[Type here]

APPENDIX A

16-3750-cv
Ileen Cain v. Atelier Esthetique Inst. of Esthetics, Inc.

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 3rd day of May, two thousand eighteen.

PRESENT:

RICHARD C. WESLEY,
DENNY CHIN,
Circuit Judges,
JESSE M. FURMAN,
District Judge.[*]

----------x

ILEEN CAIN,

Plaintiff-Appellant,

v. 16-3750-cv

ATELIER ESTHETIQUE INSTITUTE OF ESTHETICS INC.,

Defendant-Appellee,

ATELIER ESTHETIQUE, ANNETTE HANSON, INC., MS. MICHELLE, MS. CHRISTINE, MS. ANN, MS.

---

[*] Jesse M. Furman, United States District Court for the Southern District of New York, sitting by designation.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: February 16, 2018
Docket #: 16–3750cv
Short Title: Cain v. Esthetique

DC Docket #: 13–cv–7834
DC Court: SDNY (NEW YORK CITY)
DC Judge: Francis

NOTICE TO THE BAR

Offsite Video Argument. At this time the Court does not provide offsite video argument.

Recording of Argument. An audio recording of oral argument is available on the Court's website. In addition, a CD of an argument may be purchased for $31 per CD by written request to the Clerk. The request should include the case name, the docket number and the date or oral argument. CDs will be delivered by first class mail unless the request instructs to hold for pick–up or requests Federal Express Service, in which case a Federal Express account number and envelope must be provided.

Court Reporters. Parties may arrange – at their own expense – for an official court reporter to transcribe argument from a copy of the hearing tape or to attend and transcribe the hearing directly. A party must first obtain written consent from opposing counsel – or move the Court for permission – to have the court reporter attend and transcribe the hearing and must provide the calendar clerk written notice, including the name, address and telephone number of the attending reporter and, if applicable, the reporting firm at least one week prior to the hearing date.

Interpreter Services for the Hearing Impaired. Counsel requiring sign interpreters or other hearing aids must submit a written notice to the Calendar Team at least one week before oral argument.

Inquiries regarding this case may be directed to .

KERA, MR. ROCHESTER, MS. CHRISTINE,
SCHOOL RECEPTIONIST, ANNETTE HANSON,
SCHOOL ACCOUNTANT,
Defendants.

----------x

FOR PLAINTIFF-APPELLANT: JOSHUA L. SEIFERT, Joshua L. Seifert PLLC, New York, New York.

FOR DEFENDANT-APPELLEE: NICOLE FEDER, L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City, New York.

Appeal from the United States District Court for the Southern District of New York (Francis, *M.J.*).

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

Plaintiff-appellant Ileen Cain appeals the district court's judgment entered October 25, 2016, in favor of defendant-appellee Atelier Esthetique Institute of Esthetics Inc. ("Atelier"). By opinion and order entered October 21, 2016, following a bench trial, the district court dismissed Cain's disability discrimination claims under 29 U.S.C. § 794 (the "Rehabilitation Act") and the New York City Human Rights Law, N.Y.C. Admin. Code. § 8-101 (the "NYCHRL"). *Cain v. Atelier Esthetique Institute of Esthetics, Inc.*, No. 13 Civ. 7834 (JCF), 2016 WL 6195764 (S.D.N.Y. Oct. 21, 2016). The district court had previously granted summary judgment dismissing Cain's defamation claims by memorandum and order entered April 20, 2016. *Cain v. Atelier Esthetique Institute of*

Esthetics, Inc., 182 F. Supp. 3d 54, 74 (S.D.N.Y. 2016). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

In 2012, Cain was admitted to Atelier, a school that offers programs for students seeking a New York State Esthetician's License.[1] Her application indicated that she would apply for tuition assistance from the Adult Career and Continuing Education Services - Vocational Rehabilitation ("ACCES-VR"), a state agency that provides job placement and training for persons with disabilities.[2]

Cain commenced classes at Atelier on December 5, 2012. She attended classes for approximately one week before she was terminated from the program involuntarily. Cain alleges that she was subject to persistent harassment by her classmates, who mocked her mental health, accused her of making violent threats, and cyberstalked her. She also alleges that disparaging statements were made and repeated by Atelier administrators.

