Court of Appeals No. APL-2019-00218

To be Argued by:
NIALL MACGIOLLABHUÍ
(Time Requested: 30 Minutes)

Court of Appeals
of the
State of New York

An Individual Described Herein by the Pseudonym
"MARGARET DOE",

Plaintiff-Appellant,

- against -

BLOOMBERG L.P.,

Defendant,

- and -

MICHAEL BLOOMBERG,

Defendant-Respondent,

- and -

NICHOLAS FERRIS,

Defendant.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

In his Brief, Defendant-Respondent Michael Bloomberg ("Bloomberg") fails to address the fundamental flaw in the Appellate Division's decision, which is that it took the standard of liability for employers under the New York State Human Rights Law (the "State HRL") – namely, whether the employer "encouraged, condoned or approved" the underlying discriminatory conduct – and used it to define an "employer" under the New York City Human Rights Law (the "City HRL"); even though the City Council had explicitly discarded that same standard of liability almost thirty years ago, and adopted a different one (which imposes strict liability on employers for the discriminatory conduct of managers and supervisors).

The error in conflating the definition of "employer" under the City HRL with the bases for employer liability is the central point of the dissent below. Plaintiff adds in her principal Brief that the error is compounded by the legislative history of the City HRL, which shows that, when the City Council propounded a new standard of liability for employers under section 8-107(13)(b) thereof, it did so by explicitly rejecting the "encourage, condone, or approve" standard. In response, Bloomberg has

completely ignored the point of the dissent, as well as the legislative history of Section 8-107(13)(b).

Instead, Bloomberg engages in an alternative survey of provisions of the City HRL that address the standard of liability for "employees and agents" who personally engage in unlawful discrimination, and for "persons" who either aid and abet such discrimination or engage in retaliation, respectively. None of these provisions are at issue on this appeal. The purport of the alternative survey is to claim that "Plaintiff's interpretation of "employer" cannot be reconciled with the text of the City Human Rights Law," because "[t]he statute expressly delineates the circumstances in which an individual may be held personally liable," and "[a]ll of those provisions require personal involvement in a statutory violation." *See* Bloomberg Brief, p. 2. Missing, however, from the survey are individual employers (where there is no separate legal entity), who, according to Bloomberg's reasoning, cannot be held strictly liable as individuals for the discriminatory conduct of managers and supervisors in their employ. That conclusion is wrong, as even the Appellate Division acknowledges (since such an individual is the only employer that can be held liable), and thus Bloomberg's argument that liability can only be

imposed on individuals, including individual employers, for "personal involvement in a statutory violation" is mistaken.

Ultimately, the question to be answered is not the standard of liability applicable to individual employers, but how to define such an employer in the first place. The answer to that question lies in the application of the test set forth by this Court in *Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984), in light of the uniquely broad and remedial purposes of the City HRL. Bloomberg argues that, since *Patrowich* addressed an issue under the State HRL, it cannot be applied to the City HRL. That argument overlooks countless cases to the contrary. Bloomberg further argues that he does not meet the test, or at least the one derived from *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013) that is proposed in the alternative by Plaintiff (which inquires whether Bloomberg's role within Bloomberg L.P., and the decisions it entailed, directly affected the nature and conditions of Plaintiff's employment). That further argument does not bear scrutiny in the present context of a motion to dismiss for failure to state a cause of action, considering that Bloomberg is alleged to have been directly involved in addressing gender discrimination issues during the period of Plaintiff's employment, and to have fostered a "top-down culture" of discrimination

and sexual harassment to which Plaintiff fell victim. He is properly subject to liability as Plaintiff's employer.

ARGUMENT

1. Section 8-107(13)(b) of the New York City Human Rights Law Does Not Require any Involvement by Individual Employers in the Discriminatory Conduct of Managers and Supervisors

Bloomberg maintains that the employment discrimination provisions of the City HRL "expressly create individual liability applicable to an owner or executive of an organization in only three circumstances, all of which require the individual's actual participation in the alleged unlawful conduct and none of which is applicable here." *See* Bloomberg Brief, p. 16. The three specified provisions are Section 8-107(1), under which an "an employer or an employee or agent thereof" is liable for engaging in unlawful discriminatory conduct; Section 8-107(6), which makes it unlawful "for any person to aid, abet, incite, compel or coerce" such conduct; and Section 8-107(7), which prohibits retaliation by any "person." *See* Bloomberg Brief, pp. 16-18. The latter two provisions require actual participation by the person in question in the alleged discriminatory conduct. *Id.*

Bloomberg engages in a convoluted analysis aimed at showing that individuals can only be subject to liability under one of the foregoing three provisions and that Plaintiff is trying to "create a fourth, unexpressed,

and substantially broader provision that would dispense with any requirement of participation in the challenged conduct." *Id.*, p. 18. Yet, the analysis does not account for an individual employer in circumstances where there is no separate legal entity. The Appellate Division majority acknowledged that "where the only employer is an *individual* and there is no corporate employer, the individual may be held strictly liable for the discriminatory acts of his or her managers and supervisors as such individual is the only possible employer under the statute." (R. 418-19, emphasis in original). Individual liability in these circumstances – which does not require participation in the challenged conduct – is not under some "unexpressed" provision; it is under Section 8-107(13)(b), which, notwithstanding Bloomberg's exhaustive trawl elsewhere, is the only provision under which the vicarious liability of individual employers is correctly assessed.

