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COURT OF APPEALS
STATE OF NEW YORK

RUSSELL,

Appellant,

-against-

NO. 37

NYU ET AL, THOMETZ ET AL,

Respondents.

20 Eagle Street
Albany, New York
March 13, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Russell v. NYU.

3 MR. TURKEL: Avram Turkel for plaintiff-
4 appellant, Dr. Susan Russell. May it please the court.
5 Respectfully request five minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. TURKEL: We ask the court to, at a minimum,
8 affirm First Department's decision - - - or First
9 Department - - - reverse First Department's decision
10 affirming Supreme Court's CPLR 3211 dismissal of
11 appellant's claims in line with Justice Gesmer and Justice
12 Gonzalez's dissent, that there was no collateral estoppel
13 on appellant's New York City Human Rights Law claim for
14 retaliation because federal court's resolution of the
15 factual issues were on a different balancing process that
16 shaped the court's view, such that it did not consider
17 temporal prox - - - the temporal proximity of the - - - the
18 plaintiff-appellant's rejection of a settlement proposal in
19 the federal action and her termination. There was
20 therefore no full and fair opportunity to litigate the
21 question. It did not - - - and the federal court did not
22 actually analyze that temporal proximity, which - - - under
23 McDonnell Douglas, which is again noted in the dissent.

24 Secondly, we ask the court to go - - - this court
25 to go even a little further and find that the appellant has

1 stated claims against the individual respondents, Thometz
2 and Meltzer individually, which claims, when derivative of
3 appellant's retaliation claim, arise from the individual
4 respondent's active participation in the conduct giving
5 rise to the discrimination.

6 Lastly - - -

7 JUDGE SINGAS: So could we use the factual
8 findings, or are you suggesting that we can't because of
9 the more liberal standard?

10 MR. TURKEL: You - - -

11 JUDGE SINGAS: What - - - what do we do with the
12 facts?

13 MR. TURKEL: You can use the factual findings,
14 and in fact, you have to. But the factual findings do not
15 go to the temporal proximity of the rejection. The federal
16 court's factual findings do not go to the rejection of the
17 settlement and the termination. And that temporal
18 proximity is important, because what the federal court
19 found on temporal proximity was that it was too remote with
20 regard acts that happened years prior. The temporal
21 proximity between the rejection or the failure of a
22 settlement proposal, and the termination was just four or
23 five weeks.

24 And if I - - - if I may give the court just some
25 timeline for that - - -

1 JUDGE RIVERA: Well, just - - - just before you
2 do that. So if I'm understanding you, your point is that
3 that question of the temporal proximity is actually a legal
4 conclusion by the federal courts. But if you apply the
5 more liberal standard - - - more generous standard, if I
6 can say it that way - - - of the New York City Human Rights
7 Law, it may very well be that the temporal proximity would
8 assist the claimant's position. Is - - - am I getting it
9 right?

10 MR. TURKEL: Well, certainly, as to the second
11 part of what Your Honor said, that there - - - that it does
12 raise an issue of fact. Whether or not the federal court
13 actually - - -

14 JUDGE RIVERA: What's the issue of fact?

15 MR. TURKEL: The issue of fact is whether or not
16 the temporal proximity of the termination to the rejection
17 of settlement is - - - is pretext. The federal court did
18 not make - - - or at least was a motivating factor, I
19 should say - - -

20 JUDGE RIVERA: But isn't that - - - but isn't
21 that actually, more of a mixed question of law and fact,
22 when you say - - -

23 MR. TURKEL: Yes. And under - - -

24 JUDGE RIVERA: - - - because there's a legal
25 conclusion at some point about pretext, there may be some

1 facts embedded in that determination.

2 MR. TURKEL: Well, the federal court did not make
3 a decision on pretext based on the proximity between the -
4 - - the failed settlement negotiation and termination.

