NEW YORK COURT OF APPEALS ROUNDUP

INDIVIDUAL OWNER NOT VICARIOUSLY LIABLE AS 'EMPLOYER' UNDER NYCHRL

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In *Doe v. Bloomberg, L.P.*, the Court of Appeals upheld the dismissal of claims against former New York City Mayor Michael Bloomberg and made clear that individual owners of a company may not be held vicariously liable as "employers" under the New York City Human Rights Law (NYCHRL). The plaintiff in this case was an employee of Bloomberg L.P., who sued the company, her supervisor, and Michael Bloomberg, asserting several causes of action arising from alleged discrimination, sexual harassment, and abuse. The Court of Appeals held that Mr. Bloomberg's status as an owner and officer of Bloomberg L.P. was insufficient to hold him vicariously liable as an "employer" under the NYCHRL for the actions of Ms. Doe's supervisor. Judge Jenny Rivera wrote a dissenting opinion arguing that the term "employer" should be interpreted broadly to hold all owners accountable for discrimination and all employees subject to the protections of the NYCHRL.

The plaintiff alleged that her direct supervisor engaged in a pattern of serious sexual harassment. She did not allege that Mr. Bloomberg participated in any of the alleged wrongful conduct. Rather, she alleged that Mr. Bloomberg was subject to vicarious liability for her supervisor's conduct because Mr. Bloomberg was an "employer" under NYCHRL due to his status as the co-founder, chief executive officer, and president of Bloomberg L.P and because he allegedly fostered an environment encouraging sexist and sexually-charged behavior. Mr. Bloomberg moved to dismiss the claims against him. The Supreme Court initially granted the motion, but, upon reargument, denied the motion. A divided Appellate Division, First Department, reversed and dismissed the causes of action against Mr. Bloomberg. The First Department majority ruled that the NYCHRL could not be read to impose vicarious liability on individuals holding an ownership or leadership position in a company because such an expansive liability standard would be in contravention of principles underlying New York corporate law. Two Justices dissented and argued that the complaint should be sustained based on the plain language of the NYCHRL and the general judicial principle that anti-discrimination laws should be liberally construed in favor of plaintiffs. The plaintiff appealed to the Court of Appeals as of right pursuant to CPLR 5601(a).

In a majority opinion written by Judge Michael Garcia and joined by Chief Judge DiFiore and Judges Stein, Fahey, Wilson, and Feinman, the court affirmed the Appellate Division, but did not adopt the First Department holding that "some participation in the specific conduct committed against the plaintiff is required to hold an individual owner or officer of a corporate employer personally liable in his or her capacity as an employer." 178 A.D.3d at 50. The First Department dismissed the complaint because the

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plaintiff failed to allege that Mr. Bloomberg "encouraged, condoned or approved of the specific discriminatory conduct allegedly committed" by her supervisor. Id. at 50, 52. The First Department found support for its ruling in *Matter of Totem Taxi v. New York State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 305 (1985). The Court of Appeals, however, clarified that *Totem Taxi* concerned New York State's Human Rights Law, not the NYCHRL, and that the decision addressed the circumstances in which an employer could be held liable under that statute rather than the issue of who constituted an "employer" for purposes of the statute.

The majority also rejected the test proposed by the First Department's dissenting justices that would hold an individual vicariously liable as an "employer" under the NYCHRL when a plaintiff alleges that the individual has either (1) an ownership interest in the organization or (2) the power to do more than carry out personnel decisions made by others. The dissenting First Department justices relied on the Court of Appeals' decision in *Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984), but as it did with *Totem Taxi*, the court held that *Patrowich* was inapplicable because it examined the meaning of "employer" under various state and federal statutes, but not the NYCHRL. The majority acknowledged the NYCHRL's direction that "similarly worded provisions of federal and state civil rights laws should be viewed as a floor below which the City's Human Rights law cannot fall," but observed that the New York City Council used a narrower definition of employer in the NYCHRL than the definitions included in federal and state statutes. Because of this difference in language, the court held that the statutes are not "similarly worded" and the unique provisions of the NYCHRL "provide for broad vicarious liability for employers but that liability does not extend to individual owners, officers, employees, or agents of a business entity." Instead, vicarious liability is limited to the corporate entity itself.

The majority concluded that "where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the [NYCHRL]. Rather, those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct."

The majority considered the ordinary understanding of the term "employer," and observed that the common law imposes vicarious liability on a corporation for torts of its employees and agents committed within the scope of their job duties, but directors and officers are not subject to personal liability for the torts of corporation employees simply because the directors and officers hold corporate office. Additionally, the court recognized that shareholders are not subject to vicarious liability for the torts of a corporation's agents or employees. According to the court, the text of the NYCHRL does not demonstrate an intent to displace these settled legal principles.

In her 30-page dissenting opinion—twice the length of the majority opinion—Judge Rivera relied heavily on legislative history of the NYCHRL, which has been recognized as the most progressive in the nation and was intended to reaffirm New York's traditional leadership in civil rights. Judge Rivera further notes that the Court of Appeals previously held that "we must construe ... the City's Human Rights Law[] broadly in favor of discrimination plaintiffs, to the extent that such construction is reasonably possible," *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011), and points to the fact that the NYCHRL does not expressly limit "employer" to a business entity or exclude business owners from employer status. Judge Rivera argues for a broad and flexible definition of "employer" that would encourage preemptive action by employers with the means to effectuate broad workplace change and which, in this instance, would hold that Mr. Bloomberg is an "employer" under the NYCHRL based on his status as co-founder, chief operating officer, president, and majority owner of the business.

The NYCHRL indicates when an employer is liable for the unlawful discriminatory acts of its employee or agent, but it does not define who is subject to this vicarious liability as an "employer." The Court of Appeals has now resolved that question with respect to owners of business entities. To the extent the dissent is correct that the majority resolved that question in contravention of the intent of the New York City Council, it will be up to the City Council to clarify its intent as to who constitutes an "employer" for purposes of vicarious liability under the NYCHRL.