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SCOPE OF EMPLOYER LIABILITY FOR DISCRIMINATORY CONDUCT UNDER NEW YORK CITY LAW NARROWED BY COURT OF APPEALS

To Our Clients and Friends:

Plaintiffs alleging claims of employment discrimination often prefer to file suit in New York City if they can plead a violation of the New York City Human Rights Law (“City HRL”), which was enacted with the “desire that [it] meld the broadest vision of social justice with the strongest law enforcement deterrent.”^[1] Its application was nevertheless recently narrowed by the New York Court of Appeals in *Doe v. Bloomberg L.P.* That decision clarified as a matter of first impression that, despite the City HRL’s liberal construction and the availability of vicarious liability against a *company* for the actions of its employees, no such vicarious liability can be imposed on a company’s shareholders, agents, limited partners, or employees, because these individuals are not themselves deemed “employers” under the statute. As a result, “those individuals may incur liability” under the City HRL “only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct.”^[2]

Background on the City HRL

The City HRL prohibits employment discrimination within New York City based on a wide variety of protected characteristics,^[3] providing additional protections—and an additional cause of action—on top of those already available under state and federal anti-discrimination laws. In oft-quoted language addressing its enactment in 1991, Mayor David Dinkins described the City HRL as “the most progressive” such statute “in the nation,” which “reaffirm[ed] New York’s traditional leadership in civil rights.”^[4] That sentiment was underscored by a 2005 statutory amendment codifying that “similarly worded provisions of federal and state civil rights laws” provide “a floor below which the [City HRL] cannot fall, rather than a ceiling above which [it] cannot rise.”^[5] As a result, the City HRL is often invoked by plaintiffs bringing similar state and federal causes of action.

One crucial distinction between the City HRL and its federal and state counterparts is that although employers “are not normally subject to vicarious liability for the wrongs of corporate employees,”^[6] the City HRL imposes such liability. With some exceptions, under other anti-discrimination statutes employers typically only face liability where their own conduct is at issue or where they have failed to take reasonable steps to address and prevent discrimination in their workplaces. Under Title VII, for example, employers may be vicariously liable for their employee’s discriminatory conduct, but such claims are subject to an affirmative defense that the employer has enacted sufficient policies and procedures to respond to complaints of discrimination.^[7] No such affirmative defense exists under the

City HRL.[8] Rather, an “employer” can be vicariously liable “based upon the [discriminatory] conduct of [its] employees or agents” under the City HRL “where:

- (1) the employee or agent exercised managerial or supervisory responsibility; or
- (2) the employer knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action . . . ; or
- (3) the employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”[9]

But the City HRL does not provide a functional definition for the word “employer,” giving little guidance as to whom that term encompasses. Myriad tests and arguments have been offered over the years, “generating confusion as courts have endeavored to determine who is an employer in the context of the extensive—and at times strict—liability imposed” by the City HRL.[10] The Court of Appeals’ recent *Doe* decision provides significant guidance.

Facts and Procedural History of *Doe v. Bloomberg L.P.*

The plaintiff in *Doe*, a former employee of Bloomberg L.P., filed a complaint asserting claims against Bloomberg L.P., her supervisor, and Michael Bloomberg. Doe alleged that her supervisor sexually harassed her for years, but she did not allege any “personal participation” in these acts by Mr. Bloomberg.[11] Rather, her claim as set forth in her complaint against Mr. Bloomberg arose solely from his role as the “co-founder, chief executive officer, and president” of Bloomberg L.P., as a result of which Doe argued that Mr. Bloomberg was her “employer”[12] and could be held vicariously liable for the acts of her supervisor.

As the case made its way through the courts, the definition of “employer” for purposes of the City HRL was resolved in many different ways by different jurists. The trial court initially dismissed the claims against Mr. Bloomberg, finding that he could not be held liable as an employer, before subsequently reversing its own decision upon reargument and reinstating the claims against him.[13] Next, the reinstatement of the claims against Mr. Bloomberg was reversed by the Appellate Division, First Department, which split 3-2 in holding that Mr. Bloomberg could not be held liable as an employer because there was no allegation that he “encouraged, condoned or approved the specific conduct which gave rise to the claim.”[14] The Appellate Division dissenters, meanwhile, would have held that an individual is an employer under the City HRL if he or she has either an ownership interest in the corporate defendant or the power to do more than carry out others’ personnel decisions.[15] Finally, the Court of Appeals affirmed that Mr. Bloomberg was not Doe’s employer while rejecting the reasoning and tests set forth by both the Appellate Division’s majority and dissenting opinions.