5 JUDGE RIVERA: So that - - - and that - - - it -
6 - - right. So then is your point that under the more
7 liberal standard of the New York City Human Rights Law,
8 that would be a potential - - - you call it fact. I'll
9 just say it's mixed at best - - - conclusion that one could
10 reach because of the more liberal standard. Is that - - -

11 MR. TURKEL: Yes, Your Honor.

12 JUDGE RIVERA: Am I getting the gist of it?

13 MR. TURKEL: Yes, Your Honor.

14 JUDGE RIVERA: Okay.

15 MR. TURKEL: And - - - and because - - -

16 JUDGE RIVERA: So let me ask you this. What - -
17 - what's the basis for the individual liability if - - - if
18 the court decides that you're barred based on the federal
19 determination with respect to NYU's liability?

20 MR. TURKEL: Well, we are asking - - -

21 JUDGE RIVERA: The employer is out. What - - -
22 what is the hook for the individuals?

23 MR. TURKEL: If there is no derivative claim, the
24 hook would be purely on the plain language of the New York
25 City Human Rights Law statute, which says employees - - -

1 employ - - - rather employers, employees, and their agents.
2 If there's no derivative claim, then the cause of action
3 would be conduct - - -

4 JUDGE RIVERA: It's the employee's own conduct?

5 MR. TURKEL: Correct.

6 JUDGE RIVERA: Okay.

7 JUDGE HALLIGAN: I take - - -

8 JUDGE RIVERA: - - - so the employee's - - - I'm
9 sorry. Let me just finish this. Employee's own conduct
10 then falls under what, conditions, or does it fall under
11 something else? What - - -

12 MR. TURKEL: I'm not sure I quite understand - -
13 -

14 JUDGE RIVERA: An employer of course affects your
15 wages and so forth. Typical kind of discrimination you
16 look at for an employer. What is the actual discrimination
17 you're pointing to by the employees if you're on - - -
18 excuse me - - - by the individuals, if you're only looking
19 at their conduct?

20 MR. TURKEL: If you're only looking at their - -
21 -

22 JUDGE RIVERA: At their own conduct - - -

23 MR. TURKEL: Yeah. Correct.

24 JUDGE RIVERA: - - - right. NYU is not
25 unreasonable in the way it responded. Let's say we find

1 that - - -

2 MR. TURKEL: Yeah. Judge, it - - -

3 JUDGE RIVERA: - - - you're barred to suggest
4 otherwise here, based on some liberal reading of the
5 statutes - - - state statutes - - -

6 MR. TURKEL: I - - - I think - - - I think it
7 would only go into hostile work environment. But I think
8 the stronger claim in this case is that it is derivative of
9 the discrimination in terms of the retaliation.

10 JUDGE RIVERA: No, I understand that, but I just
11 want to be clear on the - - - on their own conduct. So
12 their own conduct, you're saying in creates a hostile work
13 environment, and then that hostile work environment is what
14 affects the conditions of the employment?

15 MR. TURKEL: That's where that argument would
16 have to go, Judge.

17 JUDGE RIVERA: Thank you.

18 MR. TURKEL: The - - - this - - - well, lower
19 court, certainly, in the Priore case, has held that only a
20 supervisor - - - or only an employee in a supervisory role
21 counts. And we've cited to Your Honors a Southern District
22 case, Molina v. Victoria's Secret. Standing for the
23 proposition that the individual employee who is not in a
24 supervisor's position can still contribute to the acts from
25 which the discriminatory conduct, the retaliation, arise.

1 And under the facts - - -

2 JUDGE CANNATARO: Is that an act that creates a
3 liability on the part of the - - - I'm trying to understand
4 because I really don't. When you have a hostile work
5 environment, is it the responsibility of the employer for
6 tolerating the existence of that hostile work environment,
7 or does the responsibility go even lower than that, where
8 you can hold each person who contributed to the hostile
9 work environment accountable and liable for the damage done
10 by it?

