UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROSA COX,

Plaintiff,

-against-

PERFECT BUILDING MAINTENANCE CORP.,

Defendant.

16-CV-7474 (VEC)

OPINION & ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiff Rosa Cox ("Cox") alleges that her former employer, Defendant Perfect Building Maintenance Corp. ("PBM"), discriminated against her in violation of federal, state, and city laws. PBM moves to dismiss Cox's First Amended Complaint ("FAC") pursuant to Fed. R. Civ. P. 12(b)(1) and Rule 12(b)(6), or, in the alternative, to compel mediation and arbitration. Dkt. 9 (the "Motion"). Specifically, PBM argues that Cox's claims are subject to mandatory arbitration pursuant to a collective bargaining agreement (the "CBA") and that her claims are barred by res judicata. Because the Court concludes that res judicata bars Cox's claims, the Motion is GRANTED.

FACTUAL BACKGROUND

A. Plaintiff's Employment and Transfer

For over five years, Cox was employed as a "Light Cleaner" with PBM. FAC ¶¶ 7-8.[1] After a lengthy medical leave, Cox returned to work as a "Light Cleaner," until she was

[1] This Court uses the following abbreviations herein: First Amended Complaint ("FAC"), Dkt. 6; Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Opp. Br."), Dkt. 14; Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss ("Supp. Opp. Br."), Dkt. 19; Defendant's Motion to Dismiss or in the Alternative Compel Arbitration ("Def.'s Motion"), Dkt. 9; Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def.'s Br."), Dkt. 11; and Defendant's Reply Memorandum of Law in Support of Motion to Dismiss ("Def.'s Reply Br."), Dkt. 16.

transferred to another building. FAC ¶¶ 9-10. Cox objected to her transfer. FAC ¶¶ 11-12. Cox alleges that a younger person replaced her and that she was not given a reasonable accommodation consistent with her medical condition. FAC ¶ 14.[2]

B. The CBA and Arbitral Award[3]

Pursuant to the CBA between Cox's Union and the Realty Advisory Board on Labor Relations, Inc., a multi-employer bargaining representative of which PBM is a member, all claims of employment discrimination must be arbitrated. CBA at 112. The parties do not dispute that Cox was a member of the Services Employees International Union, Local 32BJ ("the Union") at the time of these events and that the CBA is applicable to Cox's claims of employment discrimination.

Article XVI of the CBA provides, in relevant part:

> There shall be no discrimination against any present or future employee by reason of . . . age, disability . . . or any characteristic protected by law, including, but not limited to, claims made pursuant to . . . the Americans with Disabilities Act, . . . the Age Discrimination in Employment Act, . . . the New York State Human Rights Law, the New York City Human Rights Code . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Article V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

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[2] Cox alleges claims of disability discrimination and age discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"); the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"); the New York State Human Rights Law, N.Y. Exec. L. § 290 *et seq.* ("NYHRL"); and the New York City Human Rights Law, N.Y.C. Admin. Code § 8 -101 *et seq.* ("NYCHRL").

[3] The CBA was attached as Exhibit C to the Declaration of Harry Weinberg, Dkt. 10, submitted in support of the Defendant's Motion to Dismiss. The Arbitration Award (hereinafter "Award") was attached as Exhibit 1 to the Declaration of Locksley O. Wade, Dkt. 15, submitted in opposition to the Defendant's Motion to Dismiss.

Id. The arbitration procedures set forth in the CBA constitute "the sole and exclusive method for the determination," CBA at 17, of all issues arising from "differences . . . between the parties as to interpretation, application or performance of any part of [the CBA]. . . ." CBA at 15.

