

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2014

(Submitted: February 19, 2015 Decided: September 4, 2015)

Docket No. 14-713-cv

JUAN E. CORTES,
Plaintiff-Appellant,

v.

MTA NEW YORK CITY TRANSIT,
Defendant-Appellee.*

B e f o r e: WINTER, POOLER, and SACK, Circuit Judges.

Appeal from a grant of summary judgment by the United States District Court for the Eastern District of New York (Eric N. Vitaliano, Judge) dismissing appellant's claims under the Americans with Disabilities Act. We clarify the effect of prior administrative proceedings and arbitration awards in the dispute leading to the litigation and affirm in part, vacate in part, and remand.

Stewart Lee Karlin (Natalia Kapitonova on the brief), The Law Offices of Stewart Lee Karlin, P.C., New York, NY, for Plaintiff-Appellant.

* The Clerk of the Court is directed to amend the case caption accordingly.

1 Robert Kenneth Drinan (Lewis S.
2 Finkleman and Kristen M. Nolan on
3 the brief), New York City Transit
4 Law Department, Brooklyn, NY, for
5 Defendant-Appellee.
6

7 WINTER, Circuit Judge:

8 Juan E. Cortes appeals from Judge Vitaliano's grant of
9 summary judgment to MTA New York City Transit ("MTA"), dismissing
10 appellant's claims under the Americans with Disabilities Act
11 ("ADA"), 42 U.S.C. §§ 12112-12117. Before bringing the present
12 action, appellant filed a substantially similar disability
13 discrimination claim with the New York State Division of Human
14 Rights ("NYSDHR"), which dismissed it. Based on Collins v. New
15 York City Transit Authority, 305 F.3d 113 (2d Cir. 2002), the
16 district court gave almost preclusive weight to the NYSDHR's
17 dismissal of this claim. Because Collins addresses only the
18 effect of arbitration awards under a collective bargaining
19 agreement and does not apply to the decisions of state
20 administrative agencies, we vacate and remand the dismissal of
21 appellant's disability discrimination claim. However, we affirm
22 the dismissal of appellant's retaliation claim.

23 BACKGROUND

24 This is an appeal from a grant of summary judgment, and we
25 view the factual record in the light most favorable to appellant.
26 McGuinness v. Lincoln Hall, 263 F.3d 49, 52 (2d Cir. 2001).
27

1 On July 11, 1994, MTA hired appellant as a train conductor.
2 He was promoted to passenger train operator in 1998. In late
3 2001, he became a work train (no passengers) operator. On
4 October 15, 2006, appellant had a dispute with a supervisor. On
5 that day or soon thereafter, he also injured his back. A
6 subsequent MRI showed injury to four lumbar discs, and
7 appellant's personal doctor ordered him not to work from November
8 3, 2006 until January 7, 2007.

9 Appellant's employment was governed by a collective
10 bargaining agreement ("CBA") that required him, before returning
11 to work, to undergo a full physical evaluation at MTA's Medical
12 Assessment Center ("MAC") and to obtain a fit-for-duty
13 certificate. On January 7, 2007, in the course of the physical
14 evaluation, an EKG test revealed a potentially dangerous cardiac
15 abnormality. MAC doctors barred appellant from operating trains
16 until he had undergone complete cardiac testing. Because
17 appellant's job was "safety sensitive," the MTA determined that
18 there were no train-operator duties appellant could perform until
19 he was medically cleared.

20 Appellant's doctor confirmed the abnormal EKG and referred
21 him to a cardiologist, Dr. Jane Levine. On March 5, 2007,
22 appellant submitted documentation to MAC showing that Dr. Levine
23 confirmed the coronary artery disease diagnosis and, as a result,
24 he could not perform train-operator duties. Dr. Levine

1 recommended additional diagnostic procedures including a nuclear
2 stress test and a cardiac catheterization or, alternatively, a
3 cardiac CT angiogram.

4 On March 20, 2007, appellant met with MAC doctors again.
5 The stress test revealed coronary artery disease, but appellant
6 refused to undergo a catheterization. Appellant claimed that he
7 refused catheterization only because was waiting for his
8 insurer's approval of an angiogram. Because appellant had not
9 provided the requisite documentation, MAC doctors left the work
10 restrictions in place and gave him until May 15, 2007 to submit
11 the results of an angiogram. Appellant failed to submit the
12 results by the deadline. Consequently, his work restrictions
13 were changed from temporary to permanent, which allowed him to be
14 reclassified to a position encompassing duties he was physically
15 fit to perform.