11 MR. TURKEL: There's two standards. There's a
12 strictly allowable standard and there's the negligence
13 standard. The - - - the court - - - the federal court
14 found the negligence standard appropriate, and at that
15 standard dismissed - - -

16 JUDGE CANNATARO: Whatever the standard is, I'm
17 just trying to understand how - - - how the - - - how the
18 injury is created and how the damages would flow.

19 MR. TURKEL: Well, on the retaliation in
20 particular, which I - - - which is where the dissent goes,
21 and - - -

22 JUDGE CANNATARO: No, I'm just talking about
23 hostile work environment because - - - and specifically, I
24 just want to explore for one extra second this individual
25 liability. If you could show that the two individual

1 defendants personally contributed to the existence of a
2 hostile work environment, are they accountable for that, or
3 is it the employer that's accountable for that, or is it
4 both?

5 MR. TURKEL: The - - - the statute reads to me
6 that its employees - - - employers, employees, and their
7 agents.

8 JUDGE HALLIGAN: So it - - -

9 MR. TURKEL: The case law certainly goes to
10 employers.

11 JUDGE HALLIGAN: So if - - - if you're arguing -
12 - - and I understand that the statute is different. I
13 think I'm getting at the same set of questions that my
14 colleagues are. The statute includes the word employee,
15 which differentiates it. But I take you to be arguing, and
16 tell me if I if I've misunderstood, that in your reading,
17 the city statute gives rise to a cause of action that
18 someone subjected to a hostile work environment has against
19 the specific employee, setting the employer aside and
20 setting aside any retaliation in terms of employment
21 actions. If that's right, I would think that we would see
22 some body of cases in which such claims are brought, and
23 I'm wondering if you can point me to any.

24 MR. TURKEL: No. The case law stands against the
25 judge. The statute is what - - - says what it says.

1 JUDGE HALLIGAN: Okay. So your - - - your view
2 is that - - - that although the statute allows for these
3 actions, they haven't been brought - - - for whatever
4 reason. Maybe the individuals don't have significant
5 resources. And you know, perhaps an action against them
6 doesn't seem to carry a lot of upside in that respect or
7 otherwise. But I'm asking you if I'm missing a body of
8 cases. It sounds like you're saying no.

9 MR. TURKEL: I don't believe Your Honor is
10 missing a body of cases. If I may just speak to the
11 retaliation as a derivative.

12 In 2014, NYU was investigating the claims by Dr.
13 Russell, the appellant. These are really horrendous
14 claims, and I don't know if I want to get too graphic about
15 them, but they involve sadistic pornography, sending her
16 mail, including email, sadistic pornography, other really,
17 really bad stuff. And it's - - - and it's in the record.
18 Mr. Thometz quit the liberal arts program in 2014, but
19 continued working at the Gallatin School, which is still
20 part of NYU, until 2016. Dr. Russell was an adjunct
21 professor that whole time at NYU.

22 Federal court action commenced March 24, 2015.
23 On August 18th, 2015, the parties entered into a so-ordered
24 confidentiality stipulation. On October - - - on September
25 3, appellant rejected a settlement proposal by NYU. On

1 October 5 - - - right - - - about a month later, she sends
2 emails to her coworker, Bauman (ph.). On October 9 - - -
3 right - - - so now we're talking a month after the
4 settlement agreement and just a few days - - - four days
5 after the sending of this email - - - appellant was
6 terminated by letter by NYU. NYU gives two reasons. You
7 are harassing your fellow employee, and you violated a
8 court order.

9 Well, that same day, NYU goes and - - - that same
10 day as the termination - - - NYU goes and moves federal
11 court for an order on that violation. Federal court does
12 not make any determination on that violation until October
13 30th. Later, a CBA arbitrator determined that the NYU's
14 termination of appellant, Dr. Russell, was too severe. It
15 awards her - - - the arbitrator awards her back pay.

