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NYC EMPLOYERS BEWARE: NEW YORK CITY HUMAN RIGHTS LAW BARS *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE TO HARASSMENT CLAIMS

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July 22, 2010

In a decision that dramatically expands the scope of liability for New York City employers, the New York Court of Appeals held in *Zakrzewska v. The New School*, 2010 NY Slip Op. 03796 (N.Y. May 6, 2010) that the *Faragher-Ellerth* affirmative defense¹ — which allows an employer to defeat harassment claims if it demonstrates that (a) there was no adverse employment action, (b) it took reasonable care to prevent or promptly correct harassing conduct, and (c) the employee unreasonably failed to take advantage of the employer's preventive or corrective procedures — is not available under the New York City Human Rights Law ("NYCHRL").

Factual and Procedural Background

In *Zakrzewska*, Plaintiff Dominika Zakrzewska was employed part-time by a print output center within the New School's Academic Computing Center. Over the course of a year beginning in 2004, Zakrzewska's "immediate supervisor," Kwang-Wen Pan, allegedly subjected her to sexually harassing e-

mails and conduct. In alleged retaliation for Zakrzewska's complaints to School officials in May 2005, Pan covertly monitored Zakrzewska's Internet usage from August 2005 through 2006.

Zakrzewska later filed suit against the School and Pan in the United States District Court for the Southern District of New York, alleging sexual harassment and retaliation under the NYCHRL. The School moved for summary judgment dismissing Zakrzewska's complaint on the grounds that it was not vicariously liable for Pan's alleged conduct under a *Faragher-Ellerth* defense.

Analysis by the District Court

In denying the School's motion, the District Court concluded that, while use of the *Faragher-Ellerth* defense in NYCHRL cases had been an "open question" within the Second Circuit, the plain language of Section 8-107(13)(b) of the NYCHRL imposes "vicarious liability on an employer for discriminatory acts of (1) a manager or supervisor, without regard to whether the employer or another of its managers or supervisors knew or should have known of those acts, and

(2) a co-worker, provided the employer, or manager or supervisor, knew of and acquiesced in, or should have known of, the co-worker's acts, among other circumstances[.]" For purposes of the motion, the District Court noted that there was some evidence by "which a jury could conclude that Pan was a supervisory or managerial employee." The District Court further determined that Section 8-107(13)(b) would also impose vicarious liability on the School for Pan's alleged retaliation since retaliation is a discriminatory practice prohibited by the NYCHRL.

Recognizing that the issue of *Faragher-Ellerth's* application was subject to differing opinions and would ultimately impact the outcome of the litigation and other employment discrimination cases within the Circuit, the District Court certified an interlocutory appeal to the Second Circuit, asking whether the *Faragher-Ellerth* defense applied to sexual harassment and retaliation claims brought under Section 8-107

of the NYCHRL. At the suggestion of the District Court, the Second Circuit certified the question to the New York Court of Appeals.

Holding of the New York Court of Appeals

In reviewing the text and legislative history of the NYCHRL, the Court of Appeals agreed with the District Court's holding that the NYCHRL precludes a *Faragher-Ellerth* defense. Although the NYCHRL parallels the New York State Human Rights Law ("NYSHRL") "in many ways," the Court found that Section 8-107(13) of the NYCHRL permissibly imposed greater penalties for discrimination than under the state law.

Given that the law was revised in 1991 to impose "[s]trict liability in the employment context for acts of managers and supervisors," the Court reasoned that the legislative scheme of the NYCHRL "simply does not match up with the *Faragher-Ellerth* defense." Accordingly, the Court noted, the text of the NYCHRL bars an employer from eliminating its liability for a claim involving unlawful conduct by (1) a supervisor or (2) a co-worker whose conduct was known by the employer, yet the employer had acquiesced in or failed to immediately correct such conduct.

