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Client Alert

Law & the Workplace℠

A report for clients and friends of the Firm

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Important New York City Human Rights Law Developments

While there are many cases stating generally that the NYC Human Rights Law ("NYCHRL") should be construed in the same manner as Title VII, there are differences in the statutes – particularly in the wake of the 2005 Civil Rights Restoration Act amendments (the "Restoration Act") to the NYCHRL – that now seem to be drawing the attention of plaintiffs' counsel and the courts. In this Client Alert, we wish to bring to your attention two significant new decisions interpreting the NYCHRL. The analysis in each decision departs substantially from federal law and each highlights that the NYCHRL requires independent, stringent analysis due to its distinctive language and "uniquely broad and remedial purposes."

In the first case, *Zakrzewska v. The New School*, 2009 U.S. Dist. LEXIS 5183 (S.D.N.Y.), federal district court Judge Kaplan addressed the issue whether the U.S. Supreme Court's *Faragher-Ellerth*[1] affirmative defense to employer sexual harassment liability under Title VII of the 1964 Civil Rights Act, as amended, controlled the question of employer liability under the NYCHRL. Judge Kaplan concluded it did not, finding the NYCHRL created a different approach to employer vicarious liability. In the second case, *Williams v. New York City Housing Authority*, 2009 NY Slip Op 00440 (1st Dep't, January 27, 2009), the Appellate Division, First Department, affirmed summary judgment for the defendant, dismissing plaintiff's discrimination and sexual harassment claims, but, in doing so, set forth a distinct analysis of the NYCHRL in the wake of the Restoration Act, emphasizing that it was to be interpreted broadly to protect civil rights and to reverse narrow interpretations arising from its federal and state counterparts.

Faragher-Ellerth Does Not Apply under the NYCHRL

In *Zakrzewska v. The New School*, federal district court Judge Kaplan opined that the defendant had established the factual basis for a *Faragher-Ellerth* defense in a sexual harassment case because the employer had an effective policy that was disseminated to employees and students alike, the plaintiff had waited a very long time before complaining, and the employer had taken reasonable and effective steps to investigate and stop the harassment once she did make a complaint. However, Judge Kaplan then held that the *Faragher-Ellerth* defense does **not** apply to claims under the NYCHRL.

Reviewing the express language of the NYCHRL, Section 8-107, subd. 13(b), which states, among other things, that "[A]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent … where the employee or agent exercised managerial or supervisory responsibility …," Judge Kaplan observed that the NYCHRL "on its face" appears to impose vicarious liability on an employer for the discriminatory acts of a manager or supervisor without regard to whether the employer or another of its managers or supervisors knew or should have known of the discriminatory or harassing conduct. He then went on to hold that the plain language of Section 8-107, subd. 13(b), "is inconsistent with the defense crafted by the Supreme Court in *Faragher* and *Ellerth*," ruling that the statute "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. Likewise, it provides for employer liability for the discriminatory acts of co-workers in like circumstances provided only that a managerial or supervisory employee knew of and acquiesced in such conduct or should have known of what was going on and failed to take reasonable preventive measures."

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[1] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

In *Zakrzewska*, Judge Kaplan then certified his decision for interlocutory appeal to the 2nd Circuit (and, in so doing, he suggested that the question presented should be certified to the New York Court of Appeals). In the meantime, federal district courts in New York may well follow his decision because he is a very well respected jurist.

Meritor's Severe and Pervasive Test Held Inconsistent with NYCHRL

In Williams v. NYC Housing Authority, a panel of the Appellate Division, First Department, affirmed summary judgment, dismissing sexual harassment and retaliation claims but, in doing so, decided to analyze plaintiff's NYCHRL claims under the standards set out in the Restoration Act, leading the Appellate Division to reject Title VII's "severe or pervasive" standard applied since Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), as inapplicable to cases arising under the NYCHRL. In Meritor, the U.S. Supreme Court had ruled that a harassment plaintiff was required to show that the harassment was "severe or pervasive" in order to state a claim. Writing for a majority of the Appellate Division, Judge Rolando Acosta ruled that the NYCHRL, as amended by the Restoration Act, was to be construed independently of, and more broadly than, its federal and state law counterparts, and "meld the broadest version of social justice with the strongest law enforcement deterrent." In particular, Judge Acosta explained, under the Restoration Act (Section 8-107(7)), the "retaliation or discrimination complained of … need not result in an ultimate action with respect to employment … or in a materially adverse change in the terms and conditions of employment … provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity." (emphasis added.)

In rejecting the "severe and pervasive" test, the court described it as a "middle ground" that had "sanctioned a significant spectrum of conduct demeaning to women" and reduced incentives for employers to create workplaces with zero tolerance for harassment and discrimination. Acknowledging the "broad remedial purpose" of the Restoration Act and its accompanying Committee Report, the court determined that "the City HRL must be guided by the need to make sure that discrimination plays no role" and, accordingly, held that "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability."

While recognizing that the City law does not impose a "general civility code," the Appellate Division found the *Meritor* standard inconsistent with the broad remedial purpose of the NYCHRL and ruled that "[t]he way to avoid this result is not by establishing an overly restrictive 'severe or pervasive' bar, but by recognizing an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"

Interestingly, the Appellate Division affirmed summary judgment for the employer, even under its broad reading of the NYCHRL, because the comments complained of "were not directed at [the plaintiff], and were perceived by her as being in part complimentary to a co-worker." Thus, they were "petty slights or trivial inconveniences, and thus not actionable." But the court then noted in a footnote that "[o]ne 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. No such circumstances were present here."

Williams is postured differently than *Zakrzewska* because the employer prevailed. Here, there seems to be no basis for appeal, unless the plaintiff seeks review by the Court of Appeals, which may or may not accept the case. In the meantime, the new standard for hostile environment claims will necessarily be followed by trial judges in the Appellate Division, First Department.

The Bottom Line

All of this makes it that much more important to have an effective anti-discrimination/harassment training program that emphasizes zero tolerance. For information about the NYCHRL, as amended by the Restoration Act, please see the link here to our article describing the amendments to the City Human Rights Law in our Fall/Winter 2005 Edition of the Law & the Workplace Newsletter.

If you have any questions about these two decisions, or the Restoration Act amendments to the NYCHRL, please feel free to contact your Proskauer relationship lawyer or any of the lawyers listed below.

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If you have any questions about the impact of this new law, please contact your Proskauer relationship lawyer or one of the lawyers listed below:

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