16 CHIEF JUDGE WILSON: And says - - - makes a
17 finding that her misconduct was serious.

18 MR. TURKEL: It makes a finding that misconduct
19 is serious. And as - - - as stated in the dissent, that is
20 actually evidence under New York City Human Rights Law that
21 there was pretext. Right. If you have a find - - - the
22 arbitrator's finding that it was serious, but it could be
23 part of a motive, right. Part of the - - - that the - - -
24 the rejection of the - - - the settlement proposal followed
25 by termination and a short amount of time, follow - - -

1 JUDGE GARCIA: Counsel, go to that point. And I
2 think your original point was that the District Court
3 didn't address temporal proximity to the mediation. But
4 there's a line in the District Court opinion that says,
5 "Moreover, even if the court did consider the temporal
6 proximity between the court order, mediation, and Dr.
7 Russell's termination, that evidence alone would be
8 insufficient to satisfy her burden." Why - - - why is that
9 not the District Court considering temporal proximity?

10 MR. TURKEL: Because it is not the basis of the
11 District Court's finding. Under the - - - under collateral
12 estoppel - - - we can go through the factors of it - - -
13 but this - - - the court - - - the federal District Court
14 specifically found that it was not going to consider the
15 temporal proximity - - -

16 JUDGE GARCIA: But it says more even if it did
17 consider.

18 MR. TURKEL: But they didn't. And that's and
19 that's the issue with collateral estoppel, Judge - - -

20 JUDGE HALLIGAN: But isn't that just an alternate
21 grounds for the finding, the - - -

22 MR. TURKEL: No, because the court only
23 considered the temporal proximity, one under title seven,
24 and two with regard to original acts at - - - remote acts,
25 and the termination. The District Court did not consider -

1 - - did not - - - the - - - it makes mention of it in
2 dicta, but it does not consider or make a finding
3 concerning the temporal proximity of the - - - the - - -
4 the failed negotiation and the termination, which temporal
5 proximity, as - - - as well stated in the dissent - - - is
6 sufficient, certainly under New York City Human Rights Law,
7 to create an issue of fact under 3211 concerning the
8 pretext.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. TURKEL: Thank you, Your Honors.

11 MR. O'KEEFE: Good after - - - excuse me. Good
12 afternoon, Your Honors. May it please the court. Joseph
13 O'Keefe with Proskauer Rose on behalf of the respondents,
14 New York University, Fredric Schwarzbach and Robert
15 Squillace. Focusing in on the argument just made by the
16 appellant's counsel. He spoke of the court's decision with
17 respect to the retaliation claim and the two justices'
18 dissent in the First Department. He indicated at that time
19 that the District Court's failure to consider the temporal
20 proximity meant that she had not fully and fairly litigated
21 that issue in the District Court.

22 He fails to note, however, a couple of important
23 things. First of all, as noted in the District Court's
24 opinion, it was not until the appellant filed her
25 opposition brief in connection with the briefing on the

1 motion for summary judgment that she suggested for the
2 first time that a mediation and a settlement offer are
3 somehow protected activity.

4 In addition, at no point in any of the briefing
5 in these cases or the arguments before has the appellant
6 ever maintained that she did not have a full and fair
7 opportunity to litigate the issues underlying her
8 retaliation claim. And that was her burden in the trial
9 court. That was her burden in the District Court's summary
10 judgment process, the Second Circuit, the trial court here.
11 Now, standing here today for the first time, she's arguing
12 she didn't have a full and fair opportunity.

13 Well, examination of the record demonstrates a
14 couple of different things. First of all, there is
15 extensive discussion by the federal District Court in its
16 summary judgment opinion of the reasons that NYU proffered
17 for the decision to terminate. And as indicated in the
18 opinion and is found by the arbitrator, this was serious
19 misconduct.

20 What happened here was that there was discovery
21 going on in the case. A protective order was entered.
22 There was documents produced. Subsequent to that, there
23 was a mediation on September 3rd of 2017, a rejection of a
24 settlement offer. And then after that, Mr. Thometz and Ms.
25 Meltzer produced additional documents at the end of

1 September in 2017. And what they identified in those
2 documents, the name of a professor.

3 And what did the claimant here do? She
4 immediately violated the protective order and started
5 sending a series of emails to this potential witness in the
6 case, threatening her.

