New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM

An ALM Publication
VOLUME 243—NO. 19
FRIDAY, JANUARY 29, 2010

Outside Counsel

Expert Analysis

Responding to the Expanding City and State Human Rights Laws

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In 2009, New York's Appellate Division, First Department, issued three important decisions broadening employers' liability under the New York State and City Human Rights Laws. *Williams v. New York City Housing Authority*[1] lowered the threshold for actionable workplace harassment and retaliation under the City Human Rights Law (NYCHRL); *Hoffman v. Parade Publications*[2] expanded application of the NYCHRL and the state Human Rights Law (NYSHRL) to cover out-of-state employees; and *Phillips v. City of New York*[3] changed the burden of proof in disability discrimination and accommodation cases, under the NYCHRL.

We are likely to see additional expansive interpretations under the NYCHRL. *Williams* and *Phillips* are based on the local Civil Rights Restoration Act of 2005, by which the City Council voiced concern that the "City's Human Rights Law has been construed too narrowly,"[4] and underscored that "the provisions of New York City's Human Rights Law are to be construed independently from similar or *identical* provisions of New York state or federal statutes."[5]

Further, lawyers may pursue cases they previously might have avoided because the definition of a prevailing plaintiff who is entitled to attorney's fees has expanded to include those "*whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement or as a result of a judgment in such plaintiff's favor*."[6] New York City employers must be prepared to navigate a discrimination law landscape that has become more treacherous.

Threshold for NYCHRL Claims

In *Williams*, the First Department rejected the requirement that alleged harassment must be "severe or pervasive" to be actionable. The opinion reinterprets the NYCHRL—in light of the local civil rights act—to "meld the broadest vision of social justice with the strongest law enforcement deterrent."[7] Distinguishing its federal and state counterparts, the court held that to state a claim under the NYCHRL, plaintiffs need only prove they were treated "less well than other employees" because of a protected category, "regardless of whether the conduct is 'tangible' (like hiring or firing)."[8]

Acknowledging that the NYCHRL was not intended to be a "general civility code," the court allowed an affirmative defense whereby defendants can avoid liability by proving "that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"[9]

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."[10] One might well question the constitutionality of a statute that imposes liability for a single comment with no tangible effect due to the views it "signals," but that question is beyond the scope of this article.

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Addressing the evidentiary burdens for retaliation claims, the court declared that "no challenged conduct may be deemed non-retaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was…'reasonably likely to deter a person from engaging in protected activity.'"[11]

Disability Discrimination

In *Phillips*, the Appellate Division, First Department, placed the burden on the employer in disability discrimination and accommodation litigation, to prove that it did not discriminate against the employee.

Deborah Phillips, who was employed with the City's Department of Homeless Services (DHS) in a "noncompetitive" civil service title, was granted a three-month medical leave pursuant to the Family and Medical Leave Act but was denied a request for a full year off to receive treatment based on DHS's policy, which rendered employees in noncompetitive titles ineligible for additional leave. Ms. Phillips was discharged from employment when she did not return at the expiration of her approved leave.

The trial court dismissed Ms. Phillips' disability discrimination claims, concluding that her request for an indefinite leave of absence was unreasonable, and she failed to allege she could perform the essential functions of her job with a reasonable accommodation or that DHS's decision was based on any factor other than her noncompetitive title.

Reversing, the First Department held that both the state human rights law and the city human rights law require "a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested."[12] That process must continue "until, if possible, an accommodation reasonable to the employee and employer is reached."[13] An employer's failure to consider requested accommodations or to engage in the interactive process violates both statutes, the relief for which "will depend upon whether the process could have yielded a substantive accommodation that was reasonable."[14]

More significantly, the court declared that, under the city human rights law, "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.[15] Further, unlike claims brought under federal and state law, where the employee bears the burden of proving that she could perform the essential functions of her job with a reasonable accommodation, under the NYCHRL it is the employer's burden to prove, as an affirmative defense, that the employee could not perform the essential requisites of her job with a reasonable accommodation.

Extraterritorial Application

Finally, in *Hoffman*, the First Department determined that the NYSHRL and NYCHRL apply to decisions made in New York that have an impact outside New York. Howard Hoffman resided and worked in Atlanta. After his employer closed its Atlanta office, he accused it of age discrimination in violation of the NYSHRL and NYCHRL. Mr. Hoffman invoked these statutes on the grounds that the termination decision was made in New York City, where the company and his managers were located and where he traveled occasionally for work.

