



Zakrzewski Decision – No Affirmative Defense Under the NYC Code

On May 6, 2010, the Court of Appeals rendered a decision in Zakrzewska v. The New School, 2010 N.Y. Slip Op 03796, which addressed whether an employer sued for sexual harassment under the New York City Code can rely upon the affirmative defense articulated by the United States Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

Under the Faragher/Ellerth line of cases, an employer may plead an affirmative defense in cases of sexual harassment where: (1) the employer exercised reasonable care to prevent and promptly correct sexual harassment, (2) the employee unreasonably failed to take advantage of the employer's preventative or corrective measures, and (3) the employer has not taken any tangible employment action against the employee. In Zakrzewska, the Court of Appeals held that the New York City Code does not allow the employer to assert an affirmative defense if the alleged harasser "exercised managerial or supervisory authority" or the employer actually knew about the discriminatory conduct and "acquiesced in it or failed to take 'immediate and appropriate corrective action.'" Slip. Op. at 8. This is a significant departure from the law that has developed since the United States Supreme Court decided the Faragher and Ellerth cases in 1998.

Significantly, the Court of Appeals did not offer any analysis of what evidence would be sufficient to demonstrate that the alleged harasser exercised "managerial or supervisory" authority. Accordingly, employers should anticipate that plaintiffs will attempt to characterize colleagues and co-workers as exercising managerial or supervisory authority. Therefore, employers subject to the New York City Administrative Code should take pro-active measures to limit the number of employees who could be viewed as exercising managerial or supervisory authority.

In addition, the Court of Appeals tacitly rejected a theory common among the plaintiffs' bar that the New York City Code authorizes punitive damage awards against employers without a showing of fault. During the oral argument in Zakrzewska, the Court of Appeals reacted skeptically to plaintiff's contention that she could recover punitive damages without a showing of fault. The Zakrzewska decision rejected this argument. Specifically, the Court of Appeals noted that the New York City Administrative Code allows employers to "mitigate civil penalties and punitive damages," by taking appropriate measures to prevent or remedy discriminatory conduct. Slip Op. at 8 (quoting N.Y. City Admin. Code § 8-107(e)). The Court of Appeals then held that "[a]s a result, even in cases where mitigation applies, compensatory damages, costs and reasonable attorney' fees are still recoverable." Slip Op. at 8. Significantly, the Court of Appeals did not include punitive damages among the remedies that were available where the employer demonstrated that it took appropriate measures to prevent and correct harassment.

"By eliminating the affirmative defense that has been available since 1998, the Zakrzewska decision creates real challenges for employers subject to the New York City Administrative Code," said Kaufman Dolowich Voluck & Gonzo partner Janene Marasciullo. "However, the Court of Appeals did not answer the

important question of who is a manager or supervisor under the statute. Given the importance of this designation, employers should review their Employee Handbooks and procedures to limit the definition of manager or supervisor to those people who can take tangible employment actions, such as hiring, firing, promoting, demoting, or disciplining employees."

Please contact Janene Marasciullo at jmarasciullo@kdvglaw.com or 516-681-1100 if you have any questions or would like additional information.

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