No. 62

Dominika Zakrzewska,
Respondent,
v.
The New School,
Appellant,
Kwang-Wen Pan,
Defendant.

Thomas S. D'Antonio, for appellant.
Jason L. Solotaroff, for respondent.
National Employment Lawyers Association/New York Chapter et al.; Memorial Sloan-Kettering Cancer Center et al.; New York University et al., amici curiae.

READ, J.:

In her second amended complaint, dated February 12, 2008, Dominika Zakrzewska brought a diversity suit against Kwang-Wen Pan and The New School in the United States District Court for the Southern District of New York, asserting claims for sexual harassment and retaliation under the New York City Human Rights Law (NYCHRL), article 8 of the New York City

Administrative Code. The United States Court of Appeals for the Second Circuit has asked us whether "the affirmative defense to employer liability articulated in Faragher v City of Boca Raton, 524 US 775 (1998) and Burlington Industries, Inc. v Ellerth, 524 US 742 (1998) appli[ies] to sexual harassment and retaliation claims under section 8-107 of the New York City Administrative Code" (Zakrzewska v The New School, 574 F3d 24, 28 [2d Cir 2009]). For the reasons that follow, we answer this question in the negative.

I.

Zakrzewska enrolled as a freshman at the School in the fall of 2002, and worked part-time at the Print Output Center, located within the School's Academic Computing Center, beginning in April 2003. She alleges in her second amended complaint that Pan was her "immediate supervisor" at the Output Center; and that he subjected her to sexually harassing emails and conduct, beginning in January 2004 and continuing through May 2005, when she complained to School officials. She further claims that from August 2005 through 2006, Pan covertly monitored her Internet usage at work in retaliation for her accusation.[1]

On August 13, 2008, the School moved for summary judgment to dismiss Zakrzewska's complaint, arguing that it was

[1]The facts underlying this lawsuit are set out in detail in the opinion of the United States District Court for the Southern District of New York (see Zakrzewska v The New School, 598 F Supp 2d 426 [SD NY 2009]).

not vicariously liable for Pan's alleged sexual harassment, and that Zakrzewska could not establish a prima facie case of retaliation. For purposes of ruling on the motion, the District Court assumed that Zakrzewska had shown that she was sexually harassed by Pan; and mentioned that "there [was] at least some evidence that Pan was a manager or supervisor" (Zakrzewska, 598 F Supp 2d at 434), or, put another way, that "there [was] evidence from which a jury could conclude that Pan was a supervisory or managerial employee" (id. at 437).

The Judge then remarked that federal and state courts usually treat Title VII and local anti-discrimination laws as "substantially co-extensive" and therefore examine claims of employer liability for an employee's unlawful discriminatory acts under "the same analytical lens" (id. at 431). But here, the parties disagreed as to whether Title VII's Faragher-Ellerth defense to sexual harassment liability applied under the NYCHRL; and, if it did, whether the School had satisfied its requirements, or, alternatively, a genuine issue of material fact remained (id. at 432). As explained by the District Court, the Faragher-Ellerth defense provides that

> "an employer is not liable under Title VII for sexual harassment committed by a supervisory employee if it sustains the burden of proving that (1) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment, (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the

> employer or to avoid harm otherwise" (id. [internal quotation marks omitted]).

Commenting that Faragher-Ellerth's role in NYCHRL cases was "not free from doubt," the Judge elected to consider first whether the School would be entitled to dismissal of the sexual harassment claim under Faragher-Ellerth (id. at 437). After reviewing the record, he concluded that the School was, indeed, "entitled to judgment as a matter of law on the sexual harassment claim, assuming that the Faragher-Ellerth defense applie[d] to [Zakrzewska's] NYCHRL claim" (id. at 434). Having resolved this issue in the School's favor, the Judge next examined whether the NYCHRL, in fact, makes the Faragher-Ellerth defense available to employers sued for sexual harassment.

Section 8-107 (1) (a) of the NYCHRL prohibits discrimination on the basis of gender, and section 8-107 (13) (b) states that

> "[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:
>
> "(1) the employee or agent exercised managerial or supervisory responsibility; or
>
> "(2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
>
> "(3) the employer should have known of the employee's or agent's discriminatory conduct and failed to

> exercise reasonable diligence to prevent such discriminatory conduct (NYC Admin Code § 8-107 [13] [b] [emphasis added]).

