

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of September, two thousand twenty-six.

Present:

REENA RAGGI,
DENNY CHIN,
WILLIAM J. NARDINI,
Circuit Judges.

NICOLE SMITH,

Plaintiff-Appellant,

v.

25-1978-cv

ROSWELL PARK CANCER INSTITUTE
CORPORATION, DBA ROSWELL PARK
CANCER INSTITUTE, (ROSWELL PARK
COMPREHENSIVE CANCER CENTER),

Defendant-Appellee.

For Plaintiff-Appellant:

HARVEY P. SANDERS, Sanders & Sanders,
Cheektowaga, N.Y.

For Defendant-Appellee:

KATHLEEN HANNON MCGRAW (Michael E. Hickey,
Paige M. Roseman, *on the brief*), Bond, Schoeneck &
King PLLC, Buffalo, N.Y.

Appeal from a judgment of the United States District Court for the Western District of New York (Geoffrey W. Crawford, *District Judge*).¹

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Nicole Smith appeals from a judgment of the United States District Court for the Western District of New York (Geoffrey W. Crawford, *District Judge*) entered on July 16, 2025, dismissing a complaint she had brought against her former employer, Roswell Park Cancer Institute Corporation (“Roswell Park”), where she had worked as a medical records clerk. In 2021, New York State required health care workers to get a COVID-19 vaccine or secure an exemption, *see* N.Y. Comp. Codes R. & Regs. (“NYCRR”) tit. 10, § 2.61 (2021), and Roswell Park announced to its employees (including Smith) that they were required to comply with the vaccine mandate. Smith requested an exemption, submitting a form on which her physician indicated that she suffered from psoriatic arthritis and psoriasis of the scalp. After Roswell Park denied the request and terminated Smith for failing to comply with the vaccine mandate, Smith brought suit in the Western District of New York. Smith claims that Roswell Park violated her rights under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, as well as the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 296 *et seq.*, in two ways: (1) that Roswell Park discriminated against her on the basis of a disability when (a) it failed to provide her with a reasonable accommodation for her health condition—namely, a medical exemption from the vaccine mandate; and (b) it terminated her employment after she failed to get a COVID-19 vaccine; and (2) that Roswell Park’s termination of her employment constituted retaliation against her for requesting the accommodation. The district court dismissed the

¹ Sitting by designation from the United States District Court for the District of Vermont.

complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). We assume the parties' familiarity with the case.

We review *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *See Kellogg v. Nichols*, 170 F.4th 20, 24 (2d Cir. 2026). In doing so, "[w]e consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *Santos v. Kimmel*, 154 F.4th 30, 33 (2d Cir. 2025).² This includes the medical exemption request that Smith attached to her complaint. App'x at 27. A complaint must be construed liberally, with all factual allegations accepted as true, and all reasonable inferences drawn in the plaintiff's favor. *See Clark v. Hanley*, 89 F.4th 78, 90–91 (2d Cir. 2023). Even so, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and contain more than "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

I. Discrimination

To establish a *prima facie* case of employment disability discrimination under the ADA, a plaintiff must demonstrate: "(1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability." *McMillan v. City of New York*, 711 F.3d 120, 125 (2d Cir. 2013). An employer may also violate the ADA by failing to provide a reasonable accommodation. *Id.* To establish a *prima facie* case of failure to accommodate under the ADA, a plaintiff must demonstrate: "(1) [the] plaintiff is a person with a disability under the meaning of the ADA; (2) an

² Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

employer covered by the statute had notice of his disability; (3) with reasonable accommodations, [the] plaintiff could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations.” *Id.* at 125–26.