The employer successfully moved to dismiss, citing a line of cases holding that the NYSHRL and NYCHRL apply only when the impact of the alleged discriminatory decision is felt in New York. But on appeal, the court overruled this line of "impact" cases and held that a non-resident plaintiff need only allege that the discriminatory decision at issue was made in New York.

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What Does This Mean?

By expansively defining and applying the New York state and city human rights laws, the First Department has created a minefield for employers. Employers making decisions that impact employees outside New York must now be mindful of the extraterritorial application of the NYSHRL and NYCHRL. This is significant when considering the city law's broader prohibition against workplace harassment and retaliation, which will undoubtedly require more of those claims to be adjudicated at trial, and in the area of accommodation and disability law, which will be enforced principally through hindsight.

With respect to workplace harassment, the court has established a standard whereby all but the most trivial remarks are actionable. Thus, cases that seemed destined for summary judgment may now need to be reevaluated.

How the federal courts will treat *Williams* remains to be seen, as illustrated by recent cases taking different approaches. Nonetheless, nearly all reveal that employers face new hurdles in litigation: Even when the City Law claims are dismissed, it is clear that they are first examined separately and under a different standard, as *Williams* directs.[16] In *Zustovich v. Harvard Maintenance Inc.*,[17] the court dismissed plaintiff's state claims of hostile work environment on the grounds that the conduct complained of was not sufficiently severe or pervasive to state a claim but refused to dismiss the NYCHRL claims due to the more liberal standards enunciated in *Williams*.

In *Dixon v. City of New York*,[18] Judge Dora L. Irizarry, observed that "plaintiff is wrong that *Williams* sets forth a zero tolerance standard." She nonetheless granted plaintiff's motion to reconsider her decision, more than six months earlier, to dismiss his hostile work environment claims under New York City law, and reversed the dismissal. In *Grant v. Pathmark Stores Inc.*,[19] the court dismissed federal and state harassment claims because the acts were not sufficiently severe or pervasive to state a claim. The court acknowledged that the complaint could be construed to allege valid claims under the more liberal standards of the NYCHRL. So while it declined to exercise supplemental jurisdiction over those claims, it dismissed them without prejudice.

One decision suggesting that the federal courts may give a more tempered reading to *Williams* is *Panzarino v. Deloitte & Touche, LLP*.[20] The court granted summary judgment to defendant, first finding that a female manager's eight derogatory comments about pregnancy in a 13-month period, and an occasional profanity, were not sufficiently severe or pervasive to create a hostile work environment under Title VII or the NYSHRL. Despite the heightened standard of the NYCHRL, the court also dismissed that claim, relying on the statement in *Williams* that, "[S]ummary judgment will still be available where [employers] can prove that the alleged discriminatory conduct in question does not represent a 'borderline' situation"[21]

Employers must now reassess their policies, not just their litigation posture. Even prior to *Williams*, workplace harassment policies that merely tracked the "severe or pervasive" standard were arguably inadequate because an employer could not find that an employee violated its harassment policy without, in effect, admitting that it had violated the law and was potentially liable. After *Williams*, such policies are clearly inadequate. Employers must consider whether to establish "zero tolerance" policies in order to avoid issues about whether a remark or conduct is trivial. Employers may also consider disciplining employees and documenting that they did so for conduct that in the past might have resulted in no more than verbal cautionary counseling.

Disability discrimination cases also need to be reassessed. 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,"[22] and an employer must accommodate it if the "disability is known or *should have been known*" to the employer.[23] 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 a particular requested accommodation—or any accommodation—would have created an undue hardship[24] or been ineffective. Where plaintiffs have raised a disability discrimination claim under the NYCHRL, employers need to look more closely at the interactive process and the efforts taken to exhaust all possibilities before, for example, terminating the plaintiff.

Similarly, employers should be cautioned about terminating employees whose disabilities they seem unable to accommodate without having at least one last conversation with the employee to assure themselves—and the employee—that they have exhausted all possibilities of accommodation. Since failure to engage in the "interactive process" is now, effectively, a per se violation, employers are well advised to document their efforts to seek an accommodation with an employee, and their reasons for determining that a particular requested accommodation will be ineffective or an undue hardship. Given the burden of proof established by *Phillips*, it may be necessary, in some instances, for the employer to implement and try a proposed accommodation, and accumulate evidence that the accommodation is ineffective or a hardship, before rejecting it out of hand.

