General Law

Employer Beware: New Requirements for Preventing Sexual Harassment


Rhoda Y. Andors

October 9, 2019 marked the deadline for *all* employers in New York State to provide *all* of their employees with a written sexual harassment policy and annual sexual harassment prevention training. These requirements became law on April 12, 2018, and are codified in the Labor Law § 201-g, "Prevention of Sexual Harassment."

The new law is but one of the laws enacted by the State in the past several years strengthening legal protections from sexual harassment for employees, but creating more potential liability for unwary employers. State law now differs significantly from federal law in the standards of proof for employees asserting sexual harassment claims and employers defending those claims.

Practitioners representing employers who are proactively responding to the new state laws, who were interviewed for this article, emphasize that employer compliance with the new employer policy and training requirements is critical in defending against claims of sexual harassment.

State Law: An Affirmative Duty to Prevent Sexual Harassment

Whereas, New York State Human Rights Law (NYSHRL), Executive Law § 296, addresses "unlawful discriminatory practices," including sex discrimination, Labor Law § 201-g now creates an affirmative duty for employers to prevent sexual harassment, or aim to, before it occurs.

Pursuant to the new law, the New York State Department of Labor (DOL) and the Division of Human Rights (DHR) have created and published a model sexual harassment policy employers may use, along with guidance, available at the State's website, "Combating Sexual Harassment in the Workplace."[1] Alternatively, employers may develop their own policy, as long as it meets or exceeds the State's minimum standards.[2]

Whichever policy an employer uses cannot just be kept on a shelf in the human resources office; it must be distributed in writing to all employees in English or in an employee's primary language.

The training requirements in Labor Law § 201-g are very specific.

> Such model sexual harassment prevention training program shall be interactive and include: (i) an explanation of sexual harassment consistent with guidance issued by the department in consultation with the division of human rights; (ii) examples of conduct that would constitute unlawful sexual harassment; (iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; and (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.

As with the sexual harassment policy, employers may use the model training program developed by the DOL and the DHR or develop their own program.[3] In addition, other resources are available on the State's website, including a model complaint form, training videos and a webinar.

Anti-harassment training in the workplace is not a new practice. In two foundational workplace harassment opinions, [*Burlington Indus., Inc. v. Ellerth,* and *Faragher v. Boca Raton*] the Supreme Court emphasized that it is an employer's primary duty under federal anti-harassment law to exercise 'reasonable care to prevent and correct promptly any...harassing behavior' that occurs in the workplace.[4]

Federal Sexual Harassment Law

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

The term "sexual harassment" did not originate in Title VII. Rather, some 22 years after Title VII was enacted, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court affirmed "that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."[5]

The Supreme Court held in *Meritor* that "[f]or [hostile work environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[6]

A dozen years later, the Court took up the issue of employer liability in *Burlington Indus., Inc. v. Ellerth,* and *Faragher v. Boca Raton,* and fashioned a rule that when a supervisor coupled sexual harassment with a tangible employment action against the employee, a practice known as *quid pro quo*, the employer would be automatically liable.[7] On the other hand,

> [w]hen no tangible employment action is taken, a defending employer may raise an *affirmative defense* to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises *two necessary elements:* (a) that the *employer exercised reasonable care* to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff *employee unreasonably failed to take advantage* of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[8] (emphasis added.)

Under current federal law (and before recent changes to State law in 2019) an employer might successfully defend a hostile work environment claim based on sex by asserting the *Ellerth-Faragher* affirmative defense, if the employer prong and the employee prong were both met.

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Pro Bono Attorney of the Month

BY SUSAN BILLER

Melissa Levin

Nassau Suffolk Law Services' Volunteer Lawyers Project (VLP) and the Nassau County Bar Association (NCBA) are very pleased to honor Melissa Levin as our most recent Pro Bono Attorney of the Month. Levin is a relatively new, and very much appreciated addition to the Landlord/Tenant Attorney of the Day Project. Since joining the Project less than two years ago, Levin has volunteered over 60 hours representing more than 37 clients, defending or forestalling eviction from their homes.

Levin is associated with the Williston Park firm of Horing Welikson & Rosen, P.C., which she joined in 2013. She has been practicing since 2008, primarily in commercial litigation, housing law, administrative hearings, and real estate. She earned her Juris Doctor from Hofstra University School of Law in 2007, and her Bachelors of Science in Business Administration from the Long Island University Honors Program in 2003. She is admitted to practice law in both New York and Massachusetts.