Pursuant to the CBA, the Union filed a grievance on Cox's behalf, alleging that Cox "was transferred to a new building without justification." Award at 1. The arbitrator held a hearing and issued a nine-page Award addressing Cox's proposed transfer to another building, the events surrounding her termination, and the evidence (or lack thereof) submitted by both sides. During the arbitration, Cox argued that she should not have been transferred in light of PBM's seniority-based transfer policy. *Id.* at 4. Cox also argued that she was unable to perform [new or alternatively offered] duties due to her medical condition." *Id.* The arbitrator ultimately concluded that Cox's new position was the same as her prior position and that she failed to request a reasonable accommodation, instead "simply cho[osing] not to show up for work." *Id.* at 7. After reviewing the factual record, including witness testimony, the arbitrator denied Cox's grievance and concluded that PBM did not violate the CBA when it transferred Cox to another building. *Id.* at 8.

PBM moved to dismiss the FAC for failure to exhaust administrative remedies, or in the alternative, to compel arbitration. Def.'s Motion. Although the FAC did not mention that she had already arbitrated PBM's transfer decision, in response to PBM's motion to dismiss, Cox asserted that she had already (unsuccessfully) arbitrated her claims, Opp. Br. at 2-3, attached a copy of the Award, and argued that because she had exhausted her administrative remedies, this lawsuit should proceed, Opp. Br. at 1-2. In reply, PBM argued that the FAC should be dismissed based on res judicata. Def.'s Reply Br. at 1-2. Because PBM had not asserted res judicata as a basis for dismissal in its opening brief, the Court granted Cox the opportunity to file a

supplemental reply brief. Dkt. 18. In her Supplemental Reply, Cox argued that the arbitral award could not be given preclusive effect at the Rule 12(b)(6) stage and that a prior arbitration could not preclude a plaintiff from later asserting statutory claims in a judicial forum. Supp. Opp. Br. at 3-4.

For the following reasons, the Court agrees with PBM that Cox's suit is barred by res judicata.

DISCUSSION

A. Legal Standard

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

On a Rule 12(b)(6) motion, the Court must normally confine its analysis to the facts alleged in the plaintiff's complaint. The Court may, however, take judicial notice of a fact outside of the pleadings provided that the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). As such, courts have regularly taken judicial notice of arbitration awards and collective bargaining agreements in considering a motion to dismiss or to compel arbitration. *See, e.g.*, *Gorbaty v. Kelly*, No. 01-CV-8112 (LMM), 2003 WL 21673627, at *2 n.3 (S.D.N.Y. July 17, 2003) (taking judicial notice of an arbitration award); *Granados v. Harvard Maint., Inc.*, No. 05-CV-5489

(NRB), 2006 WL 435731, at *3 n.3 (S.D.N.Y. Feb. 22, 2006) (taking judicial notice of a collective bargaining agreement).

Cox argues that an arbitration award may be considered only in the context of a summary judgment motion, Supp. Opp. Br. at 3-4, but that plainly is not the law. "When a defendant raises claim or issue preclusion, dismissal under Rule 12(b)(6) is appropriate when 'it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.'" *Gorbaty*, 2003 WL 21673627, at *2 (quoting *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000)); *see also Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) ("[W]hen all relevant facts are shown by the court's own records, of which the court takes notice, [a res judicata] defense may be upheld on a 12(b)(6) motion without requiring an answer.").

B. Cox's Claims are Barred by Res Judicata

Cox initially opposed the Motion on the ground that she "raised her statutory claims of employment discrimination [at the arbitration] prior to filing this action." Opp. Br. at 3. PBM argues that if Cox is correct, then her suit is barred by res judicata. Def.'s Reply Br. at 1-2. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Citing *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002), Cox argues that the Award does not preclude her federal suit because she alleges claims of statutory discrimination. Supp. Opp. Br. at 3-4. Cox's argument does not reflect the current state of the law. Relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Second Circuit held that an arbitration award rendered under a CBA did not preclude a federal statutory

discrimination claim. *Collins*, 305 F.3d at 119. The Supreme Court has, however, since clarified that the arbitration award in *Gardner-Denver* did not have preclusive effect because the arbitration clause at issue did not expressly cover statutory discrimination claims – it only covered contractual discrimination claims. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009) ("*Gardner-Denver* and its progeny . . . do not control the outcome where . . . the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.").[4]

