AIDING AND ABETTING DISCRIMINATION — NOT JUST FOR EMPLOYERS AND SUPERVISORS ANYMORE

On May 31, 2017, the Second Circuit revived discrimination claims against two out-of-state, non-employer companies for alleged violations of New York State's Human Rights Law (NYSHRL). In *Griffin v. Sirva, Inc.*, the Second Circuit ruled that the trial court's reasons for dismissing the claims conflicted with the guidance and authority that the New York Court of Appeals recently provided on the scope of the NYSHRL, which is likely to have a significant impact on who current and former employees sue for discrimination under New York law.

BACKGROUND

The plaintiffs in *Griffin v. Sirva* were employed by Astro Moving and Storage Co., a New York-based moving company (Astro).

Astro was contracted by Allied Van Lines, Inc. (Allied), a nationwide moving company owned by Sirva, Inc. (Sirva), to provide moving services to Allied's customers. Neither Allied nor Sirva shared any employees, management or ownership in common with Astro; nor did either have authority to hire or fire Astro employees.

Under the contract, Astro agreed to provide moving services in accordance with Allied's rules. One of those rules required that individuals performing services at Allied's customers' homes or businesses must pass a criminal background check. Allied also had a "Certified Labor Program" which disqualified its employees, as well as the employees of its agents, including Astro, from working for Allied if a background check revealed certain "significant felony criminal histories."

THE BOTTOM LINE

The *Griffin* opinion paves the way for plaintiffs to assert an "aiding and abetting" theory to sue their employer's corporate customers, clients and vendors for participating in conduct or decision-making alleged to be unlawful under the NYSHRL, even if such participation is limited to having a contract, policy or protocol that runs afoul of New York law. At a minimum, companies operating in New York should confirm that any contracts, policies or protocols that apply to individuals in New York do not violate New York law.

Prior to their employment with Astro, the two *Griffin* plaintiffs each had pled guilty to violent felony sexual offenses. After working for Astro for several years, performing services on Allied's moving jobs, Astro asked them to consent to background checks, which would be done through a vendor contracted by Allied's parent, Sirva.

The background checks disclosed the plaintiffs' convictions, which automatically disqualified them from working on Allied's jobs, and Astro terminated their employment.

LAWSUIT AND APPEAL

The plaintiffs sued Astro, Allied and Sirva for unlawfully discriminating against them based on their criminal histories in violation of the NYSHRL. The trial court dismissed both Allied and Silva on the grounds that liability under the NYSHRL extends only to plaintiffs' employers, which Allied and Sirva were not.

On appeal, the Second Circuit openly questioned the district court's reasoning that a company must qualify as a plaintiff's employer, even in order to be liable for aiding and abetting discrimination.

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By way of background, before the New York Court of Appeals' recent decision in *Griffin*, authority existed as to when an *individual* may be liable for aiding and abetting under the NYSHRL (i.e., an individual who "actually participates" in the conduct giving rise to the claim may be liable). However, the *Griffin* plaintiffs had alleged that third-party *corporations* had aided and abetted the alleged discrimination because their contractual rules disqualified them from providing services. In dismissing the third-party corporate defendants as a matter of law, the trial court applied an "employer" standard, and did not consider the "actually participated" standard.

Noting that there was no clear authority in the precedents of the New York Court of Appeals on several issues, including aiding and abetting liability under the NYSHRL, the Second Circuit sought guidance and authority from New York's highest court by way of certified questions concerning the scope of liability under the NYSHRL.

IMPLICATIONS FOR COMPANIES DOING BUSINESS IN NEW YORK

In answering the Second Circuit's certified questions, the Court of Appeals stated that NYSHRL's aiding and abetting provision should be: (1) broadly construed; (2) applied to out-of-state defendants; and (3) extended to out-of-state "non employers" who aid or abet employment discrimination against individuals in New York. This ruling upends the long-standing, but perhaps misguided, assumption that individuals can "aid and abet" unlawful discrimination and retaliation in violation of the NYSHRL, but third-party companies cannot.

TAKEAWAYS

- Review client and vendor contracts for provisions, like background checks or other personnel-related policies and protocols, that may apply to a third party's employees and ensure such provisions comply with federal and state laws where the companies do business.
- Train employees as to appropriate methods to weigh in on performance issues and personnel decisions relating to non-employees.
- Determine whether your company would be obligated under an existing contract to indemnify a current or former client or vendor for the cost of defending a discrimination claim by a company employee, which may result in significant out-of-pocket costs.
- Check your company's employment practices and liability insurance (EPLI) policy to see if aiding and abetting claims against a company are covered, akin to coverage that includes costs of defending claims against your company's decision-makers.

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