16 In late August 2007, appellant received the results of the
17 angiogram, which revealed no heart or artery disease. Appellant,
18 however, did not give these results to the MTA and missed a
19 September 25, 2007 appointment with MAC for a reclassification
20 evaluation. At a rescheduled appointment on November 28,
21 appellant produced the August diagnostic results. On March 31,
22 2008, based on the new information, the MTA doctors altered
23 appellant's work restrictions to allow him to operate work (non-
24 passenger) trains, as he had done since 2001.

1 On April 16, 2007, during the various medical examinations,
2 appellant's counsel filed a complaint with the NYSDHR, claiming
3 the MTA had illegally discriminated against him under state and
4 federal law by failing to accommodate his disability, i.e., his
5 cardiac problem and neck injury. On January 23, 2009, the NYSDHR
6 issued a decision holding that appellant had not met his burden
7 of proof on the discrimination claim. The NYSDHR found, in
8 relevant part, the following facts. Appellant had not complied
9 with the CBA requirement that he obtain a fit-for-duty
10 certificate from MAC to return to work. Although the MTA was
11 ready to consider lifting appellant's job restriction if further
12 testing ruled out a heart condition serious enough to endanger
13 passengers, appellant failed to submit the diagnostic results in
14 a timely manner. As soon as appellant submitted the results of
15 the further cardiac testing, the MTA modified his work
16 restrictions and allowed him to return to operating work trains.
17 Because appellant could not fulfill the essential duties of his
18 safety-sensitive position as passenger train operator without
19 medical clearance, the NYSDHR concluded that no reasonable
20 accommodation would have been possible. The NYSDHR further noted
21 that appellant never requested an accommodation for his
22 disability. The NYSDHR opinion became final on January 25, 2010.
23 The EEOC adopted its findings on June 10, 2012. 42 U.S.C. §
24 2000e-5(b) ("[T]he Commission shall accord substantial weight to

1 the final findings and orders made by state or local authorities
2"). Appellant did not challenge the NYSDHR's decision
3 administratively or in state court.

4 On September 10, 2010, appellant commenced the present
5 action by filing a pro se complaint against the MTA in the
6 Eastern District of New York. The complaint asserted claims
7 under Title VII, the ADEA, and the ADA.¹ 42 U.S.C. §§ 2000e to
8 2000e-17, 29 U.S.C. §§ 621-634, 42 U.S.C. §§ 12112-12117. The
9 only facts alleged in the complaint were that "[I] have never had
10 a medical appeal of my case according to our collective
11 bargaining agreement" and "I had a neck injury 12-26-1996 and
12 believe the Transit Authority is retaliating against me because
13 of this." J. App'x at 13. The complaint did not assert
14 discrimination because of appellant's back or cardiac conditions
15 or retaliation because of his NYSDHR complaint.

16 The MTA moved for summary judgment, submitting, inter alia,
17 a copy of the NYSDHR/EEOC order. In response to the MTA's Rule
18 56.1 statement of material facts, appellant admitted that he had
19 filed an NYSDHR complaint alleging that the MTA discriminated
20 against him on the basis of his initial injury and his cardiac
21 condition. He also conceded that the NYSDHR had held a hearing

¹ Cortes withdrew his ADEA and Title VII claims and proceeded only on his ADA claim. The district court nevertheless addressed and granted summary judgment to the defendants on Cortes's Title VII claims. We therefore have addressed neither those portions of the district court's opinion nor Cortes's Title VII claims on appeal.

1 at which he was represented by counsel and gave sworn testimony.
2 He did not contest any of the NYSDHR's findings of fact.

3 Appellant's response to the MTA's Rule 56.1 statement
4 further stated, for the first time, that the alleged
5 discrimination stemmed not only from an injury sustained at home
6 and a verbal confrontation with a superior, but also from his
7 cardiac condition and a neck injury suffered in 1996. The neck
8 injury pre-dated by many years his promotion from conductor to
9 train operator. He alleged that he was facing disciplinary
10 charges "for being injured." J. App'x at 86. In addition, the
11 parties' summary judgment briefing discussed additional acts of
12 alleged disability discrimination during the period *after* Cortes
13 returned to work, including restricted work assignments and
14 overtime.

