



LABOR & EMPLOYMENT DEPARTMENT

ALERT

THE NEW YORK STATE COURT OF APPEALS HOLDS THAT THE *FARAGHER/ELLERTH* DEFENSE DOES NOT APPLY TO CLAIMS OF SUPERVISOR HARASSMENT UNDER THE NEW YORK CITY HUMAN RIGHTS LAW

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On May 6, 2010, the New York State Court of Appeals, the highest ranking court in New York, ruled that the *Faragher/Ellerth* defense is not an affirmative defense to a sexual harassment claim under Section 8-107 of the New York City Human Rights Law (NYCHRL) when a supervisor engages in the harassing conduct. See *Zakrzewska v. The New School*, No. 62, slip op. (N.Y. May 6, 2010).

By way of background, the NYCHRL prohibits sexual harassment and imposes liability on employers when: (1) the offending employee exercised managerial or supervisory responsibility; (2) the employer knew of the employee's discriminatory conduct, and acquiesced in it or failed to take immediate and appropriate corrective action; or (3) the employer should have known of the discriminatory conduct but failed to exercise reasonable diligence to prevent it. See *Zakrzewska*, No. 62, slip op. at 8.

The *Faragher/Ellerth* defense provides that an employer will not be held liable under Title VII for sexual harassment committed by a supervisory employee if it can prove that: (1) the harassed employee was not subjected to a tangible adverse employment action as a result of the harassment; (2) the employer exercised reasonable care to prevent and promptly correct any

sexually harassing behavior; and (3) the complaining employee unreasonably failed to take advantage of the employer's corrective or preventative action. See *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

The Court of Appeals reviewed the legislative history of the NYCHRL to determine whether a New York City employer can assert the *Faragher/Ellerth* defense as a bar to a claim under the NYCHRL that a supervisory employee committed sexual harassment. In finding that the defense is not available to a NYCHRL harassment claim, the court relied on the Report of the New York City Council's Committee on General Welfare, which stated that the NYCHRL provides for "[s]trict liability in the employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where [the] employer knew of [the] act and failed to take prompt and effective remedial action or should have known and [did] not exercise reasonable diligence to prevent [it]. [An e]mployer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken." See *Zakrzewska*, No. 62, slip op. at 9. Accordingly, where a supervisory employee sexually

harasses an employee, or where the employer knows of a non-supervisory employee's harassment of a co-worker and fails to take appropriate corrective action, the employer is automatically liable for compensatory damages, costs and attorneys' fees, even if the employer can otherwise establish the elements of the *Faragher/Ellerth* defense.

However, the Court of Appeals did note that an employer's anti-discrimination policies may be considered for purposes of mitigating the amount of civil penalties and punitive damages and as a defense to a claim "where an employer should have known of a non-supervisory employee's unlawful discriminatory acts." *Id.*

Although the *Faragher/Ellerth* defense will not be a valid defense for most harassment claims under the NYCHRL, the defense can still be invoked for sexual

harassment claims brought under Title VII and the New York State Human Rights Law. Additionally, as stated above, if the employer can prove the elements of the *Faragher/Ellerth* defense, it is possible for the employer to mitigate its economic liability to the aggrieved employee in a sexual harassment claim under the NYCHRL. Thus, it is important for New York City employers to ensure they maintain anti-discrimination policies with effective enforcement mechanisms. In doing so, employers can reduce the risk of harassment occurring and increase the likelihood that any harassment is promptly corrected.

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