7 JUDGE HALLIGAN: What about the argument that the
8 only reference that the District Court makes to the
9 temporal proximity between the arbitration and the - - -
10 and the termination is in a footnote, and it's not the
11 basis for the District Court decision. I think dicta was
12 the word that he used.

13 MR. O'KEEFE: I don't believe it's dicta, Your
14 Honor. First of all - - -

15 JUDGE HALLIGAN: So - - - so tell me why not and
16 why it should be accorded collateral estoppel effect in
17 your opinion.

18 MR. O'KEEFE: It's an alternative holding here.
19 It's stated in the text of the opinion, not in a footnote,
20 but there is a footnote which describes at some length the
21 examination of NYU's proffered reason. I think it's
22 footnote 23 in the opinion.

23 JUDGE HALLIGAN: Uh-huh.

24 MR. O'KEEFE: So it's not just existing in a
25 footnote. Perhaps most importantly, though, the court

1 indicates that had it considered temporal proximity, it
2 would have reached the same decision. And the dissent
3 rested its position - - - its dissent on a case which it
4 suggests stands for the proposition that temporal proximity
5 standing alone is sufficient. If you'll excuse me for a
6 minute. I'll just take a sip of water here. That is the
7 TCW case.

8 That is not what this TCW case stands for, and
9 the distinction is important. In TCW, there was a series
10 of progressive discipline that led up to the alleged
11 protected activity, and after that protected activity, the
12 individual was terminated. The court held in that case
13 that because there was this preexisting series of
14 progressive discipline that did not culminate in
15 termination, but the protected activity occurred and then
16 she was terminated, there's at least an issue of fact as to
17 whether or not that protective activity may have been a
18 factor.

19 Here we have the opposite. We have her engaging
20 in something which we submit is not protected activity.
21 Participating in a mediation is not protected activity
22 under the New York City Human - - - New York City Human
23 Rights Law. And it's after that alleged protected activity
24 that this individual engages in serious misconduct that is
25 found not only by NYU to be serious, but by an arbitrator

1 to be serious. She sends these threatening emails. She is
2 sent a cease-and-desist letter by NYU. And does she cease
3 and desist? No. She sends more threatening emails to this
4 individual. The level of seriousness here is so high that
5 it clearly - - - and she offers nothing to counter that.

6 JUDGE SINGAS: Suppose we find that the
7 collateral estoppel doesn't preclude the retaliation claim.
8 What happens then? Does it have to go back below, or are
9 you suggesting another way to end this litigation?

10 MR. O'KEEFE: I had not thought about that, Your
11 Honor, because I expect to win here. But I suppose if Your
12 Honor reverses on the retaliation claim, that claim is
13 resurrected and it would have to be remanded to the trial
14 court. I don't know that I see another way, unless, you
15 know - - - and perhaps there has to be new briefing on
16 summary judgment.

17 JUDGE SINGAS: Uh-huh.

18 MR. O'KEEFE: Placing that issue straight before
19 the court, but I think it is properly before this court. I
20 think the District Court properly considered it and
21 indicated what it would do with that. That was affirmed by
22 the Second Circuit, so I think there is more than enough
23 here to preclude it.

24 JUDGE RIVERA: And that's a - - - that's a fact
25 finding?

1 MR. O'KEEFE: Excuse me?

2 JUDGE RIVERA: That's a fact finding on the
3 alternative grounds of temporal proximity?

4 MR. O'KEEFE: Well, I don't believe that the - -
5 -

6 JUDGE RIVERA: Uh-huh.

7 MR. O'KEEFE: - - - temporal proximity is a fact
8 finding, because you have to combine it with the stated
9 reasons for her termination, which were extensively
10 described by NYU, credited in the record, and she did not
11 offer any evidence to contradict those stated reasons.