Atelier, however, claims that Cain was disruptive, and exhibited aggressive and threatening conduct towards other students, teachers, and Atelier's Director, Ronald Cary Rochester. Christine Anderson, one of Cain's instructors, reported that she observed Cain speaking to herself in an agitated manner and that

---

[1] An "esthetician," or "aesthetician," is "a person licensed to provide cosmetic skin care treatments and services (such as facials, hair removal, and makeup application)." Aesthetician, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aesthetician (last visited Apr. 6, 2018).

[2] In 2012, ACCES-VR was known as the Office of Vocational and Educational Services for Individuals with Disabilities.

other students complained of the same behavior. Rochester testified that during his two meetings with Cain, she became irate, threatening, and confrontational. Rochester stated that he ultimately terminated Cain from the program because of this aggressive behavior.

Cain, proceeding *pro se*, filed a complaint in district court claiming that she had been terminated because of a perceived disability. Cain also alleged defamation, specifically citing Rochester's statements to Mark Weinstein, Director of ACCES-VR, and Paula Wolff, a supervisor at the Center for Independence of the Disabled - New York ("CID-NY"),[3] that Cain was hallucinating, unable to follow class lessons, agitated and disruptive in class, and exhibited aggressive behavior. Liberally construed, Cain's complaint alleged that Rochester's statements were defamatory *per se*, falling into the category of statements that tend to injure another in her trade, business, or profession.

The district court granted summary judgment to Atelier on Cain's defamation claim on April 20, 2016, and held a bench trial on Cain's remaining claims between September 6 and 16, 2016.[4] Pursuant to its October 21, 2016 opinion and order, the district court dismissed Cain's remaining claims. This appeal followed. This Court granted Cain's motion to proceed *in forma pauperis* and appointed *pro bono* counsel on

---

[3] CID-NY is an advocacy organization where Cain had previously received services. After Atelier terminated Cain, she reached out to CID-NY for help to advocate on her behalf.

[4] The parties consented to have a United States magistrate judge conduct all proceedings in the case. 28 U.S.C. § 636(c).

the issue of whether a student has a trade, business, or profession for the purposes of defamation *per se*.

I. Defamation Claim

On appeal, Cain argues that the district court erred when it granted Atelier summary judgment, holding that Cain could not have been defamed *per se* because she was a student who did not have a trade, business, or profession.

To make a claim for defamation under New York law, the plaintiff must allege "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017) (quoting *Stepanov v. Dow Jones & Co.*, 987 N.Y.S. 2d 37, 41-42 (1st Dep't 2014)). With respect to the fourth element, the alleged harm must "consist of the loss of something having economic or pecuniary value which must flow directly from the injury to reputation caused by the defamation." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 179 (2d Cir. 2000) (citation and internal quotation marks omitted). "Defamation *per se* absolves a plaintiff of the requirement to plead special damages," *Grayson v. Ressler & Ressler*, 271 F. Supp. 3d 501, 518 (S.D.N.Y. 2017), because "the law presumes that damages will result," *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992). This presumption of damages only applies to limited categories of statements, including statements that "tend to injure [a plaintiff's] trade, business or profession." *Id.*

The district court held that extending the doctrine of presumed damages under the "trade, business, or profession" category to students "makes little sense." *Cain v. Esthetique*, 182 F. Supp. 3d at 73. We need not decide the issue. Even assuming that students can as a theoretical matter be defamed in their "trade, business, or profession" and that the remarks here related to Cain's would-be trade or profession, Cain's claim fails because Atelier has an absolute defense to Cain's defamation claim, namely that the statements at issue were true. It is well established that "[f]alsity is an element of defamation under contemporary New York law." *Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 244 (2d Cir. 2017). Thus, "[t]ruth provides a complete defense to defamation claims." *Dillon v. City of New York*, 261 A.D.2d 34, 39 (1999); *see also Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F.2d 141, 146 (2d Cir. 1986) ("[I]t is not necessary to demonstrate complete accuracy to defeat a charge of [defamation]. It is only necessary that the gist or substance of the challenged statements be true.").

