

HR Bootcamp for Healthcare Employers

Session 3: Trends in Employment Litigation

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Today's Agenda

- Discrimination, Harassment, Retaliation Under NYS and Federal Law
 - Legislative Updates
 - NYSHRL's Harassment Standard
 - Increased Employee Protections
 - Case Studies in Healthcare Setting

State and Federal EEO Law Basics

- Prohibit discrimination and harassment based on protected characteristics
- Prohibit retaliation for engaging in protected activity
- Harassment claims include:
 - Hostile work environment
 - *Quid pro quo*
 - Stereotyping

Federal Anti-Discrimination Laws

Statute	Protected Class
Title VII of the Civil Rights Act of 1964 (“Title VII”)	<i>Race, color, religion, sex, and national origin</i>
Age Discrimination in Employment Act (“ADEA”)	<i>Age</i>
Pregnancy Discrimination Act (“PDA”) & Pregnant Workers Fairness Act (“PWFA”)	<i>Pregnancy, childbirth, or related conditions (including accommodations)</i>
Americans with Disabilities Act (“ADA”)	<i>Disability</i>
Genetic Information Nondiscrimination Act (“GINA”)	<i>Genetic information</i>
Immigration Reform and Control Act (“IRCA”)	<i>Citizenship and immigration status</i>
Equal Pay Act	<i>Requires men and women to be paid the same wage for the same work</i>

New York State Human Rights Law

Protected characteristics include:

- age (18+)
- race (including traits historically associated with race)
- creed
- color
- national origin
- sex, sexual orientation
- gender identity and expression
- disability
- predisposing genetic characteristics
- marital and familial status
- reproductive health decision making
- military status
- arrest record and criminal convictions
- citizenship and immigration status (added **December 23, 2022**)
- domestic violence victim status (additional protections added **May 13, 2022**)
- associational status

Employment Discrimination/Retaliation Litigation Procedure

- Claim Process
 - Administrative Agencies:
 - New York State Division of Human Rights
 - New York City Commission on Human Rights
 - Equal Employment Opportunity Commission
 - Courts
 - New York State Court
 - Federal Court

Amendments to the NYC Human Rights Law – Height & Weight as Protected Characteristics

- Effective: November 22, 2023
- NYCHRL amended to prohibit discrimination on the basis of height and weight
- Exceptions:
 - When action is required by law or regulation
 - When the Commission on Human Rights permits such action
- Similar proposals have been made at the state level
 - Amendments to NYC law often forecast statewide change!

Update to NYSHRL Statute of Limitations

- On November 17, 2023, the Governor signed into law a bill extending the statute of limitations to file a claim with the Division of Human Rights from 1 year to 3 years
 - For all claims
- This follows prior legislation that changed the SOL for sexual harassment claims from 1 year to 3 years in 2020
- New law is effective **February 15, 2024**

Confidentiality and Non-Disclosure Provisions in Settlement Agreements

- General Obligations Law 5-336 (amended **November 17, 2023**)
- Restricts employers' use of confidentiality or non-disclosure provisions in settlement agreements when the factual foundation of the claim involves discrimination, harassment, or retaliation
 - NOTE: Limited to these circumstances
- Specifically references, but is not limited to, NYSHRL claims
- Applies to settlement agreements between employers and any “employee, potential employee, or independent contractor”
- Cannot prevent disclosure of “the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant’s preference”

Confidentiality and Non-Disclosure Provisions in Settlement Agreements

- Up to 21 days to consider confidentiality/non-disclosure provisions
 - Amendments clarify that the agreement can be executed before the 21-day consideration period expires
 - Subject to a 7-day revocation period following execution
- To obtain enforceable release of claims, a covered settlement agreement cannot:
 - Require complainant to pay liquidated damages for violating a non-disclosure or non-disparagement clause;
 - Require complainant to repay or forfeit any consideration for violating a non-disclosure or non-disparagement clause; *or*
 - Contain any affirmative statement that the complainant was not, in fact, subject to unlawful discrimination, harassment, or retaliation

DHR Administrative Agency Update FY 2023

- 77% of DHR complaints involved employment discrimination
- 11% public accommodation complaints (2% increase)
 - Places of public accommodation include hospitals, clinics, “all establishments dealing with . . . services of any kind”
- Remaining 12% housing, education, other

DHR Administrative Agency Update FY 2023

- Most common claims (often multiple bases):
 - Disability (38.8%)
 - Retaliation (36.3%)
 - Race/color (35.2%)
 - Sex (22.8%)
 - Other most frequent claims:
 - Age
 - National origin
 - Religion

