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RECENT TREND TOWARDS INCREASINGLY LIBERAL READING OF NYC HUMAN RIGHTS LAW: WHAT EMPLOYERS NEED TO KNOW

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Of the three major anti-discrimination laws that protect employees in New York, i.e., Title VII of the 1964 Civil Rights Act, the New York State Human Rights Law, and the New York City Human Rights Law, the NYCHRL protects the broadest classes of employees by far. And now, in a victory for plaintiffs and potential plaintiffs, the New York Court of Appeals, in its recent decision in *Zakrzewska v. New School*, gives employees suing under the NYCHRL an even greater chance of success. *Zakrzewska v. New Sch.*, 902 N.Y.S.2d 838, 109 FEP Cases 234 (N.Y. 2010) (34 EDR 568, 5/19/10).

Faragher/Ellerth Defense Nixed

In *Zakrzewska*, New York's highest court held that the widely-used *Faragher/Ellerth* affirmative defense to harassment by a supervisor *does not apply* to claims under the NYCHRL. The issue was before the court on certification from the U.S. Court of Appeals for the Second Circuit.

The defense was established by the U.S. Supreme Court in *Faragher v. Boca Raton*, 524 U.S. 775, 77 FEP Cases 14 (1998) and *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 77 FEP Cases 1 (1998). It shields employers from liability where the claimant does not sustain a tangible job detriment or unreasonably fails to report the harassment despite the employer's reasonable mechanism for reporting and correcting harassment.

While some courts in New York previously allowed the *Faragher/Ellerth* defense in NYCHRL cases, it now is clear that employers are strictly liable for all supervisor conduct that violates the NYCHRL, i.e., discrimination and retaliation, as well as unlawful harassment. Where employees may have been dead in the water on Title VII and/or NYSHRL claims previously because of, for example, their failure to report harassment or discrimination, plaintiffs' attorneys will be more confident that they will not have claims summarily dismissed and therefore will be more likely to institute a lawsuit under the NYCHRL.

Employers thus may see an uptick in NYCHRL lawsuits, as the *Zakrzewska* decision does away with a lot of uncertainty, but perhaps the greatest practical effect

of *Zakrzewska* will be in the settlement area. Employers, left defenseless where an employee can *prima facie* prove harassment or discrimination, likely will be advised to settle cases more quickly than before. On the other hand, where the alleged discrimination is trivial, where the mitigation defenses to penalties and punitive damages are strong, and where the plaintiff acted unreasonably, the likelihood is that cases under the NYCHRL still will proceed to trial.

Growing Trend

Zakrzewska is grounded in the Local Civil Rights Restoration Act, New York City Local Law No. 85, which in 2005 amended the NYCHRL by expressly requiring that the most liberal reading be given to claims under the statute. Given the liberal-reading trend exemplified by *Zakrzewska*, plaintiffs' attorneys are likely to push for further expansive readings of the NYCHRL to provide protections beyond those contained in federal and state anti-discrimination laws.

Some courts already had recognized employment rights under the NYCHRL beyond those guaranteed by federal and state laws, even before the *Zakrzewska* decision. These cases seem to indicate a growing trend of reading the NYCHRL liberally.

For example, the Second Circuit recently held that hostile work environment claims under the NYCHRL should be analyzed separately from such claims under federal law, noting that the Local Civil Rights Restorations Act expressly abolished the parallelism between the NYCHRL and federal and state anti-discrimination laws. *Kolenovic v. ABM Indus. Inc.*, 361 Fed.Appx. 246, 2010 WL 227660 (2d Cir. 2010) (34 EDR 158, 2/10/10). Indeed, the court in *Williams v. NYCHA*, 872 N.Y.S.2d 27 (N.Y. App. Div. 1st Dept. 2009) (32 EDR 179, 2/18/09) held that the NYCHRL is much broader than federal and state human rights laws and that something much less than the traditional ''severe and pervasive'' standard is necessary for proving a hostile work environment in a sexual harassment case under the NYCHRL.