Based on this text, the District Court concluded that

> "the local law on its face appear[ed] to impose vicarious liability on an employer for discriminatory acts of (1) a manager or supervisor, without regard to whether the employer or another of its managers or supervisors knew or should have known of those acts, and (2) a co-worker, provided the employer, or manager or supervisor, knew of and acquiesced in, or should have known of, the co-worker's acts, among other circumstances" (Zakrzewska, 598 F Supp 2d at 434 [emphasis added]).

He pointed out, however, that because Faragher-Ellerth's relevance in NYCHRL cases was "an open question in [the] Circuit," he was obliged to decide "whether the New York courts would be likely to apply Faragher-Ellerth or to adopt a different interpretation of [section 8-107 (13) (b)]" (id. at 434-435).

Noting that New York, like most states, emphasizes fidelity to the text when interpreting a statute, the District Court concluded that

> "[h]ere, the plain language of Section 8-107, subd. 13 (b), is inconsistent with the defense crafted by the Supreme Court in Faragher and Ellerth. [This provision] creates vicarious liability for the acts of managerial and supervisory employees even where the employer has 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 . . . Given the lack of any substantial reason to believe that the New York Court of Appeals would not apply Section 8-107, subd. 13 (b), as it is written . . ., the Court holds that Faragher-Ellerth does not apply in NYCHRL cases" (id. at 435).

As for Zakrzewska's retaliation claim, the Judge first decided

that there were disputed issues of material fact. Further, since retaliation is an unlawful discriminatory practice under the NYCHRL, he noted that the School would be vicariously liable for any retaliation by Pan by virtue of section 8-107 (13) (b), assuming that Faragher-Ellerth did not apply. The Judge therefore denied the School's motion for summary judgment dismissing Zakrzewska's complaint.

The District Court then certified an interlocutory appeal to the Second Circuit pursuant to 28 USC § 1292 (b) because he was of the opinion that Faragher-Ellerth's applicability under the NYCHRL was "a controlling question of law," as to which there was "substantial ground for difference of opinion . . . the resolution of which would materially advance the ultimate termination of this litigation" (id. at 437). The Judge observed that employment discrimination cases figured prominently in the district courts' dockets, and that "[t]he apparent tendency to press claims under the state and city anti-discrimination laws, either in lieu of or in addition to claims under federal statutes, create[d] a genuine need for resolution of vicarious liability standards applicable to employers under those statutes" (id.). He therefore asked the Circuit whether the Faragher-Ellerth defense applied to sexual harassment and retaliation claims under section 8-107. The Judge remarked that the Circuit might "in turn . . . see fit to certify this state law question to the New York Court of Appeals," which the Circuit

subsequently did (see Zakrzewska v The New School, 574 F3d at 28).

II.

We have "generally interpreted" state and local civil rights statutes "consistently with federal precedent" where the statutes "are substantively and textually similar to their federal counterparts" (McGrath v Toys "R" Us, Inc., 3 NY3d 421, 429 [2004] [emphasis added]). And we have always strived to "resolve federal and state employment discrimination claims consistently" (Matter of Aurecchione v New York State Div. of Human Rights, 98 NY2d 21 [2002]). But we also "construe unambiguous language to give effect to its plain meaning" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653 [2006]).

Here, as the District Court correctly concluded, the plain language of the NYCHRL precludes the Faragher-Ellerth defense. In many ways, the NYCHRL parallels state law prohibiting discrimination by employers (compare NY Admin Code § 8-107 [1] [a], [b] and Executive Law § 296). Unlike state law, though, subdivision 13 of section 8-107 of the NYCHRL creates an interrelated set of provisions to govern an employer's liability for an employee's unlawful discriminatory conduct in the workplace. This legislative scheme simply does not match up with the Faragher-Ellerth defense.

