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COURT OF APPEALS
STATE OF NEW YORK

GRIFFIN,

Appellant,

-against-

NO. 35

SIRVA, INC.,

Respondent.

20 Eagle Street
Albany, New York
March 28, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on today's
2 calendar is appeal number 35, Griffin v. Sirva.

3 Counsel.

4 MR. LICHTEN: Your Honor, I'd like to request two
5 minutes to reserve for rebuttal.

6 CHIEF JUDGE DIFIORE: Of course you may.

7 MR. LICHTEN: My name is Stuart Lichten, may it
8 please the court. I represent Plaintiffs-Appellants
9 Trathony Griffin and Michael Godwin.

10 On February 8th, 2011, Mr. Griffin and Mr. Godwin
11 were asked to sign a piece of paper which, "Authorized
12 Sirva, Inc. to investigate my background." Two days later,
13 their workplace received an email stating that Mr. Godwin
14 and Mr. - - - Mr. Griffin did not meet company standards,
15 and they received letters at their homes advising them that
16 they were not qualified to interact with service customers.
17 The next day, they were fired.

18 Mr. Griffin, that was a job he held for two-and-
19 a-half years, he hasn't been able to obtain full-time
20 employment since.

21 On that record, the district court dismissed the
22 case against Sirva and its subsidiary, Allied, entirely on
23 the grounds that Sirva and Allied were not employers of - -
24 -

25 JUDGE RIVERA: Counsel, who - - - who - - - who

1 paid the salary for Mr. Griffin and Godwin, and who sets
2 the terms of their work?

3 MR. LICHTEN: Well - - -

4 JUDGE RIVERA: Who gets to set their hours, and
5 when they show up, and what they do?

6 MR. LICHTEN: Well, the - - - they're paid by
7 Astro Moving and Storage Company; that's the name on their
8 check. The terms and conditions of their work is a larger
9 question than just the hours and their schedules. The
10 hours and their schedules were set by Astro. But whether
11 or not they could be there in the first place was set by
12 Allied and Sirva.

13 Whether or not they were qualified to interact
14 with their customers was determined by Sirva and Allied,
15 and was told to Astro, and that if Astro disregarded that
16 advice, they were subject to fines, they were subject to
17 losing seventy to eighty percent of their business.

18 The - - -

19 JUDGE STEIN: If - - - if - - - if we were to
20 agree with you that Allied was an "employer" under the
21 definition of Section 296(15), how does - - - how does that
22 interplay with the aiding and abetting provision of 296(6)?
23 It seems to me that it would kind of render the aiding and
24 abetting superfluous under these circumstances.

25 MR. LICHTEN: Well - - -

1 JUDGE STEIN: Would you address that?

2 MR. LICHTEN: Under section 296(15), it does not
3 say "employer". It says, "person, agency, bureau,
4 corporation, or association".

5 JUDGE STEIN: Well, but it also refers you to the
6 Correction Law, so you - - - you can't view that in - - -
7 in isolation from what Article 23-A of the Correction Law
8 provides, correct?

9 MR. LICHTEN: That's correct. But the Human
10 Rights Law does not require you to be an employer in order
11 to be liable under this Statute, under - - -

12 JUDGE STEIN: Well, that's - - - that's - - - I -
13 - - that's the question that - - - that we're here to - - -
14 to address. I - - - I understand that. But my question is
15 - - - is a little more narrow. If - - - if - - - if that
16 were the case, if we were to interpret it that way, then
17 what is the meaning of the aiding and abetting?

18 MR. LICHTEN: Well, the aiding and abetting,
19 there might be some overlap between the two, but it covers
20 more situations.

21 JUDGE STEIN: Such as?

22 MR. LICHTEN: Well, you can be any person at all
23 under the aiding and abetting clause. You don't even have
24 to be an employer, or a person, or - - - or any of them.

25 JUDGE STEIN: Well, but - - - I thought that's

1 what you said that the first sentence of 296(15) says "any
2 person", right?

3 MR. LICHTEN: Well, there are still five things,
4 five entities listed there. Under the aiding and abetting,
5 it's any person. But beside that - - -

6 JUDGE STEIN: So you say that subdivision 15 is
7 narrower than subdivision 6. Can you just give me some
8 examples as to where one - - - one would apply and not the
9 other?

10 MR. LICHTEN: Well, you can aid and abet, which
11 the courts have said simply means that you engage in
12 conduct that assists others in the performance of
13 prohibited acts. You can - - - in the - - - in the
14 instance of the NOW v. Gannett Newspapers case, the - - -
15 the defendant was a newspaper who had sexist ads, and
16 didn't employ anybody. There was no employment-specific
17 relationship involved in the case at all.