As the district court determined after trial, the purportedly defamatory statements were true. The trial court found that "[p]lainly, Ms. Cain appears to suffer from delusions, and although these may be manifestations of her mental disabilities, they resulted in behaviors that rendered her unqualified to participate in Atelier's educational program." *Cain*, 2016 WL 6195764, at *5. The district court found that Cain "'tune[d] out' in class," disrupted instruction by interjecting off-point comments, made

unsubstantiated complaints of harassment about classmates, and became hostile. *Id.* The factual questions of whether Cain acted erratically, aggressively, and inappropriately were squarely litigated at trial, and the district court ruled against Cain in these respects. While these findings were made in the context of the trial court's post-trial rulings on Cain's discrimination claims, nothing in the record suggests that Cain would have produced any additional evidence if the defamation claim had proceeded to trial.

To the extent there were issues of fact presented at the summary judgment stage on the issue of falsity, those factual issues were resolved against Cain at trial. Moreover, under the law of the case doctrine, Cain would be precluded from relitigating these factual determinations in any subsequent proceedings on the defamation claim. *See Devilla v. Schriver*, 245 F.3d 192, 197 (2d Cir. 2001) (purpose of doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit" (citation and internal quotation marks omitted)). While the law of the case doctrine is discretionary and "[t]he appropriateness of applying the law of the case to a jury verdict depends, therefore, on the interpretation and quality of the verdict itself," *id.*, we see no reason to remand this case for the district court to evaluate the "verdict" and exercise its discretion as this was a bench trial, the district court rendered detailed findings of fact based on record evidence, and Cain had a full opportunity to be heard on these factual questions. Accordingly, we affirm

dismissal of this claim. *See, e.g., Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 160 n.6 (2d Cir. 2017) (noting that "[w]e are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the [district] court relied" (alterations in original) (citation and internal quotation marks omitted)).

II. Credibility, Perjury, and Hearsay Claims

In her *pro se* brief, Cain contends that Atelier and its witnesses perjured themselves at trial, and that the district court admitted impermissible hearsay evidence and made improper credibility determinations.

With respect to the perjury and credibility arguments, we review a district court's factual findings for clear error. *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 528 (2d Cir. 2004) (citing Fed R. Civ. P. 52(a)). At a bench trial, the trial court is the finder of fact and makes credibility determinations. *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012). We may not "second-guess either the trial court's credibility assessments or its choice between permissible competing inferences." *Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316 (2d Cir. 2003). Upon review of the record, we conclude that the district court did not commit clear error in its evaluation and assessment of the witnesses, their testimony, and their credibility. Accordingly, we reject the perjury and credibility arguments.

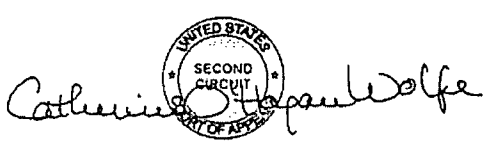
With respect to the hearsay argument, we review a district court's evidentiary rulings for abuse of discretion. *United States v. Wexler*, 522 F.3d 194, 201-02

(2d Cir. 2008). We conclude that the district court did not abuse its discretion by allowing Anderson and Rochester to testify as to complaints of other students. This testimony was not hearsay because it was not offered for the truth of the matter asserted, *see* Fed. R. Evid. 801(c), but rather, provided background information about why Cain and Rochester met and why Rochester was concerned after only a week. The fact that other students *made* complaints about Cain's behavior was relevant. As the district court concluded, "The information actually known to Mr. Rochester when he made the decision to dismiss Ms. Cain was fully sufficient to demonstrate that she was not qualified to continue in Atelier's course of study." *Cain*, 2016 WL 6195764, at *6.

