A Timely Analysis of Legal Developments

ASAP®

In This Issue:

May 2010

The highest court in New York State has confirmed that employers are strictly liable under the New York City Human Rights Law for discriminatory acts by their managers and supervisors, further broadening the scope of that law beyond its federal and state counterparts.

New York City Imposes Strict Liability for Discrimination by Managers and Supervisors

By David S. Warner

On May 6, 2010, the New York Court of Appeals held in *Zakrzewska v. The New School*,[1] that the affirmative defense to employer liability articulated by the U.S. Supreme Court in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* does not apply to sexual harassment and retaliation claims against employers under the New York City Human Rights Law (NYCHRL). Although New York courts have traditionally applied the same principles to employment discrimination claims under federal, state and local law, the court found the text of the NYCHRL compels a departure in terms of this defense.[2]

The court recognized that, unlike its federal and state counterparts, the NYCHRL contains provisions that specify clearly when liability may be imposed on an employer. According to the NYCHRL, an employer is liable for an employee's discriminatory conduct where: (1) the employee exercised managerial or supervisory responsibility; (2) the employer knew of the employee's discriminatory conduct and acquiesced in such conduct or failed to take immediate and appropriate corrective action; *or* (3) the employer should have known of the employee's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.[3] Finding those provisions inconsistent with the *Faragher/Ellerth defense*,[4] the court interpreted the NYCHRL as written and held that the defense is not available in harassment and retaliation claims against employers under the NYCHRL.

This decision marks the NYCHRL's latest deviation from federal and New York State anti-discrimination laws. In 2009, the First Department of New York's Appellate Division held in *Williams v. New York City Housing Authority*[5] that harassment need not be "severe or pervasive" to be actionable under the NYCHRL, a significant departure from the standards under federal and New York State anti-discrimination laws.

Although the *Faragher/Ellerth* defense is not available under the NYCHRL in cases of supervisory discrimination, harassment or retaliation, an employer may in such

cases mitigate its exposure to civil penalties and punitive damages by pleading and proving facts similar to those required to establish the *Faragher/Ellerth* defense.[6] Those facts include, but are not limited to, the following:

1. The employer "established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

    i. A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

    ii. A firm policy against such practices, which is effectively communicated to employees, agents and persons employed as independent contractors;

    iii. A program to educate employees and agents about unlawful discriminatory practices under local, state and federal law; and

    iv. Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and"

2. The employer has a "record of no, or relatively few, prior incidents of discriminatory conduct by" the accused "employee, agent or independent contractor or other employees, agents or independent contractors."[7]

In sum, the *Zakrzewska* and *Williams* decisions deprive employers facing claims under the NYCHRL for supervisory discrimination, harassment and/or retaliation of the two defenses most often relied upon to avoid liability, particularly before trial.[8] Without these defenses, courts are likely to begin sending more of these claims to trial, which are often jury trials. As a result, employers in New York City, like those in California and Illinois – where state law also imposes strict liability on employers for harassment by supervisors – must be even more vigilant to prevent, detect and promptly correct discriminatory, retaliatory and harassing conduct by supervisors and managers.

One effective tool is to implement lawful, written policies that explain clearly the employer's commitment to providing a workplace free of discrimination, harassment and retaliation, as well as the procedures for reporting any perceived violations of the policy. To convey the sincerity of the commitment, these policies should be distributed periodically and enforced consistently and firmly, with an expeditious and appropriate response to each and every complaint. To help ensure employees are comfortable seeking resolution through the internal procedure, the policy should also confirm that confidentiality will be preserved to the maximum extent possible. Of course, employers should continue training employees, particularly supervisors and managers, periodically on the scope of permissible behavior, so they understand the parameters of what the employer deems acceptable.

David S. Warner is a Shareholder in Littler Mendelson's New York City office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Warner at dwarner@littler.com.

---

[1] Although the underlying action is pending in federal court, the United States Court of Appeals for the Second Circuit requested an opinion from the New York Court of Appeals.

[2] Even though the question in *Zakrzewska* was raised in context of a sexual harassment and retaliation action, the court's holding should apply to all forms of employment discrimination, harassment and retaliation that are prohibited by the NYCHRL.

[3] *See* N.Y. ADMIN. CODE § 8-107(13)(b)(1)-(3).

[4] The *Faragher/Ellerth* defense bars liability under the most prominent federal anti-discrimination law, Title VII, for harassment committed by a supervisory employee if the employer can prove that: (1) no tangible employment action (e.g., discharge, demotion, reassignment) was taken in connection with the harassment; (2) the employer acted with reasonable care to prevent and correct promptly any unlawful harassment; and (3) the plaintiff-employee unreasonably failed to utilize any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

[5] 872 N.Y.S.2d 27 (1st Dep't. 2009), *leave to app. denied*, 13 N.Y.3d 702 (2009).

[6] *See* N.Y. ADMIN. CODE § 8-107(13)(e)(1)-(3).

[7] *Id.* § 8-107(13)(d).

[8] The *Zakrzewska* decision does not address whether the Faragher and Ellerth defenses are available in a case of non-supervisory coworker harassment.