Federal Law Harassment Standard

Severe

- The *minority* of hostile work environment claims
- A single incident can result in a hostile work environment
 - Sexual assault
 - Sexual touching
 - Physical violence or threat
 - Hate speech or symbols
 - *Quid pro quo*



Pervasive

- The *majority* of hostile work environment claims
- Based on totality of the circumstances (no minimum/magic number)
- Relevant factors:
 - Frequency of the conduct
 - Period of time over which the conduct occurred

New York State Harassment Standard

- Since 2019, NYSHRL harassment standard is ***significantly lower*** than the severe or pervasive standard under federal law
- Conduct is unlawful under NYS law if it:
 - Subjects an individual to inferior terms, conditions, or privileges of employment
 - Rises above what a reasonable person would consider a petty slight or trivial inconvenience
- Remember: must always be ***because of*** a protected characteristic

New York State Harassment Standard

- Petty slight / trivial inconvenience standard not defined in NYSHRL
- Litigation anticipated to provide clarity on the new standard
- Take away: to prevail on post-2019 harassment claim, employee must demonstrate they were treated “less well” than other employees because of their protected characteristic

New York State Harassment Standard

- More protective of employees
- Early dismissal can be difficult
 - Less demanding standard
 - Uncertainty regarding contours of standard
- Issues of fact are common
 - Credibility issues
 - Highlights importance of thorough investigation and prompt corrective action

Case Study: SDNY Dec. 1, 2023

- Plaintiff, an African American nurse, asserted race-based hostile work environment claim under Title VII, 42 U.S.C. 1981, NYSHRL, and NYCHRL
 - Manager denied plaintiff's PTO request, but granted other staff members' requests
 - Nov. 2018: manager made a racial remark toward plaintiff
 - Dec. 2019: manager made a similar racial remark toward plaintiff
 - Plaintiff alleged unwarranted performance critiques and heightened scrutiny

Case Study: SDNY Dec. 1, 2023

- Federal claims dismissed
 - Episodic comments do not rise to the level of “severe or pervasive” conduct
 - Remaining conduct was race neutral
- NYSHRL & NYCHRL claims dismissed
 - Court found plaintiff demonstrated that she was treated less well
 - BUT ultimately held plaintiff did not present evidence that such treatment was because of her race
 - Also held that the two race-based comments “amount only to petty slights”

Case Study: SDNY Dec. 1, 2023

- NYSHRL claims
 - Analyzed by date given that allegations pre- and post-dated 2019 amendments to NYSHRL
 - Court noted lack of clarity in this area:
 - “New York courts have not yet analyzed substantively how the amendment alters standards of liability under the NYSHRL, but, within this District, courts have interpreted the amendment to render the standard for claims closer to the standard of the NYCHRL.”
 - Confirming that despite lack of clarity, this is much less demanding than Title VII
- Decision loosely supports notion that the stray remarks defense remains viable under amended state harassment standard
 - Very fact specific

Case Study: SDNY Sept. 14, 2023

- Plaintiff, a CT Tech in a same-sex marriage, complained that one of her coworkers “bullied” her and made physical contact with her on two occasions
- Filed complaint alleging NYSHRL hostile work environment claim
- These allegations were insufficient under less demanding state law standard
 - No evidence of discriminatory animus

Case Study: SDNY Sept. 14, 2023

- “Even if Plaintiff had presented evidence of discriminatory animus, her claims would still fail because the record evidence demonstrates no more than ‘petty slights’ and ‘trivial inconveniences.’”
- Reaffirming that even under lesser standard, unpleasant conduct and personality conflicts untethered to a protected characteristic will not rise to the level of actionable harassment

Confirmation About What is NOT Harassment

- Personality conflicts
- Proper supervision and management
- Unpleasant conduct unrelated to a protected characteristic
- **Potentially** infrequent remarks over extended period of time (*i.e.*, stray remarks)

COVID-19 Healthcare Vaccine Mandates

- NYS Healthcare Vaccine Mandate – **Repealed October 4, 2023**
 - Required covered health care employers to ensure their employees were fully vaccinated against COVID-19
 - Limited medical exemptions, no religious exemptions
- CMS Healthcare Vaccine Mandate – **Withdrawn August 4, 2023**
 - Required covered health care employers to develop policies to ensure all staff fully vaccinated against COVID-19
 - Both religious and medical exemptions available

Religious Discrimination Claims Based on Healthcare Vaccine Mandates

- Vaccination mandates for health care employees prompted flurry of litigation and administrative complaints
 - Especially NYS Mandate
- Flood of religious discrimination claims from unvaccinated employees based on denial of religious exemption from vaccine mandates

Religious Discrimination Claims Based on Healthcare Vaccine Mandates

- Employers defended such claims on grounds of undue hardship:
 - Granting exception would result in violation of law
 - Increased health/safety risks to others
 - Impossibility/unavailability of remote work
 - Etc.
- In most cases, these claims were dismissed both by administrative agencies and courts

