Kane Kessler, P.C.
1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799
Direct dial (212) 519-5154
drothfeld@kanekessler.com

DATE: May 21, 2010

TO: New York City Employers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: New York City Human Rights Law

Introduction

Until recently, courts have applied the same analysis to claims of discrimination brought under the New York City Human Rights Law ("NYCHRL") as they applied to claims brought under federal discrimination laws or the New York State Human Rights Law. Plaintiffs were required to establish the same elements of a discrimination claim under all three (3) sets of laws and the same defenses were available to employers under all three (3) sets of laws. However, over the past year (and most recently in early May 2010) courts have issued a number of decisions that have interpreted the NYCHLR far more broadly – and far more favorably to plaintiffs – than federal or New York State law. This new interpretation of the NYCHRL will have a profound and troubling impact on all New York City employers.

This new interpretation of the NYCHRL has its roots in the Restoration Act of 2005 which was enacted by the City Council. The Restoration Act stated that it was the intent of the City Council that the NYCHRL be interpreted "independently from similar or identical provisions" of state and federal statutes and be "construed liberally for the accomplishment of the uniquely broad and remedial purposes" of the law.

It was not until 2009, however, that courts began to apply an independent analysis under the NYCHRL. In Williams v. New York City Housing Authority, the Appellate Division held that the NYCHRL "now requires an independent liberal analysis in all circumstances, even where state and federal civil rights laws have comparable language." The Williams court based its conclusion on the fact that the Restoration Act intended to "favor[] victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law."

Following Williams, state and federal courts in New York have applied this broader and more employee-friendly interpretation of the NYCHRL to many aspects of discrimination law, as described below.

"Severe or Pervasive" Standard in Harassment Cases

To establish that conduct is unlawful harassment in cases under federal or state discrimination laws, there must be evidence that the conduct is either severe or pervasive. In Williams, the Court ruled that under NYCHRL, the concept of "severity" or "pervasiveness" is not applicable to determine whether the conduct is harassment. However, it may be applicable to determine the amount of damages to which a victim is entitled. Presumably, this ruling means that if the conduct is a single verbal slur that does not rise to the level of "severe or pervasive," an employer may still be liable for harassment but the plaintiff may not be entitled to any damages or only minimal damages.

Although the court rejected the standard of "severe or pervasive" in interpreting the NYCHRL, it also held that an employer can still establish that conduct is not unlawful harassment if it can prove that it is nothing more than what a reasonable victim would consider "petty slights and trivial inconveniences." The few cases that have been decided so far since Williams have shed very little light on what a court will consider "petty slights and trivial inconveniences."

Faragher Defense in Harassment Cases

The most troubling new interpretation of the NYCHRL and the one that will have the biggest impact on discrimination litigation in New York City is the elimination of what is known as the Faragher defense.

A decade ago, the United States Supreme Court held in Faragher v. City of Boca Raton that in a situation where the plaintiff claims harassment by a supervisor but there is no tangible employment action (i.e., termination, demotion), an employer would not be automatically liable for the conduct of the supervisor unless the employer failed to take steps to prevent and/or remedy the harm. It ruled that if an employer can show that it has a policy against harassment with a reasonable complaint procedure and the employee unreasonably failed to utilize the complaint procedure to remedy the harm, the employee cannot maintain a harassment claim against the employer.

In Zakrzewski v. New School, a plaintiff brought a claim of sexual harassment in federal court under federal, state and city law. The Court concluded that the employee had failed to utilize the employer's complaint procedure and therefore dismissed the federal and state claims pursuant to the Faragher defense. However, the Court was uncertain as to whether the Faragher defense was applicable any longer under the NYCHRL. Utilizing a rare procedure, the federal court requested that New York State's highest court, the Court of Appeals, answer this specific question.

The Court of Appeals issued its decision on May 7, 2010. It found that the plain language of the NYCHRL forecloses the use of the Faragher defense. The NYCHRL reads as follows: "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent … where (1) the employee or agent exercised managerial or supervisory responsibility…." Neither federal nor state law has any similar language which unequivocally and without exception holds employers liable for the unlawful conduct of their supervisors.

Obviously, every employer should still maintain a policy against harassment with a complaint procedure and should still provide training to prevent harassment. But an employer in New York City will no longer be protected by the Faragher defense even if it has taken diligent steps to prevent and/or remedy harassment and has no knowledge of the supervisor's unlawful conduct. We recommend, therefore, that anti-harassment training of supervisors regarding be held more frequently (at least semi-annually, but more often if possible) and that supervisors be reminded by memoranda that any inappropriate conduct will not be tolerated. Some employers may want to adopt other more aggressive measures. Supervisors must understand that it is more important than ever that their conduct be beyond reproach at all times and that their continued employment depends on it.

"But for" Standard for Age Claims

The United States Supreme Court ruled recently that under the Age Discrimination in Employment Act ("ADEA"), a plaintiff must establish that he/she would not have been subject to the adverse employment decision "but for" his/her age. This standard of proof is more onerous for plaintiffs than the standard under other federal laws (i.e., Title VII of the Civil Rights Act, Americans with Disabilities Act) which requires a plaintiff to show only that his/her protected class was a motivating factor (possibly among others) in the employment decision. A federal court has recently held that the "but for" standard applicable to age claims under the ADEA is not applicable to age claims under the NYCHRL and that a plaintiff alleging an age claim under the NYCHRL need only show that age was a motivating factor, which is the lower threshold for plaintiffs to meet.

Reasonable Accommodation

Under federal and state law, a disabled individual is entitled to a reasonable accommodation unless such accommodation would be an undue burden on the employer. It is the plaintiff's burden in the first instance to show that the requested accommodation is reasonable. In Phillips v. City of New York, an employee had been denied a one year leave of absence on the grounds that the request was not reasonable. The Appellate Division held that under the NYCHRL, no accommodation is unreasonable unless an employer proves it would create an undue burden. The Court concluded that under NYCHRL, "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of

reasonable accommodation … and there are no accommodations that may be 'unreasonable' if they do not cause undue hardship."

This quote from Phillips is particularly troubling, since federal and state courts have long held that a request for an indefinite leave of absence is, *per se*, unreasonable. Now, New York City employers will have to show how such an indefinite leave would create an undue hardship on the employer. One possible argument for an employer is that it cannot fill the disabled employee's position unless it can offer a permanent job or a job with a definite time frame. But the employer would have to be able to provide evidence of the difficulty of filling that position.

Conclusion

It is difficult to predict with any certainty the full impact of the new interpretation of the NYCHRL. However, it is clear that it will significantly increase the volume of litigation by employees and former employees and will make it significantly more difficult to win a motion for summary judgment dismissing all claims as a matter of law.

Employers should continue to review every employment decision carefully to insure that none are motivated, even in part, by unlawful discrimination. If you have any doubt about an employment decision – even about the appearance of an employment decision – call counsel to discuss it before implementing the decision.
Niki Franzitta

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert Sacks, Niki J. Franzitta, Lois Traub or Alexander Soric.