal reading. Now, if the
17 most favorable and liberal reading, and the most
18 reasonable, and only reasonable reading, leads you to that
19 determination, well, that's something else.

20 But respectfully, again, we submit that that does
21 not lead to that conclusion here. The complaint when read
22 it's - - - in its entirety, liberally says specifically,
23 not just - - - not just the conclusory label that it was a
24 termination, the specific underlying facts, he was
25 separated, terminated for job abandonment. Then he comes



1 out and he asks for employment. At the time he asked for
2 employment, he was not employed. The conviction predated
3 that application, and he was seeking employment. Under the
4 plain and unambiguous language of the statute, then, it
5 applies.

6 JUDGE FAHEY: So - - - so let me - - - let me ask
7 a - - - a logic problem that would grow out of there. One
8 of the things that I struggle with on this is, so you're
9 fired, or you're let go because of job abandonment, and so
10 - - - or let's say a conviction for a crime here - - - and
11 that occurred during employment. You do your time, you
12 come back out. Would anyone have to be rehired because
13 they put in a new application? Because under the stat - -
14 - your reading of the statute, the conviction would precede
15 the new application for employment. Is that what you're
16 arguing?

17 MR. GOLDMAN: Well, again just to be clear, it's
18 not a guarantee that you're going to be employed. It's
19 just a guarantee that your conviction will not be used
20 against you unless one of the exceptions applies. And - -
21 - and that would be my - - - my position here - - -

22 JUDGE FAHEY: I see.

23 MR. GOLDMAN: - - - is that - - -

24 JUDGE FAHEY: Can I ask as just a - - - a
25 procedural question. Was this - - - was this decision made



1 on a pre-answer motion to dismiss?

2 MR. GOLDMAN: Yes, it was, Your Honor.

3 JUDGE FAHEY: Thank you.

4 MR. GOLDMAN: Yes, it was.

5 JUDGE SINGAS: Can I just follow up on Judge
6 Fahey. So if someone is terminated because of a
7 conviction, let's say at 3 o'clock, right. And you're
8 alleging that that's okay, right, an employer can terminate
9 someone because of a conviction?

10 MR. GOLDMAN: Yes, Your Honor.

11 JUDGE SINGAS: At 3:05, they say, I am reapplying
12 for this job. If we adopt your approach, doesn't that just
13 negate the legislative intent here?

14 MR. GOLDMAN: I don't believe it does. And - - -
15 and here's why, Your Honor. For - - - for a couple
16 reasons. First, again, I point to this plain and
17 unambiguous text that says any. And that would fall under
18 any. And I can see that's an extreme example. Second, the
19 policy of the law is very clear and it's a liberal statute,
20 a broad, remedial statute that should be liberally
21 interpreted to satisfy its goals.

22 I - - - I see my time's up, may I - - - may I
23 finish the answer?

24 CHIEF JUDGE DIFIORE: Please do.

25 MR. GOLDMAN: Thank you, Your Honor.



1 Here, again, employment is not guaranteed. A
2 conviction that occurs during someone's employment often
3 times involves contemporaneous conduct, usually conduct
4 that occurs on the job. There's practical considerations.
5 The person might be incarcerated and - - - and therefore
6 not available. Oftentimes, in those situations, the
7 employer will undoubtedly be able to satisfy the Article
8 23-A factors to find an exception and deny employment even
9 in Your Honor's hypothetical.

10 But that's not the case here. The conduct was
11 years prior, had nothing to do with his employment. And if
12 we look at the Bonacorsa case where somebody applied eight
13 years later for a license that they had held eight years
14 earlier, there was no question that the statute applied.
15 And that's the only question here, does the statute apply.
16 So if it applies eight years later, without any other
17 legislative guidance as to how long is enough, I don't
18 think it's appropriate to say, well, five minutes isn't
19 enough, or six months isn't enough. Who's to say? Any
20 means any, so here, in your example, I - - - I would - - -
21 I would submit that it would apply.

22 Again, it's not a guarantee of employment. It's
23 only a guarantee that the factors would be applied, and a
24 conviction could only be held against you if an exception
25 applies.



1 CHIEF JUDGE DIFIORE: Counsel, I have a final
2 question for you. Given the timing of the events in this
3 case, why aren't the termination and those postconviction
4 discussions that Mr. Sassi had with the company, why aren't
5 those part of the same employment determination?