15 The district court granted summary judgment to the MTA. The
16 court held that appellant's claims were not precluded by virtue
17 of the NYSDHR's prior administrative ruling based on the same
18 facts. With regard to appellant's disability discrimination
19 claim, the court assigned substantial weight to the NYSDHR's
20 findings of fact because they were the product of an "independent
21 and unbiased" hearing. J. App'x at 121 (quoting Collins, 305
22 F.3d at 115). Relying on this court's opinion in Collins, 305
23 F.3d at 115, the court held that appellant "utterly fail[ed] to
24 confront much less carry" the burden of showing that the NYSDHR's

1 decision was wrong as a matter of fact or that its impartiality
2 was tainted. Instead of presenting the district court with "any
3 evidence related to his 2007-2008 claims that was not already
4 presented," appellant "rehash[ed]" the same facts and arguments
5 he provided to the NYSDHR. Therefore, the court granted the MTA
6 summary judgment on the ADA discrimination claims.

7 Appellant's briefing in the district court also claimed that
8 he was retaliated against for filing a complaint with the NYSDHR.
9 This claim "appear[ed] nowhere in his complaint." J. App'x at
10 122. Nonetheless, because appellant filed the complaint pro se
11 and the court would have granted permission to amend it to add a
12 retaliation claim, the court deemed the retaliation claim as
13 properly before it.

14 However, the district court held that appellant failed to
15 make out a prima facie retaliation case. Although he had filed
16 an NYSDHR complaint, a protected activity of which the MTA had
17 knowledge, and he was put under work restrictions, an adverse
18 employment action, the district court held that appellant had not
19 shown a causal connection between the NYSDHR complaint and the
20 adverse employment action. It concluded that, because the NYSDHR
21 complaint was filed in April 2007 and the claimed retaliation
22 took place 14 months later, there was not even a "tenuous
23 temporal connection" to suggest retaliatory intent. J. App'x at
24 124. The court moreover found that even assuming appellant could

1 show causation, the medical evidence clearly established that the
2 MTA had a non-retaliatory basis to place appellant on work
3 restrictions. Therefore, the MTA was granted judgment on the
4 retaliation claims as well.

5 DISCUSSION

6 We review the district court's grant of summary judgment de
7 novo. See Jackson v. Fed. Express, 766 F.3d 189, 197 (2d Cir.
8 2014). Summary judgment is not appropriate unless there is "no
9 genuine issue as to any material fact" and "the moving party is
10 entitled to a judgment as a matter of law." Anderson v. Liberty
11 Lobby, Inc., 477 U.S. 242, 247-48 (1986). To survive summary
12 judgment, the nonmovant must merely show that "reasonable minds
13 could differ as to the import of the evidence . . . in the
14 record." R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir.
15 1997) (internal quotation marks omitted).

16 a) ADA Claim

17 Appellant argues that the district court misapplied Collins
18 and our caselaw regarding the weight to be given the NYSDHR
19 ruling. Collins concerns the effect of binding arbitration
20 pursuant to a collective bargaining agreement to which the
21 employer was a party on a Title VII claim.² The district court

² We treat Collins and the other Title VII cases cited in this opinion as applicable to Cortes's ADA claim because "the ADA explicitly incorporates all of the enforcement powers, remedies, and procedures of Title VII." Smith v. Perkins Bd. Of Educ., 708 F.3d 821, 827-28 (6th Cir. 2013); cf. Joseph V. Athanasopoulos,

1 appears to have equated such binding arbitration to a decision of
2 a state administrative agency. We agree that this was error and
3 write to clarify the difference.

4 “ADA employment discrimination claims are subject to the
5 familiar burden-shifting analysis established by the Supreme
6 Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973):
7 A plaintiff must establish a prima facie case; the employer must
8 offer through the introduction of admissible evidence a
9 legitimate non-discriminatory reason for the discharge; and the
10 plaintiff must then produce evidence and carry the burden of
11 persuasion that the proffered reason is a pretext.” Sista v. CDC
12 Ixis N. Am., Inc., 445 F.3d 161, 169 (2d Cir. 2006) (citing
13 Heyman v. Queens Vill. Comm. for Mental Health for Jamaica Cmty.
14 Adolescent Program, 198 F.3d 68, 72 (2d Cir. 1999)).

