Insight

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"Who Can It Be Now?" New York's Highest Court Explains Who May Be Liable For Discrimination Based On A Criminal Conviction

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On May 4, 2017, the New York Court of Appeals answered who may be liable under the state's fair employment law for discrimination based on an individual's conviction record. The opinion in *Griffin v. Sirva, Inc.* is noteworthy because it is increasingly common for more than one company to play a role in criminal background checks (*e.g.,* some require their subcontractors, suppliers or business partners to run such checks on their respective employees).

Summary of the Case

In the case before New York's highest court, two laborers were fired by a moving company's subcontractor after the moving company's required background checks revealed that they had been convicted of serious sexual offenses. The laborers responded by filing a lawsuit under the New York State Human Rights Law (NYSHRL), claiming they were wrongfully denied employment based on their criminal convictions. In addition to their direct employer, Astro Moving and Storage Co. ("Astro"), the plaintiffs sued the party that contracted for Astro's services and required the background checks, Allied Van Lines, Inc., and its parent company, Sirva, Inc. (collectively, "Allied").

Allied did not employ either plaintiff. It merely contracted with Astro to obtain certain warehouse and transportation services. As Astro was going to work directly with Allied's customers (in their homes and businesses), the contract required Astro to make sure that the employees who performed these services had passed a background check. Because the plaintiffs had been convicted of sexual offenses, they failed the screens, and the contract would not permit Astro to let them work for Allied's customers. Even though the plaintiffs could have theoretically worked on

Astro's non-Allied accounts, Astro decided to fire them and the plaintiffs sued Allied, claiming that Allied played an unlawful role and should be liable for their terminations.

The plaintiffs' claims against Allied were initially dismissed by a federal district court in New York, which found that the NYSHRL's proscription against discrimination based on criminal convictions applied to "employers" only, not those with whom the employer merely did business. The district court also dismissed the plaintiffs' claim that Allied unlawfully aided and abetted Astro because Allied did not participate in the decision to fire the plaintiffs. The plaintiffs appealed, and the federal court of appeals asked New York's highest court to explain who may be liable.

Question 1: Does liability under the NYSHRL for discrimination based on criminal convictions apply only to an aggrieved party's direct "employer"?

Yes, the New York Court of Appeals held that the law applies only to the actual employer. Even though the relevant provision of the NYSHRL, New York Executive Law § 296(15), does not specifically state that only employers may be liable, the high court noted that liability under this section arises only upon a violation of Article 23-A of the New York Correction Law ("Article 23-A"), which addresses determinations by *public and private employers* and does not extend liability to non-employers. The court also found that the legislative history behind § 296(15) confirmed that it was meant to apply to employers only.

Question 2: If liability under § 296(15) extends to "employers" only, how should courts determine who is the aggrieved party's employer?

To answer this question, the high court relied on a lower appellate court's decision from over 30 years ago. In that decision, *State Div. of Human Rights v. GTE Corp.,* the appellate court held that an "employer" under the NYSHRL depends on who has the right to control the employee. To determine that, courts should examine who is responsible for: (1) the selection and engagement of the worker; (2) the payment of the worker's salary and wages; (3) dismissing the worker; and (4) controlling the worker's conduct. The most essential element is who has the "power 'to order and control' the employee in his or her performance."

Question 3: May an out-of-state non-employer be held liable as an aider and abettor under the NYSHRL for an employer's unlawful discrimination based on a criminal conviction?

Yes, even though a jury had already held that Astro did not unlawfully discriminate against the plaintiffs, the Court of Appeals concluded that out-of-state non-employers may be liable for aiding and abetting an employer's unlawful discrimination. It explained that unlike §296(15), liability as an aider and abettor extends to any persons, citing its decision over 40 years ago in a case extending such liability to a newspaper that merely posted an employer's facially discriminatory job advertisements.

Recommendations

The Court of Appeals' ruling, which limits liability for violating the NYSHRL's proscription against discrimination based on one's criminal convictions to employers only, is helpful to companies that do business in New York. On the other hand, it confirms that those who aid and abet such discrimination may be equally liable, whether or not they actually employed the employee(s) at issue. It will be important to monitor how this area of the law evolves, including how courts determine a company's status as an "employer" under the NYSHRL.

When it comes to background checks generally, it is important for employers to be mindful that there are a host of overlapping laws, both in New York and nationwide, that govern the background check process

(*e.g.,* the federal Fair Credit Reporting Act[1] and New York General Business Law[2]). In addition, there has been a proliferation of "ban the box" laws in cities across the country, including New York City,[3] Seattle,[4] San Francisco[5] and, most recently, Los Angeles.[6]

1 *See* Rod Fliegel and Jennifer Mora, *Ninth Circuit is the First Appellate Court to Rule on "Extraneous Text" in a FCRA Background Check Disclosure*, Littler Insight (May 2, 2017); Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

2 *See* Jennifer Mora, Rod Fliegel, and Sherry Travers, *The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York*, Littler Insight (Jun. 7, 2013).

3 *See* Rod Fliegel, Jennifer Mora, and David Warner, *New York City Commission on Human Rights Issues Guidance on Citywide "Ban-the-Box" Law*, Littler Insight (Nov. 9, 2015).

4 *See* Rod Fliegel, Pam Salgado, Dan Thieme, and Jennifer Mora, *Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes*, Littler Insight (Jun. 20, 2013).

5 *See* Rod Fliegel and Jennifer Mora, *San Francisco's OLSE Issues "FAQs" On Fair Chance Ordinance*, Littler Insight (Dec. 17, 2014).

6 *See* Jennifer Mora, Rod Fliegel and Christina Cila, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law*, Littler Insight (Dec. 9, 2016).