The CBA in effect here, unlike the one in *Gardner-Denver*, explicitly states that statutory discrimination claims are subject to mandatory arbitration. CBA at 112 ("All [statutory discrimination] claims shall be subject to the grievance and arbitration procedure (Article V and VI) as the sole and exclusive remedy for violations."). Federal courts have repeatedly upheld the validity of arbitration provisions that "clearly and unmistakably require[] union members to arbitrate [statutory anti-discrimination] claims." *Pyett*, 556 U.S. at 274; *see also Lawrence v. Sol G. Atlas Realty Co.*, 841 F.3d 81, 82 (2d Cir. 2016) ("Collectively bargained agreements to arbitrate statutory discrimination claims must be clear and unmistakable.") (citations and internal quotation marks omitted).

A "clear and unmistakable" waiver of judicial remedies exists when one of two circumstances is present: (1) the arbitration clause contains a provision that explicitly provides that all causes of action arising out of the employee's employment shall be submitted to arbitration; or (2) the arbitration clause specifically references or incorporates the relevant statutes into the agreement to arbitrate. *Lawrence*, 841 F.3d at 84. Here, the arbitration provisions do both: they explicitly state that all claims relating to Cox's employment must be

[4] *Gardner-Denver* retains vitality insofar as it relates to CBA arbitration provisions that do not expressly require arbitration of statutory discrimination claims. *See, e.g.*, *Siddiqua v. N.Y. State Dep't of Health*, 642 F. App'x 68, 70 (2d Cir. 2016).

submitted to arbitration, and they explicitly reference and incorporate the discrimination statutes that are the subject of Cox's suit. CBA at 15-17, 112. Therefore, the CBA clearly and unmistakably requires arbitration of her statutory discrimination claims, including the ones asserted by Cox in this action.

A claim is precluded by res judicata if "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000) (citing *Allen*, 449 U.S. at 94). Courts have regularly found that arbitration awards may bar claims in federal court. *See, e.g.*, *Pike v. Freeman*, 266 F.3d 78, 90–91 (2d Cir. 2001); *see also Siddiqua*, 642 F. App'x at 70 ("It is well-settled that the doctrine[] of res judicata . . . can be predicated on arbitration proceedings") (citing *Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1323 (2d Cir. 1977)).

The arbitrator expressly addressed Cox's claims that she should "not have been transferred" and that she was "unable to perform the position offered [at the new building] due to her medical condition." Award at 4. The arbitrator found, based on witness testimony, that Cox was properly transferred based on her seniority and that her argument that she could not perform the new position because of her medical condition was not credible because the new position was the *same* as her prior position. *Id.* at 6. The arbitrator further noted that Cox, rather than requesting a reasonable accommodation, "simply chose not to show up for work" and failed to establish that "reporting to work . . . presented a serious health or safety hazard," which would relieve her of the obligation to report to work first and grieve the transfer decision later. *Id.* at 7.

Ultimately, the arbitrator concluded that Cox's transfer did not violate the CBA. *Id.* at 8. Accordingly, the Award was an adjudication on the merits of the transfer decision.

The second factor requires that Cox and the Union were in privity with one another at the arbitration. "[L]iteral privity is not a requirement for *res judicata* to apply." *Monahan*, 214 F.3d at 285; *see also Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995) ("For purposes of claim preclusion, the requisite privity must be found in the substantial identity of the incentives of the earlier party with those of the party against whom *res judicata* is asserted."). If a party's "interests were adequately represented by another vested with the authority of representation," that party will be bound by the previous decision. *Alpert's Newspaper Delivery Inc. v. New York Times Co.*, 876 F.2d 266, 270 (2d Cir.1989). In the context of labor unions and grievances filed on behalf of union members pursuant to collective bargaining agreements, the union is in privity with the member provided that the member "belonged to the [union] at all relevant times," and the union was "the sole and exclusive collective bargaining representative [for its members]." *Monahan*, 214 F.3d at 285. Here, Cox was at all relevant times a member of the Union, FAC ¶ 13, which was responsible for bringing claims on behalf of its members pursuant to the CBA's grievance and arbitration provisions, CBA at 15-19. At arbitration, the Union "alleged [the complaint] on behalf of Rosa Cox," and the Award dealt exclusively with Cox's claims that PBM had violated the CBA. Award at 1. The requisite privity therefore exists between Cox and the Union.

