EMPLOYMENT LAW PRACTICE GROUP ALERT
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New Decision Eases Burden for Employees Bringing Sexual Harassment Claims Under NYC Human Rights Law

A New York appellate court in Manhattan has issued an opinion that construes the New York City Human Rights Law very liberally, so as to provide considerably greater protection for employees than is available under analogous federal and New York State statutes. Among other things, under the standards articulated in this opinion, it will be significantly easier for an employee to establish a sexual harassment claim under the City law than it is under federal or New York State law. The decision is important to employers with employees in New York City both because of the new standards for workplace conduct that it establishes and because employers will need to consider whether they should amend their workplace harassment policy in light of the newly articulated standards.

The decision in *Williams v. New York City Housing Authority*[1] is predicated on language in the Local Civil Rights Restoration Act of 2005[2] and the related legislative history, describing the "uniquely broad and remedial purposes" of the New York City Human Rights Law and the statutory mandate to construe that law liberally to achieve those purposes – regardless of how federal and New York State laws with comparably-worded provisions have been construed. In addition to defining unlawful harassment liberally, the decision permits claims that would otherwise be time-barred to be brought, based on a broader interpretation of the "continuing violation" theory under the City law than applies under federal law, and leaves open the possibility that the definition of unlawful retaliatory conduct under the City law is broader than the corresponding definition under federal law.

Sexual harassment claims: The court rejected the U.S. Supreme Court's federal law standard, under which an employee must establish that the conduct at issue was "severe or pervasive" to establish a harassment claim based on a discriminatory work environment,[3] noting that such a test "reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status." Instead, based on the premise that that the primary issue for a trier of fact in a discriminatory harassment case is, "as in other terms-and-conditions [of employment] cases," whether the employee has proven by a preponderance of the evidence that she has been treated less well than other employees based on gender, the *Williams* court stated that all harassing conduct based on protected class status is actionable except for conduct that a "reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" By further contrast to federal and New York State law, the court stated that the burden is on the employer, not the employee, to show that the conduct at issue was no more than a "petty slight" or "trivial inconvenience."

Continuing violations. The *Williams* court also found that the "continuing violation" doctrine – a doctrine under which a claim may be based at least in part on conduct that occurred prior to the applicable statute of limitations – should be applied more liberally under the NYC Human Rights Law than under federal law. Under federal law, the doctrine applies only to discriminatory harassment claims, not to discrimination claims involving discrete employment decisions.[4] The *Williams* court stated that, under the City law, the continuing violation theory applies to all types of discrimination claims.

Retaliation. Interpreting the retaliation provisions of the City's law, the *Williams* court stated that retaliatory conduct is actionable where the defendant's conduct would be "reasonably likely to deter a person from engaging in protected activity." While noting that this standard appears similar to the one that has governed under federal law since 2006, i.e., conduct that might have dissuaded a reasonable worker from making or supporting a charge of discrimination,[5] the court expressly declined to assume that cases citing the federal standard adequately convey the "full import" of the City law standard.

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Although the provisions of the NYC Human Rights Law on which the *Williams* court relied were enacted in 2005, many courts had continued to construe the City law using the same principles as apply to discrimination claims under federal and New York State law. Notably, the *Williams* court addressed the issues discussed above in a case in which there was no need for it to do so: The parties had not raised the issues.[6] Moreover, the court found that, even applying its new, more liberal, standards, the decision of the trial court, granting summary judgment to the employer on all of the employee's claims, should be affirmed in all respects. It thus appears that the court was looking for an opportunity to interpret the City's law.

The opinion in *Williams* is significant for employers with employees in New York City for at least two reasons. First, employees should assess whether they should be amending the content of their work-place harassment policy in light of the standards set out in *Williams*. Second, employees will need to keep the court's statements in mind in assessing their legal obligations under the City law. In that regard, there have already been anecdotal reports that, in response to *Williams*, some New York City Commission on Human Rights personnel investigating administrative complaints under the City law have sought to hold employers to a higher standard in providing "reasonable accommodation" to employees with a disability than was previously the case.

Endnotes

1 872 N.Y.S.2d 27 (1st Dep't, January 27, 2009) (Acosta, J.).
2 Local Law No. 85 of City of New York (2005).
3 *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
4 *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
5 *See Burlington N. & Santa Fe Ry, Co. v. White*, 548 U.S. 53 (2006) (construing Title VII).
6 *See* opinion of Justice Richard T. Andrias (concurring only in the judgment for that reason).

If you wish to discuss the advisability of amending a workplace harassment policy or have other questions concerning the *Williams* opinion, please contact Ellen Martin at 212.336.2860, Lisa Cleary at 212.336.2159, or Krista Caner at 212.336.2922.