Just Made Partner? Watch Your Behavior

Harassment liability exposure is very real.

By Lawrence R. Sandak & Keisha-Ann G. Gray

New York Law Journal
February 1, 2010

Promotion from associate to partner at a law firm, while laudable, carries with it additional responsibilities beyond just business development. As business owners, new partners occupy positions of authority and function as supervisors within their respective firms. As they cross the threshold from employee to owner, new partners should be conscious of the fact that they are more vulnerable to harassment claims based on their interactions with subordinates.

Adding to this inherent vulnerability faced by partners and firms is the fact that the current economic climate has created considerable disenchantment and disillusion among some law firm employees who have lost or are slated to lose their jobs due to lay-offs. Employees who may have been reluctant in the past to bring claims when their jobs appeared secure, may now seek to exploit even marginal claims to enhance their job security or increase a severance package on their way out the door.

To avoid these situations, newly promoted partners should exercise care in their choice of words, as well as the manner in which they conduct themselves, when interacting with subordinates at their firms. This is the case even with subordinates who, over the years, have become their friends. In short, newly promoted partners should be conscious of the fact that due to a change in their status, their conduct, which may not have been seen as objectionable to associates, paralegals and staff when the partners themselves were associates, may now be perceived (or characterized) as offensive.

Elevation to partner does not negate prior consensual conduct, and it does not convert behavior that was once welcomed into un-welcomed or unlawful behavior. What does often change, however, is the perception that employees or associates have toward the newly promoted partner, and the resultant new import that the employees and associates give to the new partner's comments or actions. This is so even when the partner may have made the very same comments or engaged in the very same conduct before promotion without offending anyone.

Unfortunately, the same jokes, banter and remarks that offended no one when made by an associate can be taken as offensive or even harassing by those who, due to the promotion, no longer consider the newly promoted partner as "one of them."

Lessons From the Courts

Two cases, one federal and the other state, that were decided last year underscore why newly promoted partners, in New York City law firms in particular, should always exercise a level of caution when interacting with subordinates.

In *Zakrzewska v. The New School*,[1] a federal court in the Southern District of New York concluded that the *Faragher-Ellerth* affirmative defense to harassment liability[2] does not apply to claims under the New York City Human Rights Law.[3] The court further concluded that the New York City Administrative Code

creates vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities.[4]

Further, in *Williams v. New York City Housing Authority*,[5] the Appellate Division, First Department, emphasized that the New York City Human Rights Law should be broadly interpreted in cases of harassment and discrimination. The Appellate Division rejected the "severe and pervasive" standard that had been established by *Meritor Savings Bank v. Vinson*,[6] and held that while "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages"[7] in claims brought under the New York City Human Rights Law, they are not applicable "to the question of underlying liability."[8]

Further, it is important for new partners to understand that sexual harassment claims may also subject them to individual liability under New York state law.[9] Although the New York Court of Appeals has ruled that no individual liability may attach to a supervisor who "is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others,"[10] the converse of that is also true: If a supervisor is an equity owner or possesses sufficient authority to exercise control over personnel decisions, that supervisor may be held individually liable for acts of discrimination.

Under New York City law, a partner can be held individually liable for employment discrimination.[11] Furthermore, some New York courts have held that supervisors may also be liable for acts of discrimination under the "aiding and abetting" clause of the state Human Rights Law,[12] though generally only where the supervisor has participated in the unlawful discriminatory act.[13] The prospect of individual liability for harassment claims makes the recent rulings in *Zakrzewska* and *Williams* even more pertinent.

Cases Involving Law Firms

One of the more widely known New York cases involving hostile work environment claims in a law firm is *Fitzgerald v. Ford Marrin*,[14] in which a female attorney sued the firm for allegedly creating a sexually hostile work environment and for constructive discharge.

