ALERTS AND UPDATES

New York's High Court Holds U.S. Supreme Court's Faragher-Ellerth Defense for Employers in Harassment Claims Is Inapplicable Under New York City Human Rights Law

May 19, 2010

On May 6, 2010, in response to a certified question from the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals in *Zakrzewska v. The New School*[1] held that the affirmative defense to employer liability articulated by the U.S. Supreme Court in *Faragher v. City of Boca Raton*[2] and *Burlington Industries, Inc. v. Ellerth*[3] does not apply to sexual harassment and retaliation claims brought under the New York City Human Rights Law (NYCHRL).

The now-familiar *Faragher-Ellerth* defense negates employer liability for harassment claims when the employee has not suffered a tangible employment action and the employer demonstrates that (1) it took reasonable steps to prevent or promptly correct the alleged harassment, and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm. This defense has often been a powerful tool for employers faced with harassment claims, particularly in situations where an employee files a claim at the point of employment termination, having failed to notify the employer of the alleged harassment while employed—despite well-published procedures to address discriminatory harassment.

The *Zakrzewska* court determined that the plain language of the NYCHRL—which is set forth in section 8-107 of the New York City Administrative Code—precludes application of the *Faragher-Ellerth* defense because the language of the statute imposes vicarious liability on an employer in three instances: (1) where the offending employee "exercised managerial or supervisory responsibility"; (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take "immediate and appropriate corrective action"; and (3) where the employer "should have known" of the offending employee's unlawful discriminatory conduct, yet failed to exercise reasonable diligence to prevent it.

In so holding, the court opined that the NYCHRL's "unambiguous language" is supported by its legislative history and that the NYCHRL is not inconsistent with the New York State Human Rights Law in creating a greater penalty for unlawful discrimination. Although the court acknowledged the defendant's argument that strict liability for discrimination may impede deterrence of workplace discrimination and thereby hinder public policy, it determined that considerations relevant to policy judgments are properly made by the legislature, not the court.

It is important to note that this is not the NYCHRL's first departure from state and federal laws. In *Williams v. New York City Housing Authority*,[4] the court effectively lowered the burden for plaintiffs to establish a hostile-work-environment claim from demonstrating that the conduct was "severe and pervasive" to showing that they were treated "less well" than other employees. The *Williams* court concluded that the severe and pervasive standard set forth by the U.S. Supreme Court in *Meritor Savings Bank v. Vinson*[5] was too restrictive under the NYCHRL, as amended by the 2005 Civil Rights Restoration Act, because it effectively "sanctioned a significant spectrum of conduct demeaning to women" and was therefore inconsistent with the NYCHRL's "uniquely broad and remedial purposes." With the statute's broad remedial purpose in mind, the court concluded that the question of severity and pervasiveness was applicable to consideration of the scope of permissible damages, but not to the question of underlying liability. In the opinion of the *Williams* court, the aim of New York City's workplace harassment laws is zero employer tolerance for conduct involving an employee being treated "less well" based on his or her membership in a protected class.

What This Means for Employers

The *Zakrzewska* and *Williams* decisions are likely to lead to a significant rise in harassment claims brought under the NYCHRL. Employers with operations in New York City should consider taking steps to implement zero-tolerance discrimination and harassment policies, train employees and supervisors, and be vigilant in efforts to prevent and promptly correct discriminatory, harassing or retaliatory conduct.

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Zakrzewska v. The New School*, No. 62, slip op. (N.Y. May 6, 2010).
2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
3. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
4. *Williams v. New York City Housing Authority*, 872 N.Y.S.2d 27 (1st Dept. 2009), *leave to app. denied*, 13 N.Y.3d 702 (2009).
5. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).