. . .

We have considered Cain's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 18th day of July, two thousand eighteen.

Ileen Cain,

Plaintiff - Appellant,

v.

Atelier Esthetique Institute of Esthetics Inc.,

Defendant - Appellee,

Atelier Esthetique, Annette Hanson, Inc., Ms. Michelle, Ms. Christine, Ms. Ann, Ms. Kera, Mr. Rochester, Ms. Christine, School Receptionist, Annette Hanson, School Accountant,

Defendants.

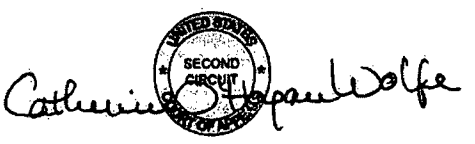
ORDER

Docket No: 16-3750

Appellant, Ileen Cain, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

Cain v. Atelier Esthetique Inst. of Esthetics, Inc.

United States District Court for the Southern District of New York

October 21, 2016, Decided; October 21, 2016, Filed

13 Civ. 7834 (JCF)

Reporter
2016 U.S. Dist. LEXIS 146124 *

ILEEN CAIN, Plaintiff, - against - ATELIER ESTHETIQUE INSTITUTE OF ESTHETICS, INC., Defendant.

Prior History: Cain v. Atelier Esthetique, 2014 U.S. Dist. LEXIS 88115 (S.D.N.Y., June 26, 2014)

Core Terms

disability, terminated, harassed, services, comments, accommodations, after-acquired, cyberstalked, impairment, Disorder, bullying, handicap, provider

Counsel: [*1] Ileen Cain, Plaintiff, Pro se, Brooklyn, NY.

Judges: JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JAMES C. FRANCIS IV

Opinion

OPINION AND ORDER

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Ileen Cain, proceeding pro se, brings this action against Atelier Esthetique Institute of Esthetics, Inc. ("Atelier"). She alleges that the defendant violated Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 et seq. ("Rehabilitation Act"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 et seq. ("NYCHRL") when it terminated her from its educational program.[1] A bench trial was held on four days between September 6 and September 16, 2016, and this opinion constitutes my findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Background

Atelier is a school of esthetics, commonly referred to as a beauty school. Ileen Cain first applied for admission as a student in 2010 and was accepted, but she chose not to attend at that time. Ms. Cain applied again in 2012 and was again accepted, and this time she enrolled. She received tuition assistance from ACCES-

[1] A variety of other state and federal claims were previously dismissed. (Order of Service dated Nov. 26, 2013; Cain v. Atelier Esthetique Institute of Esthetics, Inc., No. 13 Civ. 7834, 2015 U.S. Dist. LEXIS 43652 2015 WL 1499810 (S.D.N.Y. March 27, 2015); Cain v. Atelier Esthetique, No . 13 Civ. 7834, 182 F. Supp. 3d 54, 2016 U.S. Dist. LEXIS 53043, 2016 WL 1599490 (S.D.N.Y. April 20, 2016).

VR,[2] an agency [*2] of the New York State Department of Education that provides job placement and training for persons with disabilities. Ms. Cain began the Atelier program late because of a personal issue and thereafter attended classes for approximately one week. She was terminated from the program involuntarily.

After her dismissal, Ms. Cain filed an administrative complaint with the Office for Civil Rights ("OCR") of the United States Department of Justice. OCR reached a resolution with Atelier pursuant to which Atelier refunded Ms. Cain's tuition. Thereafter, the plaintiff filed the instant action, contending, among other things, that she had been terminated because of a perceived disability. Additional facts will be discussed below in connection with the analysis of the evidence.

