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LEGAL ALERT

Legal Alert: Faragher/Ellerth Affirmative Defense not Available for Claims under New York City Human Rights Law

5/12/2010

In another example of New York Courts expanding employee protections under the New York City Human Rights Law (NYCHRL), in *Zakrzweska v. The New School*, 2010 NY Slip Op. 03709 (May 6, 2010), the New York Court of Appeals has held that the familiar *Faragher/Ellerth* affirmative defense to Title VII claims is not available to employers seeking to defend against claims of sexual harassment or retaliation under the NYCHRL.

In two decisions, *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*, the U.S. Supreme Court afforded employers an affirmative defense to claims of sexual harassment by a supervisory employee under Title VII where the employer can demonstrate (1) no tangible employment action such as discharge, demotion or undesirable reassignment has occurred; (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (3) the plaintiff unreasonably failed to take advantage of any preventive or corrective actions or to otherwise avoid harm. These decisions created what is known as the "*Faragher/Ellerth* affirmative defense." The applicability of these defenses to claims brought under the NYCHRL remained unsettled until this decision.

In *Zakrzweska*, the plaintiff filed a lawsuit in the United States District Court alleging sexual harassment under federal, state and local laws. The District Court Judge dismissed the federal discrimination claims utilizing the *Faragher/Ellerth* affirmative defense, but found that in the absence of any legal precedent, the New York Court of Appeals would not recognize the *Faragher/Ellerth* affirmative defense to a claim under the NYCHRL because the NYCHRL statute provides a different standard of employer liability than Title VII. The District Court certified an interlocutory appeal to the United States Court of Appeals for the Second Circuit because of the existence of a "substantial ground for a difference of opinion" as to the open-ended question of whether the *Faragher/Ellerth* defense would be recognized by a New York state court applying local law. The Second Circuit in turn certified the question to the New York Court of Appeals.

The Court of Appeals, in examining the statutory language and legislative history found that the NYCHRL intended to impose strict liability on employers for acts of managers and supervisors, and that it was contrary to the purpose of the statute to provide an employer with a complete defense to a claim of harassment. The Court found that the existence of

anti-discrimination policies and procedures can serve as a way to mitigate or reduce the amount of civil penalties or punitive damages, not as a bar to liability. As such, the Court of Appeals answered the certified question in the negative, and held that the *Faragher/Ellerth* affirmative defense was not available to claims under the NYCHRL.

The *Zakrzweska* decision is the latest in a series of recent state court decisions that have held that the NYCHRL should be interpreted liberally and broadly, and that courts should not analyze claims under Title VII and the NYCHRL using the same standards.

Employers' Bottom Line:

Although employers who are subject to the jurisdiction of the NYCHRL may no longer rely on the *Faragher/Ellerth* affirmative defense as a way to escape liability, they must continue to implement and train employees on anti-harassment policies and complaint procedures, and conduct prompt and thorough investigations, as they provide a basis for the mitigation of damages. The affirmative defense still remains available to employers defending against claims under Title VII and has been recognized by lower state courts as a defense to claims under the New York State Human Rights Law.

If you have any questions regarding this decision feel free to contact any attorney in our New York City office or the Ford & Harrison attorney with whom you usually work.