18 And so therefore they couldn't go under 296(15)
19 because it wasn't an employment situation. But - - - and
20 the aiding and abetting was just the printing of the ads,
21 even though there's no specific person who is identified as
22 being harmed by the ads.

23 So that's an example of somewhere where they
24 would be found liable for aiding and abetting, but not
25 being found liable for committing an improper pract - - -

1 an unfair practice under the Human Rights Law.

2 JUDGE ABDUS-SALAAM: So following up on what you
3 just said, counsel. The definition of who - - - or who
4 would be someone who could discriminate is pretty broad in
5 terms of individuals, partnerships, associations,
6 corporations, et cetera. But are we to look at the Statute
7 under its plain terms, or look at it in - - - in reference
8 to a particular situation, like an employment situation
9 that we have here, and who would be an employer for those
10 particular - - - the circumstances that we have here.

11 MR. LICHTEN: Well, I think when the legislature
12 wrote 296(15), they specifically stayed away from putting
13 employer as a requirement. So even looking at the plain
14 language, looking at the Statute as a whole, looking at the
15 intent of the Statute, looking at Section 300 which says
16 you have to liberally construe the Statute to further its
17 aims, under any of those rubrics, you - - - you have to - -
18 -

19 JUDGE STEIN: But you haven't mentioned the
20 Correction Law. And that - - - that's in - - - integrally
21 related here; is it not?

22 MR. LICHTEN: Well - - -

23 JUDGE STEIN: And isn't that what the Correction
24 Law refers to - - -

25 MR. LICHTEN: Well, it ref - - -

1 JUDGE STEIN: - - - his employers, public
2 agencies, and private employers?

3 MR. LICHTEN: It refers to them in that section
4 of the Statute, but it doesn't say that the only people who
5 can bring a cause of action are private employers or public
6 agencies. I mean, this case is brought under The Human
7 Rights Law, Section 297 executive law, which specifically
8 says that a victim of these - - - these types of practices
9 can bring a private cause of action.

10 JUDGE WILSON: Well, I take - - -

11 MR. LICHTEN: The Correction Law doesn't - - -

12 JUDGE WILSON: I take it, your position though,
13 is that Gannett and the NOW case was not the person who
14 denied employment; is that right?

15 MR. LICHTEN: Correct.

16 JUDGE WILSON: Even if the result of the ads was
17 that people didn't - - - weren't employed - - -

18 MR. LICHTEN: Right - - -

19 JUDGE WILSON: - - - women weren't employed.

20 MR. LICHTEN: They weren't required to show that
21 they denied employment, because that was brought under the
22 aiding and abetting statute.

23 JUDGE WILSON: But I'm not asking what it was
24 brought as; I'm asking you whether Gannett, in that
25 circumstance, is an employer, that it - - - in the context

1 of (15), a person who denied employment.

2 MR. LICHTEN: They were not.

3 JUDGE WILSON: Okay. And why? That's what I
4 think we're wrestling with. How broad - - - how broadly
5 are you expanding "employer".

6 MR. LICHTEN: Well - - -

7 JUDGE WILSON: It doesn't reach somebody who
8 takes an ad out, but it does reach Allied because?

9 MR. LICHTEN: Because Allied had a significant
10 level of control over the discrimination policies and
11 practices of the direct employer. They determined who the
12 direct employer could and couldn't hire. They told them,
13 if you don't - - - if - - - if you hire this person, you'll
14 lose all our business and eighty percent of our business.
15 You can be fined, you can have - - - have permanent loss of
16 business.

17 That - - - that level of control, Astro is
18 basically outsourcing its discrimination policies to Allied
19 and Sirva. And under that situation, if they're doing
20 that, then Allied and Sirva can be liable under the Human
21 Rights Law for carrying out those discrimination policies
22 and practice.

23 JUDGE FAHEY: Well, we've been given a number of
24 different tests that have been offered, joint employer - -
25 - the Joint Employer Doctrine, the Single Employer

1 Doctrine, I think there is some amicus briefs and the State
2 have also indicated an interference test to define the
3 scope of employer.

4 But would your concerns in your case be met by
5 application of simple agency law?

6 MR. LICHTEN: I don't - - -

7 JUDGE FAHEY: So in other words, if - - - or - -
8 - Astro is - - - is simply acting as an agent for Allied
9 Van, and Allied Van has discriminatory policies, therefore,
10 if Astro is - - - discriminates, they discriminate; Allied
11 discriminates.

12 MR. LICHTEN: That is - - - that could be one way
13 of looking at it.

14 JUDGE FAHEY: Um-hum. What would the effect of
15 the jury verdict in this case be? Forgetting about the
16 general application law, what would affect the jury verdict
17 in this case?