6 MR. GOLDMAN: Well, they're not part of the same
7 employment determination because, as a matter of fact, they
8 were separate instances. So - - - and - - - and again, as
9 the - - - as the complaint sets forth, they - - - they
10 actually had told him, we're - - - we're going to allow you
11 to - - - to burn your accrued time. We'll put you on leave
12 and - - - and you'll just come back. But - - - and again
13 as the complaint says, they didn't do that. Once he didn't
14 come back to work after a few days, because he was in jail,
15 they terminated him. They completely separated from - - -
16 him from employment.

17 Then a period of time went by, more than just
18 five minutes or a half hour, several weeks in fact. And he
19 went back and said, you weren't supposed to terminate me in
20 the first place, but that's beside the point. I would like
21 employment with - - - with - - - with your agency, with
22 your a - - - with your - - - with your organization. And
23 they denied that.

24 So just as a matter of fact, they're - - -
25 they're separate events that happened spatially and



1 temporally attenuated.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel?

4 MR. GOLDMAN: Thank you, Your Honor.

5 CHIEF JUDGE DIFIORE: You're welcome.

6 MR. COHEN: Thank you, Your Honors. My name is
7 Matthew Cohen, I'm an attorney from Kaufman Dolowich and
8 Voluck. We represent the respondent in this matter.

9 The second department correctly affirmed the
10 decision and order of Judge Brands, which correctly noted
11 that in the verified complaint, plaintiff alleges that he
12 was first employed by defendant, after which he was
13 convicted of a crime and incarcerated for sixty days, after
14 which plaintiff sought to resume his employment with
15 defendant. The key word being resumed. There was no
16 reapplication here. And even a most liberal reading of the
17 complaint, I don't see how you could view this as a - - -

18 JUDGE CANNATARO: So - - -

19 MR. COHEN: - - - a new application.

20 JUDGE CANNATARO: - - - are you arguing now that
21 plaintiff was never terminated?

22 MR. COHEN: No, he was terminated. But if - - -
23 if you take - - -

24 JUDGE WILSON: So when - - - when was he
25 terminated?



1 MR. COHEN: He was terminated while he was in
2 jail.

3 JUDGE WILSON: What - - - what date?

4 MR. COHEN: It was during the sixty-day period
5 when he was - - - when he was in jail.

6 JUDGE WILSON: You can't be more specific?

7 MR. COHEN: I - - - I don't have the exact - - -

8 JUDGE WILSON: Okay, that's fine.

9 MR. COHEN: - - - I don't have the exact date.

10 JUDGE WILSON: Okay. Thank you.

11 JUDGE CANNATARO: So when he approached his
12 employer to discuss coming back, irrespective of what was
13 in the plaintiff's mind, he was actually asking for
14 employment? He was asking for reemployment, I guess. He
15 wanted his old job back.

16 MR. COHEN: I - - - I believe it's as Judge
17 Brands said it, it's a resumption of employment. And in
18 fact, if - - - and - - -

19 JUDGE CANNATARO: But you said he was terminated?
20 How - - - how - - - if you're terminated, I'm not sure I -
21 - - maybe - - - maybe it's just a semantic issue but - - -

22 MR. COHEN: Correct because the plaintiff got
23 relief - - - the plaintiff was in jail. He's in jail for
24 sixty days. When he came out of jail, he's contacting his
25 employer to see what was going on. The conversation that



1 is listed in the complaint after that, the director of
2 human resources - - - and this is just based on the
3 allegation - - - told plaintiff, as the company had
4 previously terminated others who had been in - - -
5 incarcerated, they had to be consistent and terminate
6 plaintiff. They're talking about the termination that
7 already took place.

8 JUDGE RIVERA: Well, let me - - - let me - - -
9 let me ask you a couple of things. One of them about what
10 you just quoted.

11 One is that - - - that reason sounds to me
12 exactly what the legislature's trying to get to. It has
13 nothing to do with the merits or the qualifications of the
14 individual, whether or not he was doing a good job or not.
15 And it - - - it's not even about his conviction
16 specifically. Sort of anybody who was convicted, they're
17 terminated, they're out. And - - - and it does sound like
18 that is against the public policy that the legislature
19 sought to put in place through the legislation. What - - -
20 what's your response to that?

