Developments in State and Federal Discrimination Law

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DEVELOPMENTS IN STATE AND FEDERAL DISCRIMINATION LAW

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I. Introduction – hostile work environment claims vs. pure discrimination claims

II. Overview of Protected Classifications

(A) Common Federal Statutes (Title VII, ADA, and ADEA)
(B) State Statute (Executive Law - § 296[1])

III. Legal Criteria for Establishing Actionable Hostile Work Environment

(A) General Federal Standards: Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(employee must show "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").

(B) Subjective and Objective Component: Mormol v. Costco Wholesale Corp., 364 F.3d 54, 58 (2d Cir. 2004)(under the law a hostile work environment claim must satisfy *both* a subjective and objective component).

(C) Criteria for determining whether work environment is "objectively" hostile. Brennan v. Metro. Opera Ass'n, 192 F.3d 310 (2d Cir.1999)(courts must analyze [1] the frequency of the conduct, [2] the severity of the conduct, [3] whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and [4] whether the conduct unreasonably interferes with the employee's work performance."

(D) Does employee need to personally witness challenged hostile conduct? See, Torres v. Pisano, 116 F.3d 625, 633 (2d Cir.1997).

(E) Can hostility towards protected classification of family member be sufficient? See, Chiara v. Town of New Castle, 126 A.D.3d 111, 2 N.Y.S.3d 132 (A.D. 2 Dept. 2015)(Town employee was member of protected class based on wife's Jewish faith, for purposes of claim against town for discrimination in employment on the basis of religion under State Human Rights Law, although he was not member of Jewish faith, where alleged discriminatory conduct stemmed from his marriage to a Jewish person); see also, Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008)("...we find that Holcomb, in claiming that he suffered an adverse employment action because of his interracial marriage, has alleged discrimination as a result of his membership in a protected class under Title VII).

(F) Can employee who is not a member of protected class sue for conduct creating a hostile work environment? See, Smith v. AVSC Int'l, Inc., 148 F.

Supp. 2d 302 (S.D.N.Y. 2001)(For purposes of hostile work environment claim under Title VII or ADEA based on harassing acts against other employees, other employees targeted must be in the same protected class as plaintiff for claim to withstand a motion to dismiss for failure to state a claim).

(G) Examples of lack of "severe" or "pervasive" conduct under Federal Statutes:

Carter v. Cornell Univ., 976 F.Supp. 224,232 (S.D.N.Y.1997) (holding six racial slurs uttered over "a period of years" did not constitute hostile work environment);

Mormol v. Costco Wholesale Com., 364 F.3d 54, 59 (2d Cir. 2004) (six alleged discriminatory comments in one month insufficient to constitute hostile work environment);

McKenna v. VCS Group, LLC, 2009 WL 3193879, at *5-6 (D.Conn. Sep.30, 2009) (fifteen comments over a seven month period insufficient to show hostile work environment);

Eldaghar v. City of New York Dep't of Citywide Admin. Servs., 2008 WL 2971467, at *14–17 (S.D.N.Y. 2008) (granting defendant's motion for summary judgment on plaintiff's hostile work environment claims based on six alleged derogatory comments and other alleged discriminatory conduct);

Dorrilus v. St. Rose's Home, 234 F.Supp.2d 326, 335 (S.D.N.Y.2002) (finding that supervisor's use of racially derogatory slur to refer to defendant on four or more occasions does not alter conditions of employment significantly enough to implicate Title VII).

IV. NEW AMENDMENT TO EXECUTIVE LAW SECTION 296(1)(h)

(A) New statutory language

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation or gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or

because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

(h) For an employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories. The fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable. Nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared. It shall be an affirmative defense to liability under this subdivision that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences.

(B) Examples of Court Decisions on Petty Slights and Trivial Inconveniences

Black v. ESPN, Inc., 70 Misc.3d 1217(A), 139 N.Y.S.3d 523 (NY County 2021). Plaintiff was a disabled employee who had a skin condition. Supervisor asked plaintiff "what's wrong with your skin?" and shortly thereafter another supervisor assigned someone to keep watch over the plaintiff, yelled at the plaintiff, and gave him more difficult tasks. The Court held this was more than a petty slight or trivial inconvenience.

Golston-Green v. City of New York, 184 A.D.3d 24, 43, 123 N.Y.S.3d 656, 671 (2020)(pregnancy discrimination case. Supervisor's comment that he did not "like women on this job because they have babies," and Supervisor expressing displeasure at plaintiff's employment to his unit and voiced displeasure at plaintiff's additional pregnancy was more than a petty slight or trivial inconvenience).