Levin finds support from her firm's commitment to pro bono. For the past two years, Horing Welikson & Rosen has been recognized by the NCBAs Access to Justice Committee as one of the top three medium-sized pro bono provider firms. Levin, along with attorney Richard Walsh, regularly utilize their tremendous knowledge of landlord tenant law to benefit some of Nassau County's most needy residents in District Court.

The Attorney of the Day Project, supervised by VLP (Volunteer Lawyers Project) Staff Attorney Roberta Scoll, assists hundreds of indigent and disabled men, women, and children in housing court to prevent homelessness. Many of the cases are holdover or nonpayment matters. Most tenants must appear pro se, and are severely disadvantaged by lack of counsel. The courts are overburdened trying to administer justice. Given the lack of affordable housing in this region, eviction may place families at a severe risk of becoming homeless.

This project allows attorneys to volunteer to represent these individuals for a four hour session once a week, once a month, or as frequently as they choose. The goal is to preserve housing, or at least give the tenants sufficient time to secure alternative housing in order to avoid the trauma of shelter placement or homelessness.

Levin's first encounter with VLP was in 2017, when she was covering Nassau District Court for a client of her firm. She was extremely impressed with the VLP program. As she observed the volunteer attorneys, she was inspired by their ability to level the playing field for their clients, helping to ensure greater fairness and access to justice. Roberta Scoll was equally impressed with Levin's legal skills, and asked her to join the VLP team.

Levin finds her experience with VLP particularly rewarding in that it enables her to utilize her legal skills to negotiate settlements that can literally keep a roof over the heads of a needy family. The joy and relief that the clients express is all the thanks she needs. She also recommends this to new lawyers as a way to garner courtroom experience and build a practice. She reflects, "I always knew offering my time and expertise would help those who lacked the financial means to hire proper representation, but until I started volunteering, I never knew it would also help me become a better attorney overall."

According to Roberta, "Melissa has been a tremendous asset to the Volunteer Lawyers Attorney of the Day Project. She has a soothing way of speaking with VLP clients, and represents them with skill and empathy."

Roberta is also deeply grateful to Horing Welikson & Rosen for "lending" Melissa to the program once a month, and looks forward to continuing to work with her.

Levin grew up in Plainview and now resides in Wantagh with her husband and two children ages five and two. With whatever free time she has left, she enjoys volunteering for local and national political campaigns. In honor of her commitment and dedication to serving low-income Nassau County residents, we are proud to recognize Melissa Levin as our most recent Pro Bono Attorney of the Month.

Attorneys interested in becoming involved in the Landlord/Tenant Attorney of the Day Project and our other vital work should contact Susan Biller at Sbiller@nsls.legal, or Roberta Scoll at RScoll@nsls.legal.

The Volunteer Lawyers Project is a joint effort of Nassau Suffolk Law Services and the Nassau County Bar Association, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a nonprofit civil legal services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller at (516) 292-8100, ext. 3136.

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For the employer prong, "one way for employers to demonstrate that they exercised reasonable care is to show that they had an anti-harassment policy in place."[9] "Evidence of training is most commonly introduced to show an employer's reasonable care to prevent and correct harassment under the employer prong."[10] For the second prong, if the policy has a complaint procedure then whether the employee follows the procedure may be determinative.[11]

As the Court held in *Burlington*,

> "[w]hile proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[12]

With State Laws More Favorable to Employees, Advice for Practitioners from Practitioners

Until very recently, hostile work environment claims based on sex under Title VII and the New York State Human Rights Law (NYSHRL) were governed by the same standards and the same affirmative *Ellerth-Faragher* type defense could be employed under both laws.[13]

However, on August 12, 2019, Governor Cuomo signed legislation amending the NYSHRL, effective October 11, 2019.[14] As a result, the standards under Title VII and the NYSHRL have now diverged. The State now sets a lower bar than federal law for a plaintiff to succeed on a sexual harassment claim. The NYSHRL, Exec. Law §296(1)(h), now states, in relevant part:

> It shall be an unlawful discriminatory practice…(h) For an employer… to subject any individual to harassment because of an individual's…sexual orientation, gender identity or expression…[or] sex…regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims...The fact that such individual did not make a complaint about the harassment to such employer…shall not be determinative of whether such employer…shall be liable… It shall be an affirmative defense to liability…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.

