*To Be Argued By*:
NIALL MACGIOLLABHUI
*Time Requested: 15 Minutes*

CTQ-2023-00001
U.S. Court of Appeals, Second Circuit Docket No. 22-1251

# Court of Appeals

**STATE OF NEW YORK**

NAFEESA SYEED,

*Plaintiff-Appellant,*

—against—

BLOOMBERG L.P.,

*Defendant-Respondent.*

## REPLY BRIEF FOR PLAINTIFF-APPELLANT

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## PRELIMINARY STATEMENT

The impact test formulated by this Court in *Hoffman* requires a nonresident plaintiff to plead and prove that the alleged discriminatory conduct had an impact in New York. According to Respondent Bloomberg L.P. ("Bloomberg"), while "[t]he Court phrased its holding" in these terms, what it actually meant was that the City and State Human Rights Laws "cover claims of discrimination only against those who live, work, or are physically present in New York City or State." *See* Resp. Br. at 1. However, while the impact test expressly covers those who live or work in New York, Bloomberg's claim that impact in New York otherwise corresponds with the physical location of a plaintiff is a mere interpretation of the holding in *Hoffman*. As such, it is not encompassed within the doctrine of stare decisis, as Bloomberg contends, nor does it have "the tacit acceptance of the State and City legislatures" (*id.* at 18). Furthermore, Bloomberg's interpretation has *not* been "repeatedly confirmed" by New York appellate courts (*id.* at 1). It is not even supported by the district court decision here. Indeed, the presently advocated "physical presence" interpretation was not even advanced by Bloomberg on appeal to the Second Circuit.

The actual question for this Court is how to interpret and apply the *Hoffman* impact test in failure-to-hire and failure-to-promote cases under

the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL") by nonresident plaintiffs who were discriminatorily denied employment in New York. The broad interpretation argued for by Syeed asks whether the alleged discriminatory denial of employment affects the terms, conditions, or extent of a plaintiff's employment within the boundaries of New York. Since it requires the denial of a specific job, it will be easy for courts to apply and will lead to predictable, consistent results. On the other hand, the narrow interpretation favored by Bloomberg will invite arbitrary, artificial, and unworkable distinctions based for example on whether, as suggested by Bloomberg, a plaintiff "visited [New York] while applying for a position" (Resp. Br. at 11). Syeed maintains that her interpretation is the better one. It is also the one mandated by the liberal construction clauses of the NYCHRL and the NYSHRL (though the latter does not benefit Syeed). Accordingly, this Court should answer the certified question in the affirmative.

## ARGUMENT

### I. Bloomberg's Interpretation of *Hoffman* is Not Supported by Case Law

The Second Circuit found that *Hoffman* "has not decided the specific question raised in this case," since it "was silent as to whether, in discriminatory failure-to-hire or failure-to-promote cases, a nonresident

plaintiff – who did not work in New York City or State, but who alleged that but for an employer's unlawful conduct, he or she would have worked in New York City or State – would also be unable to assert sufficient personal impact in New York City or State." A-117–118. The court further noted the absence of "*any* lower state-court case where a nonresident plaintiff who was not yet employed in New York City or State raised a failure-to-hire or failure-to-promote claim," and observed that, "to the extent that lower state-court cases applying the impact requirement to the more typical hostile-work-environment or termination fact patterns are relevant, the cases cut both ways," citing for example several First Departments cases. A-120–121.

Bloomberg disagrees with the Second Circuit. However, its disagreement as to *Hoffman* is not based on what this Court actually held—i.e., that for purposes of the NYCHRL and the NYSHRL, "nonresidents of the city and state must plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries," *Hoffman*, 15 N.Y.3d at 289—but on Bloomberg's *interpretation* of that holding. According to Bloomberg, while "[t]he Court phrased its holding" in these terms, what it actually meant was that the NYCHRL and the NYSHRL "cover claims of discrimination only against those who live, work, *or are physically present* in New York City or State." *See* Resp. Br. at 1 (emphasis

added). *Hoffman* explicitly covers claims by New York residents and workers. It does not, however, otherwise equate impact in New York with physical presence. Bloomberg nonetheless further claims that, "[o]ver the 13 years since that decision, New York appellate courts have repeatedly confirmed this physical presence requirement." *Id.* Remarkably, the cases relied upon by Bloomberg in support of this claim are the same First Department cases characterized by the Second Circuit as "ambiguous" and "cut[ting] both ways" (A-120). Review of the decisions, which are set forth below, shows that Bloomberg's reliance upon them as supposedly supporting its interpretation of *Hoffman* is misplaced.

