A Timely Analysis of Legal Developments

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Three recent decisions from the First Department of the New York Appellate Division hold that the New York State and City Human Rights Laws apply to, and prohibit, a far broader array of conduct than previously stated.

The Expanding New York Human Rights Laws

By Andrew P. Marks, David S. Warner, Sara D. Sheinkin and Adam Malik

It has been a busy year for the First Department of New York's Appellate Division, which issued three important decisions broadening employers' exposure to liability under the New York State and City Human Rights Laws. The first decision lowered significantly the threshold for actionable workplace harassment and retaliation under the New York City Human Rights Law (NYCHRL). The second expanded application of the NYCHRL and the New York State Human Rights Law (NYSHRL) to cover out-of-state employees affected by employment decisions made in New York City and State. The third decision radically changed the scope and burden of proof in disability discrimination and accommodation cases. It is critical for employers to be aware of these legal developments and adapt to them quickly.

Lower Threshold for Workplace Harassment and Retaliation Claims Under the NYCHRL

In *Williams v. New York City Housing Authority*,[1] the First Department rejected the well-established requirement that alleged harassment must be "severe or pervasive" to be actionable under the NYCHRL. In an opinion written by Justice Rolando Acosta, the City Human Rights Commissioner during the Dinkins Administration, the court reinterpreted the NYCHRL - in light of the City's Local Civil Rights Restoration Act of 2005 (Civil Rights Restoration Act) - to "meld the broadest vision of social justice with the strongest law enforcement deterrent."[2] Distinguishing the NYCHRL from its federal and state counterparts, the court held that to state a claim, plaintiffs need only prove they were treated "less well than other employees" because of a protected category, such as sex, race, age, etc., "regardless of whether the conduct is 'tangible' (like hiring or firing)."[3] Acknowledging that the NYCHRL was not intended to be a "general civility code," the court established an "affirmative defense whereby defendants can still 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.'"[4] The court noted, however, that "one can easily imagine a single

comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable."[5]

The court also addressed the evidentiary burdens for retaliation claims under the NYCHRL. Again, interpreting the NYCHRL in light of the Civil Rights Restoration Act, the court explained that any action reasonably likely to deter a person from engaging in protected activity can constitute retaliation. Therefore, "no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'"

New Disability Discrimination Standards Under the NYCHRL

More recently, the same court found that New York City's Civil Rights Restoration Act also altered the established standards for disability discrimination and accommodation litigation. In *Phillips v. City of New York*,[6] also written by Justice Acosta, the First Department found that the City Council effectively decided to place the burden on the employer to prove that it did not discriminate against the employee.

Phillips was employed as a Community Assistant with the City of New York's Department of Homeless Services (DHS), a "noncompetitive title" in the civil service system. After being diagnosed with breast cancer, Phillips requested and was granted a three-month medical leave of absence pursuant to the federal Family and Medical Leave Act. While on leave, she requested a full year off to receive additional treatment. DHS denied her request based on its leave policy, which rendered employees in noncompetitive titles, like Phillips, ineligible for additional unpaid medical leave. When Phillips did not return at the conclusion of her approved leave period, her employment was terminated. Phillips subsequently sued, alleging that DHS discriminated against her on the basis of her disability. The trial court dismissed Phillips's case, concluding that her request for what was essentially an indefinite leave of absence was unreasonable and that she failed to allege she could perform the essential functions of her job with a reasonable accommodation or that DHS's decision to terminate her employment was based on any factor other her noncompetitive title.

The Appellate Division reversed, finding that DHS could be liable for failing to engage in a good faith interactive process with Phillips to determine if a reasonable accommodation could be found and for failing to accommodate Phillip's disability. It held first that both the NYSHRL and the NYCHRL require employers to "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested."[7] That process must continue "until, if possible, an accommodation reasonable to the employee and employer is reached."[8] According to the court, an employer's failure to consider requested accommodations or to engage in the interactive process will violate both the NYSHRL and the NYCHRL, the relief for which "will depend upon whether the process could have yielded a substantive accommodation that was reasonable."[9]

More significantly, the court opined that, under the NYCHRL, "there are no accommodations that may be unreasonable if they do not cause undue hardship" and the burden of proving "undue hardship" is on the employer.[10] Further, unlike claims brought under federal and New York State law, where the employee has traditionally borne the burden of proving that she could perform the essential functions of her job with a reasonable accommodation, the court held that the NYCHRL no longer imposes this burden on the employee. Rather, it is now the employer's burden to plead and prove, as an affirmative defense, that the employee could not perform the essential requisites of her job with a reasonable accommodation.