18 MR. LICHTEN: The jury verdict was not presented
19 with an agency-type of instruction.

20 JUDGE FAHEY: Um-hum.

21 MR. LICHTEN: The jury, in fact, one of their
22 notes seemed to suggest that they believed that Astro was
23 an affiliate of - - - of Allied, and in fact, Astro's CEO
24 testified that they were a subsidiary of Allied, which
25 isn't technically true; they're two separate companies.

1 MR. LICHTEN: Well, it depends. As a general
2 rule, I would say no, because - - -

3 JUDGE STEIN: Haven't we said that they're
4 comparable and - - -

5 MR. LICHTEN: Well, there are some cases under
6 Title VII which I think would be instructive. The Spirt
7 case, which says the test is if it - - - if the - - - if
8 the entity significantly affects access of any individual
9 to employment opportunities, or where an employer has
10 delegated one of its core duties to a third party.

11 JUDGE STEIN: Well, haven't the Federal courts
12 kind of overruled that or - - -

13 MR. LICHTEN: I wouldn't - - - I wouldn't say
14 overruled. It's been hemmed in, but it's still good law.
15 The Second Circuit is still - - - it still cites it, and it
16 has not overturned it.

17 JUDGE WILSON: Why isn't the aid, abet, insight,
18 coerce, compel language sufficient for you here?

19 MR. LICHTEN: It is. I mean, it is sufficient.
20 But the - - -

21 JUDGE WILSON: Why isn't that a simpler way out
22 of this than wrestling with who's an employer and what the
23 test ought to be?

24 MR. LICHTEN: Well, because the employment part
25 of the Statute is the major part. That's - - - if - - - if

1 you - - - if you bring a case against the defendant, it's
2 hard to just rely on the - - - the aiding and abetting,
3 because you're overlooking a major part of the Statute. I
4 mean, I think they should - - - in order to further this -
5 - - the - - - the liberal reading of the Statute, which
6 furthers the intent of the Civil Rights Law, I think that
7 you should not require that the defendants be an employer.

8 I mean, in this particular case, it may be that
9 the aiding and abetting might be enough. But in other
10 cases, it might not be. I don't know if - - - if - - - if
11 the - - - the NOW case, which is still good law and - - -
12 and really shows the way here, it reversed the Fourth
13 Department's requirement that you needed knowledgeable and
14 intentional discrimination.

15 If - - - it would be - - - it would be sufficient
16 here to say the at the very least, the plaintiffs have
17 shown that Allied and Sirva were aiding and abetting, or
18 inciting, or compelling, or coercing for the matter, the -
19 - - the remaining part of the aiding and abetting Statute.
20 But as a matter of law, it's also true that they show that
21 Section 296(15) was violated, and we would argue that that
22 should be the law of this court.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel.

25 MR. TISNE: May it please the court. Philip

1 Tisne for the State of New York.

2 296(15) is not limited to employers. That
3 provision - - -

4 JUDGE RIVERA: So what - - - why - - - let's get
5 that aiding and abetting. Why isn't that the proper way to
6 look at the Statute and these two provisions, that the
7 aiding and abetting captures the kinds of actors that the
8 State is concerned with?

9 MR. TISNE: Well, certain - - -

10 JUDGE RIVERA: Why - - - why isn't that good
11 enough? Is it because of the primary liability question;
12 what - - - what is it?

13 MR. TISNE: Certainly the aiding and abetting
14 provision captures this conduct here. It certainly is - -
15 - the Second Circuit has framed the question. But I think
16 it's the posture of which this case comes to this court.
17 This court, we're going to resolve this case in the normal
18 course.

19 Of course, the easier way to do it would be on
20 the aiding and abetting, but this comes on a certified
21 question. The Second Circuit has asked this court to
22 settle two questions of New York Law that will help it
23 resolve this case, and so this court is duty bound to
24 answer those questions, to aid the Second Circuit in
25 resolving - - -

1 JUDGE WILSON: We do have the discretion to
2 reformulate those questions, no?

3 MR. TISNE: You certainly do. But the Second
4 Circuit is going to have to answer both of them,
5 regardless. So - - -

6 JUDGE WILSON: Why - - - why is that the case.
7 Let me just posit this. Suppose what we conclude, I'm not
8 saying we are going to, but suppose that what we conclude
9 is that the Section 6 expresses a broad interest of the
10 state in the human rights policy that even people who aid,
11 abet, insight, compel, or coerce, or attempt to do those
12 things, are liable under the Statute; why do we need to
13 worry about the precise contour of employer if all those
14 other - - - if all that other conduct is - - - is reached
15 by the Statute, and that was the legislature's intent?

16 MR. TISNE: Well, I don't think every situation
17 that is encompassed by direct liability is also encompassed
18 by the aiding and abetting liability. For instance, the
19 interference theory which we've discussed would apply in a
20 situation where a company takes over a piece of the hiring
21 process and injects its own discriminatory practices into
22 the hiring purpose.

