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## **HEIGHTENED BURDEN IMPOSED ON NEW YORK CITY EMPLOYERS IN EMPLOYMENT DISCRIMINATION CASES**

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A New York appellate court sitting in Manhattan has ruled that the New York City Human Rights Law will be construed so as to allow discrimination claims against employers to proceed under the New York City Human Rights Law even where the same claims would not pass muster under federal and state discrimination laws. On December 27, 2012, in Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53, a unanimous panel of the Appellate Division, First Department, reinstated three sex discrimination claims asserted against a New York City employer under the City's Human Rights Law. In the same decision, the court upheld the dismissal of sex discrimination claims asserted under the New York State Human Rights Law by the same plaintiffs against the same employer.

Until recently, the New York City Human Rights Law was interpreted in a manner consistent with federal discrimination laws. The United States Supreme Court ruled that federal discrimination statutes require a plaintiff alleging sex discrimination to show that she was treated differently because of her gender and that the discriminatory environment in her workplace was "sufficiently severe or pervasive" to create an abusive work environment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In determining whether unwelcome sexual advances or other conduct rise to the level of a "hostile environment" in violation of federal law, a court's central inquiry is whether the conduct unreasonably interferes with the individual plaintiff's work performance or creates an intimidating, hostile or offensive work environment. Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, is generally NOT sufficient to establish a hostile environment under federal law. Rather, in order to avoid dismissal, the plaintiff must establish that the conduct complained of rose to a level that was "severe or pervasive."

For many years, courts applied the federal "severe or pervasive" standard when determining claims asserted under the New York State and New York City Human Rights Laws. However, the Appellate Division, First Department, ruled in Williams v. New York City Housing Authority, 67 A.D.3d 62, that the Local Civil Rights Restoration Act of 2005, a local New York City law passed to clarify the vigor and independence of the New York City Human Rights Law, requires that courts apply a more liberal standard when analyzing discrimination claims asserted under the New York City Human Rights Law. This broader, more permissive, standard recently was applied by the Appellate Division in Hernandez v. Kaisman in which three female plaintiffs alleged that their employer, Dr. Arden Kaisman, sent highly offensive emails to male and female employees and made offensive comments to female plaintiffs on a few occasions, and that he initiated discussions about female employees' weight and underwear and his affinity for women with large breasts.

In its decision, the appellate court described Kaisman's behavior as "boorish", but not "severe" enough to state a claim under the New York State Human Rights Law, which it interpreted under the federal "severe or pervasive" standard. The court then proceeded to consider the plaintiffs' allegations under the more liberal standard applicable to the City Human Rights Law: "Whether the plaintiff has been treated less well than other employees because of her gender" as opposed to whether the conduct was "severe or pervasive." The Appellate Division ruled that although defendant's actions did not rise to the level of "severe or pervasive" conduct, his actions could be characterized as having subjected plaintiffs to "differential treatment" on the basis of their sex, thus precluding dismissal under the City law. The court stated that while "mildly offensive sexual media content may not have been enough to rise to the

level of a hostile environment," the overall context of the emails -- in conjunction with the offensive comments -- supported plaintiffs' claims that defendant took a perverse pleasure in demeaning and embarrassing female employees and that "[d]efendant considered it appropriate to foster an office environment that degraded women." The court denied the defendant employer's motion for summary judgment and allowed the claims to proceed under the New York City Human Rights Law.

The court's ruling in Hernandez could result in a significant number of cases being tried rather than dismissed by summary judgment. The ruling makes clear that employers in New York City bear a heightened burden of monitoring their workplaces for sexually inappropriate conduct. Carefully drafted non-discrimination policies and periodic sexual harassment and discrimination training are essential. Most importantly, employers must be responsive to complaints of inappropriate behavior, promptly investigating and addressing employee complaints concerning workplace misconduct. Such measures by employers will help ensure a discrimination-free workplace and provide potential defenses in the event of litigation.