Religious Discrimination Claims Based on Healthcare Vaccine Mandates

- Nine different decisions granting employer motions to dismiss
 - *Marte v. Montefiore Med. Ctr.*, No. 22-cv-03491, 2022 WL 7059182, at *4 (S.D.N.Y. October 12, 2022); *John Does 1 – 2 v. Hochul*, No. 1:21-cv-5067, 2022 WL 4637843, at *15 (E.D.N.Y. Sept. 30, 2022); *Riley v. N.Y.C. Health and Hosps. Corp.*, No. 22-cv-2736, 2023 WL 2118073, at *4 (S.D.N.Y. Feb. 17, 2023); *Corrales v. Montefiore Medical Center*, No. 22-cv-3219, 2023 WL 2711415, at *7– *8 (S.D.N.Y. March 30, 2023); *Dennison v. Bon Secours Charity Health System Medical Group, P.C.*, No. 22-cv-2929, 2023 WL 3467143, *6 (S.D.N.Y. May 15, 2023); *Shahid-Ikhlal v. N.Y. Presbyterian Hosp., Inc.*, 1:22-cv-10643, 2023 WL 3628151, at *5 (S.D.N.Y. May 24, 2023); *Algarin v. NYC Health + Hospitals Corp.*, No. 1:22-cv-8340, 2023 WL 4157164, *9–*10 (S.D.N.Y. June 23, 2023); *Cagle v. Weill Cornell Med.*, No. 22-cv-6951, 2023 WL 4296119, at *4 (S.D.N.Y. June 30, 2023); *Mace v. Crouse Health Hospital, Inc.*, No. 5:22-cv-1153, 2023 WL 5049465, at *7 (N.D.N.Y. Aug. 8, 2023)
- State Court varying outcomes

Religious Accommodations & Undue Hardship Refresher

- In *Groff v. DeJoy*, SCOTUS fundamentally changed analysis for evaluating religious accommodation requests
- **Previously:** Employer could deny religious accommodation requested based upon “undue hardship” so long as the burden of granting the accommodation would result in “more than a *de minimis* cost”
- **Now:** Rejected “*de minimis* cost” analysis and articulated new standard
 - **New Standard:** To establish “undue hardship” employer must show that “burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business.**”

Post-Vaccine Mandate Requests for Accommodation

- Changes to the standard for religious accommodations and withdrawal of state/federal mandates changes landscape of these claims
- Post-mandates, healthcare employers that opt to implement COVID/flu vaccination requirements per policy should be mindful of legal obligations
- Must analyze requests for exemption from such policies under new undue hardship standard
 - Unavailability of certain undue hardship arguments
 - *i.e.*, illegality of granting exemption

Sex Discrimination Case Study: 2d Cir. Nov. 2023

- Plaintiff, a male physician, asserted gender discrimination claim under Title VII and the NYSHRL
 - Plaintiff was terminated for poor performance and other issues
 - Shortly before termination, an anonymous complaint was made that the physician was abusive to staff
 - HR conducted an investigation, during which it was revealed that some staff members felt he discriminated against women
 - Summary judgment for employer

Sex Discrimination Case Study: 2d Cir. Nov. 2023

- Plaintiff claimed that termination was gender-based because the HR investigation was “clearly irregular”
 - Attempted to piggyback on novel discrimination theory found in *Menaker v. Hofstra University*
 - In *Menaker*, an inference of discriminatory motive could be found where there was a “clearly irregular” investigation following a complaint of sexual misconduct, but only where there was evidence of pressure on the higher education institution to respond more forcefully to allegations of sexual misconduct.
 - Court rejected Plaintiff’s theory and held that a “clearly irregular” investigation was not enough to support an inference of discrimination

Race Discrimination Case Study: NDNY Sept. 29, 2023

- Plaintiff, an Indian physician, asserted race discrimination and retaliation claims under Title VII and the NYSHRL
 - Plaintiff was terminated due to poor performance and lack of peer relationships
 - Plaintiff claimed he was treated differently than a similarly situated white physician and that he was retaliated against after he made written complaints about the physician
 - Summary judgment awarded to employer

Race Discrimination Case Study: NDNY Sept. 29, 2023

- Court reiterated several helpful principles, including:
 - Comparators must be similarly situated in all material respects, which means the comparator is subject to the same performance evaluation and discipline standards, *and* engaged in comparable conduct
 - To constitute protected activity, a plaintiff's complaint must include "sufficiently specific terms so that the employer is put on notice that the plaintiff believes he or she is being discriminated against on the basis of race" or some other protected characteristic

Thank You

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