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New York Federal Court Decides Novel Issue Arising Under New York City Human Rights Law

By Ola A. Nunez

Employers who employ individuals in New York City are well-aware of the expansive protections afforded to employees under the New York City Human Rights Law ("NYCHRL"), one of the most extensive civil rights laws in the country, prohibiting not only discrimination based on numerous characteristics but also bias-related harassment (including cyber bullying) and discrimination against interns. The NYCHRL holds individual employees or agents of an employer who actually participate in unlawful discriminatory conduct liable. Section 8-107(13)(b) of the NYCHRL also provides three circumstances where an employer can be found strictly liable for the unlawful discriminatory conduct of its employee: where the offending employee "exercised managerial or supervisory responsibility"; where the employer knew of the offending employee's conduct but acquiesced in it or failed to take "immediate and appropriate corrective action"; and where the employer should have known of the offending employee's conduct and "failed to exercise reasonable diligence" to prevent it.

But what about the circumstance where the agent of an employer has not participated in the alleged discriminatory conduct, and instead has been sued in its capacity as the employer of the offending employee? How far does liability extend for those doing business in New York City? A recent federal court case in New York, *Jennette Suarez and Jerry Mascolo v. the City of New York and Allied*

Barton Security Services LLC,11-cv-05812 (E.D.N.Y. Mar. 31, 2015), considered this very issue and provides an easy-to-understand application of this perhaps technical concept.

Jennette Suarez ("Suarez") worked for the New York City Department of Transportation (the "DOT") as a deckhand on the Staten Island Ferry ("Ferry"). While employed, she claimed she was subjected to a hostile work environment that she characterized as a "male-dominated" "locker room environment." Suarez also alleged that she was sexually harassed on several occasions by a security guard employed by the DOT's security contractor, Allied Barton Security Services ("Allied"). Suarez claimed that the security guard gave her unwanted sexual attention when he stared at her, focused on her private areas, and made noises with his mouth and lips, which she alleged occurred approximately four times per week between May 2010 and June 19, 2010.

Suarez lodged three complaints with the DOT during her employment, only the last of which, on June 19, 2010, related to conduct by Allied's security guard. She never complained directly to Allied. After Suarez complained about the security guard's conduct, the DOT investigated her complaint and informed Allied. Allied met with the DOT about the allegations and proposed to relocate the security guard to another area whenever Suarez worked. Allied also asked to participate in the DOT's investigation, but was advised that it was a DOT investigation. After the meeting, Allied met with the security guard to discuss the complaint, reviewed Allied's harassment policy with him, and reassigned him to another area. According to Suarez, however, the security guard still came into contact with her and made a derogatory comment that she believed was directed at her.

After her termination in November 2011, Suarez filed suit and brought claims against the DOT under both Title VII and the NYCHRL, and against Allied under the NYCHRL. Allied moved for summary judgment on two grounds. First, Allied claimed that because it was not Suarez's employer, she lacked standing to sue Allied under the NYCHRL. Second, Allied claimed that the alleged conduct of the security guard amounted to "petty slights and trivial inconveniences," which is not actionable under the NYCHRL.

The court quickly rejected the argument that Suarez could not sue Allied under the law, explaining that while the term "agent" is not defined by the NYCHRL, common law principles governing agency relationships applied. Because a jury could find that Allied was the DOT's agent based upon the numerous agreements governing their relationship, and based upon evidence in the record demonstrating the extent of the DOT's control over Allied, Suarez could present her arguments on Allied's liability to a jury.

The court next discussed the novel question presented by this case, specifically: what are the limits on the liability of an agent under the NYCHRL in cases where an employee (here, the security guard) of an agent (Allied) acts in an unlawful manner towards an employee (Suarez) of a principal (the DOT)? In other words, even though Allied did not employ Suarez, could it still be held liable to Suarez for the actions of its security guard? And if so, how is liability determined?

Cognizant of the principles established in the Local Civil Rights Restoration Act of 2005 that the NYCHRL should be interpreted liberally, the court found that Section 8-107(13)(b) of the NYCHRL applicable to the DOT as Suarez's employer "should apply with equal force" to the DOT's agent, Allied, as related to Suarez's claims. This is because, according to the court, it would "make little sense" to hold Allied strictly liable for the conduct of the security guard, its non-supervisory employee, while the liability of the DOT as Suarez's employer "is limited to circumstances where it knew or should have known about the conduct."

Ultimately, the court found the evidence in the record could not support a jury finding that Allied knew or should have known about the security guard's conduct before Suarez complained, and therefore granted Allied summary judgment. Although the security guard's post-complaint conduct, which Suarez conceded was not sexually charged, but rather consisted of a "campaign of intimidation" involving angry staring and a derogatory comment to another individual, the court found that such "limited and sporadic instances amount to no more than petty slights and trivial inconveniences" and are not actionable under the NYCHRL.

One notable take away from this case is gleaned from Allied's prompt actions in investigating the complaint and meeting with its employee to discuss Allied's harassment policy, and in taking measures to minimize contact and further incidents from occurring between the accused employee and the complainant while the investigation was underway. As this case demonstrates, the communication of workplace policies and implementation of effective procedures for the investigation of complaints can be useful in defending against claims brought under the NYCHRL.

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