The case was in litigation for nearly seven years and involved comments made by both associates and a partner that the plaintiff took offense to. The partner allegedly referred to the plaintiff as a "butch," and by other terms meaning lesbian. Since the plaintiff was not a lesbian, the firm took the position that the

plaintiff's complaint was no more than a catalogue of jokes and banter among friends intended as "relaxation from the rigors of demanding legal work."[15]

At the conclusion of the trial, the jury found evidence of a hostile work environment and awarded the plaintiff $80,000 in compensatory damages.[16] The district court, however, set aside the verdict after finding that the behavior was not sufficiently severe or pervasive to establish a hostile work environment. On appeal, the Second Circuit reversed and reinstated the jury verdict.[17]

This case serves as a stark example of how inappropriate comments in the law office can lead to costly litigation that can result in a trial, an appeal, and publicly available decisions that can potentially damage reputations.

In the case of *Sier v. Jacobs Persinger & Parker*, the plaintiff, a former first-year associate, testified that a partner had made various flirtatious and sexual remarks and inquiries, as well as comments about her body and clothing.[18] The individual defendant argued that his flirtatious interaction with the associate was consensual, and alleged that she made overtures to him including touching her knee to his thigh, batting her eyelashes, and using a seductive voice.[19]

In concluding that the partner had created a sexually hostile work environment, the court emphasized that the conduct must be viewed in light of the fact that the individual defendant was a 39-year-old partner at the firm, and the plaintiff was a 24-year-old first year associate.[20]

Cases such as this one demonstrate how even though a partner may be relatively young in age, courts may consider his or her age and experience (as well as the partner's status as partner) in relation to the associate when evaluating conduct that is alleged to be harassing.

The last few months have seen a continuation of the increase in hostile environment claims against law firms. As just one example, a former associate of the Mintz Levin firm filed suit in Massachusetts alleging that the firm created a hostile work environment for female associates, and specifically named three firm partners, as aiding and abetting the harassing and discriminatory behavior.[21]

Conduct that the associate alleged contributed to a sexually hostile working environment included "unprovoked, unwanted discussions of [one partner's] own sex life, …and calling plaintiff to tell her he had been dreaming about her."[22] While this case is still in the early stages of litigation, and no decision has been rendered, no firm wants to face having to defend itself and its partners against accusations of this sort.

Vulnerability, and Best Practices

Law firms are vulnerable to harassment claims due in part to their high intensity work environments.

The nature of law firm work often requires attorneys and staff to work closely together on stressful matters, over many long and grueling hours. In these circumstances, non-work related comments can

sometimes be made innocently in an effort to ease stress or to create a more relaxed work environment. Such comments, however, when made by an attorney who holds a position of authority in the firm, may be misinterpreted or given unintended weight by subordinates due to the power dynamic.

It is not uncommon for a newly promoted partner to participate in social activities with associates, many of whom he or she may have worked with and enjoyed personal relationships with prior to promotion. While the newly promoted partner should not avoid such activities for fear of being sued, he or she may need to temper behavior during those activities.

This is because, as unfortunate as it may be, there is no bright-line test for whether particular remarks or behaviors are or are not harassing. The standard separating the acceptable from the unlawful is highly contextual and subject to both objective and subjective standards of offensiveness.

To best understand the types of conduct that may give rise to liability for harassment, new partners should take advantage of their firms' harassment prevention and anti-discrimination training programs. Firms should ensure that associates and other employees have been similarly briefed on anti-harassment and anti-discrimination policies and procedures, so that if complaints or concerns arise they are timely brought to the attention of appropriate individuals, and prompt remedial action is taken, where necessary, in accordance with firm policy.

Having such policies and procedures in place, and ensuring that partners, associates and other employees are familiar with them, will help prevent situations from escalating to the point of becoming a liability threat.

New partners should also review their firms' policies regarding intra-firm relationships. Some firms discourage romantic relationships between individuals of unequal power, such as partners and associates.