21 MR. COHEN: Respectfully, I - - - I disagree with
22 that - - -

23 JUDGE RIVERA: Uh-huh - - -

24 MR. COHEN: - - - Your Honor.

25 JUDGE RIVERA: - - - go ahead.



1 MR. COHEN: The - - - the statute very clearly
2 says it applies to prior convictions.

3 JUDGE RIVERA: Um-hum.

4 MR. COHEN: This - - - this clearly was convicted
5 while he was on - - - on - - - while he was employed. If
6 you had - - -

7 JUDGE FAHEY: So - - -

8 MR. COHEN: - - - a situation where - - -

9 JUDGE FAHEY: - - - so on that point - - - on
10 that point, that's why it matters if it's a job
11 abandonment. And he was terminated for that reason, or he
12 was terminated because he was one among many employees who
13 were terminated because they had had prior - - - they had
14 had a conviction. You see why it makes a difference?
15 There's a difference between the two things.

16 MR. COHEN: Yes. Yes, Your Honor.

17 JUDGE FAHEY: All right. So - - - so that being
18 the case, that's a question of fact, isn't it?

19 MR. COHEN: Correct, Your Honor, but - - -

20 JUDGE FAHEY: All right. So if it's a question
21 of fact, then wasn't a pre-answer motion to dismiss an
22 instance of - - - that was granted, I - - - I cannot blame
23 anybody for arguing it, but the granting of it, wasn't that
24 really premature adjudication? Should have waited until
25 that fact was clarified?



1 MR. COHEN: I - - - I disagree, Your Honor. I -
2 - - I feel - - -

3 JUDGE FAHEY: Okay.

4 MR. COHEN: - - - that the statute would be
5 rendered futile if - - - if you could go to - - -

6 JUDGE FAHEY: Your argument is because - - -

7 MR. COHEN: - - - jail for sixty days - - -

8 JUDGE FAHEY: Let me just ask. It's because of
9 the previous conviction argument?

10 MR. COHEN: Correct. Because he was employed
11 when he was convicted. If you could be terminated while
12 you're in jail, you come out, you have your initial
13 conversation with the - - - with your employer who just
14 terminated you because you were convicted currently, while
15 you were employed, there - - - there would - - - there
16 would be no use of having that word previously convicted -
17 - -

18 JUDGE FAHEY: All right.

19 MR. COHEN: - - - prior conviction. It - - - it
20 would - - - that would render that term obsolete. And that
21 clearly was the leg - - - legislative intent - - -

22 JUDGE RIVERA: So - - -

23 MR. COHEN: - - - it only applies to prior
24 convictions.

25 JUDGE RIVERA: - - - so if I'm - - - if I'm now



1 understanding, perhaps more clearly - - -

2 MR. COHEN: Yeah.

3 JUDGE RIVERA: - - - what your arguing. You're -
4 - - you're first arguing this is a wrongful termination,
5 there was no reapplication or another application; that's
6 your first length - - -

7 MR. COHEN: Correct.

8 JUDGE RIVERA: - - - but I - - - as I understand
9 what you're saying now, is that even if it was, the statute
10 does not protect him; am I not - - - am I understanding - -
11 -

12 MR. COHEN: Correct, Your Honor.

13 JUDGE RIVERA: - - - you correctly?

14 MR. COHEN: Yes.

15 JUDGE RIVERA: Because even if it's a
16 reapplication, because the conviction pre - - - doesn't
17 predate the original application - - -

18 MR. COHEN: I - - -

19 JUDGE RIVERA: - - - perhaps you're thinking
20 along the same line of the questioning from the Chief
21 Judge, it's all part of - - - sort of one event cycle?

22 MR. COHEN: Exactly. I - - - I think this is
23 analogous to the example that - - - that the judge gave
24 earlier, where what if at 3:05, somebody came by and, oh,
25 you just fired me five minutes ago, I'm going to reapply.



1 It's really the same thing here. The person was - - -

2 JUDGE WILSON: Well, but let me - - -

3 MR. COHEN: - - - fired - - - the plaintiff was -

4 - -

5 JUDGE WILSON: - - - let me ask you - - -

6 MR. COHEN: - - - fired while in jail and - - -

7 JUDGE WILSON: - - - let me ask you about Judge
8 Singas' example, though.

9 MR. COHEN: Yeah.

10 JUDGE WILSON: So as I understand it if you're
11 fired at 3:05 - - -

12 MR. COHEN: Um-hum.

13 JUDGE WILSON: - - - and you go back to your - -
14 - the employer who immediately fired you, five minutes
15 later, you've already been terminated, and say, I would
16 like to file an application for a job - - -

17 MR. COHEN: Yeah.

18 JUDGE WILSON: - - - the employer can say no, and
19 the statute doesn't protect the employee. But - - -

20 MR. COHEN: Yeah.

21 JUDGE WILSON: - - - if that employee at 3:10
22 comes to me and asks for a job, I can't use the prior
23 conviction. That's your interpretation of the statute?