First, the NYCHRL imposes liability on the employer in three instances: (1) where the offending employee "exercised

managerial or supervisory responsibility" (the circumstance alleged in Zakrzewska's complaint); (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take "immediate and appropriate corrective action;" and (3) where the employer "should have known" of the offending employee's unlawful discriminatory conduct yet "failed to exercise reasonable diligence to prevent [it]" (see NYC Admin Code § 8-107 [13] [b] [1]-[3]; pp 4-5, supra). Regarding the first two instances, an employer's anti-discrimination policies and procedures may be considered "in mitigation of the amount of civil penalties or punitive damages" recoverable in a civil action (see NYC Admin Code § 8-107 [e]). As a result, even in cases where mitigation applies, compensatory damages, costs and reasonable attorneys' fees are still recoverable. Further, an employer's anti-discrimination policies and procedures -- which are at the heart of the Faragher-Ellerth defense -- shield against liability, rather than merely diminish otherwise potentially recoverable civil penalties and punitive damages, only where an employer should have known of a non-supervisory employee's unlawful discriminatory acts (id.).

The New York City Council adopted section 8-107 (13) in 1991 as part of a major overhaul of the NYCHRL. In a side-by-side comparison of then current law with the proposed new law, the Report of the Council's Committee on General Welfare describes new section 8-107 (13) as providing for

> "[s]trict liability in the employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where employer knew of act and failed to take prompt and effective remedial action or should have known and had not exercised reasonable diligence to prevent. Employer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken" (1991 New York City Legislative Annual, S.A. 1, 7 [1991] [emphases added]).

Thus, section 8-107 (13)'s legislative history is consonant with its unambiguous language.

Next, NYCHRL § 8-107 (13) is not inconsistent with state laws, as the School contends. Article IX § 2 (c) of the New York Constitution vests local governments with the power to enact only those laws that are not inconsistent with state law; specifically, "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government[,]" as well as labor, and the health and well-being of its residents. We have held that a local law is inconsistent "where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws" (Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 108 [1983] [internal citations and quotations omitted]). A local law may, however, provide a greater penalty than state law (see Wholesale Laundry Bd. of Trade v City of New York, 17 AD2d 327, 329-30 [1962]). Under these definitions of inconsistency, section 8-107 (13) is consistent with Executive

Law § 296, the State anti-discrimination statute. Both prohibit discrimination; NYCHRL § 8-107 merely creates a greater penalty for unlawful discrimination.

Further, the School's argument that section 8-107 (13) does not apply to all managers and supervisors is not supported by the statute's text. The School also contends that strict liability for discrimination impedes deterrence of workplace discrimination and so thwarts sound public policy. As the District Court pointed out, however, although "[t]he arguments for applying the Faragher-Ellerth test in state and local law cases are not trivial," ultimately such "considerations relevant to policy judgments [are] properly made by legislatures" (Zakrzewska, 598 F Supp 2d at 435). For the same reason, we may not apply cases under the State Human Rights Law imposing liability only where the employer encourages, condones or approves the unlawful discriminatory acts (see Matter of Totem Taxi v New York State Human Rights Appeal Bd., 65 NY2d 300 [1985]; Matter of State Div. of Human Rights v St. Elizabeth's Hosp., 66 NY2d 684 [1985]). By the plain language of NYCHRL § 8-107 (13) (b), these are not factors to be considered so long as the offending employee exercised managerial or supervisory control.

Finally, we note that our decision is not inconsistent with our holding in Forrest v Jewish Guild for the Blind, 3 NY3d 295 [2004]). There, we made the general statement in a footnote

that "the human rights provisions of the New York City Administrative Code mirror the provisions of the [State Human Rights Law] and should therefore be analyzed according to the same standards" (id. at 305, n 3). The plaintiff in Forrest did not argue that NYCHRL § 8-107 (13) imposes strict liability for a supervisor's unlawful discriminatory acts, and so we had no occasion to consider the point. Since the plaintiff did not establish the elements of a hostile work environment under either state or local law, we did not even reach the question of whether the Faragher-Ellerth defense applies under the State Human Rights Law (id. at 312, n 10).

Accordingly, the certified question should be answered in the negative.

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Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the negative. Opinion by Judge Read. Chief Judge Lippman and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Decided May 6, 2010