Where such a relationship does exist, it is often advisable for the partner to disclose it to an appropriate person within the firm and refrain from engaging in work-related activities with that subordinate. The partner should also no longer be involved in decisions involving the associate's assignments, workload or compensation, and should remove him- or herself from any responsibility for the associate's evaluations.

Final Word

Promotion from law firm associate to law firm partner is an achievement of which to be proud. It should not sound the death knell for all social interactions between newly promoted partners and their former peers and co-workers.

However, new partners should exercise their newly earned authority with respect, and consider the impact of their new title on their behaviors and workplace interactions. In this way, they can best enjoy the benefits of their promotion without unwittingly becoming susceptible to harassment claims.

Lawrence R. Sandak, *a partner in Proskauer Rose's labor and employment law department, is head of the firm's Newark, N.J. office.* **Keisha-Ann G. Gray** *is a senior counsel with Proskauer in New York.* **Kristine K. Huggins,** *an associate in New York, assisted with the preparation of this article.*

Endnotes:

1. *Zakrzewska v. New Sch.*, 598 F. Supp. 2d 426 (S.D.N.Y. 2009).

2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

3. N.Y.C. Admin. Code §8-107.

4. *Zakrzewska*, 598 F. Supp. 2d at 435. The question of whether the *Faragher-Ellerth* affirmative defense applies to sexual harassment claims under the New York City Human Rights Law has since been certified to the New York Court of Appeals. *Zakrzewska v. New Sch.*, 574 F.3d 24 (2d Cir. 2009).

5. *Williams v. N.Y. City Housing Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dept. 2009).

6. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

7. *Williams*, 61 A.D.3d at 75, 872 N.Y.S.2d at 38.

8. Id.

9. New York Human Rights Law prohibits certain acts of discrimination by an "employer." N.Y. Exec. Law §296(1).

10. See *Patrowich v. Chem. Bank*, 63 N.Y.2d 541, 542, 493 N.Y.S.2d 659, 660 (1984).

11. N.Y.C. Admin. Code §8-107(a) provides that it is unlawful for an employer *or an employee or agent thereof* to engage in discriminatory employment practices (emphasis added). See *Murphy v. ERA United Realty*, 251 A.D.2d 469, 271, 674 N.Y.S.2d 415, 417 (2d Dept. 1998).

12. N.Y. Exec. Law §296(6) forbids "any person to aid, abet, incite, compel, or coerce" the commission of an unlawful discriminatory practice.

13. See *Sowemimo v. D.A.O.R. Sec. Inc.*, 43 F. Supp. 2d 477, 487 (S.D.N.Y. 1999). But see *Foley v. Mobil Chem. Co.*, 170 Misc. 2d. 1, 647 N.Y.S.2d 374 (Sup. Ct. Monroe County 1996) (holding that the "aiding and abetting" clause may only be applied to persons wholly outside of the employment relationship).

14. *Fitzgerald v. Ford Marrin*, 153 F. Supp. 2d 219 (S.D.N.Y. 2001), rev'd, 29 F. App'x 740 (2d Cir.), cert. denied, 537 U.S. 886, (2002).

15. *Fitzgerald*, 153 F. Supp. 2d at 234, 237.

16. 153 F. Supp. 2d at 220.

17. 29 F. App'x 740 (2d Cir. 2002).

18. *Sier v. Jacobs Persinger & Parker*, No. 127848/1994 (N.Y. Sup. Ct. Dec. 22, 1999); see also "Female Attorney Awarded $300,000 on Harassment Claim Against Former Firm," Daily Lab. Rep. (BNA) No. 04, at A-6 (Jan. 6, 2000) (hereinafter referred as, "Female Attorney Awarded $300,000").

19. Female Attorney Awarded $300,000, at A-6.

20. Id.

21. Complaint, *Verdrager v. Mintz, Levin, Cohen, Ferris, Glovsky & Popeo, P.C., et al.*, No. 09-4717 C (Mass. Super. Ct. Nov. 3, 2009).

22. Id. at ¶17.