Finally, in considering whether a claim was or could have been raised in the prior proceeding, the Court considers whether the claims "arise from the same nucleus of operative fact." *Jordan v. Metro. Life Ins. Co.*, No. 03-CV-4110 (SAS), 2004 WL 1752822, at *3 (S.D.N.Y. Aug. 4, 2004) (citing *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985)).

A litigant must bring all claims arising out of a set of "underlying facts . . . 'related in time, space, origin, or motivation . . . form[ing] a convenient trial unit, and [whose] treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Pike*, 266 F.3d at 91 (quoting *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90 (2d Cir. 1997)). The claims in this action arise from the same set of underlying facts adjudicated during the arbitration: Cox's objection to her transfer to a new building. At arbitration, Cox claimed that she was transferred without cause to a position that she could not perform due to her medical condition. Award at 4. The arbitrator concluded that Cox's claim was meritless, that Cox was terminated because she did not obey the proper grievance procedure when she failed to show up for work, and that the transfer did not violate the CBA. *Id.* at 7-8.

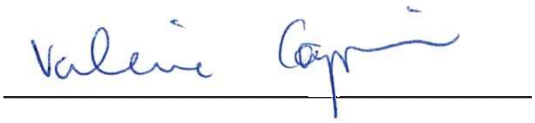
Cox concedes that she raised her present statutory discrimination claims during the prior arbitration. Opp. Br. at 2-3 ("A review of the [Award] will note that there is no question that Cox's statutory claims of unlawful employment discrimination were presented to hearing officer in the Office of the Contract Arbitration pursuant to the CBA's mediate/arbitrate provision . . . ."). Although the Award does not discuss any statutory discrimination claims, Cox represents that she raised those claims, *id.*, and she has not argued that she was precluded from pursuing them during the arbitration. Even if Cox's assertion that she raised these claims in the arbitration is mistaken, she certainly could have raised these claims in the arbitration. Because Cox's claims in this action arise from the same set of circumstances that was adjudicated at the arbitration, and she either did or could have arbitrated them, res judicata bars her federal suit. *See, e.g., Banus v. Citigroup Glob. Markets, Inc.*, No. 09-CV-7128 (LAK), 2010 WL 1643780, at *10 (S.D.N.Y. Apr. 23, 2010), *aff'd*, 422 F. App'x 53 (2d Cir. 2011).[5]

[5] Cox takes issue with Defendant's reliance on *DuBois v. Macy's Retail Holdings, Inc.*, No. 11-CV-4904 (NGG) (LB), 2012 WL 4060586 (E.D.N.Y. Sept. 13, 2012), *aff'd*, 533 F. App'x 40 (2d Cir. 2013), noting that, in

CONCLUSION[6]

For the foregoing reasons, Defendants' motion to dismiss is GRANTED. The Clerk of the Court is respectfully directed to terminate Docket Entry No. 9 and to close this case.

SO ORDERED.



Date: July 18, 2017
New York, New York

VALERIE CAPRONI
United States District Judge

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that case, the Court reviewed the entire arbitral record. Although true, that case considered two motions: the plaintiff's motion to vacate the arbitral award and the defendant's motion to dismiss the plaintiff's discrimination claims on the basis of res judicata. Thus, to decide the motion to vacate, the Court had to review the arbitral record. That review had nothing to do with its decision to bar the plaintiff from relitigating the issues that had been decided in the arbitration. *See Dubois*, 2012 WL 4060586, at *3 ("To begin with, all of [Plaintiff's reasserted] claims are barred by res judicata.").

[6] Because the Court dismisses this case on res judicata grounds, the Court need not consider Defendant's argument that Plaintiff failed to exhaust her administrative remedies and that she should be compelled to arbitrate her claims.