

Labor Law Bulletin

Decision That Employers Are Strictly Liable for Supervisor Misconduct under the New York City HRL Mandates Policy Development, Enforcement and Extensive Training

In a highly anticipated decision, New York's highest court has held that the *Faragher/Elterth* affirmative defense to alleged harassment by a supervisor does not apply to claims brought under the New York City Human Rights Law (NYCHRL). See *Zakrzewska v. The New School*, 2010 N.Y. slip op. 3796 (2010). Employers can still avoid liability for harassment by a supervisor under Title VII and the New York State Human Rights Law if they establish two facts: (1) that the alleged victim did not suffer a tangible job detriment; and (2) that he or she unreasonably failed to report the harassment even though the employer had a reasonable mechanism for reporting and correcting unlawful harassment. While it is true that in the past some courts permitted this defense in NYCHRL cases, the *Zakrzewska* decision does away with this defense in City law claims.

In fact, this decision effectively provides for strict liability for all supervisor conduct that violates the NYCHRL (e.g., discrimination and retaliation, as well as unlawful harassment).

Proper training and other strategies to prevent workplace harassment, discrimination and retaliation are now even more essential for two reasons. First, the strict liability standard imposed by *Zakrzewska* means that employers can no longer successfully plead ignorance as a defense to an NYCHRL claim. An employer's best strategy for avoiding liability is to take affirmative steps to ensure that harassment never occurs. Second, showing that the employer had effective policies and mechanisms for reporting and remediation of discrimination, harassment and retaliation complaints may be used under the NYCHRL to mitigate civil penalties and punitive damages.

It is therefore essential that employers in New York City having four or more employees take the following steps:

- provide all supervisors, managers and employees with frequent antiharassment, antidiscrimination and antiretaliation training, so that they are fully aware of what constitutes unacceptable conduct;
- maintain, enforce and publicize detailed antiharassment, antidiscrimination and anti-retaliation policies;
- assure that employees have specific information about how to register an internal complaint of conduct that the employee believes may violate the employer's policies regarding harassment, discrimination and/or retaliation. However, any complaint, no matter how informal it may appear, should be treated seriously and reported to Human Resources by supervisors and managers;
- assure that supervisors and managers report all events or behaviors they observe that may constitute a violation of the employer's antiharassment, antidiscrimination and/or antiretaliation policies. Supervisors and managers should also understand their duty to intervene and stop any questionable behavior that they witness; and
- ensure that reporting mechanisms are followed and that prompt and effective investigations—and, *if appropriate*, remedial measures—are initiated after receipt of an internal complaint.

Employers who implement these measures in a proactive manner will be able to prevent the creation of hostile work environments and will be able to remedy problems before they become severe and result in almost certain liability.

Vedder Price's labor and employment law attorneys will be pleased to consult with employers regarding appropriate responses to the new developments under the NYCHRL, or any other employment matter.

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