

620 F.3d 168
United States Court of Appeals,
Second Circuit.

Dominika **ZAKRZEWSKA**, Plaintiff-Appellee,

v.

The **NEW SCHOOL**, Defendant-Appellant,
Kwang-Wen Pan, Defendant.

Docket No. 09-0611-cv. | Submitted:
June 16, 2009. | Decided: June 22, 2010.

We certified to the **New** York Court of Appeals the question of whether the affirmative defense to employer liability articulated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), applies to sexual harassment and retaliation claims under section 8-107 of the **New** York City Administrative Code. See *Zakrzewska v. The New School*, 574 F.3d 24 (2d Cir.2009). The **New** York Court of Appeals has answered that question in the negative. Accordingly, *169 we affirm the January 26, 2009 order of the United States District Court for the Southern District of **New** York (Lewis A. Kaplan, *Judge*) denying the motion for summary judgment of defendant, The **New School**, and we remand the cause to the District Court for further proceedings. Affirmed and remanded.

Attorneys and Law Firms

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Before WINTER, CABRANES, and HALL, Circuit Judges.

Opinion

PER CURIAM:

We previously certified to the **New** York Court of Appeals the question of whether the affirmative defense to employer liability articulated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) applies to sexual harassment and retaliation claims under **New** York City Administrative

Code Section 8-107. See *Zakrzewska v. The New School*, 574 F.3d 24 (2d Cir.2009). The **New** York Court of Appeals has answered our certified question in the negative. We now review the January 26, 2009 order of the United States District Court for the Southern District of **New** York (Lewis A. Kaplan, *Judge*) denying the motion for summary judgment of defendant The **New School** (“the **School**”).¹

BACKGROUND

The facts and procedural history of this case are set forth in detail in our earlier opinion in this case, with which we assume the parties' familiarity. See *Zakrzewska*, 574 F.3d 24. We recite here only those facts pertinent to this opinion.

Plaintiff Dominika **Zakrzewska** sued her co-worker, defendant Kwang-Wen Pan, and her former employer, defendant-appellant The **New School** (“the **School**”), alleging sexual harassment and retaliation in violation of the **New** York City Human Rights Law (“NYCHRL”), which is codified in part in the **New** York City Administrative Code, see N.Y.C. AD.C. § 8-107.

The **School** moved for summary judgment on both the harassment and retaliation claims. In its motion for summary judgment, the **School** argued that summary judgment should be granted because (1) the affirmative defense to employer liability for sexual harassment cases arising under Title VII set forth in *Faragher* and *Ellerth* applies under the NYCHRL,² (2) that the **School** satisfied the requirements of the *Faragher-Ellerth* defense, and (3) with respect to the retaliation claim, even if the *Faragher-Ellerth* defense *170 does not apply, plaintiff failed to establish a *prima facie* case of retaliation.

The District Court concluded that the *Faragher-Ellerth* defense does not apply under the NYCHRL and that there were questions of material fact as to whether **Zakrzewska** suffered retaliation. Accordingly, the District Court denied the **School's** motion for summary judgment on both the harassment and retaliation claims. See *Zakrzewska v. The New School*, 598 F.Supp.2d 426, 437-38 (S.D.N.Y.2009). Recognizing that its conclusion that the *Faragher-Ellerth* defense does not apply under the NYCHRL was “not free from doubt,” *id.* at 437, the District Court certified that question for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).³ *Id.* at 437-38.

On appeal before our Court, we certified the same question—namely, whether the affirmative defense set forth in *Faragher* and *Ellerth* applies under the NYCHRL—to the New York Court of Appeals. See *Zakrzewska*, 574 F.3d at 28-29.

The New York Court of Appeals then answered our certified question in the negative concluding that the *Faragher-Ellerth* defense does not apply in cases brought under the NYCHRL. See *Zakrzewska v. The New School*, 2010 WL 2490052, 2010 N.Y. LEXIS 632 (N.Y.2010).

DISCUSSION

In denying defendant's motion for summary judgment, the District Court concluded that the School was not entitled to summary judgment because the *Faragher-Ellerth* defense

does not apply to claims brought under the NYCHRL. The New York Court of Appeals has now confirmed that such a defense does not apply under the NYCHRL. Accordingly, we conclude that the District Court did not err in denying defendant's motion for summary judgment.

CONCLUSION

For the reasons stated above, we affirm the January 26, 2009 order of the District Court denying defendant's motion for summary judgment, and we remand the cause to the District Court for further proceedings.

Parallel Citations

109 Fair Empl.Prac.Cas. (BNA) 1019

Footnotes

- 1 We have jurisdiction to review this order under 28 U.S.C. § 1292(b).
- 2 In our earlier opinion in this case, we quoted the District Court's definition of the *Faragher-Ellerth* defense:
In *Faragher* and *Ellerth*, the Supreme Court held that an employer is not liable under Title VII for sexual harassment committed by a supervisory employee if it sustains the burden of proving that (1) no tangible employment action “such as discharge, demotion, or undesirable reassignment” was taken as part of the alleged harassment, [*Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257] (2) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” [*Faragher*, 524 U.S. at 807, 118 S.Ct. 2275,] and (3) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise[, *id.*]”
Zakrzewska, 574 F.3d at 26 (quoting *Zakrzewska*, 598 F.Supp.2d 426, 432 (S.D.N.Y.2009) (footnotes omitted)).
- 3 The District Court did not certify the question of whether plaintiff stated a *prima facie* claim of retaliation, so we lack jurisdiction to consider it here.