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New York City Employers Beware: City Antidiscrimination Laws Are Tougher than Federal or State Laws

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A series of recent decisions by the New York Appellate Division and federal courts have broadened the obligations of New York City employers beyond the requirements of federal and New York State antidiscrimination prohibitions in the area of actionable sexual harassment, disability discrimination and retaliation. In addition, the Appellate Division held earlier this year that if employment decisions are made in New York City, then city law applies, even if the affected employee worked only outside the city.

These decisions are among the first to apply the New York City Local Civil Rights Restoration Act of 2005, NYC Local Law No. 85 (the "Restoration Act"), which provides that the city's antidiscrimination laws:

> shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, **regardless of whether Federal or New York State Civil and Human Rights Laws, including those laws with provisions comparably-worded to provisions [of the City Law] have been so construed** [emphasis added].

Sexual Harassment

Under federal law, hostile environment sexual harassment is actionable only if it is "severe and pervasive." However, in late July, in *Williams v. New York City Housing Authority*, the Appellate Division characterized this standard as "routinely barr[ing] the Courthouse door to women who have in fact been treated less well then men because of gender." As a result of *Williams*, under New York City law, plaintiffs must now prove only that they were treated less well than men in order to get a harassment case to a jury.

The court, however, did allow an employer to assert an affirmative defense (for which the employer has the burden of proof) that the complained-of actions were nothing more than

what a reasonable victim of discrimination would consider "petty slights and trivial inconvenience."

Also under federal law, employers have a defense to a hostile environment sexual harassment charge if: (1) the employee did not sustain a tangible employment action as part of the alleged harassment; (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (3) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

But, on July 27, 2009, in *Zakrzewska v. The New School*, the U.S. Court of Appeals for the Second Circuit decided to submit the question of whether that defense was available under the New York City law prohibiting sexual discrimination in employment to the New York State Court of Appeals, because of the absence of an authoritative state court decision resolving the question in the face of a lower federal court ruling that this defense was not available under the New York City law. We are now awaiting the decision of the New York State Court of Appeals, which will be the first definitive decision involving the Restoration Act by New York State's highest appellate court.

Disability Discrimination

Under federal and state law, employees with disabilities are entitled to reasonable accommodation to allow them to perform the essential functions of a job. The parties are encouraged to enter into an interactive process to determine if there is a reasonable accommodation available. However, an employer is only obligated to offer a reasonable accommodation and need not accept an accommodation that is preferred by the individual with a disability.

In late July, in *Phillips v. City of New York*, the Appellate Division went to great lengths to point out that the city law offered broader protections than federal law, implying that if the employee suggests an accommodation that the employer does not want to implement, the employer will have the burden of proving undue hardship, even if the employer offers an alternative effective accommodation.

Proof of undue hardship is difficult, because it involves the cost of the accommodation and the ability of the employer to absorb the cost, a standard which can be problematic for larger employers, especially before juries.

Retaliation

Under federal antidiscrimination laws, actionable retaliation requires proof of "conduct that has caused a materially adverse impact on the terms and conditions of employment." However, the New York City law spells out that:

> 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.

The Appellate Division in *Williams* indicated that almost any change in duties or place of employment could be considered retaliatory under city law and, therefore, the court suggested, this is always a jury question:

> In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependant, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of these realities. Accordingly, the language of the City [law] does not permit any challenged conduct to be categorically rejected as nonactionable.

Notwithstanding the above language, the Appellate Division recognized that summary judgment might still be obtained if the court concluded that no reasonable jury could so find. In the particular case, the Appellate Division awarded summary judgment, dismissing the case of a plaintiff who complained she had been assigned to strip floors when the employer proved that many other employees who were assigned to strip floors had not raised the complaints the plaintiff had raised.

Applicability of New York City Law to Employees Working in Other Venues

Finally, in *Hoffman v. Parade Publishing*, the Appellate Division held that the New York City antidiscrimination law would be applicable to an employee of a New York City employer who had never worked in the city if the decision to take adverse employment action, which was alleged to violate the antidiscrimination law, was made in New York City. It didn't matter that the decision only affected an employee who was working solely in Atlanta.

Significance for Employers

As a result of these cases, New York City employers are advised to:

1. Train and periodically retrain supervisors and managers to be more aware of, and put a stop to, any actions which might constitute harassment of employees on the basis of sex, race, religion, national origin, sexual orientation, disability, citizenship or victims of domestic violence and any other factor protected under city or state law.

2. Promulgate written policies against prohibited employment discrimination against employees in any of the protected classes, and review and amend rules and definitions of harassment to take the New York City law into account.

3. Specifically prohibit retaliation against any employee who protests or opposes real or perceived illegal discrimination and ensure that supervisors and managers are trained to avoid retaliation against those who oppose reasonably perceived violations of law.

4. Implement a grievance procedure that allows employees to raise concerns and ensures that the employees' concerns are responded to with proper care and that employees are not retaliated against for using the procedure.

5. Be prepared to enter into a serious effort to provide reasonable accommodation to people with disabilities, including an interactive process (in which employees must put their requested accommodations in writing) in order to ascertain what accommodations would allow employees to work productively. Employers should seek to obtain an agreement with the employee to the employer's proposed accommodations and, if agreement is not reached, be prepared to analyze and document why the accommodation the employee proposes creates an undue hardship for the employer (this will entail determining and documenting the extra cost involved). If an agreement cannot be reached, it will be important to carefully review the decision in light of the possible impact upon a jury if litigation ensues.

6. If decision-makers are in New York City, consider either decentralizing decision-making so that personnel decisions about out-of-city employees are not covered by New York City law or revamping manuals and personnel practices to comply with New York City law.

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