23 The standard - - - the - - - the quintessential
24 example is the staffing company that screens out applicants
25 based on a discriminatory practice.

1 JUDGE WILSON: And that wouldn't be - - -

2 MR. TISNE: In that situation - - -

3 JUDGE WILSON: And that wouldn't be aiding or
4 abetting?

5 MR. TISNE: - - - they would be directly liable.
6 I'm sorry.

7 JUDGE WILSON: And that wouldn't be aiding or
8 abetting?

9 MR. TISNE: Well, they wouldn't have aided and
10 abetted anybody else's discrimination, because the only
11 discrimination there is their own principle discrimination.
12 The - - - the company that they are screening applicants
13 for could be agnostic about whether they take people with
14 criminal convictions or not. It's the purp - - - the
15 company that is screening applicants that is introducing
16 discrimination into the process.

17 So there isn't an onto relationship between these
18 two provisions. There's certainly significant overlap, but
19 it's not perfect.

20 JUDGE RIVERA: So you mean when you don't have
21 like Allied who's got this rule or policy that they impose?

22 MR. TISNE: I'm sorry?

23 JUDGE RIVERA: Your - - - your example is when
24 you don't have Allied who is imposing the rule, but it's
25 just this other actor who is not going to be the employer,

1 who imposes this rule.

2 MR. TISNE: Well, I mean, it - - - it would apply
3 - - -

4 JUDGE RIVERA: Is that what you mean? They - - -
5 they wouldn't fit the aiding and abetting or employer, and
6 they're lost?

7 MR. TISNE: I think given the specific facts of
8 this case, the overlap is fairly complete, that is to say
9 that because of their involvement with - - - because of
10 Allied's involvement with the employment decisions of
11 Astro, that while - - - while it will be liable directly,
12 it will also be liable as an aider and abettor. But I
13 don't think that in every case, those two things overlap.

14 JUDGE GARCIA: But going back to that - - -

15 CHIEF JUDGE DIFIORE: Counsel, getting back to
16 the - - -

17 JUDGE GARCIA: - - - question that - - - I'm
18 sorry.

19 CHIEF JUDGE DIFIORE: Excuse me. Counsel,
20 getting back to the initial question as to whether or not
21 (15) applies to employers.

22 MR. TISNE: Um-hum.

23 CHIEF JUDGE DIFIORE: Talk about the interplay
24 between the Corrections Law and (15).

25 MR. TISNE: Sure. Well, 296(15) defines the

1 scope of entities to which it applies; the - - - the scope
2 of entities that are prohibited from engaging in
3 discrimination. Prohibits any person, bureau, agency,
4 association, or corporation from engaging in illegal
5 conviction discrimination.

6 The substantive provision of the Corrections Law,
7 Corrections Law 752, doesn't even talk about who is
8 prohibited from engaging in illegal discrimination. It
9 uses a dramatic passive-voice formulation of it by saying
10 that no application for employment or any employment shall
11 be denied or adversely affected.

12 CHIEF JUDGE DIFIORE: Um-hum.

13 MR. TISNE: And there are other provisions,
14 certainly, in the Corrections Law which discuss or mention
15 employers - - -

16 CHIEF JUDGE DIFIORE: Does it reference - - -

17 MR. TISNE: - - - but they don't limit - - -

18 CHIEF JUDGE DIFIORE: - - - private employers and
19 public agencies?

20 MR. TISNE: The - - - the closest situation where
21 the Correction Law references private employers is in 751,
22 which is - - - that is not a provision that defines the
23 class of entities that are prohibited from engaging in
24 illegal discrimination. That defines - - -

25 JUDGE STEIN: Well, does - - - is there any

1 significance to the fact that under Section 753, which sets
2 forth the factors to be considered in - - - concerning a
3 previous criminal conviction says, "In making a
4 determination pursuant to 752, the public agency or private
5 employer shall consider the following facts." I mean - - -

6 MR. TISNE: Well, I think what that section is
7 saying is that when the entity that is in the position to
8 make the hiring or firing decision makes that decision,
9 then it has to take in fac - - - into consideration these
10 factors.

11 JUDGE STEIN: But there, it refers to - - - it
12 clearly refers to "employer". And - - - and you're saying
13 now, you - - - you're asking that we find that staffing
14 agencies, hiring companies, things like that, fit within
15 that bill. But they're - - - they're not a private
16 employer or a public agency.

17 MR. TISNE: So - - -

18 JUDGE STEIN: So how does - - - how does - - -
19 how does that relate to what you're suggesting?

20 MR. TISNE: A company that doesn't make the
21 actual hiring and firing decision, and therefore doesn't
22 have to take into consideration the factors that are set
23 out in 753, nevertheless could be said to deny employment
24 where its involvement in the employment process or the
25 hiring process of a company that is hiring workers, that is

1 making the actual decision, prevents - - -

2 JUDGE STEIN: But I thought you said that they
3 are making the actual decision, because they are screening
4 them out. It never gets to the direct employer.

