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EMPLOYMENT ALERT

RECENT DECISIONS INCREASE RISK OF EMPLOYER LIABILITY UNDER NEW YORK CITY ANTI-DISCRIMINATION LAW

As a steady stream of corporate surveys confirm, employment litigation ranks high on Corporate America's list of concerns in the recessionary economy. In New York City, companies now have an additional reason to be wary: Two recent decisions have construed the city's anti-discrimination law in a broad new way, presenting greater potential risk for employers doing business in the city. The decisions impact workplace harassment cases, as well as cases alleging retaliation and other theories. Companies already are seeing an uptick in claims brought under the city law and may face greater time and expense in disposing of such claims in the future.

LOWER THRESHOLD FOR ESTABLISHING HOSTILE WORK ENVIRONMENT CLAIMS

In *Williams v. The New York City Housing Authority*,[1] the Appellate Division, First Department established a new, lower threshold for establishing hostile work environment claims under the city's anti-discrimination statute, the New York City Human Rights Law (NYCHRL).

Under federal and state law, an employee claiming a hostile work environment must show employer conduct that is "severe or pervasive" in nature.[2] This standard long has been applied to claims under the NYCHRL as well. According to *Williams*, however, the "severe or pervasive" standard does not apply to NYCHRL claims arising after the effective date of the city's Local Civil Rights Restoration

[1] 872 N.Y.S.2d 27 (1st Dep't 2009)
[2] *See, e.g.*, *Gallo v. Alitalia-Linee Aeree Italiane-Societa Per Azione*, 585 F. Supp. 2d 520, 549 (S.D.N.Y 2008).

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Act of 2005.[3] Rather, once an employee shows that she was "treated less well than other employees because of her gender," the burden shifts to the **employer** to show that the conduct at issue was no more than a "petty slight" or "trivial inconvenience."[4]

One recent decision has applied *Williams* to reconsider and then reverse an earlier grant of summary judgment for a defendant. In its initial decision, the court in *Dixon v. City of New York*[5] had dismissed plaintiff's hostile work environment claim, finding an alleged one-time grabbing of plaintiff's arm and a threat to hurt plaintiff insufficiently severe or pervasive to be actionable. The court reversed itself in light of *Williams*, however, finding that "a reasonable trier of fact could construe such a threat of physical violence as something more than a petty slight or trivial inconvenience."

Where no threat of violence is involved, however, courts have continued to apply the NYCHRL in a way that screens out sporadic offensive remarks and taunts. In *Wilson v. The New York Post*,[6] for example, the plaintiffs complained that supervisors made several derogatory comments about women and African-Americans and that inappropriate photos and graffiti were present in the workplace. Applying *Williams*, the court ruled that "no reasonable fact finder could conclude that the alleged conduct amounts to more than . . . petty slights and inconveniences."[7]

POTENTIAL ELIMINATION OF KEY EMPLOYER DEFENSE TO HARASSMENT CLAIMS

In another recent case, *Zakrzewska v. The New School*,[8] Judge Kaplan of the Southern District of New York interpreted the NYCHRL to bar a significant defense to hostile work environment claims: the *Faragher-Ellerth defense*.[9]

Under this defense, a company can avoid liability for certain alleged acts of harassment by showing that (a) the company has an effective internal complaint procedure for reporting incidents of workplace harassment, and (b) the employee unreasonably failed to take advantage of that procedure. According to Zakrzewska, however, this defense is not available under the NYCHRL, as it is "inconsistent" with the law's text.

[3] Local Law No. 85 of City of New York (2005).
[4] Evidence that actionable conduct was not severe or pervasive remains relevant, according to *Williams*, but goes to the issue of the appropriate level of damages.
[5] No. 03 Civ. 343 (DLI) 2009 U.S. Dist. LEXIS 35096 (E.D.N.Y. April 24, 2009).
[6] No. 05 Civ. 0355 (LTS) 2009 U.S. Dist. LEXIS 28876 (S.D.N.Y. March 31, 2009).
[7] *See id.*
[8] No. 06 Civ. 5463 (LAK), 2009 U.S. Dist. LEXIS 5183 (S.D.N.Y. Jan. 26, 2009)
[9] *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

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The court in *Zakrzewska* acknowledged that its conclusion was "not free from doubt." Indeed, the court noted that until now, state and federal courts in New York "either have applied or assumed the applicability of, *Faragher-Ellerth* in NYCHRL cases."

It is too early to tell whether the reasoning in *Zakrzewska* will be upheld. If the decision is sound, however, employers with highly effective harassment policies may still be left without a key affirmative defense to claims under the NYCHRL.[10]

POTENTIAL CHANGE TO STANDARD FOR ESTABLISHING RETALIATION

The recent cases also may have changed the standard for proving employer liability in NYCHRL cases alleging unlawful retaliation.

Under federal and state law, conduct can be deemed retaliatory only where it is "materially adverse" to the employee. According to the court in *Williams*, however, this standard does not apply to NYCHRL claims.

The court in *Williams* went on, however, to enunciate a standard that appears quite similar to the federal standard. Under federal law, the "materially adverse" standard encompasses conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[11] Under the standard articulated in *Williams*, retaliatory conduct similarly includes conduct "reasonably likely to deter a person from engaging in protected activity." Employers will need to track developments in NYCHRL retaliation claims to see whether and how this new standard is applied differently than the retaliation standard under federal and state law.

CONTINUING VIOLATION DOCTRINE UNDER NYCHRL

The court in *Williams* also seemed to effectively expand the statute of limitations for claims brought under the NYCHRL. The decision broadens the application of the "continuing violation" doctrine, which allows an employee to bring a claim based partly on conduct occurring outside the governing statute of limitations.

[10] *Zakrzewska* makes clear that an employee's failure to complain about objectionable conduct remains relevant under the NYCHRL. For example, such a failure may help prove that the employee perceived the conduct as trivial and/or that any emotional injury incurred was not significant.
[11] *See Burlington N. & Santa Fe Ry, Co. v. White*, 548 U.S. 53 (2006).

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Under federal law, the continuing violation doctrine generally applies only to claims of workplace harassment and not to claims of discrimination.[12] According to *Williams*, however, the doctrine may apply to NYCHRL claims of discrimination so long as (a) one of the acts at issue occurred within the limitations period, and (b) the acts occurring outside the limitations period are "joined" or "connected" with conduct occurring within it. Plaintiffs' attorneys can be expected to cite *Williams* in seeking to challenge workplace conduct that facially would appear untimely under the law.

CONCLUSION

It is too early to tell whether and how *Williams* and *Zakrzewska* may alter the landscape of equal employment opportunity litigation in New York City. One thing is clear, however: With an increasing number of employees losing their jobs or otherwise becoming disillusioned, it never has been more important for employers to promulgate and maintain effective anti-discrimination policies and to ensure that workplaces are free of unlawful conduct. Akin Gump's labor and employment lawyers are available to further discuss these important issues and to help employers avoid potential liability.

[12] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

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