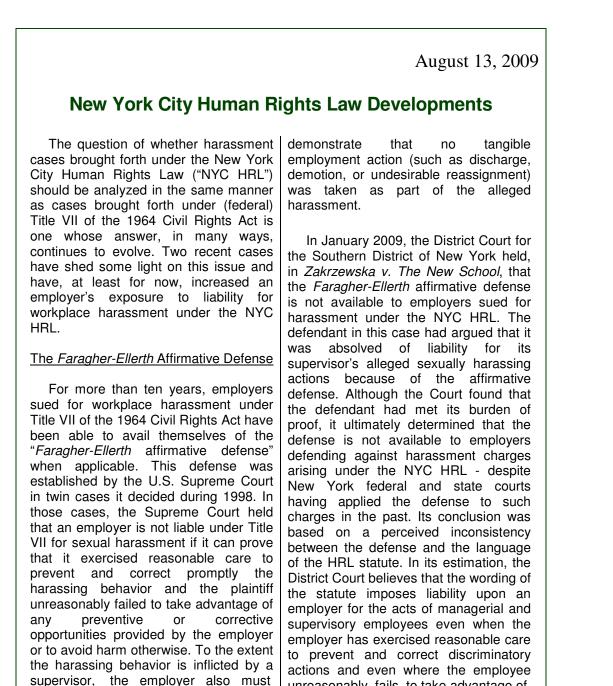
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unreasonably fails to take advantage of

employer-offered corrective options. It also noted that an employer is liable under the NYC HRL for the discriminatory acts of co-workers where a managerial or supervisory employee knew of and acquiesced in, or should have known of, such conduct and failed to take reasonable measures to put an end to the discriminatory conduct.

Since the District Court issued its decision in January, the United States Court of Appeals for the Second Circuit has considered the matter and determined that the issue of whether the Faragher-Ellerth defense applies to cases brought forth under the NYC HRL is one best resolved by the New York Court of Appeals. The Second Circuit, therefore. has certified the issue to New York's highest court. A final disposition should be forthcoming in the near future.

## The "Severe and Pervasive" Nature of Harassing Conduct

In Williams v. The New York City Housing Authority, the New York Appellate Division, First Department, held that where an employee files a sexual harassment claim against his or her employer under the NYC HRL, the employer may not escape liability simply because the allegedly harassing conduct is not "severe or pervasive." According to the Court, the NYC HRL is designed to be more expansive than state and federal law and questions of "severity" and "pervasiveness" are only applicable to a consideration of the scope of permissible damages, not to the question of underlying liability. The Court thereby endorsed a rule where under the NYC HRL, liability is determined simply by the existence of differential gender-based treatment in the workplace.

The Court, however, emphasized that the NYC HRL should not operate

as a "general civility code". Employers may avoid liability if they prove, as an affirmative defense, that the conduct in question amounts to nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences." The Court, in fact, found that the comments complained of by the plaintiff in the *Williams* case were petty slights and trivial inconveniences, and therefore not actionable, because the comments were not directed at the plaintiff and were perceived by the plaintiff as being in part complimentary to a co-worker.

## **Conclusion**

Employers should be mindful that the Zakrzewska and Williams cases make it easier for employees to successfully litigate harassment claims under the NYC HRL. Unless the Zakrzewska holding is overturned, New York City employers should operate under the principle that the Faragher-Ellerth defense is not available for harassment claims under the NYC HRL. In addition, they should be vigilant in nipping problematic behavior in the bud since they cannot escape liability under the NYC HRL by arguing that any alleged harassing conduct is not "severe or pervasive". It is increasingly important that employers conduct harassment training and enforce zero tolerance policies regarding harassment and discrimination in the workplace. If you have any questions about these cases, please contact Farah Mollo at (212) 758-1078.

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