



---

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | [www.law360.com](http://www.law360.com)  
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

---

## An Eye On Workplace Harassment Liability In NYC

*Law360, New York (May 21, 2009)* -- In recent months, a federal district court judge and a New York state court appellate judge have held that the New York City Human Rights Law ("NYCHRL") should be more liberally construed than its federal and state counterparts, Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law.

In *Zakrzewska v. The New School*, 2009 U.S. Dist. LEXIS 5183 (S.D.N.Y. 2009), the court held that there is strict liability for supervisory harassment and that the long-standing Faragher/Ellerth affirmative defense does not apply to claims brought under the NYCHRL.

In another recent decision, *Williams v. New York City Housing Authority*, 872 N.Y.S.2d 27 (1st Dept. 2009), the court effectively lowered the burden for plaintiffs to establish a hostile work environment claim from demonstrating that the conduct was "severe and pervasive" to simply showing that they were treated "less well" than other employees.

Both decisions dramatically increase potential liability under the NYCHRL for employers who have operations in New York City and raise questions for all employers nationwide as to the applicability of well-settled federal standards to state and local laws.

In *Zakrzewska v. The New School*, the U.S. Court for the Southern District of New York held that New York City employers accused of sexual harassment under the NYCHRL are not entitled to an affirmative defense initially set forth by the 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).

The now familiar Faragher/Ellerth defense negates employer liability for harassment claims when the employee has not suffered a tangible employment action and the employer demonstrates that (1) it took reasonable steps to prevent or promptly correct the alleged harassment; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.

This defense has proven to be a powerful tool for employers faced with harassment claims, particularly in situations when an employee files a claim of harassment at the point of employment termination, having never notified the employer of the alleged harassment while employed despite well-published procedures to address discriminatory harassment.

Although the Zakrzewska court opined that the employer had established a factual basis for a Faragher/Ellerth defense because it had in place and disseminated an effective harassment policy, took reasonable steps to investigate the complaint and the plaintiff unreasonably failed to take advantage of corrective opportunities offered by the employer, the court held that the defense did not apply to claims raised under the NYCHRL.

In so holding, the court reviewed the language of the NYCHRL, which it construed to impose vicarious liability on an employer for discriminatory acts of (1) a manager or supervisor, without regard to whether the employer knew or should have known of the acts, and (2) a co-worker, provided the employer, or a manager or supervisor knew of and acquiesced to, or should have known of the co-worker's acts.

The court held that the plain language of the NYCHRL is inconsistent with the Faragher/Ellerth defense because the statute creates vicarious liability for the acts of managerial and supervisory employees even where the employer exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities.

Likewise, it provides for employer liability for the discriminatory acts of co-workers in like circumstances provided only that a manager or supervisory employee should have known of the unlawful conduct and failed to take reasonable preventative measures.

Finding the Faragher/Ellerth defense inapplicable to claims brought under the NYCHRL, the court denied the employer's motion for summary judgment. Notably, the court recognized the significance of its findings and that its determination was "not free from doubt" and certified the decision for interlocutory appeal to the Second Circuit Court of Appeals.

In *Williams v. New York City Housing Authority*, the Appellate Division lowered the threshold for plaintiffs to establish hostile work environment claims under the NYCHRL from the well settled "severe and pervasive" standard to whether the plaintiff has been treated "less well" than other employees.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court determined that, to prevail on a workplace harassment claim, the plaintiff must demonstrate that the harassment is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment.

The Supreme Court has characterized this requirement as a “middle path” between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury, as some earlier judicial decisions had held.

The Williams court concluded that this middle path approach was too restrictive under the NYCHRL, as amended by the 2005 Civil Rights Restoration Act, because it effectively “sanctioned a significant spectrum of conduct demeaning to women” and was therefore inconsistent with the NYCHRL’s “uniquely broad and remedial purposes.”

The Williams departure from federal and state precedent is based on the Restoration Act, which amended the NYCHRL to state that the “provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof regardless of whether federal or New York state civil and human rights laws including those with provisions comparatively worded to provisions of this title have been so construed.”

With the statute’s broad remedial purpose in mind, the court concluded that the question of severity and pervasiveness was applicable to consideration of the scope of permissible damages, but not to the question of underlying liability.

Instead, the court determined that for establishing liability under the NYCHRL, the primary issue for the trier of fact in harassment cases is whether the plaintiff has proven by a preponderance of the evidence that she has been treated “less well” than other employees because of her gender.

The court further held that, at the summary judgment stage, judgment should normally be denied to a defendant as to whether such conduct occurred unless the employer can establish an affirmative defense that the conduct complained of constitutes nothing more than what a “reasonable victim of discrimination would consider petty slights and trivial inconveniences.”

In the opinion of the Williams court, the aim of New York City’s workplace harassment laws is zero employer tolerance for conduct involving an employee being treated “less well” based on his or her membership in a protected class.

## **New York’s Decisions Raise Questions for Employers Nation-Wide**

The Zakrzewska and Williams decisions will likely lead to a substantial rise in harassment claims brought under the NYCHRL.

While employers with operations in New York City are particularly vulnerable and should take steps now to implement zero tolerance discrimination and harassment policies, the cases raise questions for all employers as to how courts will interpret and apply different legal standards arising under federal, state and local laws governing discrimination and harassment.

Historically, despite some difference in language and structure, New York federal and state courts had treated Title VII and the local antidiscrimination laws as substantially co-extensive with respect to the standards for determining discriminatory harassment. See *Patane v. Clark*, 508 F.3d 106 2d Cir. (2007).

Until now, the Second Circuit, federal district courts and New York state courts have either applied, or assumed the applicability of the Faragher/Ellerth affirmative defense and the Meritor Savings “severe or pervasive standard” in NYCHRL cases.

These recent decisions represent a significant departure from existing law. As recognized by the Zakrzewska court, the existence of different standards to employer liability requires employers to conduct their businesses in the manner dictated by the most restrictive criteria.

Furthermore, once litigation begins, the existence of different standards for federal, state and local laws applied to the same facts could render trials — in which plaintiffs commonly proceed in the alternative on federal, state and local legal theories based on the same facts — more complex, time consuming and confusing for juries.

For states like New York that provide for an election of remedies, permitting a complainant to choose between an administrative or judicial forum, these decisions leave open the question of whether a plaintiff whose state claim is dismissed can refile her case before the New York City Commission on Human Rights or a court on grounds that her claim is meritorious under the more liberal city statute, thereby obtaining a second bite at the apple.

Employers are well advised to stay tuned for the Second Circuit’s consideration of *Zakrzewska* and to see whether other judicial departments and ultimately the New York Court of Appeals will follow the court’s ruling in *Williams*.

--By Eve I. Klein and Jodi R. Varon, Duane Morris LLP

*Eve Klein is a partner with Duane Morris in the firm’s New York office. Jodi Varon is an associate with the firm in the New York office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*