In *Benham v. eCommission Sols., LLC*, 118 A.D.3d 605 (1st Dept. 2014), the First Department rejected the plaintiff's argument that, because she filed New York State nonresident income tax returns, she was entitled to the benefits of the NYCHRL and the NYSHRL, finding that "[w]hether New York courts have subject matter jurisdiction over a nonresident plaintiff's claims under the HRLs turns primarily on her physical location at the time of the alleged discriminatory acts, and not on her taxpayer status." *Id.* at 606 (citations omitted). Subsequently, in *Wolf v. Imus*, 170 A.D.3d 563 (1st Dept. 2019), the court quoted the foregoing passage from *Benham* in finding that "the impact on the plaintiff from the

termination of his employment occurred in Florida, since he lived and worked." *Id.* at 464 (citations omitted). In *Hardwick v. Auriemma*, 116 A.D.3d 465 (1st Dept. 2014), the plaintiff held the position of Director of Security for her employer, the National Basketball Association ("NBA"), a New York City-based member of USA Basketball, Inc. ("USAB"), the national governing body for the sport of basketball, which employed Auriemma and Tooley, respectively, as its executive director and head coach. The plaintiff alleged that Auriemma retaliated against her (after she had rejected his sexual advances during a 2009 overseas assignment) by first telling Tooley (who contacted her supervisor at the NBA) that he did not want her to provide security to the Women's National Basketball team at the 2012 London Olympics, and then, after the plaintiff complained and her assignment to the Olympics went ahead, ensuring that she had significantly diminished responsibilities while in London. USAB, Tooley and Auriemma (none of which were New York residents, and thus were, unlike the NBA and her supervisor, beyond the reach of Executive Law § 298-a) moved to dismiss the complaint against them. The First Department held that "plaintiff's mere employment in New York does not satisfy the "impact" requirement [of *Hoffman*]," since she "makes no claim that the alleged retaliatory acts, including the reduction in her duties at the London

Olympics, have had any impact on the terms, conditions or extent of her employment with the NBA within the boundaries of New York." *Id.* at 467. In *Pakniat v. Moor*, 192 A.D.3d 596 (1st Dept. 2021), *lv. denied*, 37 N.Y.3d 917 (2022), where the plaintiff was living and working in Montreal, the court held: "The fact that the alleged discriminatory acts and unlawful decision to terminate plaintiff's employment occurred in New York is insufficient to plead impact in New York." *Id.* at 597 (citations omitted). Finally, in *Jarusauskaite v. Almod Diamonds, Ltd.*, 198 A.D.3d 458 (1st Dept. 2021), *lv. denied*, 38 N.Y.3d 904 (2022), the First Department quoted *Benham* and *Hardwick* in holding that the alleged discriminatory conduct did not impact the plaintiff in New York since it "occurred while plaintiff was physically situated outside of New York, *and* did not have any impact on the terms, conditions or extent of her employment ... within the boundaries of New York." *Id.* at 579-580 (quotations and citations omitted, emphasis added).

Aside from not addressing failure-to-hire or failure-to-promote claims, the above First Department cases simply do not support Bloomberg's interpretation of *Hoffman*. While they place the initial focus of the impact requirement on a nonresident plaintiff's physical location at the time of the alleged discriminatory acts, that focus is neither exclusive nor determinative.

The analysis in *Hardwick* (upon which Bloomberg places particular reliance, *see* Resp. Br. at 12) makes clear that the place of impact of discrimination does not necessarily correspond with the physical location of a plaintiff, since, while Hardwick was located in London at the time of the alleged discrimination, the First Department held that she could nonetheless have felt its impact in New York if she had sufficiently pled that it had impacted the terms, conditions or extent of her employment in New York. On the other hand, in failure-to-hire or failure-to-promote cases involving a nonresident plaintiff, the terms, conditions, or extent of his or her employment *are* impacted in New York by the discriminatory denial of employment in New York, even if the plaintiff is physically located outside New York when the discrimination occurs.

Bloomberg also points to two federal cases that supposedly support its interpretation of *Hoffman*. *See* Resp. Br. at 12-13. The first case is *Shiber v. Centerview Partners LLC*, No. 21-cv-3649 (ER), 2022 WL 1173433 (S.D.N.Y. Apr. 20, 2022), in which the district court found the plaintiff's allegations were "not enough" to constitute "a discriminatory failure-to-hire claim" since "Shiber points to no facts showing—with any specificity—that she one day would have been able to work in Centerview's New York City offices or that she relied on some promise of eventual in-

