New York Law Journal

Big Brother in the Big Apple: Subtle Erosion of Employment at Will?

Michael C. Schmidt
09-24-2010

Employers in New York have taken great comfort over the years in citing the "at will" nature of an employee's job status when taking virtually any action ranging from discipline, to a diminution of salary or job responsibilities to outright termination. New York has generally been considered a pro-employer jurisdiction, with employees often having to clear high hurdles before circumventing the cornucopia of legal precedent granting employers free and unfettered rights when it comes to beginning and ending one's employment.

However, over the past few years—and, perhaps, most pronounced this year—there has been a noticeable trend whereby the legislative and judicial branches in New York appear ready to impose their will on at will employment, and increase potential protections and remedies available to employees. This article discusses the subtle erosion of employment at will in New York, and the extent to which "big brother" might be directing a more watchful eye at employers who do business in this state.

Longstanding 'Murphy' Rule

It is axiomatic in New York that, in the absence of a constitutional or statutory violation, or an express contractual limitation, employment in New York is "at will" and an employer may discharge an employee for any reason at any time, with or without cause. The leading pronouncement on the at will rule in New York continues to be the Court of Appeals' 1983 decision in *Murphy v. American Home Prod. Corp*. In *Murphy*, the plaintiff asserted a common law cause of action for abusive discharge after he was fired from his job, he alleged, because of his age and his disclosure to management of certain accounting improprieties.

The lower court denied the employer's motion to dismiss the abusive discharge claim, but the Appellate Division reversed and dismissed plaintiff's complaint in its entirety. In affirming that decision on appeal, the Court of Appeals refused to recognize a common law cause of action for abusive discharge in light of the strong at will presumption, specifically noting that "such a significant change in our law is best left to the Legislature."

On the surface, not much has been done over the years to significantly erode the at will rule. While the unique facts of a particular case have given rise to a successful employee claim, particularly where the alleged harm is unrelated to the act of termination itself, courts remain loathe to erode the *Murphy* doctrine. Thus, courts have refused to create any public policy exception to the at will doctrine, and have refused to recognize fraudulent inducement claims where an employee alleges that he or she was fired shortly after accepting the job in reliance on a misrepresentation of material fact.

Indeed, a corollary to the at will presumption is the well-established "business judgment rule" applied in employment discrimination cases to preclude a court from substituting its judgment for the business or financial judgment of an employer in the operation of its business.[1] And, for more than 20 years, the New York Legislature has joined the judiciary in refusing to accept the *Murphy* invitation to create a "significant change in our law."

Until now.

Upon closer review, one could argue that certain legislative and judicial developments over the past couple of years, up to and including 2010, represent a shift in the desire to instill a "big brother" role in the workplace. The result has been the creation of additional obligations for employers and potential new causes of action and remedies for employees.

The Legislature's Role

The New York Legislature has increasingly appeared intent on affording greater rights to employees. For example, in 2007, §§202-j and 206-c of the New York Labor Law were enacted to require employers to provide a leave of absence and break time respectively for employees to donate blood and express breast milk. Section 191 of the Labor Law was amended that same year to compel employers to put in writing the terms of employment for all commissioned salespersons, including a description of how commissions and other monies earned are to be calculated, the frequency of reconciliation between any recoverable draw and an earned commission, and the manner in which any earned monies will be paid in the event employment is terminated.

The pro-employee trend continued in 2009 with two significant amendments to the New York Labor Law. First, §195 was amended to require that employers notify all employees, in writing, of the rate of pay and regular payday designated by the employer, as well as the regular hourly rate and overtime rate of pay for all non-exempt employees. To tie a bow around the newly-enacted Labor Law obligations, §198 was amended to increase the monetary penalties for employers who violate the New York wage and hour laws, and also to expand potential liability for unlawful retaliation to officers or agents of any partnership or limited liability company.

We have only completed the first half of 2010, and already it seems that the New York Legislature (with the blessing of Governor David Paterson) is primed to continue regulating the working environment for employers operating in this state. First, the Legislature has proposed adding Article 20-D to the Labor Law to create a new private cause of action for an alleged abusive work environment (A5414/S1823). Under the proposed law, an employer would be liable for the existence of an "abusive work environment" within its control in which "an employee is subjected to abusive conduct that is so severe

that it causes physical or psychological harm to such employee[.]"

In turn, "abusive conduct" is defined as "conduct, with malice, taken against an employee by an employer or another employee in the workplace, that a reasonable person would find to be hostile, offensive and unrelated to the employer's legitimate business interests." Obviously, within these defined terms are additional terms of art that are either further defined, or will require interpretation through inevitable lawsuits.

Critically, however, the proposed "abusive work environment" legislation marks a dramatic shift in the legislative desire to closely monitor and regulate the day-to-day operations of an employer's business and workforce. Indeed, one could argue that existing federal and state law provides sufficient redress to an employee who has been subjected to discriminatory or abusive conduct on the basis of a wide spectrum of protected classes.

Similarly, state law currently affords protection to employees in areas such as engaging in legal, off-duty activities, certain leaves of absences, and anti-retaliatory proscriptions. This new law could threaten the well-established at-will and business judgment rules by creating a general civility code that empowers employees to litigate general workplace annoyances and frustrations, and reduce the ability of an employer (both large and small) to manage its operations. This bill passed the Senate and is currently held in committee in the Assembly for consideration.