15 A plaintiff establishes a prima facie case of discrimination
16 by demonstrating that he “suffered an adverse employment action
17 under circumstances giving rise to an inference of discriminatory
18 intent.” Maraschiello v. City of Buffalo Police Dep’t, 709 F.3d
19 87, 92 (2d Cir. 2013) (internal quotation marks and ellipses
20 omitted). Once the plaintiff shows this, the burden shifts to
21 the employer to articulate “some legitimate, nondiscriminatory
22 reason for the adverse employment action.” Id. (internal
23 quotation marks omitted).

648 F.3d 58, 64 (2d Cir. 2011) (“[W]e are aware of no distinction between the [ADA and Title VII] that would require affording a state court judgment a different preclusive effect.”).

1 We will assume, without deciding, that appellant established
2 a prima facie case by alleging that he was not allowed to return
3 to work after being injured as well as alleging discriminatory
4 treatment upon his initial return to work.³ With respect to the
5 first issue, the MTA countered with the NYSDHR's findings of fact
6 as evidence of a legitimate non-discriminatory reason for barring
7 appellant from working. The burden then shifted to appellant to
8 produce evidence showing that the various reasons relied upon by
9 the NYSDHR were a pretext. In response, appellant made arguments
10 substantially similar to those he made in proceedings before the
11 NYSDHR.

12 A claimant may bring federal ADA and Title VII claims even
13 if they have been rejected in a state administrative proceeding.
14 See Joseph v. Athanasopoulos, 648 F.3d 58, 62, 64 n.6 (2d Cir.
15 2011); see also Staats v. Cty. of Sawyer, 220 F.3d 511, 514 (7th
16 Cir. 2000); Thomas v. Contoocook Valley Sch. Dist., 150 F.3d 31,
17 39 n.5 (1st Cir. 1998) (The ADA incorporates Title VII deferral
18 procedures; therefore, Title VII precedents "apply with equal
19 force in the ADA context").

³ Despite the parties' briefing on this issue, the district court did not consider Cortes's allegations of disability discrimination upon his return to work in the form of restricted work assignments and overtime, instead apparently considering these contentions relevant only to appellant's retaliation claim. Although we take no position on the merits of these post-return allegations or whether they are properly exhausted, the district court is instructed to consider them on remand as part of its consideration of appellant's disability discrimination claim.

1 Because we do not give preclusive effect to state agency
2 decisions unless they have been reviewed in a state court
3 proceeding, see Nestor v. Pratt & Whitney, 466 F.3d 65, 73 (2d
4 Cir. 2006) (citing Univ. of Tenn. v. Elliott, 478 U.S. 788
5 (1986)), an unreviewed NYSDHR decision is not binding on a trier
6 of fact in an ADA action. The unreviewed findings of an agency
7 are, however, admissible as evidence under Fed. R. Evid.
8 803(8)(A)(iii) as “factual findings from a legally authorized
9 investigation” by a public office. See also Arroyo v. WestLB
10 Admin., Inc., 54 F. Supp. 2d 224, 230 (S.D.N.Y. 1999), aff’d, 213
11 F.3d 625 (2d Cir. 2000); Henry v. Daytop Vill., Inc., 42 F.3d 89,
12 96 (2d Cir. 1994).

13 Discrimination claims are also often brought in federal
14 court after being submitted to binding arbitration pursuant to a
15 collective bargaining agreement. In that context, we have held
16 that “a decision of an independent and unbiased arbitrator based
17 on substantial evidence after a fair hearing . . . has probative
18 weight regarding the requisite causal link between an employee’s
19 termination and the employer’s illegal motive.” Collins, 305
20 F.3d at 115. When an employee submits his claim of unlawful
21 treatment to arbitration, “a decision by an independent tribunal
22 that is not itself subject to a claim of bias will attenuate a
23 plaintiff’s proof of the requisite causal link.” Id. at 119.
24 Therefore, when an arbitrator’s “decision follows an evidentiary

1 hearing and is based on substantial evidence, the Title VII
2 plaintiff, to survive a motion for summary judgment, must present
3 strong evidence that the decision was wrong as a matter of fact
4 -- e.g. new evidence not before the tribunal -- or that the
5 impartiality of the proceeding was somehow compromised." Id.

6 The district court appears to have equated binding
7 arbitration and judicially unreviewed agency findings. It held
8 that, based upon Collins, appellant "utterly fail[ed] to confront
9 much less carry" the burden of showing that the NYSDHR's decision
10 was factually wrong or biased. J. App'x at 121. Although it is
11 not clear that application of the distinction between binding
12 arbitration under a collective bargaining agreement and an agency
13 decision would alter the outcome in this particular case, we
14 expressly reject the view that Collins applies to agency
15 decisions.