The liberal-reading trend is likely to extend to age discrimination claims as well. While the U.S. Supreme Court recently held in *Gross v. FBL Fin. Servs. Inc.*, 129 S.Ct. 2343, 106 FEP Cases 833 (2009) (32 EDR 717, 6/24/09) that a plaintiff must prove that he or she would not have experienced an adverse employment action ''but for'' his or her age—which is a high burden to satisfy—at least one court has held that the causation standard set out in *Gross* does not apply to age claims under the NYCHRL. *Weiss v. JPMorgan Chase & Co.*, No. 06-CV-4402, 2010 WL 114248 (S.D.N.Y. 2010) (34 EDR 125, 2/3/10). Arguably, however, *Gross* still applies to age claims brought under the NYSHRL. *See, e.g,. Marino v. Avon Prods. Inc.*, No. 108598/2004 (N.Y. Sup. Ct., N.Y. Co., July 19, 2010) (granting summary judgment to employer in NYSHRL age discrimination case in part because plaintiff did not establish that age was the ''but for'' cause of her termination).

Possible Future Extensions

Proving discrimination might become easier as well. Allegations of ''stray remarks'' or one-off offensive comments by a co-worker or supervisor currently are not sufficient to prove discrimination under federal or state law, but such evidence easily could be deemed sufficient proof of a discriminatory motive for an adverse employment action under a liberally-construed NYCHRL.

Courts in New York even may go so far as to apply the ''discouraged employee'' standard for proving retaliation to a case of discrimination under the NYCHRL. Plaintiffs currently can prove retaliation by establishing that a particular act would discourage other employees from exercising their rights under Title VII, including opposing discriminatory conduct and participating in internal investigations.

While that analysis is applied to retaliation claims under Title VII, it is not extended to discrimination claims under Title VII. However, the trend of providing extra protections to employees under the NYCHRL might prompt the courts to once again break away from federal law. That is, the courts could hold that if a potential employee would be discouraged from applying for a position because a specific act occurred, or an existing employee would prefer not to work for that employer due to a specific act, that act may be termed ''discriminatory.''

Finally, the definition of what is a ''reasonable accommodation'' of a disability potentially may be expanded under the NYCHRL. As it stands, the definition of a ''disability'' is extremely broad under the ADA, NYSHRL and NYCHRL, but none of these statutes define ''reasonable accommodation,'' arguably the most litigated area of disabilities discrimination law. Instead, the determination of what is ''reasonable'' is left up to the courts.

However, the liberal-reading trend may well cause courts analyzing disabilities discrimination claims under the NYCHRL to determine that a broad range of accommodations is ''reasonable,'' including more costly or extensive accommodations. Such a broadening of what is ''reasonable'' may even extend to religious accommodations.

Further, while employers can avoid providing accommodations that pose an ''undue hardship'' to their business, it may become increasingly difficult to prove undue hardship under the NYCHRL. It bears noting, however, that a claim of undue hardship, while not avoiding liability under the NYCHRL, may be a viable argument to mitigate damages.

Tips for Avoiding Liability

An employer's best strategy for avoiding liability thus remains to take affirmative steps to ensure that NYCHRL violations never occur at all. Accordingly, proper training and other strategies to prevent workplace harassment, discrimination, and retaliation are now even more essential.

It therefore is absolutely essential that employers having four or more employees in New York City—and thus covered by the NYCHRL—take the following steps:

- Maintain and publicize detailed and sweeping anti-harassment, anti-discrimination, and anti-retaliation policies, specifically defining prohibited conduct.
- 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.

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- Provide all supervisors, managers, and employees with frequent anti-harassment, anti-discrimination, and anti-retaliation training, so they are fully aware of what constitutes unacceptable conduct, and emphasize that 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 that they observe that may constitute a violation of the company's anti-harassment, anti-discrimination, and/or anti-retaliation policies. Supervisors and managers also should understand their duty to intervene and stop any questionable behavior that they witness.
- Be flexible and interactive when engaging in reasonable accommodation discussions with employees seeking accommodation for a disability or a work/religion conflict.

Employers that take these measures in a proactive manner will be able to not only prevent hostile work environments from being created, but they will strengthen the opportunity to mitigate damages, effectively lessening the danger of liability. Just as importantly, employers will be able to remedy nascent problems before they become severe and result in almost certain liability.