Sexual Harassment Cases in the New York State Courts—2006

By Howard S. Shafer

Recent years have seen more sexual harassment cases filed in New York State Courts, and 2006 seems to continue the trend. The first half of 2006 has seen seven reported decisions involving sexual harassment. The First Department has seen the most action, with three decisions in the Appellate Division and one in the New York County Supreme Court. The Fourth Department ranks second, with two decisions, followed by the Second Department with one. Of the four decisions on the merits, two were in favor of the plaintiffs and two were in favor of the defendants. The remainder of the decisions were based upon procedural motions or statute of limitation defenses.

Miccio v. Fits System, January 17, 2006

In *Miccio v. Fits System*, 25 A.D.3d 439, 810 N.Y.S.2d 13 (1st Dep't, 2006), the employee sought damages for sexual harassment, disparate compensation due to employee's sex and marital status and wrongful discharge. Defendant sought dismissal of the sexual harassment claims based upon plaintiff's failure to file a complaint with the New York State Division of Human Rights within one year. The court ruled that the failure to file within one year did not bar the claim. However, it did find that the failure to file the action within three years after the acts which formed the basis of the complaint did bar the claim. The court did allow the disparate compensation claim to proceed.

Kowalewski v. New York State Division of Human Rights, February 3, 2006

In *Kowalewski v. New York State Division of Human Rights*, 26 A.D.3d 888, 809 N.Y.S.2d (4th Dep't, 2006), the employee sought damages for sexual harassment based upon being touched sexually and being subject to sexual comments daily. She filed a claim with the New York State Division of Human Rights and was awarded $35,000 for mental anguish and humiliation.

The defendant sought review and annulment of the Commissioner's order and the respondent sought an order of enforcement. The Petitioner argued substantial prejudice based upon the 12 year delay between the complaint and the hearing. The Appellate Division, Fourth Department, denied the petition and ordered the petitioner to pay the prior award plus interest.

Curto v. Zittel's Dairy Farm, February 3, 2006

In *Curto v. Zittel's Dairy Farm*, 26 A.D.3d 808, 808 N.Y.S.2d 886 (4th Dep't, 2006), an employee sought damages for, among other things, sexual harassment, that occurred during her employment with the defendant. The plaintiff sought partial summary judgment. In denying the motion, the lower court found that the plaintiff had not met her initial burden of showing in a dmissible form that: the defendant was aware of the harassment by the co-defendant co-worker; or that it acquiesced in or condoned the conduct. The denial of the motion was affirmed by the Appellate Division.

Juanita Ghee v. Washington Mutual, March 20, 2006

In *Juanita Ghee v. Washington Mutual*, 11 Misc. 3d 1066(A), 2006 WL 7006472 (Sup. Ct., Kings Cty., 2006), the plaintiff filed a complaint alleging personal injuries as a result of sexual harassment, employment discrimination and assault. The defendant filed a motion to dismiss based upon lack of personal jurisdiction. In a lengthy decision the court denied the motion and permitted the suit to proceed in New York.

Arnovitz v. Price Water House, March 30, 2006

In *Arnovitz v. Price Water House*, 27 A.D.3d 393, 812 N.Y.S.2d 504 (1st Dep't 2006), a Canadian resident sued a Canadian company alleging quid pro quo and hostile work environment sexual harassment. The plaintiff claimed that her supervisor began pressuring her for sexual relations as soon as he became her supervisor. The court determined that the plaintiff's statement in her pleadings of when the harassment began constituted a judicial admission.

The court applied New York's borrowing statute in determining whether the action was timely. In an action accruing outside New York brought by a non-resident, New York's borrowing statute requires that the action be timely under the statute of limitations of both jurisdictions. Under a one-year Canadian statute of limitations, the action was time barred. Accordingly, the dismissal was affirmed.

Mitchell v. Tam Equities, March 28, 2006

In *Mitchell v. Tam Equities*, 27 A.D.3d 703, 812 N.Y.S.2d 611 (2d Dep't, 2006), a black female employee brought a suit against her employer and numerous co-workers alleging, among other things, violation of Executive Law § 296(1)(a) by committing racial and sexual harassment, creating a hostile work environment and thus discriminating against her based upon her race and sex. Retaliation based upon the complaints was also alleged. The lower court granted defendants' motion to dismiss based upon failure to state a cause of action.

The Appellate Division found that the plaintiff alleged that two of her co-workers "routinely, repeatedly, and over a significant period of time, directed sexually and racially offensive language at her." She alleged that she repeatedly told them to stop and complained to her supervisors but the behavior continued and her complaints were ignored. The plaintiff also alleged that her employment became intolerable and she felt the need to leave her employment with Homebridge. The Appellate Division determined that the plaintiff sufficiently alleged that the conduct "pervaded the workplace" and that the conduct occurred on "more than a few isolated occasions." In so finding the Appellate Division found that the lower court erred in dismissing the cause of action against her employer pursuant to Executive Law § 296(1)(a) based upon sex and race harassment that created a hostile work environment.

For similar reasons, as well as the alleged response to her complaints and the fact that the plaintiff was engaged in a protected activity, the Appellate Division reversed the dismissal of her claim pursuant to Executive Law § 296(7) based upon unlawful retaliation. The court also determined that although her co-workers were not "employers" within the meaning of Executive Law § 292(5) and cannot be held personally liable for a violation of Executive Law § 296(1)(a), the plaintiff did allege sufficient conduct to subject them to liability based upon aiding and abetting an employer that discriminates in violation of Executive Law § 296(1)(a). The Appellate Division also held that lower court erred in dismissing the constructive discharge cause of action.

The plaintiff also sought to hold the employer's parent and sister companies liable for its actions. The Appellate Division found that the plaintiff had failed to allege sufficient facts to hold them liable and affirmed the dismissal.

Anderson v. Shimella "Star" Abodeen, May 18, 2006

In *Anderson v. Shimella "Star" Abodeen*, 29 A.D.3d 431, 816 N.Y.S.2d 415 (1st Dep't, 2006), the plaintiff alleged, among other things, sexual harassment based upon hostile work environment and intentional infliction of emotional distress, as a result of the display by his supervisor of nude photographs of the plaintiff to co-workers. The co-worker maintained that the showing of the photographs was necessary in order to determine whether it was the plaintiff that had been using company facilities to contact a woman in whom he was interested. The defendants sought summary judgment dismissing the claims. The lower court granted the motion and dismissed the claims and the plaintiff appealed.

The Appellate Division found that the conduct was not sufficiently outrageous to support a claim for intentional infliction of emotional distress. The court, while finding the conduct alleged to be offensive, determined that there was no evidence that the conduct was motivated by animus against men such as might support a sexual harassment claim.

Conclusion

The Federal District Courts will not be supplanted by the New York State Courts as the venue of choice for sexual harassment claims any time soon. However, plaintiffs have shown in recent years that they are a viable alternative and 2006 appears to be no different.

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