5 MR. TISNE: Well, no. They don't. So - - - let
6 me be clear. When I - - - when I refer to a "direct
7 employer", I'm - - - I'm referring to the entity that
8 actually makes the decision whether to hire and fire.

9 JUDGE STEIN: So that could be a staffing agency.

10 MR. TISNE: Well, no, because the staffing agency
11 isn't hiring somebody or firing somebody; they are
12 controlling who goes - - - which applicants go through to
13 the ultimate company who is going to make that decision.
14 But they aren't actually making the decision themselves.
15 But that doesn't mean that they can't be said to have
16 denied employment as to every person that they screen out.
17 They're not even letting them get their foot in the door,
18 and they're doing so for discriminatory reasons. It's the
19 same effect as if they - - -

20 JUDGE STEIN: The question is is whether their -
21 - - well - - - I'll take that back. Go ahead.

22 MR. TISNE: The - - - the fact is that 296(15)
23 simply doesn't refer to employers; it refers to any person
24 who denies employment. And there are circumstances where a
25 company that doesn't make the actual hiring and firing

1 decision can be said to deny employment based on its
2 involvement in the actual hiring and firing decision.

3 We've talked about the interference during the
4 staffing agency, this could also happen where a company
5 that isn't making the actual decision, effectively controls
6 the hiring process of - - - of the company that is making
7 the decision. For instance, by imposing discriminatory
8 hiring criteria. In that situation, the company that sets
9 the policy would be set to have denied employment because
10 it's the policy that results in the denied employment just
11 as much as it is the person who actually implements the
12 policy.

13 JUDGE FAHEY: It seems like you have two types of
14 tests. One is that - - - one is a series of control tests,
15 and then - - - then there's the interference test. Is
16 there any limit to the interference test? How far does
17 this extend?

18 I mean, in theory, you know, a government agency
19 that didn't make a regulation could be interfering. It's -
20 - - I just - - - I'm wondering what the parameters are - -
21 -

22 MR. TISNE: Sure.

23 JUDGE FAHEY: - - - of this interference test.

24 MR. TISNE: And - - - and I think the D.C.

25 Circuit's decisions in Sibley and - - -

1 JUDGE FAHEY: Right, it's the '73 case. I looked
2 at it.

3 MR. TISNE: And - - - and Redd as well, that
4 follows it sort of describe the - - - the limits that
5 you're asking about, which it say that the company that is
6 doing the interfering has to be within the employment
7 decision-making process.

8 If it stands outside of that process, if it acts
9 like a customer and not somebody who is together with the
10 prospective employer providing services to the world, then
11 there wouldn't be a sufficient connection of the employment
12 decision to allow the interference theory to come into
13 play.

14 JUDGE FAHEY: I see.

15 MR. TISNE: I'd like to speak very briefly about
16 aiding and abetting. Like we said, it clear - - - as the
17 Circuit has - - - has framed the question, certainly a
18 company that requires another company to engage in illegal
19 discrimination can be said to have compelled or coerced
20 that company to engage in discrimination. The record also
21 suggests here another basis for accomplice liability,
22 that's where a company gives substantial assistance to
23 another company in engaging in discrimination. We think
24 both of those are potentially applicable in this case.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 MR. TISNE: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. WRIGHT: Good afternoon, Your Honors, and
4 thank you for the scheduling accommodation today.

5 The Human Rights Law is not a suicide pact. By
6 that, I mean it - - - it is not a law that mandates the - -
7 - the hiring of persons with criminal histories under all
8 circumstances, no matter what the potential cost. It does
9 something quite different.

10 The legislature struck a delicate balance when it
11 enacted these laws in 1976. The legislature sought to, of
12 course, encourage the employment of people with criminal
13 histories. But it gave precedence and priority to public
14 safety and the safeguarding of property. The safeguarding
15 of property covers a lot of territory. Obviously, in - - -
16 in the context that we're dealing with in this case, it
17 applies to the safety of our customers and their property.

18 But I would also ask you to consider the fact
19 that "property" includes the property rights of the service
20 providers in question. The integrity, the financial
21 integrity of their businesses, and their business
22 reputations. Those are all property rights we would
23 respectfully submit that our - - -

24 JUDGE RIVERA: Counsel, if in 296(15) the
25 legislature only meant "employer", why is that not in that

1 first sentence? Why does it say "person, agency, bureau" -
2 - - why - - - why does it say that instead of "employer",
3 since it uses "employer" later in the same section?