A. Failure to Accommodate

Smith contends that her psoriasis constitutes a disability that precluded her from getting a COVID-19 vaccine, and that her employer was required to accommodate that disability by allowing her to work without getting a vaccine. But the ADA does not require an employer to provide an accommodation if it imposes an “undue hardship” on the employer. *McMillan*, 711 F.3d at 128. We have held that “an accommodation that would require an employer to violate the law” would impose precisely such an undue hardship, and that an employer is therefore not liable under anti-discrimination laws for failing to provide such an accommodation. *Russo v. Patchogue-Medford Sch. Dist.*, 129 F.4th 182, 186 (2d Cir. 2025) (rejecting failure-to-accommodate claim under Title VII based on employer’s refusal to grant religious exemption from COVID-19 vaccine mandate because plaintiff’s “requested exemption from in-person work without vaccination or testing would have placed the [defendant] in violation of 10 NYCRR § 2.62”); *see also Bey v. City of New York*, 999 F.3d 157, 168 (2d Cir. 2021) (“An accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation promulgated by a federal agency.”). Smith offers two reasons why New York law did not require her to get a COVID-19 vaccine (and hence why Roswell Park could have reasonably accommodated her by allowing her to work without the vaccine), but neither reason is persuasive.

First, Smith argues that, by virtue of her position at Roswell Park, she did not qualify as covered “personnel” subject to New York’s COVID-19 vaccine mandate in the first place. *See* 10 NYCCR § 2.61(a)(2). She contends that the district court erred in reaching a contrary

conclusion, and that it did so by impermissibly drawing unreasonable inferences against her at the pleading stage of her case. But Smith admitted in her Memorandum in Opposition to the Motion to Dismiss that “Plaintiff does not contest she fell within the covered personnel category as defined by the Regulation.” Dist. Ct. Dkt. No. 18, at 10. Having conceded this issue in the district court, Smith has waived her right to contest it on appeal. “When a party concedes a point before a lower court, it generally waives the issue and cannot thereafter raise an argument on appeal that is contrary to the concession.” *Schneiderman v. Am. Chem. Soc’y*, 172 F.4th 158, 165 n.3 (2d Cir. 2026).

Second, Smith claims that even if she fell within the category of covered “personnel,” she was nevertheless eligible for a medical exemption under the New York law. Section 2.61(d)(1) authorized covered personnel to continue to work without a COVID-19 vaccine if they had a valid medical exemption, based on a certification by a licensed physician or certified nurse practitioner “that immunization with COVID-19 vaccine is detrimental to the health” of the person in question. 10 NYCCR § 2.61(d)(1). “The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards” *Id.* But Smith’s complaint does not adequately allege that a COVID-19 vaccine would have been “detrimental to [her] health” “in accordance with generally accepted medical standards.” *Id.*

Smith relies in part on allegations in her complaint that she suffers from psoriasis and psoriatic arthritis and that, upon information and belief, getting a COVID-19 vaccine might exacerbate those conditions, and cause her to develop a blood clot and consequently a stroke. But “information and belief” is not a substitute for factual allegations that would plausibly support the contention that a vaccine would trigger such health problems. As the district court properly

observed, pleading on information and belief is appropriate in circumstances like these only if “the facts are peculiarly within the possession and control of the defendant.” App’x at 61 (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)). Smith offers no reason to believe that she lacked access to information that could link her conditions to adverse effects of a COVID-19 vaccine, much less that her employer had peculiar control of such information.

Smith also relies on the medical exemption form that she submitted to her employer, which was signed by her primary physician. That form contains a list of conditions that might indicate that getting a COVID-19 vaccine would contravene generally accepted medical standards, but her doctor checked off none of them. In response to the form’s direction to indicate that the vaccine exemption request was based on a condition not reflected in that list, the doctor simply wrote in: “psoriatic arthritis; psoriasis of scalp.” App’x at 27. This spare notation—without any medical explanation (much less a generally accepted one) for why these unlisted conditions would justify not getting the vaccine—is insufficient to plausibly allege that Smith did, in fact, qualify for the vaccine exemption, or that Roswell Park’s failure to afford her such an exemption was discriminatory. Put another way, Smith’s allegations were insufficient to raise above the speculative level her right to relief under the ADA. *See Twombly*, 550 U.S. at 555.

