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LITIGATING WORKPLACE HARASSMENT IN THE WAKE OF ELLERTH AND FARAGHER

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ABSTRACT

Recently, the U.S. Supreme Court has issued a flurry of rulings intended to clear the murky waters of sexual harassment and give lower courts guidance in assessing employer liability in these suits. While employers have always been liable for tangible injuries to employees harassed by their agents, there has been a question about their liability for harassment resulting in no tangible injury to the plaintiff. The recent spate of Supreme Court rulings extended employer liability to include even those instances of harassment where the victim remains physically and economically intact, but in the interest of prescriptive policymaking from the bench, allowed employers to avoid liability by invoking an affirmative defense designed to encourage employer policies and procedures that discourage hostile workplace environments. This study explores the success of the Court's efforts.

On June 26, 1998, the U.S. Supreme Court decided two cases intended to give new guidance to lower courts grappling with the question of employer liability for sexual harassment in the workplace. *Burlington Industries v. Ellerth* [1] and *Faragher v. City of Boca Raton* [2], decided on the same day, address employer liability for the creation of a hostile environment by employees acting within the scope of their employment. Ultimately, these decisions center on the Court's redefinition of the rights and responsibilities of employers and individual employees placing harassment claims. This study reviews the history of litigation leading to the Court's June rulings, the rulings themselves, and the questions and problems these rulings have created.

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HISTORY OF THE PROBLEM

Title VII of the 1964 Civil Rights Act [3] prohibits gender discrimination in the terms and conditions of employment, and when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates" on the basis of sex [4]. In litigating employer liability for a supervisor's harassment, the presence or absence of tangible employment actions has always been a pivotal issue. A tangible employment action is one that affects employment status, in most cases inflicting direct economic harm [1, at *36]. This type of harassment has come to be known as *quid pro quo* sexual harassment—harassment in which the resisting employee is actually injured economically in retaliation for that resistance. Whenever an employee victim is fired, demoted, reassigned, or in any way injured as the result of the harasser's discriminatory behavior, the courts have routinely found *the employer liable.* When a plaintiff proves a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, s/he establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII [1, at *22-23]. The courts have reasoned that employees in the position to make such decisions are supervisors empowered by the employer as a distinct class of agent with the authority to make economic decisions affecting other employees, so the employer cannot evade liability for retaliatory decisions made in a hostile environment. A tangible employment action taken by an employee supervisor becomes, for Title VII purposes, the act of the employer. When a supervisor makes such a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation [1, at *36]. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisors, whether or not the employer knew, or should have known, or approved of the supervisor's actions [4, at 70-71].

The courts have used the terms *quid pro quo* and hostile work environment to distinguish between cases in which threats of tangible work actions are carried out and those in which threats are not carried out or are absent altogether. In *Meritor Savings Bank v. Vinson* [4, at 65], the Supreme Court distinguished between *quid pro quo* and hostile environment claims but said both were cognizable under Title VII, though harassment must be severe or pervasive to establish a hostile environment claim. Title VII is violated by explicit or severe or pervasive constructive alterations in the terms or conditions of employment.

As litigation in the area of workplace harassment has evolved, however, the standard of employer liability has turned on which type of harassment had occurred [1, at *21]. The employer was always vicariously liable for *quid pro quo* harassment resulting in tangible employment actions, and, under the Civil Rights Act of 1991 [5], could be sued for compensatory and punitive damages in addition to the traditional remedies of lost pay and benefits, reinstatement, and attorney fees. Vicarious liability for hostile environment harassment, however,

was not so clear-cut. Victims in a hostile environment suit had to show severe or pervasive conduct, often a subjective determination by a court or jury, to win hostile environment claims. Winning hostile environment claims was always a gamble. Thus, Title VII plaintiffs were encouraged to state their claims as *quid pro quo* claims, which in turn put expansive pressure on the definition [1, at *21].

In *Burlington Industries v. Ellerth* [1, at *22] and *Faragher v. City of Boca Raton* [2], the Supreme Court addressed the question of whether a claim of *quid pro quo* sexual harassment may be stated under Title VII in cases where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions, or privileges of employment as a consequence of refusing to submit to those advances. In both of these cases the Court was asked to decide whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threats [1, at *24].