Bloomberg proceeds from the false premise that the provisions of the City HRL bearing upon individual liability all "require personal involvement in a statutory violation" to the claim that courts have "consistently required involvement in the specific conduct giving rise to a plaintiff's claim before an individual defendant may be held liable as an "employer" under the City Human Rights Law." *See* Bloomberg Brief, p. 19.

Immediately, though, the supposed consistency breaks down; Bloomberg notes that "[s]ome courts, including the Appellate Division here, have required that the owner or executive "encouraged, condoned or approved" the specific conduct constituting a statutory violation," whereas "[o]ther courts have articulated the requirement of personal involvement in the alleged conduct in various other ways but have reached the same conclusion." *Id.*, p. 20 (internal citations omitted).

The divergent approaches alone suggest that these courts are not engaged in proper statutory interpretation. However, the Appellate Division here goes well beyond that, in adopting a standard that the City Council expressly rejected in 1991. In *Zakrzewska v. New School*, 14 N.Y.3d 469 (2010), this Court stated the following in respect of employer liability under the City HRL for the discriminatory conduct of managers and supervisors: "[W]e may not apply cases under the State Human Rights Law imposing liability only where the employer encourages, condones or approves the unlawful discriminatory acts." *Id.* at 481 (citing *Matter of Totem Taxi v. New York State Human Rights Appeal Bd.*, 65 N.Y.2d 300 (1985), and *Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.2d 684 (1985)).

Yet Bloomberg (echoing the Appellate Division) maintains that since *Zakrzewska* concerned a corporate employer, the above statement about employers in general is therefore confined to corporate employers. *See* Bloomberg Brief, p. 21. It is an entirely fanciful distinction (even without resort to the legislative history). Indeed, the Appellate Division cited *Totem Taxi* in one footnote to explain that the City HRL imposes strict liability on employers for the discriminatory acts of managers and supervisors, "unlike the New York State Human Rights Law (State HRL), which only imposes liability on an employer for an employee's discriminatory acts if the employer encouraged, condoned or approved the discriminatory conduct" (R. 418 n. 2), and then, inexplicably, in the very next footnote, cited *Totem Taxi* again to support its holding that Bloomberg cannot be liable as an employer for the discriminatory acts of his supervisor unless Plaintiff alleges that he "encouraged, condoned or approved the specific conduct which gave rise to the claim" (just like the State HRL) (R. 419 n. 3). The acknowledgement that the *Totem Taxi* standard did not apply to the City HRL, followed by its application to the City HRL, is baffling and indefensible. It was indisputable error to apply the rejected State HRL standard to Bloomberg.

2. Bloomberg Meets the *Patrowich* / Economic Reality Test for Individual Employers

According to Bloomberg, "the opening sentence" in *Patrowich v. Chemical Bank*, 63 N.Y.2d 541 (1984) has been a source of confusion to lower courts. *See* Bloomberg Brief, p. 25. This sentence, the holding in the case to be more exact, is as follows:

> A corporate employee, though he has a title as an officer and is the manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on age or sex under New York's Human Rights Law (Executive Law, art. 15) or its Labor Law (§ 194) or under the Federal Age Discrimination in Employment Act (29 U.S.C. § 623) or Equal Pay Act (29 U.S.C. § 206, subd. [d]) if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others.

Bloomberg cites to *Giuntoli v. Garvin Guybutler Corp.*, 726 F. Supp. 494 (S.D.N.Y. 1989), as questioning whether the *Patrowich* holding applied specifically to the State HRL claim. *See* Bloomberg Brief, p. 25. Yet while that court acknowledged some ambiguity raised by the subsequent discussion in *Patrowich* of the above-enumerated statutes, it continued:

> On careful reading, however, it does not support defendants' suggestion that the "economic reality" test held

> by the New York Court of Appeals in *Patrowich* to apply to the federal claims under the Equal Pay Act and the ADEA was not held applicable to HRL claims. On the contrary, the New York Court of Appeals appears in that case to apply the economic reality test to all of the claims advanced, and to dismiss claims against plaintiff's supervisor based upon application of that test.
>
> The lower court cases interpreting *Patrowich* have so assumed or held, and have thus found that, under the HRL, a suit against an individual should be dismissed where he or she "has not been shown to have any ownership interest or power to do more than carry out personnel decisions made by others"—the so-called "economic reality" test.

Id. at 506 (collecting cases). Likewise, in *Kaiser v. Raoul's Rest. Corp.*, 72 A.D.3d 539 (1st Dept. 2010) – the other case cited by Bloomberg as questioning the scope of the *Patrowich* holding – the court stated that it "has been broadly read to adopt the "economic reality" test for determining who may be sued as an "employer" under the [HRL], although the cases do not invariably use the phrase "economic reality." *Id.* at 540 (collecting cases).