16 In Collins, the appellant had challenged his termination by
17 his employer through his collective bargaining agreement's multi-
18 step grievance procedure ending in binding arbitration. 305 F.3d
19 at 115-16. His grievance claimed racial discrimination and
20 retaliation. Id. The arbitration board upheld the termination.
21 Id. at 117. In Collins, we held that the appellant failed to
22 make out a prima facie case under Title VII because he did not
23 show a causal link between the employer's alleged bias and his
24 termination. Id. at 119.

1 Collins had “challenged the Transit Authority's decision to
2 fire him and was finally discharged only after the arbitration
3 board made an independent inquiry, including the taking of
4 evidence.” Id. at 118. The arbitration board was a “fully
5 independent and unbiased decisionmaker.” Id. at 119. We further
6 noted that “the CBA established [the arbitration] process both to
7 deprive the Transit Authority of the power to terminate an
8 employee unilaterally and to ensure fair and probatively sound
9 decisions for aggrieved employees.” Id. “Appellant's
10 termination occurred, therefore, only after a decision, based on
11 substantial evidence, of an undisputedly independent, neutral,
12 and unbiased adjudicator that had the power to prevent the
13 termination. This fact is highly probative of the absence of
14 discriminatory intent in that termination.” Id.

15 In Collins, therefore, we held only that while “a negative
16 arbitration decision rendered under a CBA does not preclude a
17 Title VII action by a discharged employee[,] . . . a decision by
18 an independent tribunal that is not itself subject to a claim of
19 bias will attenuate a plaintiff's proof of the requisite causal
20 link.” Id. (internal citation omitted). Under such
21 circumstances, when an arbitral decision “follows an evidentiary
22 hearing and is based on substantial evidence, the Title VII
23 plaintiff, to survive a motion for summary judgment, must present
24 strong evidence that the decision was wrong as a matter of fact

1 -- e.g. new evidence not before the tribunal -- or that the
2 impartiality of the proceeding was somehow compromised." Id.

3 We note here that Collins is applicable only to decisions of
4 a tribunal to which an employer has contractually surrendered the
5 final power to discipline or discharge employees. The analysis
6 Collins requires is the same as that required in all Title VII or
7 ADA cases regarding a causal connection between the prohibited
8 motive and the adverse employment action. If a company's Vice-
9 President for sales is discharged, the bias of a janitorial
10 foreman will be irrelevant because the foreman is not the
11 decision-maker regarding the Vice-President's employment.
12 Similarly, when the final decision on discipline or discharge is
13 made by an arbitrator whose lack of bias is conceded, enough
14 evidence linking the employer's motive and the arbitration
15 decision must be proffered to allow a reasonable trier of fact to
16 find that the decision was affected by acts resulting from that
17 motive. In this case, appellant did not submit to binding
18 arbitration under his CBA. Therefore, appellant was not required
19 to meet the burden established by Collins for Title VII
20 plaintiffs to survive a motion for summary judgment or at trial.

21 Again, the NYSDHR's findings are admissible evidence, and we
22 hold only that consideration of them on a motion for summary
23 judgment, or, if appropriate, at a trial, is not governed by

1 Collins. We of course intimate no view on the outcome of further
2 proceedings on summary judgment.

3 b) Retaliation Claim

4 On the retaliation claim, appellant did not make out a prima
5 facie case. While he participated in a protected activity known
6 to the MTA and suffered an adverse employment action, we agree
7 with the district court that he failed to proffer enough evidence
8 to support a finding of a causal connection between the protected
9 activity and the adverse employment action. See Gorman-Bakos v.
10 Cornell Coop. Extension of Schenectady Cty., 252 F.3d 545, 554
11 (2d Cir. 2001) (collecting cases). The filing of the NYSDHR
12 complaint in April 2007 is too remote from the alleged adverse
13 employment action in June 2008 to support by itself an inference
14 of retaliation. The record indicates no other retaliatory
15 behavior. Indeed, appellant was allowed to return to work after
16 he produced the appropriate diagnostic results.⁴ Thus, we affirm
17 the district court's dismissal of appellant's retaliation claim.

18 CONCLUSION

19 For the foregoing reasons, the judgment of the district
20 court is affirmed as to appellant's retaliation claims, but the
21 dismissal of the ADA discrimination claims is vacated and
22 remanded.

⁴ Appellant does not argue that those results entitled him to return to passenger-train operation.