Statutory Framework A. Rehabilitation Act

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To state a prima facie claim under the Rehabilitation [*3] Act, a plaintiff must demonstrate: (1) that she is a qualified individual with a disability within the meaning of the statute; (2) that the defendant is subject to the Act; and (3) that she was denied the opportunity to participate in the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant, by reason of her disability. Harris v. Mills, 572 F.3d 66, 73-74 (2d Cir. 2009).

A "qualified individual with a disability" is defined as an individual with a disability who "with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by" the covered entity. 42 U.S.C. § 12131(2); see also McElwee v. County of Orange, 700 F.3d 635, 640 (2d Cir. 2012). An individual may qualify as "disabled" by showing that she is "regarded as having" a disability. 42 U.S.C. § 12102(1)(C); 3 see also 29 U.S.C. § 705(9)(B) (incorporating definition of disability from the Americans with Disabilities Act, 42 U.S.C. § 12102); Zick v. Waterfront Commission of New York Harbor, No. 11 Civ. 5093, 2012 U.S. Dist. LEXIS 144920, 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012).

A person is regarded as having a disability where she establishes that "she has been subjected to an action prohibited under [the statute] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). A "mental impairment" under the [*4] relevant implementing regulations means "[a]ny mental or psychological disorder, such as an intellectual disability . . . , organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2).

B. NYCHRL

[2] At that time, ACCES-VR was known as VESID.

Under the NYCHRL, it is an "unlawful discriminatory practice" for "any place or provider of public accommodation[,] [b]ecause of any person's actual or perceived . . . disability . . . [to] directly or indirectly[] [] refuse, withhold from or deny to such person . . . any of the accommodations, advantages, services, facilities or privileges [thereof]." N.Y.C. Admin. Code § 8-107(4)(a). The NYCHRL defines "provider of public accommodation" to mean "providers . . . of goods, services, facilities, accommodations, advantages or privileges of any kind," and defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." N.Y.C. Admin. Code § 8-102(9), (16)(a). It does not require a showing that a disability, perceived or actual, substantially limits a

major life activity. Reilly v. Revlon, Inc., 620 F. Supp. 2d 524, 541 (S.D.N.Y. 2009).

Pursuant to the NYCHRL, entities such as Atelier are prohibited from denying "accommodations, advantages, services, facilities or privileges" to an individual because of a perceived [*5] disability. N.Y.C. Admin. Code § 8-107(4)(a). "[C]ourts must analyze NYCHRL claims separately and independently from any federal . . . claims." Mihalik v. Credit Agricole Cheuvreux North America, Inc., 715 F.3d 102, 109 (2d Cir. 2013). The NYCHRL creates a lower threshold for actionable conduct and must be construed liberally in favor of discrimination plaintiffs, meaning that a defendant may be liable under the NYCHRL but not under state or federal statutes. Id. at 109-13; see also Anderson v. Davis Polk & Wardwell LLP, 850 F. Supp. 2d 392, 404 (S.D.N.Y. 2012); Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d 881, 884-85, 998 N.E.2d 1050, 976 N.Y.S.2d 426, 428 (2013). Moreover, in assessing claims brought under the NYCHRL, courts should view similar provisions under federal law as "a floor below which the [NYCHRL] cannot fall." Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85, § 1 (2005); see also Loeffler v. Staten Island University Hospital, 582 F.3d 268, 277-78 (2d Cir. 2009).

As under the Rehabilitation Act, in order to establish a claim under the NYCHRL, a plaintiff must show that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305, 819 N.E.2d 998, 786 N.Y.S.2d 382, 390 (2004); accord Melman v. Montefiore Medical Center, 98 A.D. 3d 107, 113, 946 N.Y.S.2d 27, 31 (1st Dep't 2012).

