

ALERT

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SEXUAL HARRASSMENT IN THE WORKPLACE- IS YOUR COMPANY PROTECTED?

Two recent New York decisions highlight the importance of understanding how discrimination and harassment laws apply to your company, and how your company can implement policies and procedures to minimize exposure.

The Importance of Employee Handbooks

The decision by the New York State Supreme Court in Bogata v. University Club emphasizes the importance of having an employee handbook to, among other things:

- *Outline company policies against workplace discrimination and harassment;*
- *Educate employees on internal complaint procedures;*
- *Develop procedures to supervise employees regarding the prevention and detection of discrimination and harassment;*
and
- *Train employees on company policies and procedures*

The Bogata court discussed how the proper preparation, training and use of policies and procedures can make legal defenses available to companies responding to lawsuits alleging harassment. The Court noted, however, that the policies and procedures must be properly implemented in order for companies to take advantage of these defenses. The Court also explained how these defenses are analyzed differently under the New York City Human Rights law ("City Law") than they are under the New York State Human Rights Law ("State Law") and Federal Law (Title VII of the Civil Rights Act of 1964, or "Title VII").

In Bogata, several so-called "C" list banquet servers sued both the University Club ("Club") and an individual supervisor for sexual harassment. "C" list banquet servers worked temporary hours when needed by the Club. The female banquet servers alleged that a male supervisor sexually propositioned and harassed them and, when they declined his advances, assigned more work hours to other female servers who were more receptive to him.

The Club argued that even if these allegations were true, the case should be dismissed because, among other reasons, the Club had a policy against harassment and a complaint procedure available to all of its employees that the banquet servers did not utilize, and the Club's liability was based solely on the alleged misconduct of the supervisor. Essentially, the Club argued that it could not correct the problem because the banquet servers did not bring the problem to its attention.

The Court explained that under the City Law, the Club was legally responsible for the supervisor's discriminatory conduct (if proven) if the Club: (1) knew of it and either acquiesced or failed to take immediate and appropriate corrective action; or (2) should have known of the conduct and failed to exercise reasonable diligence to prevent it.

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Because the Club's liability was based solely on the conduct of its employee, the City Law permitted the Club to plead (and prove, if it could) that, prior to the discriminatory conduct for which it was found liable, it had established, appropriately implemented and enforced policies and procedures to prevent and detect unlawful discrimination and harassment.

Importantly, the Bogata court explained that the City Law is different from Title VII or State Law regarding these issues. Under the State Law and Title VII, employers who establish the foregoing may establish a complete defense to liability. Under the City Law, however, these factors might serve to reduce damages but they are *not* a defense to liability.

Applying these criteria, the Bogata court decided that a trial was necessary to decide whether the Club communicated its policies and procedures regarding workplace harassment to the "C" list employees, and whether the Club properly trained them on those policies. The court also explained that temporary and part-time employees have the same status as full-time employees under the various discrimination statutes and that *all* employees, regardless of their status, must receive the requisite training.

Applying New York's Discrimination Law to an Out of State Office

As the Bogata decision illustrates, the City Human Rights Law differs from the State Human Rights Law and Title VII in important ways. In Hoffman v. Parade Publications, New York's highest court addressed the important question of when the City Law might apply to employees who worked outside the territorial boundaries of New York City.

In Hoffman, Parade Magazine terminated a manager from its Atlanta office, and the former employee sued Parade for age discrimination under the New York City and New York State age discrimination laws, arguing that New York law applied because Parade is headquartered in New York. The New York Court of Appeals disagreed, explaining that the firing had to have some "impact" in New York for New York law to apply. The Court of Appeals explained that the only significant contact that the case had with New York was that the decision to fire plaintiff was made in New York and that it was communicated to the former employee from New York. Neither of those factors was sufficient.

The Hoffman decision may prove to be important to many New York employers with employees located outside of New York who seek to avail themselves of New York's human rights laws. Where, as in Hoffman, the employee's (or former employee's) contacts with New York are "at most, tangential," Hoffman suggest that New York courts may be reluctant to apply New York law.

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Employers must understand their relationship to New York's discrimination and harassment laws, including the expanded exposure to liability explained in the Bogata decision, and the steps they can take to reduce that exposure. MHH&H can assist you in understanding and addressing these issues, including reviewing your discrimination and harassment policies and analyzing your company's relationship to New York's laws.