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What Can Employers Do?

To help ensure compliance with these newly evolved requirements, the following steps are suggested:

1. Revise policies prohibiting workplace harassment and retaliation to reflect the broader standard under the NYCHRL. Consider a "zero tolerance" attitude to remarks or conduct that could be construed as harassment.

2. Train managers, supervisors and human resources staff to understand that the standards for unacceptable workplace harassment have changed and to intervene sooner and with less serious conduct.

3. Revise policies and procedures for accommodating disabilities to reflect that: (1) there MUST be an individualized interactive process; (2) the process continues until all efforts at resolution have been exhausted; (3) no requested accommodation is categorically unreasonable; and (4) an accommodation IS reasonable if it enables the employee to perform the job in a reasonable fashion and is not an undue hardship.

4. Establish a clearly defined procedure for employees to request accommodations for their disabilities, so that an accommodation request is recognized as such, and to document such requests, including specific facts regarding an employee's circumstances and specific limitations where appropriate.

5. Establish a protocol to document the interactive process including (1) dates and length of meetings, (2) accommodations requested, (3) the specific reasons why a requested accommodation would be ineffective or an undue hardship, and (4) alternative accommodations proposed.

6. Arrange for independent medical exams when the extent of a disability is in question.

7. When a requested accommodation is denied, communicate such decision to the impacted employee and continue a dialogue regarding alternatives and ways to minimize hardship.

8. Establish procedures for assessing whether provided accommodations are effective. If the provided accommodation does not enable the employee to perform the essential job functions, that should not end the matter; the interactive process should be initiated once again.

9. Where human resources staff are located outside of New York City, it may be especially important to alert them to the new requirements and standards applicable to New York City employees.

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1. 872 N.Y.S.2d 27 (1st Dept. 2009), lv. to appeal den., 2009 WL 2622097 (N.Y. Aug. 27, 2009). This article includes excerpts from Littler Mendelson's ASAP Newsletter, "The Expanding New York Human Rights Laws," August 2009.
2. 878 N.Y.S.2d 320 (1st Dept. 2009).
3. 2009 WL 2225617 (1st Dept. July 28, 2009).
4. New York City Local Law No. 85 of 2005, sec. 1.
5. Id. (emphasis added). Section 7 of the Act states: "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions comparably worded to provisions of this title, have been so construed." New York City Local Law No. 85 of 2005 §7 (amending N.Y. City Admin. Code §8-130) (new wording in italics).
6. New York City Local Law No. 85 of 2005 §8 (amending N.Y. City Admin. Code §8-502(f) (new wording in italics).
7. 872 N.Y.S.2d at 32.
8. Id. at 40.
9. Id. at 41.
10. Id. at 41 n.30.
11. Id. at 34.
12. 2009 WL 2225617, at *3.
13. Id.
14. The court held that, if so, 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.
15. Id. at *7.
16. See, e.g., *Wilson v. N.Y.P. Holdings* Inc., 2009 U.S. Dist. LEXIS 28876 (SDNY March 31, 2009)
17. 2009 U.S. Dist. LEXIS 22640 (SDNY March 20, 2009).
18. 2009 U.S. Dist. LEXIS 35096 (EDNY April 24, 2009).
19. 2009 U.S. Dist. LEXIS 65393 (SDNY July 29, 2009).
20. No. 05-cv-08502 (EDNY filed Oct. 29, 2009)
21. Id., slip op. at 25, quoting *Williams*, supra., 872 N.Y.S.2d at 41. (But query whether the court was influenced by these facts: nearly all employees hired by the manager were females of child-bearing age; an independent report found no adverse employment actions based on pregnancy; and plaintiff testified that the alleged hostile work environment had not affected her performance.)
22. N.Y. City Admin. Code §8-102(16)(a).
23. Id. §8-107(15)(a) (emphasis added).
24. Whether a potential accommodation would create an undue hardship for purposes of the NYCHRL depends largely on:

a. The nature and cost of the accommodation;

b. The overall financial resources of the facility or the facilities 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;

c. 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

d. 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).