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New York City Human Rights Law Developments

The question of whether harassment cases brought forth under the New York City Human Rights Law ("NYC HRL") should be analyzed in the same manner as cases brought forth under (federal) Title VII of the 1964 Civil Rights Act is one whose answer, in many ways, continues to evolve. Two recent cases have shed some light on this issue and have, at least for now, increased an employer's exposure to liability for workplace harassment under the NYC HRL.

The *Faragher-Ellerth* Affirmative Defense

For more than ten years, employers sued for workplace harassment under Title VII of the 1964 Civil Rights Act have been able to avail themselves of the "*Faragher-Ellerth* affirmative defense" when applicable. This defense was established by the U.S. Supreme Court in twin cases it decided during 1998. In those cases, the Supreme Court held that an employer is not liable under Title VII for sexual harassment if it can prove that it exercised reasonable care to prevent and correct promptly the harassing behavior and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. To the extent the harassing behavior is inflicted by a supervisor, the employer also must demonstrate that no tangible employment action (such as discharge, demotion, or undesirable reassignment) was taken as part of the alleged harassment.

In January 2009, the District Court for the Southern District of New York held, in *Zakrzewska v. The New School*, that the *Faragher-Ellerth* affirmative defense is not available to employers sued for harassment under the NYC HRL. The defendant in this case had argued that it was absolved of liability for its supervisor's alleged sexually harassing actions because of the affirmative defense. Although the Court found that the defendant had met its burden of proof, it ultimately determined that the defense is not available to employers defending against harassment charges arising under the NYC HRL - despite New York federal and state courts having applied the defense to such charges in the past. Its conclusion was based on a perceived inconsistency between the defense and the language of the HRL statute. In its estimation, the District Court believes that the wording of the statute imposes liability upon an employer for the acts of managerial and supervisory employees even when the employer has exercised reasonable care to prevent and correct discriminatory actions and even where the employee unreasonably fails to take advantage of

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employer-offered corrective options. It also noted that an employer is liable under the NYC HRL for the discriminatory acts of co-workers where a managerial or supervisory employee knew of and acquiesced in, or should have known of, such conduct and failed to take reasonable measures to put an end to the discriminatory conduct.

Since the District Court issued its decision in January, the United States Court of Appeals for the Second Circuit has considered the matter and determined that the issue of whether the *Faragher-Ellerth* defense applies to cases brought forth under the NYC HRL is one best resolved by the New York Court of Appeals. The Second Circuit, therefore, has certified the issue to New York's highest court. A final disposition should be forthcoming in the near future.

The "Severe and Pervasive" Nature of Harassing Conduct

In *Williams v. The New York City Housing Authority*, the New York Appellate Division, First Department, held that where an employee files a sexual harassment claim against his or her employer under the NYC HRL, the employer may not escape liability simply because the allegedly harassing conduct is not "severe or pervasive." According to the Court, the NYC HRL is designed to be more expansive than state and federal law and questions of "severity" and "pervasiveness" are only applicable to a consideration of the scope of permissible damages, not to the question of underlying liability. The Court thereby endorsed a rule where under the NYC HRL, liability is determined simply by the existence of differential gender-based treatment in the workplace.

The Court, however, emphasized that the NYC HRL should not operate as a "general civility code". Employers may avoid liability if they prove, as an affirmative defense, that the conduct in question amounts to nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." The Court, in fact, found that the comments complained of by the plaintiff in the *Williams* case were petty slights and trivial inconveniences, and therefore not actionable, because the comments were not directed at the plaintiff and were perceived by the plaintiff as being in part complimentary to a co-worker.

Conclusion

Employers should be mindful that the *Zakrzewska* and *Williams* cases make it easier for employees to successfully litigate harassment claims under the NYC HRL. Unless the *Zakrzewska* holding is overturned, New York City employers should operate under the principle that the *Faragher-Ellerth* defense is not available for harassment claims under the NYC HRL. In addition, they should be vigilant in nipping problematic behavior in the bud since they cannot escape liability under the NYC HRL by arguing that any alleged harassing conduct is not "severe or pervasive". It is increasingly important that employers conduct harassment training and enforce zero tolerance policies regarding harassment and discrimination in the workplace. If you have any questions about these cases, please contact Farah Mollo at (212) 758-1078.