24 MR. COHEN: Yeah, if you're a different employer,
25 yes.



1 JUDGE WILSON: So why - - - where in the statute
2 do you see that the statute reads differently on your - - -
3 the employer who fired you and any other employer?

4 MR. COHEN: I - - - I'm not saying it - - - it's
5 - - - it's - - - it goes on forever, you know, for
6 infinity. It - - - it goes on for - - - and just
7 logically, if somebody is terminating an employee, if you
8 have a right to terminate an employee for a conviction that
9 occurs during your employment, you have to have the ability
10 to terminate them. If somebody could just come five
11 minutes later and apply - - - reapply for that same job,
12 and you can - - - and you can no longer terminate them, it
13 renders the statute obsolete.

14 JUDGE RIVERA: What - - - what if they came and
15 reapplied for another job?

16 MR. COHEN: For another job?

17 JUDGE RIVERA: The same type of job - - -

18 MR. COHEN: Um-hum.

19 JUDGE RIVERA: - - - but the one that someone
20 left while they were incarcerated.

21 MR. COHEN: For - - -

22 JUDGE RIVERA: What about that? Can they do
23 that?

24 MR. COHEN: If - - - if - - -

25 JUDGE RIVERA: Same - - - same skillset, same



1 title, but it's not the exact same one that they had.

2 MR. COHEN: If - - - if it was a legitimate
3 reapplication - - -

4 JUDGE RIVERA: No, no. No. They're applying for
5 a different job - - -

6 MR. COHEN: Yeah - - -

7 JUDGE RIVERA: - - - with the same employer?

8 MR. COHEN: If - - - if - - - if you're applying
9 for a different job, yes. But that's not what they allege
10 - - - was alleged in the complaint here.

11 JUDGE RIVERA: And you don't think that leads to
12 absurd results?

13 MR. COHEN: I - - - I think it could lead - - -

14 JUDGE RIVERA: Judge Wilson's question to you,
15 this question, you don't think the - - - any of these are
16 absurd results, or perhaps - - - perhaps, even if you don't
17 think they're absurd, they seem to not be in line with the
18 legislative intent?

19 MR. COHEN: I - - - I - - - I disagree with that.
20 Right - - - right now, in - - - in the state legislature,
21 there - - - there was a bill I think brought out in April,
22 it's in committee now, where they're trying to remove the
23 prior conviction part - - -

24 JUDGE RIVERA: Um-hum.

25 MR. COHEN: - - - of the statute. There would



1 both - - - there would be no need to do it if five minutes
2 later I could just reapply for the job. So to me, the
3 legislative intent was that if somebody's convicted during
4 your employment, you can terminate them. And that's what
5 took - - - took place here. They terminated him while he
6 was in jail, he came out after - - -

7 JUDGE WILSON: Would it be fair - - -

8 MR. COHEN: - - - and was talking about it - - -

9 JUDGE WILSON: - - - would it be fair to say that
10 the legislature was probably imagining that most people who
11 are incarcerated spend more than five minutes in jail?

12 MR. COHEN: Probably.

13 JUDGE WILSON: Okay.

14 MR. COHEN: Yeah, but - - - so here, it - - -
15 it's - - - again, this was a short period, it was sixty
16 days in jail. He - - - he came and spoke to them. And a
17 reading of the complaint, it does - - - it is not a
18 reapplication. I - - - I'll even point out even - - - even
19 though this is - - - this really isn't part of the record,
20 in the initial briefing papers, the very first line of the
21 opposition from plaintiff referred to it as a suspension.
22 It - - - there's no way or in this - - - in the complaint,
23 that - - - that it's in - - - it's an application. He - -
24 - he got out of jail, and he's having this conversation - -
25 -



1 JUDGE RIVERA: But again, aren't you then sort of
2 having the challenge of addressing, what I believe was
3 Judge Fahey's line of questioning, that that's his factual
4 assertion - - -

5 MR. COHEN: Yeah.

6 JUDGE RIVERA: - - - your company has a different
7 view of these conversations and what occurred. It's a
8 factual dispute, you can't resolve this on this motion.
9 That's why I asked you about your second line of
10 argumentation - - -

11 MR. COHEN: Yeah - - -

12 JUDGE RIVERA: - - - which I understood to be as
13 a question of law, not as a question of fact.

14 MR. COHEN: Yeah.

15 JUDGE RIVERA: Which would then mean regardless
16 of the facts, take it as he argues it. It doesn't matter
17 because the statute doesn't apply.