In both *Ellerth* and *Faragher* the district court had found the alleged conduct was severe or pervasive enough to constitute a hostile work environment, and the Supreme Court accepted that finding. In *Faragher,* the supervisors were accused of creating a sexually hostile atmosphere by submitting female employees to repeated uninvited and offensive touching, by making lewd remarks, and by speaking of women in offensive terms. In *Ellerth,* the victim quit her job after fifteen months because her supervisor threatened on many occasions to retaliate against her if she denied some sexual liberties. Employees Faragher and Ellerth were also alike in that, while they proved they were subject to a hostile work environment as a result of the repeated advances and threats of their supervisors, they suffered no tangible, work-related injury as a consequence of that harassment. That is, there was no significant change in either woman's employment status, such as being fired, failing to be promoted, reassignment with significantly different responsibilities, or a significant change in job benefits. In both cases the threats creating the hostile environment went unfulfilled, and, in fact, Ellerth was actually promoted once during the fifteen months she was at Burlington, although she had resisted all advances made by her supervisor.

THE DECISION

In deciding employer liability for a hostile environment resulting in no tangible injury, the Court turned to the principles of agency law, noting that under Title VII the term "employer" is defined to include "agents" [3, at 2000e(b)], and a master is subject to liability for the torts of servants committed while acting in the scope of their employment [6]. The rationale for placing harassment within the scope of supervisory authority would be the fairness of requiring the employer to bear the burden of foreseeable social behavior, and the same rationale would apply when the behavior was that of co-employees [2, at *47]. An employer is

negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it [1, at *31]. Negligence sets a minimum standard for employer liability under Title VII; but *Ellerth* invoked the more stringent standard of vicarious liability [1, at *31].

The Court also considered the intent of Title VII, the applicable statute in these suits. Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms [1, at *40]. Title VII borrows from tort law the avoidable-consequences doctrine [7]. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context [8]. Employees would also be encouraged to report harassing conduct before it becomes severe or pervasive [9]. With these principles and goals in mind, the Court adopted the following holding in both *Ellerth* and *Faragher:*

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise [1, at *41-42].

The Court went on to discuss the relative importance of each of these elements in assigning vicarious liability to an employer:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense [1, at *42].

Under this new rule an employer is subject to vicarious liability for sexual harassment resulting in no tangible employment actions, but has the opportunity to assert and prove an affirmative defense to liability. That is, an employer may concede that a hostile environment existed but defend itself by showing a workable antiharassment policy was in place and the plaintiff did not use the procedures in place to avoid harassment.

THE AFTERMATH

The dissent in *Ellerth* by Justices Thomas and Scalia signaled concern for the Court's ambiguity in defining the affirmative defense that would allow employers to avoid vicarious liability for supervisors who create hostile working environments. Specifically, the dissent maintained that employers would be vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define [1, at *44]. The dissent accused the Court of providing shockingly little guidance about how employers can actually avoid vicarious liability, leaving the dirty work to the lower courts [1, at *55].

The dissent also expressed concern for the effect this ruling would have for district courts ruling on motions for summary judgment [1, at *56]. Either party in a civil action may ask the court to rule in its favor if the moving party believes no genuine issue of material fact exists and it is entitled to prevail as a matter of law. A motion for summary judgment may not be granted unless the court determines there is no genuine issue of material fact to be tried and the moving party is entitled to judgment as a matter of law [10]. The employer's affirmative defense, however, will always be based on the presentation of genuine issues of material facts. It is "subject to proof by a preponderance of the evidence" [1, at *41]. Therefore, it would seem the new rule would discourage the use of the summary judgment in deciding cases of hostile environment harassment without tangible employment action.

The language in which the affirmative defense is framed would also tend to disfavor the use of the summary judgment in these cases. The employer must have exercised "reasonable" care to prevent and correct "promptly" any sexually harassing behavior, while the plaintiff employee must have "unreasonably" failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise [11, p. 533]. When the reasonableness of conduct is in question, summary judgment is rarely appropriate because juries have "unique" competence in applying the reasonable person standard to the facts of the case [11, p. 533]. The language of the law created by the affirmative defense is replete with subjective terms that will always create issues of material fact best decided by juries.

Harrison v. Eddy Potash, Inc., a case following the *Ellerth* and *Faragher* decisions, illustrates the way in which courts now wrestle with this subjective language [12]. Although neither prong of the affirmative defense was specifically at issue in the first trial on this claim, the court found the evidence actually presented relating to the two prongs of the new defense was not so one-sided as to entitle the employer, Eddy Potash, to a judgment in its favor [12, at *13]. The court found the evidence presented posed serious questions concerning the "reasonableness" of the employer's conduct in preventing sexual harassment in the workplace, in that while Potash had an official policy against sexual

harassment, plaintiff Harrison had not been made aware of that policy prior to the actions giving rise to her complaint [13, at 1442]. Therefore, this case was remanded for further proceedings to resolve questions regarding the *reasonableness* of the employer's conduct [13].