4 MR. WRIGHT: Yes. I would - - - and I could only
5 guess that when the legislature listed the five or six
6 categories of potentially responsible parties in sentence
7 one, they were mindful of the fact they used those exact
8 same words in the definition of "employer" in Section 296.
9 And also, the same words are contained in the Labor Law, in
10 Section 190, where that statute defines "employer".

11 The legislature, I believe, and I don't know the
12 answer why the word is not in the first sentence, but it -
13 - - it caught my attention that the very next sentence, the
14 second sentence, which uses the word "employer" twice,
15 begins with the word "further". I think that's a clue. I
16 think that's a clue that the legislature meant the first
17 and second sentences to run one from the other seamlessly.
18 And that when the legislature talks about "employer" in the
19 second sentence of (15), it's talking about the same
20 entities that it mentions in the first sentence.

21 There's also the fact, as - - - as you mentioned
22 earlier, that even the first sentence references Article
23 23-A. And this gets us into, what is the gravamen of a - -
24 - of a violation of a Corrections Law. And it hasn't been
25 talked about yet. But as we see it, the - - - the essence

1 of a violation of the HRL is found in 23-A.

2 And it's - - - it's dual. It's the failure to
3 consider the eight factors coupled with an unreasonable
4 termination of employment or denial of employment. That's
5 really the essence of - - - of a violation of the HRL.

6 So it makes no sense, and - - - and this court
7 has commented in Albano, you don't construe a statute by
8 taking it out of context. And that's what the appellants
9 are advocating.

10 In context, it's very clear to us that the first
11 sentence of 296(15) must refer to private employers and
12 public employers, in our case, a private direct employer.
13 And - - - and here, it's Astro; it's not Allied.

14 So looking at all those factors, all those clues
15 that the legislature gave us - - -

16 JUDGE RIVERA: So is then, under your theory, the
17 only way Allied could be liable if there has been a
18 discriminatory act, I know you've - - - you've dispute
19 that, but let's just assume for one moment - - -

20 MR. WRIGHT: Yes.

21 JUDGE RIVERA: - - - is under the aiding and
22 abetting provision?

23 MR. WRIGHT: I think that's a fair statement,
24 because the aiding and abetting provision in (6) is broad
25 enough to cover anyone who might substantially assist or

1 actually participate in a discriminatory act. I think
2 those two phrases are synonymous. They - - - they imply
3 that the - - - the principle actor has knowledge that he or
4 she is - - - is promoting an unlawful act. We clearly
5 argue that that doesn't apply here. Certainly not in light
6 of what happened below.

7 But as we see in the NOW case, it can apply to
8 parties who are not direct employers, who are not defined
9 as such in the other parts of the Statute.

10 So we would contend that the aiding and abetting
11 part of the Statute is the catchall that the legislature
12 intended it to be. And we would also submit that the rest
13 of the Statute, as - - - insofar as it applies to direct
14 employers, is fully enforceable as the legislature meant it
15 to be, by holding direct employers accountable. They are
16 the only parties who are really capable - - - they are the
17 only parties who are required to consider the eight factors
18 as a practical matter. They are the only parties were able
19 to do so, a party who merely does business with an
20 employer.

21 JUDGE STEIN: What is the - - - the test or
22 definition for "employer" that - - - assuming that we agree
23 with you that it only applies to employers, what - - - what
24 is the tester definition that you are asserting we should
25 find applicable?

1 MR. WRIGHT: We - - - we only ask that the court
2 apply its own decision in Carter, which is to acknowledge
3 and - - - and rein - - - reiterate, reaffirm the dictionary
4 definition of "employer", which is one that everyone
5 understands what it means. So it - - - it's not only
6 valuable to lawyers, but - - - but the public understands
7 what an employer is and what an employer is not.

8 So with that as the starting point, I - - - I
9 think that - - - that if you look at the Patrowich test, to
10 the extent that there might be a third party, it is not
11 nominally the employer, but - - - who, in fact, so controls
12 the - - - the nominal employer to the point where that
13 employer has no free will, which doesn't exist in an arm's-
14 length contractual situation, typically, but I - - - I
15 think that Patrowich provides a - - - a guide for looking
16 at who else might be deemed an employer under the rest of
17 the Statute, excluding aiding and abetting.

18 JUDGE ABDUS-SALAAM: Counsel, could you just
19 respond to your adversary's position that just aiding and
20 abetting isn't enough to further the aims of the Statute to
21 prevent discrimination in - - - in the circumstances that
22 we're looking at?

23 MR. WRIGHT: Well, I'm challenged to - - - to
24 understand what consequences there could be in any
25 particular situation that would not be a remed - - -

1 remediable under either aiding and abetting or holding the
2 direct employer accountable. Someone has hired the
3 aggrieved party at some point. And if that someone has
4 violated the Statute, well, that - - - that employer may be
5 liable.

