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Changes to Sexual Harassment Law Could Help Victims in NYC, Minnesota

By Carolyn Wheeler
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In the wake of the #MeToo movement, several states and localities have proposed or enacted workplace protections that are more robust than Title VII of the Civil Rights Act of 1964, the federal statute prohibiting sexual harassment in the workplace. As a general rule, federal employment law sets a "floor"—that is, the minimum level of workplace protection that covered employers must provide their employees—above which, states can enact more protective employment laws, if they choose. By imposing additional requirements on employers or lowering the burden of proof on employees, these new laws may make it easier for employees who have been sexually harassed to obtain relief in court and may also help to stem the tide of workplace harassment in the first place.

Stop Sexual Harassment in NYC Act

In April 2018, the New York City Council passed the Stop Sexual Harassment in NYC Act, which requires employers to conduct anti-sexual harassment trainings on an annual basis. Under the new law, New York City employers must conduct annual "interactive trainings" for all employees, including supervisory and managerial employees, as well as interns, aimed at preventing sexual harassment. It also requires the New York City Commission on Human Rights to develop and make available a free online training module for use by covered employers.

In a pair of cases decided in 1998, the Supreme Court laid out what has become known as the *Faragher/Ellerth* affirmative defense to sexual harassment claims involving supervisory employees. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Under these cases, an employer can avoid liability for sexual harassment by its supervisory employees if it "exercise[s] reasonable care to prevent and correct promptly any sexually harassing behavior," and the employee "unreasonably fail[s] to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Although this defense does not apply when employees are harassed by coworkers, similar principles govern an employer's liability in such cases. Employers are liable for coworker harassment only if they know it is going on and fail to respond reasonably to correct it, but Title VII does not require that employers have specific policies, procedures, or training to prevent harassment.

Neither Title VII nor the caselaw since *Faragher* and *Ellerth* specify what employer policies or practices constitute the "reasonable care" that is necessary to prevail on the affirmative defense to supervisory harassment or to avoid liability for coworker harassment. Instead, employers have been allowed to argue that ineffectual strategies like distributing employee handbooks or designating an individual to receive complaints of sexual harassment constitute the sort of "reasonable care" that should insulate them from liability and allow them to blame harassment victims for failing to use the employers' designated procedures.

With the passage of the Stop Sexual Harassment in NYC Act, however, employees can point to a concrete set of policies that employers must follow to fulfill their obligation to exercise "reasonable

care" to prevent and correct sexual harassment. Employees whose employers do not conduct the requisite trainings therefore will be on surer footing to defeat their employers' *Faragher/Ellerth* affirmative defense in court, or to argue that their employers did not respond reasonably to complaints of coworker harassment. Perhaps more importantly, if employees are better educated about what constitutes harassment and how to complain about it before it becomes so serious they see no option but to quit their jobs, employers might be better positioned to eradicate harassing conduct from their workplaces.

Minnesota Human Rights Act Amendment

Also in April 2018, four Minnesota state legislators introduced a bill that would amend the Minnesota Human Rights Act (the state's equivalent of Title VII) to clarify that a sexually hostile work environment "does not require the harassing conduct or communication to be severe or pervasive." This seemingly small change would dramatically lower the burden of proof on employees alleging the existence of a sexually hostile work environment.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment" in order to state a claim under Title VII. *Id.* at 67 (internal quotation marks omitted). In theory, the more "severe" a particular instance of harassment, the less "pervasive" the harassment must be to rise to the level of a hostile work environment. This often means that a single instance of sexual assault or rape can create a hostile work environment. By the same token, however, courts across the country have interpreted this rule to require plaintiffs who experience verbal harassment or less violent physical harassment to demonstrate that the behavior is extremely pervasive to state a claim under Title VII or a state law equivalent. Because of these severity and pervasiveness standards, people who are targeted with sexist epithets, unwanted touching, or crude jokes often suffer in silence because they assume this treatment is not illegal and are afraid of the consequences of complaining about it.

Under the proposed amendment to the Minnesota Human Rights Act, unwelcome sexual advances, requests for sexual favors, or sexually motivated physical contact that otherwise affect an employee's employment would be sufficient to create a hostile work environment without also meeting the "severe or pervasive" standard. If passed, this law would provide relief for employees who experience less severe, more sporadic sexual harassment than that required to prevail under Title VII. Indeed, the Minnesota law recognizes that employees should not have to tolerate sexual harassment in the workplace in any measure. Further, as with the NYC Act, this change to the Minnesota law would provide a valuable tool for educating employees about the nature of harassment and why such conduct creates abusive working conditions for its victims.

Under these and other laws percolating across the country, employees who have been sexually harassed may be entitled to relief that would not otherwise be available to them under federal law, and employers may have more effective tools for eliminating harassment in the workplace before it even starts.