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Has the standard for discrimination claims truly changed for NYC employers and employees?

The New York City Human Rights Law is significantly more lenient than both state and federal law

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In 2005, New York City passed the Civil Rights Restoration Act amendments to the New York City Human Rights Law (NYCHRL). Given the language and legislative history of these amendments, many courts have since recognized that the burden on an employee to establish discrimination under the NYCHRL is significantly more lenient than under both federal and state law. In *Williams v. New York City Housing Authority*, for example, the NYCHRL was interpreted to require an independent and broader construction than its federal and state counterparts, Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law (NYSHRL).

The First Department went on to hold that in harassment cases, as in other terms and conditions cases, the burden on an employee is to prove by a preponderance of the evidence that she has been treated less well than other employees because of her protected status. The court then recognized an affirmative defense that the "conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'" The *Williams* court granted the defendant summary judgment because it determined that the complained-of harassment—which consisted of a supervisor's remark to the plaintiff when she requested shower facilities that "you can take a shower at my house," coupled with a second incident in which the plaintiff witnessed sex-based remarks directed at another employee—were petty slights or trivial inconveniences.

It is now well-settled law that the NYCHRL is intended to give greater protections to employees than both federal and state anti-discrimination statutes, and that these statutes must be read separately. The traditional federal common law standard for establishing a Title VII claim of a hostile work environment required that the workplace be permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive so as to alter the condition of the plaintiff's employment. The 2nd Circuit has described claims under the State Human Rights Law and Title VII as analytically identical. *Williams* stressed that it was not mandating a general civility code for employers and then went on to fashion the petty slights and trivial inconvenience affirmative defense. At the same time, of course, the federal "severe and pervasive" standard continued to protect an employer from liability from isolated remarks or occasional episodes of harassment in the workplace.

An interesting development in this area is the possible melding of these standards in actual practice. A trend has apparently developed where conduct that under Title VII analysis would not be considered sufficiently severe and pervasive to survive summary judgment has more often than not also failed to pass muster under the NYCHRL petty slights or trivial inconvenience standard. Perhaps this is because it has been determined, as seen in *Petrosino v. Bell Atlantic*, that in order to pass the Title VII threshold there must be more than "simple teasing, offhand comments, or isolated incidents of offensive conduct" which, unless they are serious, will not support a claim of discriminatory harassment.

In *Mikhalik v. Credit Agricole Cheuvreux N.A.*, the district court determined that the NYCHRL would not apply where the chief executive officer showed the plaintiff pornographic images, made objectifying comments (including questioning whether she enjoyed a particular sexual position) and initiated sexual overtures. The district court determined these acts as non-actionable trivial inconveniences and then stated that courts have generally granted summary judgment for defendants when alleged incidents are sporadic insensitive comments.

Similarly in *Short v. Deutsche Bank Sec., Inc.*, the First Department recently held that various complaints about a manager's conduct, which included allegations that he took customers to strip clubs, could not

survive summary judgment under the NYCHRL in a case in which the Equal Employment Opportunity Commission found reasonable cause to believe that the defendant had discriminated against the plaintiff and a class of similarly situated females.

Thus, there appears to be a definite trend towards granting employers summary judgment in suits asserting discrimination under the traditional national Title VII standards and the supposedly more liberal and expansive New York City standard. Has the NYCHRL truly changed the legal landscape since its 2005 amendments?

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