

EMPLOYER LIABILITY FOR SUPERVISORY SEXUAL (AND RACIAL) HARASSMENT AFTER FARAGHER AND ELLERTH

By

Jeff Scott Olson

INTRODUCTION

In Faragher v. City of Boca Raton, ___ S.Ct. ___ (1998), and Burlington Industries, Inc. v. Ellerth, ___ S.C. ___ (1998), the United States Supreme Court undertook to resolve confusion among the circuits concerning when employers will be vicariously liable for sexual harassment perpetrated by supervisory personnel. Though the formal holding of the Court creates little advantage for victims who are harassed by supervisory personnel compared to those who are harassed by co-workers of equal rank, certain nuances of the Court's opinion open new possibilities for creative advocacy.

I. THE COURT USED PUBLIC POLICY TO CRAFT A CAREFULLY WORDED HOLDING AIMING TO RESOLVE THE TENSION BETWEEN THE RESTATEMENT OF AGENCY'S BROAD AIDED-BY-AGENCY VICARIOUS LIABILITY STANDARD AND MERITOR'S REQUIREMENT THAT THERE BE SOME LIMIT ON EMPLOYER LIABILITY FOR SUPERVISORY HARASSMENT.

In Faragher, a female lifeguard had been subjected to uninvited and offensive touching, lewd remarks, and offensive talk about women by two supervisors. A district court had found that Faragher had been subjected to sexual harassment which was sufficiently serious to alter the conditions of her employment, and awarded her nominal damages of \$1.00. The en banc Eleventh Circuit reversed the judgment in Faragher's favor, holding that Faragher's supervisors had been acting outside the scope of their employment when they harassed Faragher because their wrongful actions had not been actuated by a purpose to serve their employer's ends, the traditional test of whether an agent's act lies within the scope of his or her employment. The Eleventh Circuit also rejected Faragher's argument that the city was liable because her supervisors had been aided in accomplishing their sexual harassment by their agency relationship with her employer, the City of Boca Raton. The court reasoned that if an employer were liable because an agency relationship led to close proximity and regular contact with the victim, employers would be liable for all sexual harassment perpetrated by all of their employees, and neither traditional agency principles nor the Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), indicate that such a broad construction of agency law should be applied in the context of employer liability under Title VII.

In determining Faragher's case, Justice Souter's analysis began with the observation that the seminal case of sexual harassment decided by the Supreme Court, Meritor Savings Bank v. Vinson, *id.*, had held that employers are not automatically liable for sexual harassment by their supervisors; i. e., there must be some limits upon employer liability for supervisory sexual harassment when it does not involve a tangible employment decision adverse to the victim. Of course, Meritor also directed courts to look to traditional agency principles for determining when employers will be liable for

supervisory sexual harassment. Justice Souter engaged in some competent historical analysis designed to show that the law governing vicarious liability for the acts of an agent, which depends primarily upon whether the agent can be said to have been acting within the scope of his or her employment at the time of the tortious act in question, has been quite malleable both over time, and from one area of the law to another, because of the inadequacy of any single definition of the term "scope of employment." Justice Souter's conclusion from this analysis is that courts have molded their treatment of the term "scope of employment" to engineer employer liability for torts which are foreseeable consequence of the employer's business, whether or not the perpetrator can be said to have been activated by a purpose to serve his or her employer. Since, as Judge Posner's opinion noted in the Seventh Circuit's en banc treatment of Ellerth at 123 F.3d at 511, "everyone knows by now that sexual harassment is a common problem in the American workplace," Justice Souter said that given the way courts have traditionally handled the scope of employment analysis, the very commonality of sexual harassment "might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business. . . ." ___ S.Ct. ___.

Justice Souter rejected this conclusion both because of Meritor's holding that there must be some limits on employer liability for supervisory sexual harassment, undisturbed by Congress in spite of substantial intervening amendments to Title VII, and because of the uniformity of lower court opinion that employers are liable for co-worker harassment only under negligence theory, never under a theory of vicarious liability.