Determination

Ms. Cain satisfies many of the elements for establishing a claim under both the Rehabilitation Act and the NYCHRL. There is no dispute, for example, that [*6] Atelier is an entity governed by both statutes. The plaintiff has qualifying disabilities, including Post-Traumatic Stress Disorder, Major

Depressive Disorder, and Personality Disorder. (Exhs. 17, 21, 35).[3] Furthermore, she was perceived as displaying manifestations of disability. For example, Ronald Corey Rochester, who was Director of Atelier during the relevant period (Tr. at 165),[4] testified that he witnessed Ms. Cain talking to herself as if she were hallucinating.
(Tr. at 181). Those observations are consistent with records of the International Center for Disabled, an organization that had provided her with psychological and social services, which state that she had experienced auditory hallucinations. (Tr. at 30-31, 44-45; Exh. 31).

There is also evidence that Ms. Cain was subjected to an adverse action because of a perceived disability. Dismissal from an educational program is plainly an adverse action. And, as the Second Circuit has held in the context of an employment discrimination claim under section 504, "[t]he causal relationship between disability and decision [*7] need not be direct, in that causation may be established if the disability caused conduct that, in turn, motivated the employer to discharge the employee." Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994); accord Husowitz v. Runyon, 942 F. Supp. 822, 832 (E.D.N.Y. 1996). Here, Mr. Rochester acknowledged that he discharged the plaintiff from Atelier because of behaviors that may have been attributable to mental illness: hallucinations, emotional outbursts, and persistent distractedness. (Tr. at 175, 180-81, 201-03). The issue of "pretext" therefore does not arise in this case, since Atelier does not contend that it discharged Ms. Cain for reasons independent of disability.[4]

The analysis must therefore turn to the issue of qualification. As the Second Circuit has observed, again in connection with an employment case,

> [t]he handicap and its consequences are distinguished for purposes [*8] of § 504 only in assessing whether or not the firing was discriminatory. If the consequences of the handicap are such that the employee is not qualified for the position, then a firing because of that handicap is not discriminatory, even though the firing is "solely by reason of" the handicap.

Teahan v. Metro-North Commuter Railroad Co., 951 F.2d 511, 516 (2d Cir. 1991). In other words, even if Ms. Cain was terminated for conduct related to her disability, Atelier is not liable under § 504 if that behavior demonstrated that she was unqualified to participate in the defendant's program.

The credible evidence clearly demonstrates that Ms. Cain was expelled because she was not qualified to continue in the program. Mr. Rochester, the Director, testified that he met with the plaintiff twice after she commenced classes. (Tr. at 173). Prior to the first meeting, students and teachers had advised Mr. Rochester that her classmates were having difficulty concentrating because Ms. Cain was making distracting comments. (Tr. at 174). She was apparently having trouble keeping up with

[3] Unless otherwise indicated, all references to exhibits refer to evidence received at trial.

[4] "Tr." refers to the trial transcript.

[4] Indeed, in the context of mental illness, demonstrating a motive for an adverse action independent of disability can be particularly challenging. For example, if Atelier had terminated the plaintiff for failing grades, the argument could be made that her academic shortcomings were in turn attributable to her disability, a contention that would be implausible if her disability were, for example, an orthopedic anomaly.

the material, would ask questions after the class had moved on to other subject matter, and would "interject material that was not germane to the topic." (Tr. at 175). When Ms. Cain met with Mr. Rochester, [*9] she complained that other students were bullying her. (Tr. at 175-76). She alleged that when she had previously attended a program at Long Island University, the students there had bullied her, and she suspected that they had "gotten to" the students at Atelier. (Tr. at 176). The plaintiff also asserted that "she had experienced bullying in her housing, her neighbors were requesting that she do things or telling her things or other people talking about her." (Tr. at 176-78). Ms. Cain insisted that Mr. Rochester call the police, but she refused to identify any Atelier students who were purportedly harassing her. (Tr. at 176). When Mr. Rochester declined to contact the police, the plaintiff became "confrontational," "irate," and "threatening," and suggested that whoever was responsible for the bullying had "gotten to" him as well. (Tr. at 178). As the meeting concluded, Ms. Cain stated, "I know how to handle this, I know what to do with people like this . . . ." (Tr. at 178). Mr. Rochester took this to mean that Ms. Cain was considering "physical confrontation or violence." (Tr. at 178-79).