6 Now, I don't know how it's possible to have more
7 coverage than to add to that standard of liability what is
8 provided - - -

9 JUDGE ABDUS-SALAAM: In this case, you know, and
10 correct me if I'm wrong, but I - - - I think the jury found
11 the Astro was not liable for discrimination, even though it
12 essentially terminated these two employees - - -

13 MR. WRIGHT: Yes.

14 JUDGE ABDUS-SALAAM: - - - based on the
15 information that it received from Allied, Allied's vetting
16 company. So if - - - if Astro was not liable, then you're
17 - - - you're saying that - - - I guess you're saying that
18 Allied would be liable only on an aiding and abetting
19 theory.

20 MR. WRIGHT: Well, that's our view. And - - -
21 factually, if I can be very specific - - -

22 JUDGE ABDUS-SALAAM: How would they be held
23 liable if - - - if Allied - - - if Astro was not held
24 liable for discrimination?

25 MR. WRIGHT: If we have, as - - - as we do in

1 this case, res judicata on - - - on the finding of - - - of
2 nondiscrimination and nonliability, where the only
3 possibility is that if - - - if there was any theoretical
4 possibility that Allied could be liable to these
5 plaintiffs, and their own employer who terminated them was
6 found not liable, then there is no practical mechanism that
7 we - - - we can think of that we see in the record that
8 would make Allied liable just because of the existence of
9 its rules, which - - -

10 JUDGE RIVERA: But - - - but see, this is where
11 I'm having a problem with your argument.

12 MR. WRIGHT: Yes.

13 JUDGE RIVERA: Because isn't the Statute and the
14 legislative intent to get to exactly the entity like
15 Allied, the one that sets the policy, the one that sets
16 that rule that then everyone else has to fall in line?
17 Isn't that - - - isn't that the problem, that Astro may not
18 very much believe in this view that Allied has, but it's
19 about the bottom line, it's about money, and I want to keep
20 this contract, or I want to keep this arrangement with
21 Allied, I want to keep this business. And so they fall in
22 step.

23 And so isn't - - - isn't this Statute about
24 getting to really the source of the discrimination, which
25 is the decision maker, which is, in this case, Allied?

1 MR. WRIGHT: No. We - - -

2 JUDGE RIVERA: And that's why it doesn't say
3 "employer" in the first sentence.

4 MR. WRIGHT: No. We - - - we don't see - - - we
5 don't see anything in the first sentence that implies that
6 it - - - that it extends to the world, which is basically
7 plaintiff's argument.

8 JUDGE RIVERA: No, no, no. It doesn't say that.
9 It says that - - - "to deny any license or employment",
10 right? That's your focus. It's not to the world. It has
11 to have - - - be some entity - - -

12 MR. WRIGHT: I thought we were talking about - -
13 -

14 JUDGE RIVERA: - - - an individual or an entity
15 that has some role in this. And - - - and all I'm
16 suggesting is, isn't - - - isn't the point of this to get
17 to the source of the inherent discrimination, which is that
18 view, that someone who has a criminal record should not be
19 employed in a particular job.

20 And in this case, that's Allied that's making
21 that decision. That's who you want to get to. Because
22 they are the ones who will influence the market and the
23 opportunities. It may very well be, I understand your
24 position, it may very well be that if what the Correction
25 Law anticipates, which is those balancing of factors and

1 seeing if otherwise this is the kind of individual who
2 should not be employed in a particular job, once doing
3 that, that termination or not allowing them to work in
4 certain positions is totally appropriate and not a
5 violation of the Statute, right?

6 But - - - but isn't this focusing on the people
7 who make, or the entity that - - - that sets the game
8 rules?

9 MR. WRIGHT: We don't see that in the Statute,
10 Your Honor, to - - - to be direct.

11 JUDGE RIVERA: Um-hum.

12 MR. WRIGHT: We don't see any indication in the
13 way the Statute is framed and worded that the legislature
14 meant to reach beyond direct employers, and were excluding
15 aiders and abettors, to reach beyond direct employers to
16 other third-party non-employer decision makers who might
17 influence them in a decision.

18 JUDGE WILSON: But when you say to - - -
19 excluding the aiding and abetting, that doesn't just
20 include aiding and abetting; there's also insight, coerce,
21 compel, and it says attempt. So - - -

22 MR. WRIGHT: Yes.

23 JUDGE WILSON: - - - why does the - - - the
24 judgment you're claiming has res judicata effect prevent a
25 lawsuit under Section 6 against Allied on the theory that

1 they attempted to incite, or coerce, or compel, and that's
2 the effect of their policy, and the legislature meant to
3 get that, regardless of the result.