Ellison v. Chartis Claims, Inc., 178 A.D.3d 665, 669, 115 N.Y.S.3d 53, 59 (2019), leave to appeal dismissed, 35 N.Y.3d 997, 149 N.E.3d 433 (2020)(two isolated remarks challenged by the plaintiff constituted no more than petty slights or trivial inconveniences)

V. DIFFERENCES IN FEDERAL VS. STATE LAWS ON EMPLOYER LIABILITY FOR HOSTILE WORK ENVIRONMENT

(A) HOSTILE WORK ENVIRONMENT CREATED BY HIGH-LEVEL SUPERVISOR

Townsend v. Benjamin Enterprises, Inc., 679 F.3d 41, 53 (2d Cir. 2012)(When the alleged harasser qualifies as the employer's proxy, the official's unlawful harassment is imputed automatically to the employer); Bentley v. AutoZoners, LLC, 935 F.3d 76 (2d Cir. 2019)(Strict vicarious liability applies in a Title VII hostile work environment claim if an employer's supervisor has created the hostile environment); Father Belle Community Center v. New York State Div. of Human Rights on Complaint of King, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996)(where the acts of discrimination were perpetrated by a high-level managerial employee, the employer may be liable without any showing of condonation or acquiescence).

(B) FEDERAL "FARAGHER/ELLERTH" AFFIRMATIVE DEFENSE

This is an affirmative defense to hostile environment claims is available to employers upon a showing that (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior and (2) the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise, Burlington Industries, Inc. v Ellerth, 524 US 742, 118 S.Ct. 2257 (1998); Faragher v Boca Raton, 524 US 775, 118 S. Ct. 2275 (1998).

(1) Must Have Policy

(2) Employee's reasons for not reporting must be reasonable and based on articulated facts. See, Gonzalez v. Beth Israel Med. Ctr., 262 F. Supp. 2d 342 (S.D.N.Y. 2003) (speculative and unsubstantiated reasons for not reporting harassment insufficient to avoid application of

Faragher/Ellerth affirmative defense); Stofsky v. Pawling Cent. Sch. Dist., 635 F.Supp.2d 272, 296 (S.D.N.Y.2009) ("Because Plaintiff did not come forward with any ... evidence [that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints] in support of her view that her failure to complain was reasonable, she cannot defeat Defendants' Faragher/Ellerth defense.").

(C) AMENDMENT TO EXECUTIVE LAW

"The fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable." Executive Law §296(1)(h).

(D) OTHER STATE DEFENSES

Where the harasser is a co-employee (not a supervisor) the employer does have a defense if it can show that it exercised reasonable care to prevent harassment, and did not condone or acquiesce in the discriminatory conduct. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998 (Ct. App. 2004)(employer cannot be held liable under State Human Rights Law for employee's discriminatory act unless employer became party to it by encouraging, condoning, or approving it); Totem Taxi, Inc. v. New York State Human Rights Appeal Bd., 65 N.Y.2d 300, 491 N.Y.S.2d 293 at 295, 480 N.E.2d 1075 (Ct. App. 1985)("...this court has uniformly held that the employer cannot be found to have violated the statute solely because of an employee's discriminatory act; in order to hold the employer responsible the agency must demonstrate that the employer approved of, or acquiesced in, the employee's conduct"); State Div. of Human Rights on Complaint of Greene v. St. Elizabeth's Hospital, 66 N.Y.2d 684, 496 N.Y.S.2d 411, 487 N.E.2d 268 (Ct. App. 1985)(employer cannot be held liable for employee's discriminatory act unless employer became party to it by encouraging, condoning or approving it); Escobar v. Spartan Assemblies, Inc., 267 A.D.2d 272, 700 N.Y.S.2d 206 (A.D. 2 Dept. 1999)("[t]he Supreme Court erred in denying those branches of the motion of Spartan and Pappas which were for summary judgment dismissing the complaint insofar as asserted against them. Spartan and Pappas are not liable under Executive Law § 296[1][a] since there was no evidence that they encouraged, condoned, or approved of Sarabia's allegedly discriminatory conduct")

VI. OTHER RECENT AMENDMENTS TO EXECUTIVE LAW

(A) No need to identify comparators § 296(1)(h)

(B) Prevailing party can obtain Attorney's Fees §297(10)

(C) Unlawful employment practices extends to non-employees, such as independent contractors, vendors and consultants § 296-d

(D) Statute of Limitations for claims of sexual harassment extended to 3 years for SDHR filings § 297(5)