person work." *Id.* at *4. The court carefully distinguished the circumstances before it from those presented in *Anderson v. HotelsAB, LLC*, No. 15-cv-712 (LTS), 2015 WL 5008771 (S.D.N.Y. Aug. 24, 2015), and in *Chau v. Donovan*, 357 F. Supp. 3d 276 (S.D.N.Y. 2019), holding that, unlike in those cases, Shiber had not pled a viable failure-to-hire claim because "unspecified future career prospects" or "a mere hope to work in New York down the line" does not suffice to show impact in New York. 2022 WL 1173433, at *4 (quoting *Kraiem v. JonesTrading Inst. Servs. LLC.*, 492 F. Supp. 3d 184, 199 (S.D.N.Y. 2020)). The second federal case cited by Bloomberg is *Ann Wang v. Gov't Emps. Ins. Co.*, No. 15-cv-1773 (JS) (ARL), 2016 WL 11469653 (E.D.N.Y. Mar. 31, 2016), where the plaintiff both lived and worked in Long Island but contended that, if she had received a particular "supervisory attorney position, she would have handled cases in "New York City Civil Courts and District Courts."" *Id.* at *7 (citation omitted). *Wang* is a case involving a prospective Long Island-based position with a tangential connection to New York City. It does not involve the denial of promotion to a New York City-based position.

Thus, none of the state or federal cases relied upon by Bloomberg support its interpretation of the impact test. Indeed, even the district court decision in Syeed's case does not support Bloomberg's

interpretation. That court held that the protections of the NYCHRL and the NYSHRL are confined to "individuals who live and work in New York City and State." A-64. Perhaps most tellingly, Bloomberg took the position on appeal to the Second Circuit that "the district court correctly held … [that] Syeed's claims under these statutes fail as a matter of law because she never lived or worked in New York and, as such, she cannot plead that any alleged discriminatory conduct had an impact on her in New York State or New York City." *See* 2d Cir. Resp. Br., dated September 2, 2022, at 1. It made no mention of the "physical presence" element it now insists was always implicit in the *Hoffman* test and endorsed for over a decade by New York appellate courts. In her principal brief before this Court, Syeed argued that the impact test for nonresident plaintiffs discriminatorily denied employment in New York should not be reduced to a pre-existing employment test, and pointed out the arbitrary and perverse outcomes that would follow, particularly in failure-to-hire cases. As detailed in the next section, the outcomes that would follow from the physical presence test Bloomberg now favors are no less arbitrary and invidious.

## II. Physical Presence as a Basis for Jurisdiction in Failure-to-Hire and Failure-to-Promote Cases is Artificial, Arbitrary, and Unworkable

In *Hoffman*, this Court concluded as follows: "Hoffman was neither a resident of, nor employed in, the City or State of New York. Nor

does Hoffman state a claim that the alleged discriminatory conduct had any impact in either of those locations." 15 N.Y.3d 285 at 292. The Second Circuit noted that the test, thus formulated, "seems to allow for the possibility that a plaintiff could satisfy the impact requirement without living or working in New York City or State at the time of the discriminatory acts." A-119. Alternatively, Bloomberg maintains, "[t]o the extent the *Hoffman* Court meant anything at all by the "nor," it is far more plausible that the Court referred to the possibility that an individual may live and work outside the jurisdictions but be subjected to discriminatory conduct while physically present in New York City or State." *See* Resp. Br. at 14. As a purported example of the "physical presence" test in practice, Bloomberg refers to *Kraiem v. JonesTrading Institutional Servs. LLC.*, 492 F. Supp. 3d 184 (S.D.N.Y. 2020), specifically its finding that the plaintiff therein was impacted in New York City by sexual harassment and retaliation she alleged occurred there during a week-long business trip. What Bloomberg omits to mention is that the court in *Kraiem*, as indicated above by the quotation in *Shiber*, also cited *Anderson* and *Chau* as sufficiently pled failure-to-hire cases, "where the impact of the plaintiff was specifically tied to their being deprived a job in New York on discriminatory grounds." *Id.* at 199. *Kraiem* clearly therefore does not stand for the proposition that physical presence in

New York is a necessary requirement in failure-to-hire or failure-to-promote cases for plaintiffs who neither live nor work in New York.

Bloomberg otherwise avoids almost any explanation of how its proposed "physical presence" requirement would apply in nonresident failure-to-hire or failure-to-promote cases. With regard to Syeed's case, Bloomberg notes that she does not "allege that she even paid a visit [to New York] in the course of applying for any New York position," and concludes more generally: "A plaintiff simply cannot feel the impact of a decision in a locale where she neither lives nor works, nor has even visited while applying for a position." *See* Resp. Br. at 11. It is difficult to conceive of a more superficial basis for jurisdiction than whether a nonresident plaintiff in a failure-to-hire or failure-to-promote case paid a visit to New York in the course of seeking (and being discriminatorily denied) the position. Bloomberg's proposed test specifies the nonresident plaintiff being "at any relevant time physically present in either [New York State or City]." *Id.* at 15. What that appears to mean is that, to meet the impact test, a nonresident plaintiff's presence in New York is sufficient either when the job application is submitted, or when the decision is made, or even when the decision is communicated. Bloomberg though neglects to specify any further details, including whether appearing in-person at an interview in New York confers

jurisdiction, whereas appearing remotely does not; or whether a minimum period of time spent in New York is necessary to establish presence (for example, will a day trip suffice or must a prospective plaintiff stay overnight).

