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Amendments to New York State Human Rights Law Increase Protections against Sexual Harassment

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On August 12, 2019, New York Governor Andrew M. Cuomo signed into law the state's latest changes to its civil rights statutes: amendments to the New York State Human Rights Law ("NYSHRL") that increase protections against sexual harassment in the workplace, especially in the context of harassment by a supervisor. In the past, New York courts have interpreted the NYSHRL in accordance with precedent under the analogous federal law, Title VII of the Civil Rights Act of 1964. But the latest changes to the NYSHRL eliminate several barriers to bringing sexual harassment claims on the basis of harassment by a supervisor that nevertheless remain features of Title VII. As a result, when the amendments go into effect on October 12, 2019, New York employees will be able to seek relief from sexual harassment that negatively impacts their day-to-day lives, but that may not otherwise be actionable under federal law.

Standard for Federal Sexual Harassment Claims

Under Title VII, harassment of any kind must be "severe or pervasive" to state a claim for relief. But the "severe or pervasive" standard, which animates all federal sexual harassment claims, frequently fails to account for the power dynamics inherent in workplace interactions, which can cause conduct that is comparatively less "severe" or less "pervasive" to nevertheless have a serious negative impact on the "terms and conditions" of one's employment. Indeed, although stated in the disjunctive, some federal courts seem to require that harassment be both pervasive and severe to constitute a violation of the law. For example, in Gibson v. Potter, 264 F. App'x 397 (5th Cir. 2008), the plaintiff's supervisor grabbed her buttocks and made suggestive comments to her in front of another employee. Id. at 398. Even though this incident, on its own, rises to the level of a sexual assault – "severe" by any measure – the Fifth Circuit agreed with the lower court's holding that it did not violate Title VII because it only occurred once – that is, because the conduct was not also sufficiently "pervasive." Id. at 401. In other words, the court required plaintiff to show that the harassment had been both severe and pervasive, even though it involved assaultive behavior by her supervisor. Notably, after investigating the incident, the plaintiff's employer reassigned her supervisor – a clear acknowledgment that his conduct had negatively affected her working environment. Id. at 398. Gibson therefore exemplifies how rigorous application of this standard sometimes closes the courthouse doors to employees whose supervisors have without question impacted the "terms and conditions" of their employment for the worse.

Faragher/Ellerth Affirmative Defense

Also under Title VII, employers can assert an affirmative defense to liability for sexual harassment by a supervisor, known as the Faragher/Ellerth affirmative defense, if (1) they exercised reasonable care

to prevent and correct the harassment, and (2) the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. In many cases, this defense shields employers from liability if employees fail to use the proper channels to file a complaint of sexual harassment. Given the well-documented disincentives to reporting sexual harassment, the defense places an excessive burden on employees who wish to preserve their legal claims, but who fear job-related retaliation from their supervisors or face other legitimate social barriers to doing so. See, e.g., Harvard Business Review (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (women do not report harassment because of retaliation fears, the bystander effect, and male-dominated work environments). In fact, and in an effort to set the minimum level of "reasonable care" that employers must exercise to prevent and correct harassment, New York City recently implemented the Stop Sexual Harassment in NYC Act, which requires New York City employers to conduct anti-sexual harassment trainings on an annual basis.

New York Redefines Unlawful Harassment and Alleviates Burden for Reporting

The latest amendments to the NYSHRL remove both of these barriers to relief. First, the amendments expressly eliminate the requirement that sexual harassment be "severe or pervasive," providing that harassment is actionable "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." In light of that change, the law redefines unlawful harassment as any conduct that "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of [the] protected categories" identified in the law. The law is clear that to qualify as actionable sexual harassment, conduct need only rise above what a "reasonable victim of discrimination" would consider "petty slights" or "trivial inconveniences." In so doing, the amendments account for the reality that sexual harassment creates hostile work environments in part because it exploits power dynamics among employees.

Second, the changes alleviate the burden on employees to report sexual harassment, even when they fear reprisal from their supervisors, by guaranteeing that "[t]he fact that such individual did not make a complaint about the harassment . . . shall not be determinative of whether [her] employer . . . shall be liable" for harassment. This change will help ensure that employees who decline to report sexual harassment are not penalized for their inaction. It also acknowledges the fact that, in spite of the progress made during the #MeToo era, the personal and professional risks of reporting sexual harassment continue to prevent a disproportionate number of employees from doing so.

After decades of relying on judge-created standards that do not always reflect the realities of the workplace, the amended NYSHRL will offer employees the types of protections that experience has shown are necessary to provide a harassment-free work environment. Indeed, as of October 12, New Yorkers finally will be able to pursue claims of sexual harassment that without question affect the "terms and conditions" of their employment, but that may not otherwise be actionable under federal law. Others who believe they are experiencing workplace harassment often will need legal advice to determine whether the treatment they are enduring is sufficiently egregious or pervasive to meet the standard in their particular jurisdiction.