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New York's High Court Rejects Faragher-Ellerth Affirmative Defense For Claims Under New York City Law

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On May 6, 2010, the New York Court of Appeals held that an affirmative defense, available under federal law, that allows employers to avoid liability in sexual harassment and retaliation cases, is not available under the New York City Human Rights Law (NYCHRL). The affirmative defense that is now commonly relied on by defendants in sexual harassment lawsuits, was set out in two 1998 Supreme Court cases: *Faragher v. City of Boca Raton*; and *Burlington Industries, Inc. v. Ellerth*. *Faragher* and *Ellerth* held that under Title VII an employer is not liable under Title VII for sexual harassment committed by a supervisory employee where there is no tangible employment action (such as termination), and the employer can show that: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities or to otherwise avoid harm.

In 2009, a Federal Judge in the U.S. District Court for the Southern District of New York held in *Zakrzewska v. The New School* that the affirmative defense set out in *Faragher* and *Ellerth* does not apply to claims under the NYCHRL. The district court certified an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit to confirm whether the *Faragher-Ellerth* defense applies to claims under the NYCHRL. The Second Circuit in turn certified this same question to the New York Court of Appeals. The New York Court of Appeals agreed with the district court, holding that the NYCHRL makes clear that the *Faragher-Ellerth* defense does not apply to claims brought under the city law. Instead, under the NYCHRL, employers are subject to strict liability for sexual harassment committed by supervisory employees.

In the opinion issued yesterday, denying the applicability of the *Faragher-Ellerth* defense to city claims under the NYCHRL, the Court of Appeals noted that there were good policy arguments weighing in favor of applying the defense. In particular, as the defendant employer argued, strict liability for discrimination "impeded deterrence of workplace discrimination," as employers will have less of an incentive to maintain and follow complaint procedures that help prevent harassment, if procedures will not help absolve them from liability under the NYCHRL. Nevertheless, the Court of Appeals found that such policy judgments are properly made by legislatures, and the legislative scheme set out in the NYCHRL is inconsistent with the *Faragher-Ellerth* defense. Specifically, the NYCHRL states that an employer is liable for the conduct of an employee when the "employee or agent exercised managerial or supervisory responsibility." The Court of Appeals found that this plain language is inconsistent with the *Faragher-Ellerth* defense. Therefore, employers should expect an increase in disputes concerning which employees "exercised managerial or supervisory responsibility" in sexual harassment cases, as this becomes a crucial factor under the NYCHRL.

The *Zakrzewska* case is one of several recent cases highlighting possible differences between the NYCHRL and state and federal anti-discrimination laws, which had long been analyzed under identical frameworks. In 2009, the New York Supreme Court, Appellate Division, First Department, held in *Williams v. New York City Housing Authority* that, based on the broad and remedial purpose of the NYCHRL, hostile work environment claims need not meet the "severe or pervasive" threshold to be actionable under the NYCHRL. Although the New York Court of Appeals has not ruled on this important question, the Second Circuit recently noted in *Fleming v. Maxmara USA, Inc.*, that the NYCHRL "does not require the same severity or pervasiveness that federal law requires."

Although the New York Court of Appeals decision yesterday in *Zakrzewska* prevents employers from using the *Faragher-Ellerth* defense for NYCHRL claims, the defense remains available for claims brought under the New York State Human Rights Law and Title VII. Employers should continue providing avenues for employees to complain about discrimination, as this can help stop problems from escalating. Given this recent decision, prevention is more important than ever. Providing supervisors and all employees with sexual harassment training can help prevent hostile work environments from arising and keep employers free from liability.

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