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# New York Court of Appeals Holds Faragher-Ellerth Affirmative Defense Not Applicable to Harassment Claims Brought Under New York City Human Rights Law

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On May 6, 2010, in *Zakrzewska v. The New School*, New York State's highest court held that the affirmative defense to sexual harassment claims articulated in *Faragher v. City of Boca Raton*, 524 US 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 US 742 (1998) (the "*Faragher–Ellerth*" defense) does not apply to sexual harassment and retaliation claims brought under section 8-107 of the New York City Human Rights Law ("NYCHRL")[1].

In *Faragher* and *Ellerth*, the Supreme Court provided employers facing liability under Title VII for acts of sexual harassment by a supervisory employee with an affirmative defense if the employer could demonstrate: (1) the employee was not subjected to an adverse employment action as a result of the harassment; (2) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior (generally interpreted as having a published anti-harassment policy prohibiting the conduct in question and providing employees with channels to report the conduct); and (3) the complaining employee unreasonably failed to take advantage of the employer's policies and procedures.[2]

In *Zakrzewska*, the New York Court of Appeals concluded that the plain language of section 8-107 of the NYCHRL precludes the *Faragher–Ellerth*

defense because the legislative scheme of the NYCHRL simply "does not match up with the *Faragher-Ellerth* defense."[3] The Court explained that the NYCHRL imposes liability on employers in three instances: "(1) where the offending employee exercised managerial or supervisory responsibility; (2) where the employer knew of the employee's discriminatory conduct, and acquiesced in it or failed to take immediate and appropriate corrective action; and (3) where the employer should have known of the employee's discriminatory conduct yet failed to exercise reasonable diligence to prevent it."[4]

The Court noted that, as to the first two instances, an employer's anti-discrimination "policies and procedures" may serve to mitigate liability but not prevent it, and that even in cases where mitigation applies, compensatory damages, costs and reasonable attorneys' fees are still recoverable.[5] As to the third instance, the Court held that an employer's anti-discrimination policies and procedures shield against liability, rather than merely diminish recoverable damages, only where an employer should have known of a non-supervisory employee's unlawful discriminatory acts — but not when the offending employee exercised managerial or supervisory control.[6]

In support of its decision, the Court cited to a 1991 New York City Council report prepared in conjunction with adoption of section 8-107 of the NYCHRL, which describes the statute as providing for "strict liability in the employment context for acts of managers and supervisors" and stating that an "[e]mployer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken."[7] In addition, the Court found that its interpretation of the NYCHRL did not render it inconsistent with state law, stating that both statutes prohibit discrimination; section 8-107 "merely creates a greater penalty."[8] And in response to the argument that "strict liability for discrimination impedes deterrence of workplace discrimination" contrary to public policy, the Court agreed with the district court that, although the arguments for applying the *Faragher–Ellerth* defense "are not trivial . . . such considerations relevant to policy judgments are properly made by legislatures."[9]

While *Zakrzewska* holds that the *Faragher-Ellerth* affirmative defense is not available under the NYCHRL, it is now more important than ever that New York City employers ensure that they have in place robust anti-discrimination policies with effective enforcement mechanisms. In so doing, employers can reduce the risk of harassment occurring and increase the likelihood that it is promptly addressed. Moreover, proof of effective polices and procedures can still serve to mitigate civil penalties and punitive damages if liability is found.

A copy of the Court of Appeals decision is available here.

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[1] *Zakrzewska v. The New School*, No. 62, slip op. (N.Y. May 6, 2010).

[2] *Faragher*, 524 U.S. at 807.

[3] *Zakrzewska*, No. 62, slip op. at 7.

[4] *Id.* at 8.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 8–9.

[8] *Id.* at 9–10.

[9] *Id.* at 10.