12 So had she offered some sort of statement by NYU
13 that occurred during this process, that considered it was
14 some sort of subterfuge to punish her for failing to accept
15 the settlement offer, we would be in a different place.
16 You know, there we have the mixed motive. But here there
17 is zero evidence, no evidence whatsoever from the claim - -
18 - from the appellant here that the reason - - - that the
19 reason that NYU stated is pretextual, except for some
20 after-the-fact reference to a mediation that occurred prior
21 to these acts.

22 Anything further, Your Honors?

23 CHIEF JUDGE WILSON: Thank you.

24 MR. O'KEEFE: Thank you.

25 MR. ALBERTS: Good afternoon, and may it please



1 the court. My name is David Alberts, from McElroy,
 2 Deutsch, Mulvaney and Carpenter. I represent the
 3 individual defendants, Thomas Mel - - - excuse me - - -
 4 Joseph Thometz and Eve Meltzer.

5 JUDGE RIVERA: Can you address this argument - -
 6 - or this claim - - - excuse me - - - that under the New
 7 York City Human Rights Law, because the statute
 8 specifically refers to employees that the individuals - - -
 9 there could be a viable claim. Let me put it that way - -
 10 - against the individuals for allegedly creating a hostile
 11 work environment through their - - - their individual
 12 conduct.

13 MR. ALBERTS: Absolutely, Your Honor. The - - -
 14 both the New York State Human Rights Law and the New York
 15 City Human Rights Law effectively provide for individual
 16 liability in three separate ways. There's the employer
 17 theory where the employee is effectively the employer by
 18 virtue of the fact that they own the business or they have
 19 an ownership interest in the business.

20 There is the supervisor theory, where the
 21 employee has the capacity to impact the terms and
 22 conditions of employment of the plaintiff. You know, they
 23 can hire them, they can fire them, they can set their pay,
 24 they can reduce their pay. And they're not simply there to
 25 carry out the personnel decisions of other people. And



1 then there is the active participation, aiding and abetting
2 type liability.

3 And the first of those here obviously is not even
4 alleged. The - - - neither of the individual defendants
5 own any stake in NYU. The second, the supervisory theory
6 was dispensed with and is now collaterally stops the
7 plaintiff from alleging in the federal action. The
8 conclusion there was that neither of the individual
9 defendants were the supervisor of the plaintiff. That
10 carries forward here, obviously. The third theory, the
11 active participation, aiding and abetting, is purely
12 derivative. If - - -

13 JUDGE HALLIGAN: What about the hostile work
14 environment claim?

15 MR. ALBERTS: The - - - I'm sorry?

16 JUDGE HALLIGAN: Is there not a hostile work
17 environment claim?

18 MR. ALBERTS: There is. Yeah. Purely - - - so
19 the - - - so the - - - the theory of liability for the
20 individual defendants - - -

21 JUDGE HALLIGAN: Yes.

22 MR. ALBERTS: - - - under the hostile work
23 environment would be active participation aiding or
24 abetting, and that's a derivative claim. That claim does
25 not - - -

1 JUDGE HALLIGAN: Well, what about - - - I thought
2 - - - I thought that your adversary was arguing that
3 because the City HRL includes the word employee, not just
4 employer, that you could have an action that was directly
5 against the employee that was not derivative and cites - -
6 - I think Molina is the name of the case for that
7 proposition.

8 MR. ALBERTS: Yeah. The way that - - - the way
9 the City Human Rights Law reads in the provision, which is
10 8-107(1) (a).

11 JUDGE HALLIGAN: Uh-huh.

12 MR. ALBERTS: It provides that an employee can be
13 liable for discrimination if they discriminate against such
14 person in compensation or in terms of conditions or
15 privileges of employment. So to be directly liable as an
16 individual defendant, you have to have the capacity to
17 impact terms and conditions of employment.

