New York Court of Appeals Rules on Scope of Law Prohibiting Discrimination Based on a Criminal Conviction

May 31st, 2017 | and Latif Zaman

Latif Zaman

The New York Court of Appeals, the highest court in the state, recently answered three questions certified by the United States Court of Appeals for the Second Circuit regarding the scope of liability under a New York antidiscrimination statute, N.Y. Exec. Law § 296(15) of the New York State Human Rights Law ("NYSHRL"). *See Griffin v. Sirva, Inc.*, _____ N.E.3d _____, 2017 WL 1712423 (2017). The scope of N.Y. Exec. Law § 296(15) is relevant not only to direct employers, but also to out of state companies employing contractors within the state of New York, and others doing business with those employers, such as background screening companies and credit reporting agencies, which could be subject to aiding and abetting liability.

The underlying case, *Griffin v. Sirva*, 835 F.3d 283 (2d Cir. 2016), involved an action brought by two individuals with criminal records that were terminated from their jobs. The terminated employees sued their former employer, as well as a company that had a contractual relationship with the employer and the contracting company's parent company, for discrimination on the basis of criminal convictions, in violation of N.Y. Exec. Law § 296(15). Section 296(15) creates liability for violations of Article 23-a of New York's Corrections Law, which prohibits discrimination based on a criminal conviction, unless the person making the allegedly discriminatory decision takes certain factors into account. The Second Circuit certified the following three unsettled questions of New York law to the New York Court of Appeals:

(1) Does Section 296(15) of the New York State Human Rights Law, prohibiting discrimination in employment on the basis of a criminal conviction, limit liability to an aggrieved party's "employer"?

(2) If Section 295(15) is limited to an aggrieved party's "employer," what is the scope of the term "employer" for these purposes? Does it include an employer who is not the aggrieved party's "direct employer," but who, through an agency relationship or other means, exercises a significant level of control over the discrimination policies and practices of the aggrieved party's "direct employer"?

(3) Does Section 296(6) of the New York State Human Rights Law, providing for aiding and abetting liability, apply to Section 296(15) such that an out-of-state principal corporation that requires its New York State agent to discriminate in employment on the basis of a criminal conviction may be held liable for the employer's violation of Section 296(15)?

In response to the first certified question, the New York Court of Appeals determined that N.Y. Exec. Law § 296(15) only creates liability for employers. The Court noted that liability under N.Y. Exec. Law § 296(15) arises when "any person" commits a violation of Article 23-A. However, the Court determined that Article 23-A, by its language, targets only public or private employers making decisions about current employees or applicants for employment. Because Article 23-A applies to employers, the Court determined that N.Y. Exec. Law § 296(15) transitively only creates liability for employers as well.

The Court then reformulated the second certified question to reflect what the Second Circuit described in its ruling as an open question of New York law: "[i]f Section 296(15) is limited [to an employer,] how should courts determine whether an entity is the aggrieved party's 'employer' for the purposes of a claim under Section 296(15)?"

In determining who an "employer" is for purposes of the NYSHR, the Court adopted the four-factor common-law test set forth by a New York trial court in *State Div. of Human Rights v. GTE Corp.* 109 A.D.2d 1082 (4th Dept 1985):

(1) the selection and engagement of the servant;

(2) the payment of salary or wages;

(3) the power of dismissal; and

(4) the power of control of the servant's conduct.

GTE Corp. at 1083.

The Court specifically emphasized the alleged employer's power "to order and control" the employee in his performance of work. In *GTE Corp* an employee sued a company for discrimination relating to employment based upon her sex and disability due to pregnancy. Applying the test described above, the court in *GTE Corp* found that the defendant company was an employer despite the fact that the employee was not on the company's payroll and a temporary employment agency paid her wages and benefits. As the court explained:

GTE not only selected and hired the petitioner, but possessed and exercised the power of control, reserved the power of dismissal, and, indirectly, through the agency, paid her wages. GTE may not avoid its obligations under the Human Rights Law by the expediency of contracting with another for the payment of workers under its control.

GTE Corp. at 1083.

With respect to the third certified question, the Court also reformulated the question to ask whether N.Y. Exec. Law § 296(6) "extends liability to an out-of-state nonemployer who aids or abets employment discrimination against individuals with a prior criminal conviction." The Court answer this question in the affirmative.

Section 296(6) states: "It shall be an unlawful discriminatory practice for **any person** to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this [NYSHRL], or to attempt to do so." (emphasis added). The Court noted that "[u]nlike section 296(15), nothing in the statutory language or legislative history limits the reach of [Section 296(6)] to employers." As

noted above, liability under N.Y. Exec. Law § 296(15) arises when a person violates Article 23-A, which the Court found only applicable to employers. By contrast, a person may be liable under N.Y. Exec. Law § 296(6) without themselves committing a violation of Article 23-A. Consequently, the Court determined that aiding and abetting liability under N.Y. Exec. Law § 296(6) should be "construed broadly" and not limited to employers.

In support of a broad reading of the statute, the court of appeals noted that it had previously applied Section 296(6) to a newspaper company that had no employment relationship with the plaintiff. *National Org. for Women v. State Div. of Human Rights,* 314 N.E.2d 867 (1974). In *National Org. for Women* (*"NOW"*), the defendant newspaper company divided employment listings into categories with the captions "Help Wanted – Male" and "Help Wanted – Female". The court in *NOW* held that these listings discriminated on the basis of sex. Although the defendant did not "directly perpetuat[e]" the discrimination since it was not the women's employer or prospective employer, the court found that it "aided and abetted" such discrimination as condemned by Section 296(6). Notably, the court in *NOW* did not consider the issue of whether, separate from the newspaper company, any employer or prospective employer was liable for primary discrimination under the NYSHRL.

It is important to note that Section 296(6) also applies to out-of-state companies. The NYSHRL contains an extraterritoriality provision, which provides: "The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state … if such act would constitute an unlawful discriminatory practice if committed within this state" Executive Law § 298-a (1). Therefore, the court of appeals found an out-of-state nonemployer who aids or abets employment discrimination is liable under the NYSHRL.

The general hope is that the New York Court of Appeals' ruling on these certified questions will create more clarity on the liability that businesses may face when dealing with employment issues. However, aiding and abetting liability is still the most troublesome issue for companies doing business with New York companies, including background screening companies and credit reporting agencies entities, which do not have direct oversight over the employment practices of the companies to which they provide information.

As we noted in a previous article, the New York Attorney General has used the "aiding and abetting" theory to assert claims against background screening companies for violations of N.Y. Exec. Law § 296(15). In 2014, the New York Attorney General obtained agreements with four of the nation's largest background screening companies based on the assertion that certain automated rejection letter processes constituted "aiding and abetting" violations of N.Y. Exec. Law § 296 and New York Correction Law §§ 752,753. The AG's press release noted that the agreements, which were voluntary and did not include any admission of liability, were needed to "ensure that employers conduct the required case-by-case, individualized assessments of job candidates."