4 MR. WRIGHT: Well, res judicata would cut that
5 off, I believe, Judge, because if the - - - if the attempt
6 requires that either the - - - the act was near at hand or
7 capable of being achieved in, at least in the mind of the
8 perpetrator, that never happened. There's no evidence, and
9 there never will be, the Allied had any reason to believe
10 that what it was asking its agent, Astro, to do in
11 complying with these rules, that - - - that Allied had
12 reason to believe it was unlawful. Allied, on the
13 contrary, required - - -

14 JUDGE WILSON: But neither did Gannett, neither
15 did Gannett.

16 MR. WRIGHT: Well, Gannett knew that - - - that
17 the HRL in Section 291 forbade sex discrimination. And it
18 - - - it certainly should have known, at least in
19 hindsight, that its ads were promoting that.

20 But what we have here is a policy that even if
21 Astro had devised it and implemented it itself, would be
22 lawful. The policy would be lawful because the result is
23 lawful. The result of excluding the worst of the worst,
24 the - - - the Apex felons from going into people's homes
25 and providing services, and heightening the risk to the - -

1 - the employer sending them into that home, is exactly the
2 kind of result that the Statute allows and contemplates.

3 JUDGE RIVERA: That might be a basis not to be
4 held liable. It's not a basis to - - - to seek exclusion
5 from the coverage of 296(15) as an employer.

6 MR. WRIGHT: No. Our - - - our contention with
7 respect to 296(15) is simply that read in context, both
8 with respect to the second sentence that follows in Article
9 23-A, that is incorporated by it, it's clear to us that
10 that first sentence only applies to - - - was only meant to
11 apply to employers.

12 But getting back to - - - to the essence of
13 Allied's position, and - - - and what it - - - what it did.
14 The policy that Allied promotes is designed to be applied
15 in all fifty states. And I say that more as context than
16 in defense. But looking at this particular policy, not
17 only did it require Astro to comply with New York Law, as
18 the New York employer, but if Astro or any other agent
19 believes a particular policy might violate its local state
20 law, the agent has the right under the contract to appeal
21 from that, to seek a rescission or modification.

22 So I think that's very inconsistent with any
23 suggestion that there was an attempt to violate a statute.
24 There's simply no objective evidence of that in this case.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 MR. WRIGHT: Thank you.

2 MR. LICHTEN: I would just like to take a minute
3 to talk about the interplay between Executive Law Section
4 296(15) and Correction Law Section 753.

5 First of all, the Executive Law does not adopt
6 the Correction Law's definition of who is liable. It does
7 refer to Article 23 of the Correction Law, but it just says
8 that in order to be found liable for violating Section
9 296(15), you have to discriminate against someone based
10 upon his having been convicted of one or more crimes when
11 it's in violation of the provisions of Article 23. Which
12 means that when it doesn't - - - it doesn't comport that
13 the defenses - - - that the two defenses that are provided
14 in the Correction Law are not appropriate.

15 It doesn't say that you - - - you - - - that you
16 have to be an employer, that you have to be a public
17 employer, or you have to be a public - - - a private
18 employer or a public agency, because Executive Law 296 just
19 refers to the Correction Law for that specific limited
20 purpose; it doesn't incorporate it in hole.

21 Second of all, just because public agencies and
22 private employers are liable under the Correction Law, it
23 doesn't mean they're not liable under the Executive Law.
24 The Executive law is - - - can add people who are liable or
25 say a different group of people are liable than in the

1 Correctional Law. The Correction Law doesn't exempt
2 anybody from the - - -

3 JUDGE STEIN: If - - - if we adopt your
4 interpretation, would that result in a greater protection
5 to persons with criminal backgrounds than those who are
6 discriminated against, on the basis of, for example, race,
7 or sex, or age, or any of the other number of things that
8 are covered by the Human Rights Law?

9 MR. LICHTEN: No, I wouldn't say it's more
10 protection; it's just different protection. And I think
11 the Second Circuit intimated why that is when it's talked
12 about how an out-of-state actor like Allied or Sirva,
13 coming from a state where discrimination based on criminal
14 history is not against the law, and then having their agent
15 violate what is against the law in New York. That's why
16 the provision - - -

17 JUDGE STEIN: But what - - - do you believe that
18 somebody like Allied would be held liable if - - - if the
19 situation were based on some other kind of discrimination?

20 MR. LICHTEN: Well, sure. If there are certified
21 labor programs that you can't hire women in a specific job
22 as a driver, then they would be held liable for that.

23 JUDGE STEIN: Well, but they're not a certified
24 labor program.

25 MR. LICHTEN: That's what they call it.

1 JUDGE STEIN: I'm sorry?

2 MR. LICHTEN: That's what - - - that's what
3 Allied calls its - - - its policy of not allowing people
4 with criminal convictions to work for them. It's called a
5 certified labor program; it's not actually certified by
6 anybody.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. LICHTEN: Thank you.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Griffin v. Sirva, Inc., No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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