In those two instances, the employer can, at best, use its anti-discrimination policies and procedures to mitigate civil penalties and punitive damages for such claims. Where an employer "should have known" of an employee's unlawful conduct "yet 'failed to exercise reasonable diligence to prevent [it],'" the Court found that an employer can use its anti-discrimination policies and procedures

to shield itself against liability. Citing to the District Court's decision, the Court acknowledged policy considerations in favor of applying the *Faragher-Ellerth* defense to claims under state and local laws, but nevertheless determined that such considerations are to be made by legislators.

Lessons to be Learned

Zakrzewska epitomizes the recent trend by New York courts in analyzing NYCHRL claims under broader standards than those applicable to NYSHRL and Title VII claims. *E.g.*, *Williams v. New York City Housing Authority*, 872 N.Y.S.2d 27 (N.Y. App. Div. 2009) (in rejecting traditional state and federal standards, court held that a plaintiff asserting a hostile work environment claim under the NYCHRL need not establish discrimination "severe and pervasive" enough to alter the conditions of employment; instead, plaintiff must show, by a preponderance of the evidence, that she was treated "less well" than other employees on account of her gender); *Okayama v. Kintetsu World Express (U.S.A.), Inc.*, No. 0111494/2005, 2008 WL 2556257 (N.Y. Sup. Ct. June 12, 2008) (holding that *Faragher-Ellerth* defense does not apply under the NYCHRL); *Pugliese v. Long Island R.R. Co.*, No. 01-CV-7174 (NGG), 2006 WL 2689600 (E.D.N.Y. Sept. 19, 2006) (noting that the "breadth and scope of [NY]CHRL will often yield results different from Title VII").

This trend is the product of New York City's Local Civil Rights Restoration Act of 2005 (the "Restoration Act"), which requires courts to liberally interpret the NYCHRL, regardless of how similarly-worded state and federal laws have been construed. As

a result, state and federal civil rights laws set "a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."

As a consequence of *Zakrzewska* and the Restoration Act, employers can expect an increase in harassment and retaliation claims under the NYCHRL based upon the conduct of supervisors and/or the failure to correct a co-worker's unlawful conduct of which the employer was aware — claims for which an employer cannot assert an absolute defense to liability

Of moment, *Zakrzewska* leaves open the question of whether the *Faragher-Ellerth* defense is available under the NYSHRL. The Court of Appeals noted that its decision in *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (N.Y. 2004), did not address the applicability of the defense under state law. Thus, *Zakrzewska* leaves employers to ponder the fate of decisions such as *Barnum v. New York City Transit Authority*, 878 N.Y.S.2d 454 (N.Y. App. Div. 2009), which upheld the use of a *Faragher-Ellerth* defense in NYSHRL cases.

In light of the *Zakrzewska* decision, consider taking the following steps:

- If you do not already have one, create an anti-discrimination policy that expressly outlines inappropriate conduct, the consequences of same, and reporting procedures. Although an employer cannot shield itself from liability based upon its anti-discrimination policies and procedures in NYCHRL cases involving supervisors and co-workers whose conduct was known to the employer, the employer can use

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such policies to mitigate penalties and damages. Importantly, *Zakrzewska* still allows an employer to use its anti-discrimination policies and procedures to avoid liability, “rather than merely diminish” penalties and damages, “only where an employer should have known of a non-supervisory employee’s unlawful discriminatory acts.”

- Distribute the anti-discrimination to all employees via both hand delivery and electronic mail. Require employees to sign an acknowledgement confirming receipt.
- Train all employees, particularly supervisors and managers, on appropriate workplace conduct. Ensure that supervisors and managers are trained regarding their obligations to report and immediately correct inappropriate conduct.

- Uniformly enforce anti-discrimination policies and procedures and take prompt, remedial action once inappropriate workplace conduct is brought to your attention.
- Periodically review effectiveness of mechanisms for reporting inappropriate workplace conduct, and ensure that such mechanisms are properly functioning.

If you have any questions about the *Zakrzewska v. The New School* decision, please call any of the following members of the firm’s Employment & Labor practice group: William I. Greenbaum or Danielle C. Carmona at 973 597 2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

¹ The affirmative defense was crafted from two United States Supreme Court decisions, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

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