Of course, the Restatement of Agency also provides for vicarious liability where an agent acts outside the scope of his employment, under certain circumstances (enumerated in § 219(2)(d) of the Restatement). Most relevant of these exceptions is where an agent is aided in accomplishing his wrongdoing by the existence of the agency relationship. Justice Souter recognizes that there are good reasons for holding that supervisors are always aided by their status when they undertake to sexually harass a subordinate. This analysis would lead to employer liability for all acts of supervisory sexual harassment, in Justice Souter's view, were it not for Meritor's caution that employers are not automatically liable for all harassment by supervisors.

Thus, Justice Souter reasons that the Court should recognize a general rule of employer liability for supervisory sexual harassment, but must erect certain limitations to that rule because of the limiting language of Meritor. He finds the limitations which he chooses in public policy, specifically, Title VII's policy that employers should take steps, including the promulgation of complaint procedures, to attempt to prevent sexual harassment from occurring or continuing, and the policy of our entire tort system that if victims can avoid harm, the law charges them with an obligation to do so.

Based on these policy considerations, Justice Souter states the following holding, which is set forth in Justice Kennedy's opinion in Ellerth in exactly the same words:

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. While proof that an employer had promulgated an antiharassment policy with a 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 an 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. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Applying its new rule to Faragher's facts, the Court had little difficulty in holding that as a matter of law Faragher was entitled to judgment and there was no need to remand for fact finding to apply the new test to the circumstances at bar. The Court held that the City of Boca Raton would be utterly unable to satisfy the first element of its affirmative defense obligation for three reasons: (1) "the city had entirely failed to disseminate its policy against sexual harassment among the beach employees"; (2) "its officials made no attempt to keep track of the conduct of supervisors" like Faragher's bosses; and (3) "the city's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints." ___ S.Ct. at ___.

Justice Kennedy's opinion in *Burlington Industries v. Ellerth* stated the same rule and applied it to a factual situation in which the parties had been arguing about whether stated but unfulfilled threats of job consequences could amount to the sort of quid pro quo harassment that would automatically lead to vicarious liability. While the Seventh Circuit opinion below had refused to recognize a difference between cases in which threats of formal employment actions are used against an employee but not carried out in cases in which they are carried out, the Supreme Court does recognize this difference in *Ellerth*. Scenarios in which threats are made but not carried out must be analyzed under the rule quoted above, with the two-element affirmative defense noted there being afforded to the employer. Cases in which threats are carried out lead to vicariously liability with no affirmative defense available.

II. EMPLOYERS SHOULD NOW ALSO BE LIABLE FOR SUPERVISORY HARASSMENT WHERE (A) THE VICTIM ACQUIESCES, OR WHERE (B) A TANGIBLE EMPLOYMENT ACTION FACILITATES THE HARASSMENT.

Ellerth answers two important questions about employer liability for supervisory harassment by implication only. The first of these concerns the proper analysis to be

employed where the target of supervisory threats acquiesces and engages in sexual activity or otherwise does what the supervisor wants in order to avoid the threatened consequences. Ellerth strongly implies that because such a chain of events leads to a concrete alteration in the conditions of employment of the victim, i.e., she has an additional duty added to her job description, there should be no affirmative defense available. Just as well as the consummated threat in response to nonacquiescence, acquiescence demonstrates an extreme example of the aided-in-agency rule: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." ___ S.Ct. at ___. Certainly, it is equally true that a supervisor could not obtain sexual perks by threatening a tangible employment decision "absent the agency relation."

The second question to which the answer is only implied in Ellerth concerns the analysis to be employed where the supervisor's implementation of a tangible employment action is not a retaliatory response to nonacquiescence or simply the hostile consummation of a campaign of sexual harassment, but rather a mechanism designed to make sexual harassment easier to perpetrate. In *Harrison V. Eddy Potash, Inc.*, 112 F. 3d 1437 (10th Cir. 1997), the Tenth Circuit had found employer liability where the supervisor used his authority to direct workers in their tasks in order to send his chosen victim to remote areas of the worksite where he could harass her without fear of detection. Ellerth implies that this holding remains good law, because, in its chain of reasoning, it is the presence of a tangible employment action that is crucial, not its timing.