18 JUDGE HALLIGAN: And a hostile work environment,
19 is that not terms and conditions of employment?

20 MR. ALBERTS: If it impacted their terms and
21 conditions of employment, if - - - if it caused them to
22 lose pay, if it caused them to lose their job or experience
23 some other adverse employment action, yes. But failing
24 that, then you have to default - - -

25 JUDGE HALLIGAN: That's - - -



1 JUDGE RIVERA: That's - - - that's not how
2 hostile work environment works. You need not have had your
3 pay reduced to nevertheless be working in a hostile work
4 environment.

5 MR. ALBERTS: In order to have a - - - in order
6 to have a claim under the discrimination statute, you need
7 to experience an adverse employment action that - - - you
8 have to lose your job or you have to lose pay or suffer
9 some type of damages.

10 JUDGE HALLIGAN: A hostile work environment? You
11 need - - - you need a termination or a loss in pay as
12 opposed to something other than that?

13 MR. ALBERTS: An adverse employment action, yes.

14 JUDGE RIVERA: Experiencing - - - experiencing a
15 work environment that is different from others, and it is
16 adverse to your situation at the workplace based solely on
17 the protected categories. That's in part what a hostile
18 work environment means. You don't need to be fired. You
19 don't need to lose your pay. You don't need to not be
20 promoted. Those are other kinds of adverse results. I
21 agree with you there. And he didn't assert that, so
22 everyone agrees with you there.

23 MR. ALBERTS: Yep. The - - -

24 JUDGE RIVERA: Let's - - - let's say - - - go
25 with - - - go with what I am suggesting as the hostile work

1 environment. If that is true, that if an individual
2 employee creates by their conduct a - - - what - - - what
3 the law would recognize as a hostile work environment, what
4 would be the barrier under the New York City Human Rights
5 Law to recognizing a viable claim?

6 MR. ALBERTS: The existence of a claim against
7 the employer. What the cases have recognized is that - -
8 - it's a derivative. It's derivative. You need to have a
9 viable claim against an employer in order for a claim
10 against the individual to survive. That - - - that's the
11 barrier. That's the barrier.

12 JUDGE RIVERA: What's the point of having the
13 word employee in the statute then, or agent for that
14 matter?

15 MR. ALBERTS: The point of having the word
16 employee is to impose individual liability, but only where
17 they have the capacity to affect the terms and conditions
18 of employment. That's the supervisory theory.

19 JUDGE RIVERA: Okay. But we're back in that
20 circle. Let's say that - - - let's say by creating a
21 hostile work environment, you're affecting the conditions.
22 Why - - - why do you need then to indeed have that be a
23 derivative claim from the employer's potential liability?

24 MR. ALBERTS: I think it's because the way the
25 law was written, by imposing that condition there.

1 JUDGE RIVERA: Yeah.

2 MR. ALBERTS: It was a limitation on the types of
3 - - - of claims that are available under the statute.

4 JUDGE RIVERA: Well, one could have a situation -
5 - - and maybe this could be it - - - where the employee's
6 conduct does create a hostile work environment, the
7 employer acts reasonably in whatever action it takes that
8 the employee is complaining about, but the - - - the - - -
9 the employee, who's terminated in this example - - - but
10 the employee says, but these other people created this
11 terrible work environment for me, that under any fact
12 pattern that would be presented to a court, if it was the
13 employer, they'd say, yes, that's a hostile work
14 environment. I'm still not understanding why that would
15 not further - - - first of all, why that's not required in
16 a - - - for purposes of the New York City Human Rights Law
17 and the way one would construe that statute, but also why
18 it would not further the goals of that statute.

19 MR. ALBERTS: Well - - -

20 JUDGE RIVERA: But even when you - - - you are
21 not able to establish your claim against the employer, one
22 could proceed against the employer. They may not. They
23 may not be the deep pockets. Maybe that's not what they -
24 - - but that's not - - - that's a different question from
25 whether or not you've got a viable claim.



1 MR. ALBERTS: Yeah. I think what we're talking
2 about here is a significant departure from the way these
3 types of issues have been addressed in the courts and in -
4 - - in the past. And I expect if you - - - if you were to
5 see that type of an actionable claim available - - -

6 JUDGE RIVERA: Uh-huh.

7 MR. ALBERTS: - - - there would be more express
8 language in the statute or in the - - - in the Human Rights
9 Law to - - -

10 JUDGE RIVERA: Well, but the - - - the - - - the
11 Human Rights Law has been amended to be very clear, our
12 mandate is to interpret it as broadly as the law permits,
13 notwithstanding what may be existing jurisprudence to the
14 contrary.

15 MR. ALBERTS: I certainly understand that, Your
16 Honor. But in the absence of clear statutory language,
17 allowing a claim that's never been permitted that way, I
18 think would - - - would be a real departure from the
19 purpose of the statute.

20 JUDGE SINGAS: So can I ask you, because it seems
21 that you're tied to NYU, or that's your argument because of
22 the aiding and abetting part of that. So if we let the - -
23 - the claim against NYU stand, then it reasons that your
24 claim stands and vice versa?

25 MR. ALBERTS: Depends which claim, Your Honor.

1 There has been no retaliation claim asserted against the
2 individual defendants here. So if that claim survives,
3 which is the one that obviously appeared in the dissent - -
4 -

5 JUDGE SINGAS: Understood.

6 MR. ALBERTS: - - - no, that would - - - the
7 claim against the individual - - - individuals would not.

8 JUDGE SINGAS: Okay.

9 MR. ALBERTS: But if the others do, I think I
10 would have to concede that the ones against my clients
11 would as well.

12 JUDGE SINGAS: Okay.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. ALBERTS: Thank you, Your Honors.

15 MR. TURKEL: To Your Honor's point, in 2014,
16 there's an investigation. And to the fact pattern, Your
17 Honor, imagine, that is very much this fact pattern. The
18 NYU made an investigation in 2014 wherein Mr. Thometz and
19 Ms. Meltzer, the individual respondents lied. They said
20 they did nothing. They didn't send anything. All of it.
21 And federal District Court already found that NYU was not
22 negligent in their investigation, et cetera, of that.

23 In fact, by 2017, we know that Mr. Thometz admits
24 that, yes, he sent at least some of this stuff, what he
25 called free stuff, which we can only assume includes this

1 really horrendous material. So did Mr. Thometz create a
2 condition where the appellant was held up as somebody who
3 just makes baseless accusations against their coworkers,
4 complains erroneously, consistently, et cetera, creates
5 that hostile work environment? Did that end up with this
6 settlement agreement that wouldn't - - - that didn't go
7 forward and about a month later end up in her termination.
8 I think that is the fact pattern.

9 As to counsel's statement about the factor that
10 we discussed previously in collateral estoppel, which is
11 full and fair opportunity, it's only one factor, right?
12 There has to be - - - issues have to be identical. The
13 issue of the prior proceeding was litigated and decided,
14 was actually litigated and decided.

15 And I come back to the federal District Court's
16 decision. And - - - and you know, with reference to this
17 footnote 33 at - - - at page 28 of the federal court's
18 decision, "In her opposition brief, Dr. Russell relies on
19 the first time when the alleged temporal proximity between
20 the courts ordered mediation held in this lawsuit and her
21 termination."

22 Further down, "The court has not considered this
23 argument in analyzing the NYU defendant's motion." That's
24 - - - that's what's in the decision.

25 So the court didn't consider it. It's not its

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finding. If this court has any doubt - - - any doubt about the preclusive effect of the federal court's finding it must find for plaintiff - - - it must find that it is not preclusive, and that is the law, and it is the burden on the other side seeking to impose the preclusive effect, to establish the - - - they have to establish the identity of issues, all the factors in - - - in the basic analysis.

If Your Honors have no further questions.

CHIEF JUDGE WILSON: Thank you.

MR. TURKEL: Thank you, Your Honors.

(Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Russell v. NYU, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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