Several cases tried in the wake of *Ellerth* and *Faragher* illustrate other areas of the employer's defense that have proven open to interpretation. In *Williamson v. The City of Houston,* for instance, a jury found the city liable under Title VII for hostile work environment sexual harassment and for retaliation against Williamson in spite of its argument that it had not received *official notice* from the plaintiff [14]. Williamson was a police officer who alleged she had been sexually harassed on a daily basis by her partner, Officer Doug McLeod. She presented evidence at trial that McLeod regularly engaged in behavior that created a hostile work environment for her, including: conducting obvious and demeaning inspections of her appearance, making comments on how her body looked in different clothes, on the appearance of her buttocks, and on the size of her breasts; wedging himself into the cubicle beside her and touching her body, pulling her hair, leaning over her, breathing heavily into her ear, and sticking his tongue in her ear; bumping, tapping, and slapping her; whistling and purring at her; and trying to look up her skirts and down her necklines [14, at 463].

At the end of a seven-day trial, the jury awarded Williamson $28,000 in back pay and $100,000 in compensatory damages; the district court also awarded her $182,794 in attorney's fees and $17,823 in costs and expenses. After the district court entered judgment on the jury's verdict, the city moved for judgment as a matter of law and that motion was denied. The city then appealed the jury's verdict, arguing as a matter of law that it did not have notice that Williamson was being harassed until she filed her complaint with the Internal Affairs Division. Although Williamson had repeatedly complained about McLeod's behavior to her supervisor, Sergeant Bozeman, the city contended Bozeman's knowledge of McLeod's harassing behavior should not be imputed to the city for purposes of holding the city liable for negligently failing to take prompt remedial action. The court, however, noted Bozeman was McLeod's supervisor in an organization noted for its strong chain of command. Bozeman had both the power and the authority to order McLeod to stop his harassing behavior and could have disciplined McLeod if he failed to obey. Ultimately, he could have reported the harassment to higher authority as prescribed in the city's own policy. The city argued that Bozeman's failure to act according to policy actually insulated the city from liability because Bozeman was acting outside the scope of his authority when he chose to ignore stated policy. But echoing the Supreme Court's ruling in *Ellerth,* the Williamson court found the city misstated the relevant agency principle. An employer is not insulated from liability simply because an agent fails to perform as he or she is supposed to perform. If the city's own policy gave Bozeman the authority to accept harassment complaints, his knowledge can

indeed be imputed to the city for purposes of liability whether he exercised that authority or not [14, at 466].

The *Ellerth* decision means an employer will be vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. Essentially, Bozeman, Williamson's immediate supervisor, created such an actionable hostile environment by allowing McLeod's harassment to persist. The city's own policy specifically directed victims to report harassment to their supervisors and directed supervisors to ensure that complaints of sexual harassment were resolved promptly and effectively. The Williamson decision provides important procedural clarification in the wake of *Ellerth.* When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to deal with the problem. One of the purposes of Title VII is to create antiharassment policies and effective grievance mechanisms [1]. Thus, an employer will not be allowed to escape liability when the mechanism it has created fails.

The Williamson case posed yet another question with respect to the place of notice in the *Ellerth* affirmative defense. The city's policy also stated that if a complaint to a supervisor does not lead to a satisfactory solution, the employee should go directly to the city's director of affirmative action. Williamson did not do this. Testimony indicated that instead she had ten or twelve additional meetings wit Bozeman requesting that she not be assigned to work with McLeod. It was only after these repeated efforts that she at last asked the Internal Affairs Division for a transfer out of the Criminal Division because of McLeod's sexual harassment and ultimately filed a claim with the EEOC. The city argued that since Williamson did not go directly to the city's director of affirmative action after Bozeman's failure to address her complaint it should not be liable. The court, however, found Williamson's repeated complaints to Bozeman were an adequate showing of her attempt to avoid further harm. An employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law [15]. That is, an employer cannot avoid liability by developing a complex and lengthy system for reporting harassment that would allow the abuse to go on unabated while the victim maneuvers through a bureaucratic maze in search of redress.