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. ___ S.Ct. at ___. Certainly, when a supervisor uses the coercive authority of his position to set up an opportunity to act against his chosen victim with impunity, such as by ordering her to a remote area of the workplace as in *Harrison*, or, perhaps, ordering her to accompany him on a weekend convention trip out of town, this is every bit as much "a tangible employment action against a subordinate," as ordering a subordinate to clean toilets with a toothbrush as a sanction for nonacquiescence. In both cases the supervisor uses the formal authority delegated to him by the employer to order the employee into less favorable conditions of employment, in one case where she will be sexually harassed and in another case where she will be subjected to less desirable work.

III. EXISTING THEORIES OF EMPLOYER LIABILITY ARE STRENGTHENED BY THE SUPREME COURT'S NEW OPINIONS: (1) PROXY LIABILITY; (2) NEGLIGENCE LIABILITY; AND (3) ABSOLUTE LIABILITY FOR TANGIBLE EMPLOYMENT ACTIONS.

In *Faragher*, the Supreme Court recognized the general rule that in cases where sexual harassment is perpetrated by very high level officials, employer liability may arise from simply determining these officials to be the organization's proxy. ___ S.C. at ___. *Harris*

v. Forklift Systems, 510 U.S. 17, 19 (1993), is cited as an example of this genre, because in that case the abusive atmosphere was created by the president of the corporate employer. Other cases are cited for the proposition that an individual sufficiently high in the management hierarchy, such as a proprietor, partner or corporate officer can, essentially bind the employer by his acts of sexual harassment.

For small employers, this is the downside of Faragher; the upside is that the opinion recognizes that they may be able to enforce their expectations against sexual harassment informally, without promulgating written policies and complaint procedures. ___ S.Ct. at ___.

Faragher recognizes, and Ellerth actually strengthens, the traditional negligence theory of employer liability applied to co-worker harassment cases. Justice Kennedy's opinion in Ellerth states succinctly, "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." ___ S.Ct. ___. This is a better formulation of the negligence rule than most previous statements, which simply required the employer to act promptly and appropriately, but did not require a showing of success in order to avoid a negligence finding. This formulation also eliminates any doubt that constructive knowledge as well as actual knowledge triggers an employer's obligation to act.

Finally, both Faragher and Ellerth recognize an employer's liability for tangible employment actions which occur in connection with a campaign of hostile environment sexual harassment or otherwise. Another phrase for a "tangible employment action" is a "materially adverse change" which, according to Crady v. Liberty National Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993), can include "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."

IV. A LOOK AT THE TWO PART, SLIDING SCALE AFFIRMATIVE DEFENSE CREATED BY FARAGHER AND ELLERTH.

The affirmative defense quoted above contains two necessary elements, both of which are the employer's burden and both of which must be proven to establish the defense. It can be a complete defense to liability. As noted in Faragher, it can also be a partial defense to damages, where the employer proves that, for example, a campaign of harassment started without any contribution from the victim's negligence, but continued longer than it had to because the victim negligently failed to report or otherwise address it. Under such circumstances, the victim's negligence would create a cutoff date after which she would accrue no damages for further harassment.

What now is the difference between a co-worker negligence case and a supervisory vicarious liability case? On the surface, not much. In a co-worker harassment case, where employer liability is premised on employer negligence, there has always been an issue as to whether the employer learned of the harassment as rapidly as it should have and

whether, when it knew or should have known of the harassment, it did in fact take prompt and appropriate remedial action. Failure to learn early enough or failure to act early or firmly enough was negligence. This issue is transplanted in identical terms into the supervisory harassment scenario by the Supreme Court's new opinions. Only the burden of proof has shifted.

Similarly, employee negligence has also always been at issue in co-worker harassment cases where employer liability has been premised on employer negligence. This is because the employer's obligation to exercise ordinary care only kicks in at that point at which it knows or ought to know of the harassment. If its only available conduit of information is the employee herself, her conduct in failing to report the harassment may let the employer off the hook for a considerable portion or even all of her injuries. The employer's obligation to act arises late in the day or never because of the employee's negligent failure to report. This issue remains the same in the supervisory harassment scenario created by the new opinions, with only the burden of proof shifting to the employer.