The above discussion in *Giuntoli* illustrates that the *Patrowich* holding and its economic reality test were well-established by the time the City Council enacted section 8-107(13)(b) of the City HRL. According to

Bloomberg, to apply this test "would yield the absurd result of turning every individual with any ownership interest into an "employer" under the City Human Rights Law, including, for that matter, any plaintiff compensated with equity or shares of stock in his or her employer." *See* Bloomberg Brief, p. 23 (internal citation omitted). This self-serving alarmism is neither new nor warranted. *See, e.g.*, *Salomone v. Merrill Lynch & Co.*, No. 96 Civ. 6570 (JFK) (JCF), 1998 WL 151036, at *3 (S.D.N.Y. Mar. 31, 1998) ("[Stock options and other profit sharing plans] would hardly satisfy the *Patrowich* standard. Not every stockholder of a corporation is an "owner" who may be held individually liable under the Human Rights Law. Rather, in this context, ownership implies a degree of control over the enterprise that is not shared by every employee who might qualify for a stock option."); *Salgado v. Club Quarters, Inc.*, No. 96 Civ. 383 (LMM) (HBP), 1997 WL 227598, at *1 (S.D.N.Y. May 5, 1997) ("… *Patrowich's* emphasis on economic realities clearly suggests that the nature and extent of a defendant's ownership interest is relevant to determining whether he or she exercised sufficient control to constitute an "employer.").

Bloomberg also argues that the "economic reality" test, as it has been further developed by federal courts in the context of Fair Labor Standards Act ("FLSA"), must be disregarded because the FLSA definition

of "employer" is different (to that of the City HRL), and because it is "specifically tailored to that statute's purpose, including ensuring the payment of minimum wages." *See* Bloomberg Brief, pp. 29-30. However, while the FLSA definition "includes any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 U.S.C. § 203(d)), the economic reality test is addressed to "defin[ing] "employer" in the first instance." *Irizarry v. Catsimatidis*, 722 F.3d 99, 103 (2d Cir. 2013). Furthermore, while FLSA-specific factors have evolved, the underlying test is a broader one, as shown by the fact that the cases cited in *Patrowich* also encompassed the ADEA (before a consensus developed among federal courts that individuals could not be held liable at all under its provisions). Indeed, the *Patrowich* test has been applied to the City HRL itself, in *Makinen v. City of N.Y.*, 167 F. Supp. 3d 472 (S.D.N.Y. 2016), *rev'd in part on other grounds*, 722 F. App'x 50 (2d Cir. 2018), to find former NYPD Commissioner Ray Kelly liable for discrimination despite "not a scintilla of evidence demonstrating that Kelly participated—or was even aware of—any allegedly discriminatory conduct." *Id.* at 488 (internal citation omitted). Bloomberg tries to distinguish this case on the basis that Kelly's control over the NYPD derives from the Charter of the City of New York, and "[t]here is

no similar vesting here of legal authority as an employer." *See* Bloomberg Brief, p. 29. Once again, the distinction is entirely fanciful.

Ultimately, the issue for this Court is how to apply the *Patrowich* / economic reality test to define an individual "employer" under the City HRL, in light of the mandate that its provisions must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v. City of New York*, 16 N.Y.3d 472, 477–478 (2011). The dissent below relies directly on *Patrowich* to find that "plaintiff is required only to allege that Bloomberg is an individual with an ownership interest and/or someone with the power to do more than carry out the personnel decisions of others." (R. 425). Plaintiff suggests an alternative economic reality test, modeled on the one set forth in *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. 2013), based on the concept of "operational control," by which an individual is considered an employer "if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees' employment." *Id.* at 110.

Bloomberg is alleged to have been directly involved in addressing gender discrimination issues during the period of Plaintiff's employment. (R. 160). Plaintiff further alleged that he fostered a "top-down culture" of discrimination and sexual harassment at Bloomberg L.P., that she

found herself in a workplace that had become "a reckless playground for male supervisors to target young, naïve female employees aspiring to have a career at [Bloomberg L.P.] for sex," and that her ordeal was a product of this culture. (R. 22, 32).

Bloomberg does not address these allegations other than to cursorily claim that the economic reality test proposed by Plaintiff "requires a specific nexus between the individual defendant and the relevant aspects of a plaintiff's employment which is wholly absent here," and to point out that most of what Plaintiff describes about the Bloomberg workplace culture pre-dated her employment. *See* Bloomberg Brief, pp. 3, 33. However, the history of the Bloomberg culture is entirely relevant; Plaintiff alleges that it continued into the period of her employment (and was certainly not confined to the past). Furthermore, the nexus sought by Bloomberg has been more than sufficiently alleged for purposes of a motion to dismiss. Aside from his alleged role in fostering a culture of discrimination and sexual harassment, Bloomberg is alleged to have directly addressed gender discrimination issues during the period of Plaintiff's employment.

Bloomberg meets the test for an individual "employer" under the City HRL. His motion to dismiss for failure to state a cause of action should not have been granted.

CONCLUSION

For the reasons set forth above, and those in Plaintiff's principal Brief, the decision of the court below should be reversed.

Dated: New York, New York
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Respectfully submitted,

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