

The Second Circuit Gives Ex-Cons' Wrongful Termination Suit A Second Chance

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On May 31, 2017, the United States Court of Appeals for the Second Circuit gave two Ex-Cons a second chance at pursuing their wrongful termination suit against their employer's client, after New York's highest court weighed in, advising that out-of-state entities that aid or abet employment discrimination against individuals with criminal convictions may be liable under New York State Human Rights Law ("NYSHRL").

The plaintiffs are both convicted sex offenders and former employees of Astro Moving and Storage Co. Astro provides certain moving and storage services under a contract with its client. Astro terminated Plaintiffs after discovering past criminal convictions through a background check. The contract between Astro and its client prohibited Astro from employing individuals convicted of certain crimes from working on the client's jobs.

The district court granted the clients' motion for summary judgment, stating NYSHRL § 296(15), which prohibits the denial of employment on the basis of a criminal conviction, applied only to the aggrieved party's "employer." Plaintiffs appealed.

On appeal, the Second Circuit certified three questions to the New York Court of Appeals:

1. Does Section 296(15) limit liability for unlawful denial of employment only to the aggrieved party's "employer"?
2. If Section 296(15) is limited to the aggrieved party's employer, how should courts determine whether an entity is the aggrieved party's "employer" for purposes of claims under Section 296(15).
3. Does the "aiding and abetting" liability provision of the NYSHRL, Section 296(6), apply to Section 296(15) such that a non-employer may be liable under Section 296(15) as an aider and abettor of the employer's unlawful denial of employment?

The New York Court of Appeals [answered these questions](#) on May 4, 2017. It answered question one in the affirmative—yes, section 296(15) limit liability for unlawful denial of employment only to the aggrieved party's "employer."

In answer to the second question, the New York Court of Appeals identified four factors to use in determining whether an entity is an aggrieved party's "employer": "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct."

Finally, the Court reformulated the third question, finding the aiding and abetting statute "extends liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction." *Id.* at 14. Accordingly, the Second Circuit vacated the order of the District Court to the extent it conflicts with the decision of the New York Court of Appeals and remanded the case for wrongful termination for further proceedings.

Following this decision, staffing companies and companies who employ individuals to work on third-party projects should review their contracts and hiring practices to ensure that they are not screening out all employees with convictions as a matter of course. Instead, the company should make an individualized assessment of what convictions are directly related to the job prior to making a decision regarding employment of an individual. Additionally, companies should be cognizant of the laws and guidelines of foreign states within which they do business to ensure compliance with local laws employment regulations.

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Topics

Discrimination, Background Checks, Aiding And Abetting, Conviction Record, New York State Human Rights Law, NYSHRL