Subsequent to this meeting, Mr. Rochester conducted an observation of one of Ms. Cain's classes. [*10] He noted that "[s]he was towards the back of the class, sitting a bit glazed, not really relating to the class, not taking notes, not reading. She was glazed." (Tr. at 180-81). He also observed her in the hallway "talking and seeming to respond when no one was there. . . . She was scowling, angry, almost having an argument with herself." (Tr. at 181).

Mr. Rochester also spoke with Ms. Cain's teachers about her conduct. One, Christine Anderson, told him that Ms. Cain was making comments that weren't really related to esthetics out of nowhere, that she didn't seem to be following the material. At times, she was very active in saying things and at times seemed not able to --not relating to the classroom at all. At times, looking at the other students and not taking notes. (Tr. at 182).

On the day of her dismissal, Mr. Rochester met with Ms. Cain and told her that when he had observed her class he had not seen evidence of bullying, and he tried to suggest ways for her to adjust to the program. (Tr. at 183). Although Ms. Cain was initially calm, she "became agitated, threatening, aggressive." (Tr. at 183). When Mr. Rochester did not respond to Ms. Cain's demand that he call the police, she stormed [*11] out. (Tr. at 184). Mr. Rochester contacted ACCES-VR and told a supervisor about his observations. (Tr. at 184-85). The supervisor suggested that Ms. Cain be referred back to the agency. (Tr. at 185). Mr. Rochester, accompanied by Ann Pandullo, the financial aid officer for Atelier, then met again with Ms. Cain. (Tr. at 185). At that point, he terminated Ms. Cain from the school. (Tr. at 186).

Ms. Anderson, one of Ms. Cain's instructors, also testified. She remembered little of her interactions with Ms. Cain with one notable exception. On the day that Ms. Cain was dismissed, some of Ms. Anderson's students reported to her that the plaintiff had "threatened other students by saying she was going to do the same thing that the Sandy Hook shooter did to the students at Atelier, and that she would have done it better than the Sandy Hook shooter." (Tr. at 280-81, 284). Ms.

Anderson informed Mr. Rochester of this behavior, though apparently after he had already dismissed Ms. Cain. (Tr. at 28081).

By contrast to the evidence presented by the defendant's witnesses, Ms. Cain's testimony was not credible. She continued to make implausible claims of being harassed and "cyberstalked." (Tr. at 18). [*12] When asked how she knew she was being cyberstalked, she said,

> Because I'm continuously being harassed at different places that I appear. For example, you know that I have been terminated from four schools of higher learning. Over the past several years I'm constantly being bombarded, harassed by different individuals who I don't even know . . . . I have been accused of things I have never done. People appear to know me and I don't know them in institutions of higher learning where I have attended. (Tr. at 20-21).

When asked to define "cyberstalking," Ms. Cain stated:

> Cyberstalking is a form of electronic harassment used by social media. It's something that individuals use to target an individual by posting comments about that person, making lies, telling lies about the person, changing the person's character, the person's identity. This is used during social media. It's something that is instantaneous. It's something that reaches the four corners of the population, the entire world. It is a form of electronic harassment as opposed to the common stalker which is more in person, someone who is actually physically tracking you or stalking you.

(Tr. at 21). Although she has never participated [*13] in social media, Ms. Cain insisted that the students at Atelier were cyberstalking her and referring to her using a number of incomprehensible epithets. (Tr. at 22-23).