18 MR. COHEN: Correct. No, I - - - I - - - I agree
19 it does. Like - - - like I said, if - - - if - - - if what
20 plaintiff is looking to apply the statute and the way
21 plaintiff wants to do it here, the - - - the prior
22 conviction language would be rendered obsolete. Nobody
23 would be able to terminate an employee that's convicted
24 during their employment for the simple reason being two
25 minutes later they could walk back and reapply. And it - -



1 -

2 JUDGE RIVERA: So if it didn't have that word - -

3 -

4 MR. COHEN: Um-hum.

5 JUDGE RIVERA: - - - whatever way the phrase is
6 found in - - -

7 MR. COHEN: Yeah.

8 JUDGE RIVERA: - - - in the statute - - -

9 MR. COHEN: Um-hum.

10 JUDGE RIVERA: - - - do you concede then that he
11 would be right?

12 MR. COHEN: If it didn't have that word, yeah.
13 But it's an important word.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. COHEN: Thank you.

16 CHIEF JUDGE DIFIORE: Counsel, you have one
17 minute of rebuttal time.

18 MR. GOLDMAN: Thank you, Your Honor.

19 CHIEF JUDGE DIFIORE: You're welcome.

20 MR. GOLDMAN: Very briefly, to - - - to answer
21 the question about the date. It's - - - it's not
22 specifically in the record, but if you would like the
23 specific date, I - - - I do have it for, Your Honor.

24 JUDGE GARCIA: Counsel, on that point, just to
25 clarify something. I think it was Judge Fahey, though, who



1 was asking about it, and I want to understand if I - - - if
2 I have your argument right. If somebody, hypothetical,
3 gets convicted, you know, assaulting a child, let's say,
4 and they get one month, and you terminate them for job
5 abandonment. Your position would be that, just that part,
6 is okay under the statute?

7 MR. GOLDMAN: Yes, Your Honor.

8 JUDGE GARCIA: Now that same person gets
9 convicted of that same crime and for whatever reason they
10 get no jail time. You can terminate them or not terminate
11 them based on the conviction alone without the job
12 abandonment part?

13 MR. GOLDMAN: Well, you - - - you could terminate
14 them for - - - for any reason. And again, it's we're - - -
15 we're - - -

16 JUDGE GARCIA: So it's not the question of fact
17 whether it's abandonment or just the conviction?

18 MR. GOLDMAN: Well, a - - - a - - - a couple
19 points. I - - - I think the fact that they fired him for
20 job abandonment is relevant to - - - to the extent that - -
21 - to the - - - to the extent that when he comes back and
22 reapplies, and now they're calling it a conviction - - -

23 JUDGE GARCIA: Well, I understand that argument -
24 - -

25 MR. GOLDMAN: Right.



1 JUDGE GARCIA: - - - but just in terms of would
2 it be a violation of the statute, it doesn't matter if it's
3 abandonment or just based on the conviction?

4 MR. GOLDMAN: Well, a - - - again, if they're
5 saying abandonment is pretext for the conviction, then it
6 might make a difference. But if it was actually for
7 abandonment - - -

8 JUDGE GARCIA: Well, no, but let's say they - - -
9 they just say conviction, I'm terminating - - -

10 MR. GOLDMAN: Yep.

11 JUDGE GARCIA: - - - you because you were
12 convicted; is that a violation of the statute?

13 MR. GOLDMAN: No, it's not, Your Honor.

14 JUDGE GARCIA: Okay.

15 MR. GOLDMAN: It's not, Your Honor.

16 JUDGE GARCIA: So it's not a question of fact,
17 their reason, whether it's abandonment or the conviction
18 alone, the termination part?

19 MR. GOLDMAN: Right. Exactly. The reason for
20 the prior determination is not necessarily a relevant
21 factual dispute here. The factual question that's relevant
22 is whether - - - whether the complaint amply alleges that
23 he was terminated before the made the application.

24 JUDGE GARCIA: And what if the employer said, you
25 know, I realized during this time I only need three people



1 for this job rather than four?

2 MR. GOLDMAN: Okay. I mean, that would raise a
3 factual issue as to their motivations. And again that's
4 not what's alleged in this complaint. I agree. Like I
5 said before, there might be some extreme examples, there
6 might be significant factual issues that arise in these
7 cases. But the legal question that's before the court, and
8 on which it went off below, is whether the statute applies
9 in these factual circumstances.

10 JUDGE GARCIA: Okay.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 MR. GOLDMAN: Thank you very much, Your Honors.

13 (Court is adjourned)

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