New Extraterritorial Application: Was it Decided in New York?

Finally, in *Hoffman v. Parade Publications*,[11] the First Department rejected the established "impact" rule to determining whether or not the NYSHRL and/or the NYCHRL apply to decisions made in New York that have an impact only outside New York. In that case, Hoffman worked in Atlanta for a company based in New York City. After he was discharged in 2008 when his employer decided to close its Atlanta office, he accused it of age discrimination in violation of the NYSHRL and NYCHRL. Even though he resided and worked in Georgia, Hoffman invoked these statutes on the grounds that the termination decision was made in New York City, where his managers were

located and where he traveled occasionally for work.

At first, the employer successfully moved to dismiss the case, citing a line of earlier cases in which courts found that the NYSHRL and NYCHRL apply only when the impact of the alleged discriminatory decision is felt in New York State and New York City, respectively. In reversing the dismissal and reinstating Mr. Hoffman's case, the First Department overruled this line of "impact" cases and held that a non-resident plaintiff need only allege that the discriminatory decision(s) at issue were made in New York State to invoke the NYSHRL and, if in New York City, the NYCRHL.

What Does This Mean for Employers Doing Business in New York?

By expansively defining and applying the New York State and City Human Rights laws, the First Department has created a virtual minefield for employers. Employers making decisions in New York that impact employees outside New York must now be mindful of the expanded extra-territorial application of the NYSHRL and NYCHRL. This is significant not only when considering the NYCHRL's broader prohibition against workplace harassment and retaliation, which will undoubtedly require more of those claims to be adjudicated at trial, but more particularly in the area of accommodation and disability law, which will be enforced principally through 20-20 hindsight. It must be kept in mind that a disability under the NYCHRL is defined broadly to include "any physical, medical, mental or psychological impairment, or a history or record of such impairment,"[12] and an employer must accommodate if the "disability is known or should have been known" to the employer.[13] That accommodation obligation now includes a potentially lengthy interactive process and careful consideration of every employee-requested accommodation unless the employer is confident it can prove at trial, often years later, that any accommodation would have created an undue hardship[14] or been ineffective.

What Can Employers Do to Limit Liability

To help ensure compliance with these newly evolved areas of the law, the following steps are suggested:

1. Determine, to the extent possible, whether the NYSHRL and the NYCHRL may apply to the decisions at issue.
2. Expand policies prohibiting workplace harassment to reflect the broader standard under the NYCHRL.
3. Analyze claims of workplace harassment in a manner consistent with the NYCHRL's new, broader standard.
4. Assure that job descriptions clearly identify all essential job functions.
5. Establish a clearly defined procedure for employees to request accommodations for their disabilities.
6. Record accommodation requests and specific facts regarding employee's circumstances, including documentation of limitations where appropriate.
7. Establish, and train staff to follow, an interactive process protocol, documenting such items as dates and length of meetings and specifics of discussions.
8. Arrange for independent medical exams when extent of disability is in question.
9. Follow up on all provided accommodations to assess utility in allowing employee to perform essential job functions.
10. Document all factors leading to a determination that requested accommodation will cause an undue hardship, communicate such decisions to impacted employees and continue dialogue regarding alternatives and ways to minimize hardship.

Andrew P. Marks and David S. Warner are Shareholders and Sara D. Sheinkin and Adam Malik are Associates in Litter Mendelson's New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Marks at amarks@littler.com, Mr. Warner at dwarner@littler.com, Ms. Sheinkin at ssheinkin@littler.com, or Mr. Malik at amalik@littler.com.

[1] 872 N.Y.S.2d 27 (1st Dept. 2009).

[2] *Id*. at 32.

[3] *Id*. at 40.

[4] *Id*. at 41.

[5] *Id*. at 41 n.30.

[6] 2009 WL 2225617 (1st Dep't July 28, 2009).

[7] 2009 WL 2225617, at *3.

[8] *Id*.

[9] If so, the court held, the full panoply of remedies are available under both statutes, but if not, the NYCHRL provides limited, unspecified remedies "designed to respond only to the failure to engage in the interactive process." Id. at *4 n.6.

[10] *Id*. at *7.

[11] 878 N.Y.S.2d 320 (1st Dept. 2009).

[12] N.Y. City Admin. Code § 8-102(16)(a).

[13] *Id*., § 8-107(15)(a)

[14] Whether or not a potential accommodation would create an undue hardship for purposes of the NYCHRL depends largely on:

1. The nature and cost of the accommodation;
2. The overall financial resources of the facility or the faculties involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
3. The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
4. The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id., § 8-102(18).