Under the amended State law, plaintiffs no longer have to meet the "severe and pervasive" standard set for plaintiffs in *Meritor* to establish a *prima facie* case. Further, the employee prong of the *Ellerth-Faragher* affirmative defense has been eliminated, so that an employer may be liable even though the plaintiff has failed to complain about the harassment to the employer. In addition, the threshold for employer liability, rising above the level of "petty slights or trivial inconveniences," is far easier for a plaintiff to meet than *Meritor's* "severe and pervasive" standard for sexual harassment.

Given the changes to state law in favor of employees, and in the wake of the #MeToo Movement and media frenzy with each new high profile sexual harassment story, sexual harassment claims against employers are sure to increase as a result. Practitioners representing employers will need to promptly review their clients' sexual harassment policies and training, and stress the importance of adopting such policies to employers who do not have them.

Gregg Kligman of Meyer Suozzi English and Klein, P.C. comments that employers who do not comply with the policy and training requirements effective October 9, 2019 "will have a major strike against them in litigation and before administrative agencies such as the Equal Employment Opportunity Commission and the New York State Division of Human Rights. Those out of compliance will be deemed not to have fulfilled their obligations to prevent sexual harassment and provide their employees with a safe work environment." Gregg's firm has proactively developed sexual harassment training materials for its clients. The interactivity requirement is met by in-person delivery which includes presenting different scenarios related to sexual harassment specific to the type of workplace. Greg advises that "whereas formerly training was just for managers, now all employees must attend the training to meet the new requirements."

Hayley Dryer of Cullen and Dykman LLP states that for employers, "compliance is crucial." "Sexual harassment training can limit corporate liability. Preparation and prevention are far more effective at reducing workplace misconduct than a government investigation, agency proceeding or litigation. A small amount of proactive risk management can save employers time and money while reducing the risk of liability and exposure."

"In that regard, in order for an employer to have a defensible position if a claim is filed, the employer must be able to demonstrate that employees have been trained and know, or should know, exactly what improper conduct is and what to do about improper conduct if they see it happening to them or anyone else. Employers must ensure that employees know how to recognize and respond to reports of misconduct and that all employees, particularly supervisors, know about their obligations to report (and consequences of not reporting)."

"To maximize the benefit of such training sessions, employers should make sure that their policies against misconduct are reviewed at the training. Such a review helps to familiarize employees with the policies and will also help a person report the misconduct appropriately. An employee is arguably less likely to immediately seek legal action if he or she believes there is a mechanism in place at the employer to address the misconduct."

Rhoda Y. Andors is an attorney with Bee Ready Fishbein Hatter & Donovan, LLC in Mineola, where she primarily practices employment law and works on class actions. She is past Co-Editor-In-Chief of the *Nassau Lawyer*.

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1. Sexual Harassment Policy for All Employers in New York State, available at https://on.ny.gov/2PGrQmS.
2. Minimum Standards for Sexual Harassment Prevention Training, available at https://on.ny.gov/2mnY9Kk.
3. New York State Sexual Harassment Prevention Training (Oct. 2018), available at https://on.ny.gov/2kRde6K.
4. JoAnna Suriani, Reasonable Care to Prevent and Correct: Examining the Role of Training in Workplace Harassment Law, 21 N.Y.U. J. Legis. & Pub. Pol'y 801, 803, 2018–19 (*citing Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 744–45 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998)).
5. *Meritor Sav. Bank, FS v. Vinson*, 477 U.S. 57, 73 (1986).
6. *Id.* at 67.
7. 524 U.S. 742, 765 (1998).
8. *Id.*
9. Suriani, *supra* n.4, at 825–26.
10. *Id.*
11. *Id.*
12. 524 U.S. at 765.
13. *Murphy v. Wappingers Cent. Sch. Dist.*, No. 15 CV 7460 (VB), 2018 WL 1831847, at *4 (S.D.N.Y. Apr. 16, 2018).
14. Jimmy Vielkind, *Gov. Cuomo Signs Tougher Workplace Harassment Law*, The Wall Street Journal (Aug. 12, 2019), available at https://on.wsj.com/2mfOjtM.