New York City Council Amends Human Rights Law

On March 9, 2016, the New York City Council passed legislation to amend the City's Human Rights Law ("NYCHRL"). Together, the legislation requires that exceptions or exemptions to the NYCHRL be construed narrowly, endorses three court opinions that the Council states properly applied the 2005 "Restoration Act," allows attorney's fees to be awarded to prevailing complainants in administrative complaints, and repeals language addressing how to construe the NYCHRL's prohibition on discrimination based on sexual orientation.

The Mayor is expected to sign the bills within a few weeks. Once the Mayor signs them, they will become law effective immediately.

The first bill, Intro 814-A, would build on the Council's Restoration Act of 2005, which required that the NYCHRL "be construed liberally for the accomplishment of [its] uniquely broad and remedial purposes" regardless of how courts have interpreted similar provisions under state and federal anti-discrimination laws. Intro 814-A adds a specific provision requiring that any exceptions and exemptions in the NYCHRL be construed narrowly. It also specifically endorses three court opinions that the Council characterizes as having "correctly understood and analyzed the liberal construction requirement" of the Restoration Act: *Albunio v. City of New York*, 16 N.Y.3d 472 (2011); *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011); *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009).

Taken together, these cases set forth the following guidance for courts in interpreting the NYCHRL:

- The Restoration Act requires that *all* provisions of the NYCHRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *See Albunio*, 16 N.Y.3d at 477-78.
- The following analysis of the NYCHRL's burden shifting framework in the context of summary judgment motions is appropriate:
    - In determining whether a prima facie case has been made, the inquiry is whether "the initial facts described by the plaintiff, *if not otherwise explained*, give rise to the McDonnell Douglas inference of discrimination."
    - If a defendant puts forth evidence of a legitimate, nondiscriminatory motive, the court "ordinarily" should avoid the issue of whether the plaintiff brought forth a prima facie case. Instead, the Court should determine whether the defendant has shown that no jury could find for the plaintiff under "any" of the "evidentiary routes--McDonnell Douglas, mixed motive, 'direct' evidence, or some combination thereof."
    - "[E]vidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" regardless of conflicting Supreme Court precedent stating that the evidence must indicate that the pretext was pretext *for discrimination* in order to survive summary judgment. *See Bennett*, 92 A.D.3d at 45.
- Retaliation claims under the NYCHRL are not limited to material changes in terms and conditions of employment. *See Williams*, 61 A.D.3d at 70-71.

- The continuing violations doctrine applies to discreet acts of discrimination. *Id.* at 72-73.

- The "severe and pervasive" test does not apply to sexual harassment claims brought under the NYCHRL except in considering damages. *Id.* at 73-81.

The second bill, Intro 818-A, would permit the City's Commission on Human Rights (the "Commission") to award attorney's fees and costs to complainants in cases brought before the Commission. The bill does not permit the Commission to award fees to a prevailing respondent. Currently, the NYCHRL permits courts to award attorney's fees and costs to a prevailing party only in civil actions.

Intro 818-A directs the Commission and courts to consider "the hourly rate charged by attorneys of similar skill and experience litigating similar cases in New York county" when factoring an hourly rate into an attorney's fee award. It also permits the Commission and courts to award expert's fees.

The final bill, Intro 819, would repeal language addressing how to construe the NYCHRL's existing prohibition on discrimination based on sexual orientation. Specifically, the existing language being repealed states that the law should not be construed to: (a) restrict an employer's right to insist that an employee meet bona fide job-related qualifications of employment; (b) authorize or require affirmative action quotas or to make inquiries regarding the sexual orientation of current or prospective employees; (c) limit or override exemptions in the human rights law (including the exemption of employers of fewer than four persons and religious institutions); (d) make lawful any act that violates the New York penal law; or (e) endorse any particular behavior or way of life.

Notably, there is no complimentary language in the NYCHRL addressing how to construe the law's prohibitions on discrimination based on other protected categories. Based on testimony in Committee, the intended effect of this bill appears largely symbolic, as the Council deems the repealed language to be unnecessary, antiquated, and offensive.

The Committee also passed two bills that would amend the NYCHRL that are not related to discrimination in the workplace. Intro 805-A applies the NYCHRL's prohibitions on discrimination in public accommodations to franchisors, franchisees, and lessors. Intro 832-A prohibits housing discrimination based on a tenant's actual or perceived status as a victim of domestic violence, sex offense, or stalking.

This post was authored by Matt Lampe, Kristina Yost, and Michael Casertano of Jones Day. The views and opinions expressed herein are those of the authors and do not necessarily reflect the views of Jones Day or the New York State Bar Association.

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