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Employment, Labor and Benefits Advisory: Broad Interpretations of Human Rights Law May Increase Discrimination Exposure for New York City Employers

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Two recent decisions may affect an employer's potential exposure under the New York City Human Rights Law ("NYCHRL"), which, like its state and federal counterparts, prohibits discrimination and harassment in the workplace. Both decisions potentially increase New York City employers' exposure for claims of discrimination and harassment by making it easier for an employee to prevail on a claim under the NYCHRL.

Defense Under Faragher-Ellerth May No Longer Apply to NYCHRL Claims

Under the so-called Faragher-Ellerth defense the United States Supreme Court established in 1998, an employer may avoid liability for alleged unlawful harassment by its managers and supervisors where it can demonstrate that: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and (2) the complaining employee unreasonably failed to take advantage of the employer's preventive or corrective measures. Until recently, New York courts have allowed employers to assert the Faragher-Ellerth defense to NYCHRL claims. However, in *Zakrzewska v. The New School*, 06-Civ-5463, 2009 WL 252094 (S.D.N.Y. 2009), a federal district court decided that the Faragher-Ellerth defense does not apply to claims brought under the NYCHRL.

In strictly reading the NYCHRL, the Court emphasized that the NYCHRL creates vicarious liability for an employer with respect to discriminatory acts by a manager or supervisor *even where* the employer has exercised reasonable care to prevent and correct discriminatory conduct and *even where* the employee has failed to complain under the employer's policies. As a result, the Court found that the Faragher-Ellerth defense, which essentially permits an employer to escape vicarious liability for federal claims under certain circumstances is inconsistent with the NYCHRL.

Although the Court certified this case for interlocutory appeal to the Second Circuit Court of Appeals, employers may expect other courts to follow this new analysis of NYCHRL claims, unless and until the Court of Appeals rules otherwise. The *Zakrzewska* case does affect an employer's ability to assert the Faragher-Ellerth defense in response to federal and New York State discrimination claims.

Appellate Court Finds "Severe or Pervasive" Test Inapplicable to NYCHRL Claims

Within days of the *Zakrzewska* decision, a New York Appellate Division Court dismissed a plaintiff's sexual harassment and discrimination claims in *Williams v. New York City Housing Authority*, 872 N.Y.S.2d 27 (1st Dep't 2009). In its ruling, the Court refused to apply the federal "severe or pervasive" standard to the plaintiff's NYCHRL claims.

Under the federal "severe or pervasive" standard outlined by the United States Supreme Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), a plaintiff can state a claim for harassment only if the plaintiff is able to prove that the conduct complained of was "severe or pervasive" enough to alter the conditions of the employee's employment and to create an abusive working environment. The *Williams* Court examined this standard and concluded that it does not reach far enough to comply with the "uniquely broad and remedial purposes" of the NYCHRL. Instead, the Court deemed the "severe or pervasive" test to be a "middle ground" that continues to allow conduct that is demeaning to women and reduces the incentive for employers to create zero tolerance anti-discrimination and harassment policies. The *Williams* Court explained that to "maximize the law's deterrent effect," courts must determine whether a plaintiff has established the existence of differential treatment based on protected class and not whether such treatment rises to the level of "severe or pervasive." This new standard would appear to be easier to meet than the federal "severe and pervasive" test previously applied to NYCHRL claims.

The *Williams* Court recognized that the NYCHRL is not a "general civility code" and outlined a defense whereby employers may avoid liability if they prove that the conduct complained of "consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences.'"

Action Items For Employers

In an age of increasing exposure for employers, these two decisions further reinforce the critical importance that employers maintain a zero tolerance policy for discrimination and harassment. Requiring an employee to avail him/herself of the employer's anti-harassment complaint procedures is no longer enough to avoid liability, at least in New York.

New York employers should be prepared to take the following actions:

- train managers and supervisors as to their legal obligations so that they can help to enforce a zero tolerance policy;
- include the term "zero tolerance" in all written anti-discrimination and harassment policies and procedures;
- conduct annual anti-discrimination and harassment training for all employees and maintain the proper postings in common areas in the workplace; and
- instruct supervisors to report and Human Resources to investigate any and all complaints made by employees, no matter how trivial or inconsequential.

Although employees may still assert NYCHRL claims in spite of these preventative measures, engaging in these proactive steps may lead to early intervention and hopefully, the prevention of resulting litigation and potential liability.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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