In *Edwards v. State of Connecticut Department of Transportation,* another of the cases tried in the wake of *Ellerth,* the district court again denied a defending employer's request for summary judgment [16]. This time, however, the genuine issue of material fact cited was whether the Department of Transportation's offering the plaintiff a transfer and indicating it would investigate her charges were sufficiently prompt and effective to relieve it of liability for the allegedly hostile work environment, since it took four months to respond to her complaint and she felt equally threatened by harassment at the new facility. Edwards

testified under oath that she feared for her personal safety because of communications between the garages.

SUMMARY

These cases appear to signal the demise of the summary judgment as means for resolving hostile environment sexual harassment suits involving no tangible employment actions. The courts have always recognized that evaluating the severity and pervasiveness of a harasser's conduct on summary judgment is often difficult and, in many cases, inappropriate [17]. There are difficult problems of proof in sexual harassment cases and recognized dangers in the robust use of summary judgment [18]. The Supreme Court's affirmative defense for employers will now require triers of fact to weigh the "reasonableness" of care provided by the employer and the "promptness" of action taken as well as the "reasonableness" of the employee in acting to take advantage of any preventive or corrective opportunities to avoid harm. These are subjective judgments acknowledged to be the province of juries, not judges.

Juries, however, can be unpredictable and they appear to favor plaintiffs in lawsuits against employers. Members of the jury in employment cases inevitably identify with the plaintiff, often thinking "there, but for the grace of God, go I." Juries are seldom composed of managers, but are more commonly the employee's peers [19, p. 68]. As a result, plaintiffs win 70 percent of jury trials [19, p. 68].

Statistics further indicate that fear of jury bias in employment cases causes employers to seek out-of-court settlements. In Indiana, for example, 20 percent of cases with future jury trials were settled out of court, while only 2 percent of cases to be decided by judges were settled out of court [20]. Thus, the Supreme Court's rulings in *Ellerth* and *Faragher* may ultimately remove such hostile environment harassment suits from the courtroom altogether. The new affirmative defense for employers begs for jury definition, and for employers a jury trial is both expensive and risky. With this in mind, the prospect of out-of-court settlement becomes a more appealing and controllable cost of doing business.

This predicted outcome has both a positive and a negative aspect. The good news may be that employers faced with repeated settlement costs will see the need to clean up their acts and exercise the reasonable care and prompt attention needed to assure they have done all they can to eliminate hostile environments in the workplace. The bad news is that the promise of out-of-court settlements may give rise to a rash of unfounded nuisance claims unfairly increasing the cost of doing business for all employers.

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ENDNOTES

1. *Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257 (1998), 1998 U.S. LEXIS 4217 [* pagination].
2. *Faragher v. City of Boca Raton,* 118 S.Ct. 2275 (1998), 1998 U.S. LEXIS 4216 [* pagination].
3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).
4. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65 (1986).
5. Civil Rights Act of 1991, 42 U.S.C.A. § 1981 A (b)(3).
6. The Restatement (Second) of Agency (hereinafter Restatement) § 219(1), 219(2)(b) (1958).
7. *Ford Motor Co. v. EEOC,* 458 U.S. 219, 231, n. 15 (1982).
8. *EEOC v. Shell Oil Co.,* 466 U.S. 54, 77 (1984).
9. *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 358 (1995).
10. Rule 56(c), Fed. R. Civ. P.
11. Charles Alan Wright et al., *Federal Practice and Procedure § 2729,* 3rd ed., 1998.
12. *Harrison v. Eddy Potash, Inc.,* 1998 U.S. App. LEXIS 27934, *13.
13. *Harrison v. Eddy Potash, Inc.,* 112 F.3d 1437, 1442 (10th Cir. 1997).
14. *Williamson v. The City of Houston,* 148 F.3d 462 (1998).
15. *Young v. Bayer Corp.,* 123 F.3d 672 (7th Cir. 1997).
16. *Edwards v. State of Connecticut DOT,* 1998 U.S. Dist. LEXIS 15018.
17. *Ponticelli v. Zurich American Ins. Group,* 1998 U.S. Dist. LEXIS 13767, No. 96 Civ. 9095 RWS, 1998 WL 564012 (S.D.N.Y. Sept. 3, 1998); *DiLaurenzio v. Atlantic Paratrans, Inc.,* 926 F.Supp. 310, 314 (E.D.N.Y. 1996).
18. *Gallagher v. Delaney,* 139 F.3d 338, 342, 343, 346 (2d Cir. 1998).
19. Jay Finegan, Law and Disorder; employee lawsuits, *INC.,* Apr. 1994, pp. 64-71.
20. *Wall Street Journal,* June 19, 1995, p. B5.

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