Second, the Legislature has proposed a new "Wage Theft Protection Act" to provide a host of new employer obligations and broaden the available remedies for aggrieved employees (A10163/S7050). For example, the proposal imposes certain meal and rest period obligations, requires that wage-related notifications be provided to employees every year for each employee (even if the employee received the notification in the prior year), and, for the first time, creates new rights to inspect or copy an employee's own personnel file. This bill passed the Assembly and is currently held in committee in the Senate.

Third, this past July, both houses of the Legislature passed this country's first Domestic Worker Protection Law. The law requires employers to give nannies, housekeepers and other domestic workers one day of rest per week (or premium overtime compensation in lieu of the rest day), as well as three paid days off per year after the domestic worker has worked for the employer for a full year. In addition, the new law provides anti-discrimination and anti-retaliation rights to domestic workers, and establishes the number of hours constituting minimum daily and weekly working hours, above which the employer is required to pay overtime to the domestic worker. Governor Paterson is expected to sign the legislation.

The Judiciary's Role

Efforts by the Legislature to increase the level of outside regulation of the workplace have seemingly been matched in recent years by the New York Judiciary. Beginning in 2008, for example, New York's highest court determined a then-open-ended question of whether company executives were covered generally under the wage and hour provisions in Article 6 of the New York Labor Law.[2] The Court held in *Pachter v. Bernard Hodes Group Inc.* that executives are included within the definition of "employee"

for purposes of Labor Law coverage, and are only considered exempt from a requirement in Article 6 if the requirement expressly exempts executives.

More recently, courts in New York have interpreted New York City's local human rights law (NYCHRL) far more broadly than parallel state, and even federal, anti-discrimination laws. The genesis of this trend began in 2005 when the New York City Council amended the NYCHRL with the "Restoration Act," which unequivocally stated its purpose:

The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

Courts interpreted this "construction provision" to require a separate and distinct analysis for claims under the NYCHRL.[3] Analyzing such city-based claims more liberally, courts have refused to grant summary judgment for an NYCHRL claim even when identical claims under state or federal law might otherwise warrant dismissal.[4]

Then, on May 6, 2010, the Court of Appeals answered the following question certified by the U.S. Court of Appeals for the Second Circuit: Whether the federal and state *Faragher/Burlington* affirmative defense to employer vicarious liability in harassment cases applies to claims under the NYCHRL.[5] Under that defense created in 1998, an employer can avoid liability in a case that does not involve a tangible employment action if (i) the employer exercised reasonable care to prevent and remedy harassment, and (ii) the aggrieved employee unreasonably failed to utilize the employer's established preventative methods.

While noting that it generally interprets state and local anti-discrimination statutes "consistently with federal precedent", the Court of Appeals answered the question in the negative, ruling that "the plain language of the NYCHRL precludes the *Faragher-Ellerth* defense."

In doing so, the Court rejected the argument that the broader, more pro-employee language in the NYCHRL should be struck as inconsistent with state law, noting that "[b]oth [state and city law] prohibit discrimination; NYCHRL §8-107 merely creates a greater penalty for unlawful discrimination."[6] The import of *Zakrzewska* is that employers operating in New York City—and their counsel—must re-evaluate the value of certain claims brought by employees under the NYCHRL in light of the liberal standards required under that law and the inability to raise at least this one affirmative defense.

More generally, however, the *Zakrzewska* decision signals a continuing landscape change, where the Court of Appeals (and lower courts as well) seem ready to afford greater protections to employees in areas that traditionally have been open for New York employers to make their own decisions without significant second guessing.

Conclusion

It remains to be seen whether recent legislative and judicial developments in 2010 are nothing more than a short-lived wave of pro-employee efforts and case-by-case holdings, or mark a definitive

crossroads in the fundamental nature of employment in New York. While recent legislative and judicial pronouncements retain certain defenses and strategies for employers to defeat workplace claims—even creating new ones—it is clear that employers doing business in New York should be cognizant of the apparent trend and mindful of its effect on employee relations issues.

Michael C. Schmidt *is a member of the labor and employment practice group in the New York office of Cozen O'Connor and an adjunct professor at Touro Law School. He can be contacted at mschmidt@cozen.com.*

Endnotes:

1. See, e.g., *Alvarado v. Hotel Salisbury Inc.*, 38 A.D.3d 398, 833 N.Y.S.2d 25 (1st Dept. 2007); *Citibank, N.A. v. New York State Div. of Human Rights*, 227 A.D.2d 322, 643 N.Y.S.2d 68 (1st Dept.), lv. to app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996).

2. *Pachter v. Bernard Hodes Group Inc.*, 10 N.Y.3d 609, 861 N.Y.S.2d 246 (2008).

3. See *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dept.), lv. to app. denied, 13 N.Y.3d 702, 885 N.Y.S.2d 716 (2009)

4. See, e.g., *Dixon v. City of New York*, 2009 WL 1117478 (E.D.N.Y.); *Weiss v. JPMorgan Chase & Co.*, 2010 WL 114248 (S.D.N.Y.)

5. *Zakrzewska v. The New School*, 14 N.Y.3d 469, —N.Y.S.2d— (2010).

6 . Id. at 481.