Education professionals are entitled to deference in determining whether an individual is qualified to participate in an academic program. See Powell v. National Board of Medical Examiners, 364 F.3d 79, 88 (2d Cir. 2004); Roggenbach v. Touro College of Osteopathic Medicine, 7 F. Supp. 3d 338, 345-46 (S.D.N.Y. 2014). In this context, "deference must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons." Doe v. New York University, 666 F.2d 761, 776 (2d Cir. 1981), superseded on other grounds by Zervis v. Verizon New York, Inc., 252 F.3d 163 (2d Cir. 2001). Based on his personal observations as well as credible information he had received from others, Mr. Rochester's decision to terminate the plaintiff from Atelier was a rational one and was not based on discriminatory animus. Plainly, Ms. Cain appears to suffer from delusions, and although these may be manifestations of her mental disabilities, they resulted in behaviors that rendered her unqualified to participate in Atelier's educational program. A student who "tunes out" in class, who disrupts instruction by interjecting comments that are off-point, who makes unsubstantiated complaints of harassment about her classmates, [*14] and who becomes hostile when she believes that those complaints are not properly addressed is

not qualified to continue in an academic environment.[5]

Thus, Mr. Rochester's dismissal of Ms. Cain was lawful based on the information he had at the time he made the decision. And his judgment was confirmed by the information he subsequently learned from Ms. Anderson about Ms. Cain's comments alluding to the Sandy Hook massacre. In the context of most antidiscrimination laws, after-acquired evidence may be used to cut off damages after the point the information is learned, but it does not operate to relieve a defendant from all liability. See McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358, 361-62, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995). With respect to laws prohibiting discrimination on the basis of disability, the analysis may be more subtle. To the extent that the after-acquired evidence is independent of disability, the general [*15] rule applies. For example, an employee who is terminated because she has a seizure disorder would not be barred from all recovery if it is later discovered that she committed misconduct by violating her employer's policy governing computer use; she would, however, be precluded from obtaining front pay or similar relief for the period after her misconduct is discovered. See Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005) (limiting remedies but not precluding liability where truck driver alleging discrimination based on disability found not to have driver's license); Williamson v. Ball Healthcare Services, Inc., Civ. A. No. 14-552, 2016 U.S. Dist. LEXIS 106212, 2016 WL 4257554, at *7-9 (S.D. Ala. Aug. 11, 2016) (limiting remedies but allowing claim to proceed where it is later discovered that disability plaintiff made misleading and incomplete statements in employment application process); Seegert v. Monson Trucking, Inc., 717 F. Supp. 2d 863, 869-70 (D. Minn. 2010) (holding disability claim not entirely precluded where plaintiff found to have made false statements about health history at time of employment application).

But where the after-acquired evidence does relate to the plaintiff's disability, some courts hold that it may preclude a finding of liability altogether. This is because such evidence may demonstrate that a plaintiff is not "otherwise qualified": the "[p]laintiff bears the burden of proving qualifications, without reference to knowledge by the [*16] defendant, and [the] defendant may use any otherwise admissible evidence to undercut this proof." E.E.O.C. v. Fargo Assembly Co., 142 F. Supp. 2d 1160, 1164-65 (D.N.D. 2000). I need not determine, however, whether this exception to general principle governing after-acquired evidence is warranted. The information actually known to Mr. Rochester when he made the decision to dismiss Ms. Cain was fully sufficient to demonstrate that she was not qualified to continue in Atelier's course of

[5] As discussed above, this analysis is premised on the finding that Ms. Cain's behavior was a manifestation of her disability. If that were not the case, the outcome would be the same, though the analysis would be different. If the conduct at issue were independent of Ms. Cain's disability, then her disability would not have been the sole reason for her dismissal.

study.[6]

Conclusion

For the reasons discussed above, judgment shall be entered in favor of the defendant, dismissing the plaintiff's remaining claims.

SO ORDERED.

/s/ James C. Francis IV

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York

October 21, 2016

End of Document

[6] The impact of the after-acquired evidence rule on this case would be minimal in any event. Because Ms. Cain's threatening comments about Sandy Hook came to light immediately after she had been terminated, the only practical effect of a finding that Mr. Rochester's initial decision had been improper would be to create an entitlement for Ms. Cain to nominal damages and, had she been represented by counsel, to an award of attorneys' fees.

Additional material from this filing is available in the Clerk's Office.