Accordingly, the district court properly dismissed Smith’s ADA claim that her employer denied her a reasonable accommodation.

B. Termination

Smith also challenges the district court’s dismissal of her claim for discrimination based on her termination, after she refused to get a COVID-19 vaccine. As noted above, the third element of an ADA termination claim is that “plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation.” *Kinneary v. City of New York*, 601 F.3d 151,

155–56 (2d Cir. 2010). New York law made a COVID-19 vaccine, or a valid medical exemption, a condition of employment for personnel such as Smith at the times relevant to this complaint. Smith did not receive a COVID-19 vaccine and, as we have concluded, she did not demonstrate her eligibility for a medical exemption. As a result, Smith was not qualified for her job. The district court therefore properly dismissed the claim that her termination constituted discrimination under the ADA.

II. Retaliation Under the ADA

Lastly, Smith appeals the district court’s dismissal of her claim that she was terminated as retaliation for having submitted requests for an accommodation—namely, for a medical exemption to the vaccine requirement. To state a claim for retaliation under the ADA, a plaintiff must allege that “(i) [she] was engaged in protected activity; (ii) the alleged retaliator knew that [the] plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action.” *Natofsky v. City of New York*, 921 F.3d 337, 353 (2d Cir. 2019).

Our Court has held that a plaintiff failed to plausibly plead a claim of retaliation when an employer terminated employees who failed to receive a COVID-19 vaccine after the employer clearly announced that failure to comply with a company-wide (and here, state-dictated) vaccine mandate would result in termination. *See Sharikov v. Philips Med. Sys. MR, Inc.*, 103 F.4th 159, 170 (2d Cir. 2024). “In the Title VII context, which utilizes the same standards as ADA claims, we have held that allegations of adverse actions that occur as a result of generally applicable workplace policies fail to state a retaliation claim because absent allegations of more direct hostile conduct, a reasonable employee would not be dissuaded from taking protected action simply because he is subject to the same policies as other employees.” *Id.* at 171. Here, the allegations

in the complaint demonstrate that Smith's employment was terminated only after she failed to comply with a previously announced directive, of general applicability, that all covered employees obtain a COVID-19 vaccine, and after she failed to demonstrate her eligibility for a medical exemption from that requirement. She has therefore failed to allege any causal connection between her accommodation request and her termination.

Smith's attempts to distinguish her case are unpersuasive. She argues that Roswell Park "escalated its disciplinary response . . . only after [Smith] pursued accommodations." Appellant's Br. at 28. On the contrary, the allegations demonstrate only that Roswell Park delayed its decision, on more than one occasion, to terminate Smith while it gave her a chance to request a medical exemption. Roswell Park sent an email to all its employees announcing the vaccine mandate on August 31, 2021. When Smith informed Roswell Park that she wanted to request a medical exemption, Roswell Park told her it would consider an exemption or accommodation request even if submitted after the September 27, 2021, deadline imposed by New York to receive the first vaccination dose. On September 28, 2021, Roswell Park placed Smith on indefinite unpaid suspension, and the next day, Smith submitted a medical exemption request form. Then, on December 6, 2021, Smith submitted another request for accommodation and referenced the medical information she had already submitted. On approximately December 10, 2021, Roswell Park issued Smith a notice that she was discharged from her employment, citing "misconduct." App'x at 11. The allegations in the complaint show that, far from "escalat[ing]" after Smith indicated that she planned to request a medical exemption, Roswell Park gave her extra time to submit such a request before terminating her employment, and then terminated her as forecast in the email announcing the vaccine mandate.

Accordingly, we affirm the district court's dismissal of Smith's retaliation claim under the ADA.

* * *

Smith raises identical claims of disability discrimination and retaliation under the NYSHRL. Because the same legal standards apply under the NYSHRL and the ADA, *see Noll v. Int'l Bus. Machs. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015), her NYSHRL claims fail for the same reasons we have already set forth.

We have considered Smith's remaining arguments and find them unpersuasive. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk