State of New York
Court of Appeals

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To be argued Tuesday, March 27, 2018

No. 45 Matter of Marine Holdings, LLC v New York City Commission on Human Rights

Irene Politis, who is paraplegic and has been confined to a wheelchair since 1979, filed a complaint with the New York City Commission on Human Rights against Marine Holding LLC, the owner of her Queens apartment complex, and its management company in 2010, alleging they had discriminated against her on the basis of her disability by denying her request to install a wheelchair ramp to her first-floor apartment. Because five steps lead up to the entrance, she had to be carried by her husband or son to enter or leave the apartment. The front entrance was too narrow for a ramp, but Commission staff proposed that a rear window be converted into a door and a ramp installed to give her access. Marine had previously converted an apartment in a similar building in the complex into a management office, a project that included turning a rear window into a doorway and building a ramp.

At an administrative hearing, Marine argued it did not discriminate against Politis because the accommodation would pose an undue hardship, claiming the conversion of the window into a door was structurally infeasible. Marine and the Commission presented conflicting expert testimony on the structural feasibility of the project. The administrative law judge found Marine did not discriminate and recommended that Politis's complaint be dismissed, saying Marine's expert testimony "was sufficient to prove that it was structurally infeasible to build a ramp" and the Commission's expert testimony was "insufficient to effectively rebut [Marine's] expert evidence." The Commission rejected the recommendation, saying Marine failed to prove undue hardship because none of the experts had said the project was impossible and Marine had successfully installed a similar doorway and ramp for its management office in the complex. It also said the ALJ improperly shifted the burden of proof from Marine to the Commission. It found Marine discriminated against Politis, awarded her $75,000 for mental anguish, imposed a $125,000 civil penalty on Marine, and ordered it to install the ramp.

Supreme Court reduced the mental anguish award to $60,000, but otherwise confirmed the determination, finding the Commission's decision was supported by substantial evidence.

The Appellate Division, Second Department reversed and annulled the determination. "[T]he record did not contain any substantial evidence rebutting [Marine's] showing that it would be structurally infeasible to install a handicapped accessible entrance to [Politis's] apartment," the court said.

The Commission argues, "The Appellate Division committed two fundamental errors that amplified one another. It began by adopting a mistaken view of the 'substantial evidence' standard: that standard doesn't permit a court to decide which of two competing interpretations of the evidence is *more* reasonable; it asks only whether the agency's interpretation was *a* reasonable one. The court then compounded that threshold error by creating a new obligation on the Commission [or tenant] to 'rebut' undue hardship claims in reasonable accommodation cases. In fact, the burden of proving undue hardship always remains with the landlords" under the City Human Rights Law.

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To be argued Tuesday, March 27, 2018

No. 46 People v Donald Odum

Donald Odum was arrested for driving while under the influence of alcohol and related offenses after allegedly striking a parked car in the Bronx in October 2014. More than two hours later, when a police officer asked Odum if he would take a breath test, he initially refused. The officer then informed him that if he refused to submit to the test, his driver's license would be suspended and the refusal "will be introduced as evidence against you in any trial proceeding resulting from the arrest." After the officer's warning, Odum agreed to take the breath test, which resulted in a BAC reading of .09 percent. Odum later moved to suppress evidence of his initial refusal to take the test and of the test result.

Criminal Court granted the motion to suppress. It said the prosecution failed to meet its burden of showing that Odum's consent to the test was voluntary and that the chemical test was administered in compliance with Vehicle and Traffic Law § 1194(2)(a), which provides that a driver is deemed to have consented to a chemical test administered "within two hours after such person has been placed under arrest." The court said the evidence "shows that consent was given only after [the police officer] gave the improper warnings.... In accordance with People v Atkins [85 NY2d 1007] and People v Rosa [112 AD3d 551 (1st Dept 2013)], such warnings given after a refusal by a defendant more than two hours after the arrest have been deemed improper and require proof that consent was voluntary to avoid suppression.... [T]he People failed to show that [Odum's] consent after the improper warnings was voluntary and not the result of coercive conduct by the officer."

The Appellate Term, First Department affirmed. "'Because more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that if he refused to take the test, his driver's licence would be suspended and the refusal could be used against him in court,'" it said, quoting Rosa. "Inasmuch as defendant agreed to take the test only after the officer gave the 'inappropriate warnings,' the court properly found that defendant's consent was involuntary...."

The prosecution says Rosa is based on "outdated law" and conflicts with the Second Department's ruling in People v Robinson (82 AD3d 1269 [2011]), which held, "The time limit set forth in Vehicle and Traffic Law § 1194(2)(a) was not intended by the Legislature to be an 'absolute rule of relevance, proscribing admission of [test] results [obtained] after [such a time] period' [quoting Atkins].... Where ... the person is capable, but refuses to consent, evidence of that refusal, as governed by Vehicle and Traffic Law § 1194(2)(f), is admissible into evidence regardless of whether the refusal is made more than two hours after arrest...." The prosecution says the warning to Odum that his license would be suspended was also accurate because the Department of Motor Vehicles changed its regulations in 2012 to authorize license suspensions for drivers who refused a test more than two hours after arrest. "[S]ince the administered warning was legally proper, it would not have coerced consent, but, rather, have given legitimate inducement for [Odum] to give consent, which is the purpose of the admonishment."

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State of New York
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To be argued Tuesday, March 27, 2018

No. 47 People v Sergey Aleynikov

Sergey Aleynikov was a computer engineer for Goldman Sachs, working on software for its high-frequency trading business until he left in June 2009 to develop high-frequency trading software for a start-up company, Teza Technologies. Just before he left Goldman, Aleynikov uploaded thousands of proprietary files from Goldman's source code repository, including components of its high-frequency trading platform, to a computer server in Germany. He then downloaded the files to his home computers and used some of the source code in his work at Teza. After Goldman detected his activities, Aleynikov was arrested by the FBI in July 2009 and convicted in federal court of violating the National Stolen Property Act. The U.S. Court of Appeals for the Second Circuit reversed the conviction in 2012, in United States v Aleynikov (676 F3d 71), ruling the source code was "intangible property" that did not constitute stolen "goods, wares, or merchandise" under the statute. Five months later, Aleynikov was indicted on state charges of unlawful use of secret scientific material (Penal Law § 165.07), which states that a person is guilty "when, with intent to appropriate to himself or another the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he has such right, he makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material."

A jury found Aleynikov guilty, but Supreme Court granted his motion for a trial order of dismissal and set aside the verdict, ruling there was insufficient evidence that he made a "tangible" copy of the source code or that he acted with "intent to appropriate ... the use" of Goldman's code. Noting that "computers were at a very primitive stage of development" in 1967, when the statute was enacted, it said, "The electronic reproductions the drafters of the ... statute contemplated surely had little relationship to what is at issue here." It declined to apply "a non-physical definition to the word tangible" and said, "An electronic image can become tangible when it is printed on paper. But computer code does not become tangible merely because it is contained in a computer." It said the evidence did not satisfy the intent element because it showed only that Aleynikov "intended to derive a significant economic benefit from [the code]. But the evidence did not prove he intended to appropriate all or a major portion of the code's economic value or benefit for himself or Teza.... The uncontested evidence indicated Goldman was not deprived of any of its [high-frequency trading] profits because of Aleynikov's actions."

The Appellate Division, First Department reversed and reinstated the conviction. While the source code may have "remained in an intangible state," it said the relevant question is "whether defendant made a tangible reproduction of it, which he unquestionably did when he copied it onto the server's 'physical' hard drive where it took up 'physical space' and was 'physically present'.... The statute merely requires a 'tangible reproduction or representation' of the secret material, and is silent as to the medium upon which the reproduction or representation will reside. Thus, the fact that defendant made the reproduction onto a physical hard drive, rather than onto a piece of paper, is of no consequence." As for the intent element, it said the proof "permits a rational inference that defendant intended to exercise permanent control over the use of Goldman's source code, as opposed to a short-term borrowing," and the prosecution was not required prove that he "intended to deprive Goldman of the use of the source code."

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