Bloomberg tries to avoid such complications by maintaining that only Syeed's individual circumstances matter in deciding how the impact test should apply in failure-to-hire or failure-to-promote cases, and that it need not engage with "hypothetical questions that are not before the Court." *See* Resp. Br. at 30. In doing so, it fundamentally misunderstands the purpose of the present proceedings, which is to answer a certified question from the Second Circuit, not to decide Syeed's individual case. The answer to the question will have obvious ramifications beyond this case. Bloomberg's proposed "physical presence" test seeks to draw an artificial, arbitrary distinction in failure-to-hire and failure-to-promote cases and practically invites the contrivance of jurisdiction. It should be rejected by this Court.

## III. The Broad Interpretation of the Impact Requirement, which is Simple for Courts to Apply and will Lead to Consistent Results, Should Prevail

In contrast to the Bloomberg interpretation, Syeed has argued that this Court should adopt a broad interpretation of the impact test for

nonresident plaintiffs in failure-to-hire or failure-to-promote cases that asks whether the alleged discrimination affects the terms, conditions, or extent of the plaintiff's employment within the boundaries of New York. This test would encompass a nonresident plaintiff who, in the words of the Second Circuit, "did not work in New York City or State, but who alleged that but for an employer's unlawful conduct, he or she would have worked in New York City or State." A-118. Since the denial of a specific job in New York must be alleged, the test would also be "relatively simple for courts to apply and litigants to follow," *Hoffman*, 15 N.Y.3d at 291, and unlike the regressive interpretation advanced by Bloomberg, would not lead to arbitrary and dubious results.

Bloomberg claims that a broad interpretation would "undo" *Hoffman*. *See* Resp. Br. at 2. That claim is obviously self-serving and baseless. The impact test—which confines the effects of the NYSHRL and the NYCHRL within the respective State and City boundaries—is not in question. The only question here is how the test should be applied in failure-to-hire and failure-to-promote cases by nonresident plaintiffs (a relatively small sub-category) who were discriminatorily denied employment in New York. Bloomberg further claims that its narrow interpretation is appropriate because Syeed "had a remedy for her failure-to-promote claim in

Washington, D.C." *Id.* at 8 n. 4. However, whether or not a plaintiff has a remedy under another jurisdiction's laws should not determine whether a remedy exists under the City and State Human Rights Laws. The strange logic of this point is that, had Syeed resided in a state which does not provide her with a remedy,[1] she should be entitled to seek the protections afforded by the NYCHRL and the NYSHRL. Moreover, although Bloomberg is again silent with regard to failure-to-hire cases, plaintiffs there will almost invariably be left without a remedy in other states.

Ultimately, the question before this Court is whether to adopt a broad or narrow interpretation of the impact test. The broad interpretation advanced by Syeed will lead to predictable, consistent results. It will also properly ensure that New York employers who direct discriminatory hiring and promotion practices at nonresidents are subject to accountability in New York courts. Under the NYCHRL, the choice is circumscribed (if not determined) by its construction clause, N.Y.C. Admin. Code § 8-130, which mandates that it 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). A

[1] For example, Alabama has no statutory protections beyond equal pay against sex-based discrimination, and Georgia and Mississippi have statutes that prohibit sex-based discrimination in state government employment only. *See* Ga. Code. Ann. § 45-19-22 (2022); Miss. Code Ann. § 25-9-103 (2020).

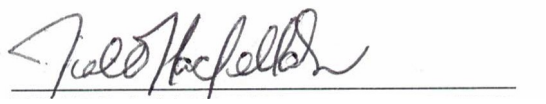
corresponding amendment, in 2019, of the construction clause of the NYSHRL, Executive Law § 300 (*see* L. 2019, ch. 160, § 6), postdates the events at issue in Syeed's case. Nevertheless, to the extent a broad interpretation of the impact requirement turns on the construction clause of the NYCHRL, that interpretation will also apply to claims filed after the effective date of the 2019 amendment of the NYSHRL.

## CONCLUSION

For the reasons set forth above, and in Syeed's principal brief, this Court should answer the certified question in the affirmative.

Dated: New York, New York
June 26, 2023

Respectfully submitted,



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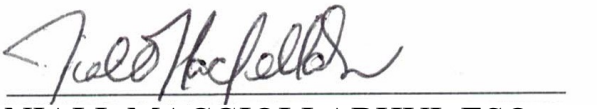
## CERTIFICATION

I hereby certify pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.), § 500.13(c)(1), that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 3,229 words.

Dated: New York, New York
June 26, 2023

Respectfully submitted,



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