The Faragher-Ellerth Defense: Inapplicable to Harassment and Retaliation Claims under the New York City Human Rights Law

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On May 6, 2010, the New York Court of Appeals held that the affirmative defense created by the Supreme Court in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth (the “Faragher-Ellerth defense”) does not apply to sexual harassment and retaliation claims under the New York City Human Rights Law (NYCHRL). In Zakrzewska v. The New School, 2010 NY Slip Op. 3796, the Court concluded that the NYCHRL subjects employers to strict liability for harassment committed by supervisory employees, and that Faragher-Ellerth-type evidence can only be used to mitigate potential civil penalties and punitive damages.

The Facts

Dominika Zakrzewska attended, and worked part-time at, The New School (the “School”). She alleged that Kwang-Wen Pan, her supervisor, sexually harassed her. In response to her complaint in May 2005, the School warned Pan that he was to have no further personal communications with Zakrzewska, stripped him of all supervisory and managerial responsibilities over her, and required him to attend sexual harassment training. Thereafter, Pan ceased communicating with Zakrzewska, but according to her, he covertly monitored her computer use at work in retaliation for her complaint.

The District Court

Zakrzewska filed suit in the Southern District of New York alleging sexual harassment and retaliation under the NYCHRL. The School moved for summary judgment, arguing that it had established the Faragher-Ellerth defense, which the School maintained was applicable to the NYCHRL.

In Faragher and Ellerth, the Supreme Court held that where no tangible employment action exists, an employer may not be liable for supervisory sexual harassment under Title VII if the employer can show that (1) it exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and (2) the aggrieved employee unreasonably failed to take advantage of preventive or corrective opportunities or to otherwise avoid harm.

The District Court first considered whether the School would be entitled to dismissal if the Faragher-Ellerth defense applied to NYCHRL cases. Given the existence of an express and properly disseminated harassment policy and evidence that the School took reasonable, effective steps to end Pan’s conduct, the District Court ruled that the School would be so entitled.

The District Court then considered whether that defense applied to NYCHRL cases. Finding that the NYCHRL imposed vicarious liability for the acts of managers and supervisors, even where the employer has exercised reasonable care to prevent and correct discriminatory conduct, and where the employee unreasonably failed to take advantage of corrective opportunities, the District Court ruled that the NYCHRL was inconsistent with the Faragher-Ellerth defense, and therefore held the defense inapplicable. Summary judgment was denied.

Acknowledging that its decision was not “free from doubt,” and given the importance of that issue, the District Court certified an appeal to the federal appellate court to answer whether the Faragher-Ellerth defense applied to sexual harassment and retaliation claims under the NYCHRL.
The Second Circuit

Due to the absence of authoritative state court decisions, the considerable importance of the issue, and the capacity of certification to resolve the pending matter, the Second Circuit Court of Appeals certified that question to the New York Court of Appeals.

The New York Court of Appeals

The Court of Appeals found that the Faragher-Ellerth defense is inconsistent with the NYCHRL. The NYCHRL, the Court noted, permits an employer’s anti-discrimination policies and procedures to be considered in mitigation of civil penalties and punitive damages, but even where such mitigation applies, other damages, such as compensatory damages, could be recovered. In addition, the Court remarked that anti-discrimination policies and procedures, which are central to the Faragher-Ellerth defense, shield employers from liability only where an employee should have known of a non-supervisory employee’s discrimination.

The Court of Appeals also examined the legislative history of the NYCHRL, finding that history demonstrated that the NYCHRL was designed to impose strict liability for acts of managers and supervisors and that employer’s affirmative anti-discrimination steps could mitigate liability for civil penalties and punitive damages. The Court determined this legislative history was consistent with the language of the NYCHRL.

The School argued that the NYCHRL conflicted with the state anti-discrimination statute. The Court disagreed, observing that the two statutes were consistent because both prohibited discrimination; that the local law created a greater penalty for that discrimination did not render it inconsistent.

The Court of Appeals was similarly unpersuaded by the School’s argument that the NYCHRL did not apply to all managers and supervisors and that strict liability would impede deterrence of workplace discrimination. The Court found the first argument unsupported by the statute’s text, and held the second reflected a policy judgment that was properly made by the legislature, and consequently, was not a factor if the offending employee exercised supervisory or managerial control.

Finally, the Court of Appeals ruled that its decision was not inconsistent with Forrest v. Jewish Guild for the Blind, wherein the Court commented that the NYCHRL mirrored the New York State Human Rights Law, and therefore should be analyzed according to the same standard. The Zakrzewska Court distinguished that comment, finding that Forrest did not consider whether the NYCHRL imposed strict liability for a supervisor’s discrimination and did not address whether the Faragher-Ellerth defense applied under the state anti-discrimination law.

Accordingly, the New York Court of Appeals answered the certified question in the negative, holding that the Faragher-Ellerth defense to employer liability does not apply to sexual harassment and retaliation claims under the NYCHRL.

Conclusion

In light of Zakrzewska, employers must be more vigilant in maintaining effective anti-harassment policies and actively enforcing those policies. While proof of effective measures and an employee’s unreasonable failure to take advantage of corrective opportunities will not operate as a complete bar to liability under the NYCHRL, such evidence may reduce a damage award.

When a claim of supervisory harassment or retaliation is established under the NYCHRL, litigation is more likely to focus on damages, and not liability. The greatest practical impact of Zakrzewska on employers may be to encourage settlement, making such discussions more likely if liability is a foregone conclusion.

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