The *Doe* Court’s Legal Analysis

In a 6-1 decision, the Court of Appeals held that “where a plaintiff’s employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers” for purposes of being held vicariously liable under the City HRL.[16] Instead, “those individuals may incur liability”

under the City HRL “only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct.”^[17]

The majority opinion reasoned that the statute expressly distinguishes between agents, employees, owners, and employers in various ways, “demonstrat[ing] that employees, agents, and others with an ownership stake are not employers within the meaning of the City HRL.”^[18] It also observed that the law generally does not view a company’s shareholders, agents, and employees as “employers” or “subject [them] to vicarious liability for the wrongs of corporate employees.”^[19] Moreover, designating shareholders as employers for the purpose of imposing vicarious liability “would go against the principles underlying the legal distinction” between a company and its owners because “[t]he law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability.”^[20] While acknowledging the “broad vicarious liability” imposed on employers by the City HRL, which remains “substantially broader than that provided by its state counterpart,” the Court of Appeals nonetheless narrowly construed the law’s use of the term “employer.”^[21] Although the majority did not provide an affirmative test for determining who is an “employer” under the City HRL, it concluded that the term, pursuant to its “ordinary meaning,” “does not extend to individual owners, officers, employees, or agents of a business entity.”^[22] Accordingly, the Court of Appeals determined that Mr. Bloomberg was not Doe’s employer under the City HRL and thus could not be held vicariously liable for the discriminatory conduct that she alleged.^[23]

Conclusion

Doe provides an important clarification concerning the extent of employer liability under the City HRL and brings the City HRL closer in line with similar state and federal causes of action. Under the rule announced by the Court, a business entity’s “individual owners, officers, employees, or agents” are not themselves “employers,” and therefore cannot be held vicariously liable for the actions of the company’s employees. Nevertheless, they can continue to be held personally liable for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct. In addition, “the unique provisions of the City HRL” continue to “provide for broad vicarious liability” for “employers”—that is, for the business entities themselves—when their employees violate the City HRL.^[24]

[1] *Williams v N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 68–69 (1st Dep’t 2009) (internal quotation marks omitted).

[2] *Doe v. Bloomberg, L.P.*, 2021 WL 496608, at *4 (N.Y. Feb. 11, 2021).

[3] N.Y.C. Admin. Code § 8-101 (listing protected characteristics including “race, color, creed, age, national origin, immigration or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking”).

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[4] Comm. on Gen. Welfare, Committee Report at 2 (Aug. 17, 2005) (quoting Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws, June 18, 1991, at 1).

[5] Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005).

[6] *Doe*, 2021 WL 496608, at *5.

[7] *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *see also, e.g., Vance v. Ball State Univ.*, 570 U.S. 421, 428 (2013); *Totem Taxi v. N.Y. State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 305 (1985).

[8] *See Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 481 (2010).

[9] N.Y.C. Admin. Code. § 8-107.

[10] *Doe*, 2021 WL 496608, at *2.

[11] *Id.* at *1; *id.* at *10 (Rivera, J., dissenting).

[12] *Id.*

[13] *See Doe v. Bloomberg, L.P.*, 178 A.D.3d 44, 47 (2019).

[14] *Id.* at 48.

[15] *Id.* at 53 (Manzanet-Daniels, J. dissenting).

[16] *Doe*, 2021 WL 496608, at *4.

[17] *Id.*

[18] *Id.*

[19] *Id.* at *5.

[20] *Id.* (quoting *Walkovszky v. Carlton*, 18 N.Y.2d 414 (1966)).

[21] *Id.*

[22] *Id.*

[23] *Id.* at *6.

[24] *Id.* at *5.



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