Although these observations make it look as if employers have gained ground with these rulings, subtle nuances of the opinion provide ammunition for plaintiffs' lawyers. First, the actual track record of an employer's sexual harassment policy, and the nature and extent of its communication to employees become crucial under the new formulation. This is so because whether an employee is negligent in failing to utilize an employer's sexual harassment mechanisms may depend, at least in part, on whether the employer has as the Court suggests it may, "a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." Faragher, ___ S.Ct. ___. Since employees won't be negligent for failing to utilize a proven and effective mechanism which entails little risk or expense unless they know that it is proven, know that it is effective, and know that they won't suffer for employing it, many current sexual harassment policies will be weighed in the balance and found wanting when the analysis reaches the employee-negligence phase. This is true because many employers don't tell anyone, even a complaining victim, what the result of a sexual harassment investigation has been or what if any corrective actions have been taken as a result.

For the victim, this means that filing a sexual harassment complaint through channels is like dropping it into a black hole. The victim never learns whether her concerns about sexual harassment have been determined to be valid by the company, or whether the perpetrator's denials have been believed and she is now branded as a false complainer. The harassment may, indeed, stop after a time, but in an atmosphere of corporate secrecy the victim cannot know whether this is because the company has acted on her complaint and sanctioned the perpetrator, or whether the perpetrator has simply lost interest, found a new target, or been deterred by her personal firmness.

Similarly, if the employee, at some point after filing a harassment complaint has an unhappy experience with management herself, can she know whether it is the consequence of her complaint, either because such complaints are not really welcomed

by the company or because her particular complaint is believed to have been unfounded. If such a victim who has used the complaint system and received no concrete report from the company confides in other victims who are considering using it, they won't be encouraged by what they hear. Is it unreasonable of them to attempt to deal with the situation themselves for as long as they can without risking the exposure of a formal complaint? A great argument can be made that it is quite reasonable for them to withhold their complaints where they don't know whether the company's system is proven, where they don't know whether the company's system is effective, and where they don't know whether the company's system is risk-free for the victim. No rational trier of fact would expect employees to simply take the company's word on these matters.

Victims will be justified in being even more cautious about taking their employer's word for the efficacy of an harassment policy where it is included in a typical employee handbook. This is because, in response to court decisions recognizing employee's contract claims arising out of alleged employer violations of employee handbook provisions, the typical employee handbook now contains a disclaimer of contractual effect. Such a disclaimer is, after all, essentially a statement that the employer is not bound to follow its policies and may ignore or deviate from them without consequence of any kind. A solid argument can be made that it is non-negligent for an employee to decide against staking her career on a policy stated in "maybe-we will-and-maybe-we-won't" terms.

Also, since it is so obvious and so widely known that victims of sexual harassment themselves have a variety of reasons to hesitate before reporting it, an employer policy probably ought to require reporting by those who are not victimized by sexual harassment but merely witness it. A sexual harassment policy that does not require witness reporting may fail the test of reasonable-ness.

Finally, the very way in which an employer's sexual harassment policy is communicated to workers may enter into the calculus of reasonableness. Is it simply one page of a 100-page policy manual which is given to every employee on their first day along with reams of insurance information, security information, and, incidentally, the instructions the employees need to perform their own jobs adequately so as not to be fired? Or, is it important enough to the employer that it is distributed separately, perhaps at a short training session on sexual harassment policy for new employees, perhaps with some audiovisual aids or videotape vignettes? Does the employer share any of the policy's history with new employees to demonstrate that it is "proven and effective"? All of these issues are now fair game at the affirmative defense stage.

CONCLUSION

How, now, is a lawyer to advise a client who comes in to confide that her supervisor has threatened to fire her unless she fellates him? If she refuses and is fired she can recover. If she acquiesces, she can probably recover. If she refuses, complains to the company, and is not fired, she is up against the new affirmative defense and probably cannot recover.

As Justice Souter noted in *Faragher*, an employee who is being sexually harassed by a co-worker is, her legal position to one side, substantially better off than an employee who is being sexually harassed by a supervisor. She can walk away or tell the co-worker where to go. She could expect to be disciplined for showing this sort of disrespect to a supervisor. As a result of the Supreme Court's new opinions in *Faragher* and *Ellerth*, employees are marginally better off, as a legal matter, to be harassed by supervisors than they are to be harassed by co-workers, because their cases will be marginally easier to prove against their employers. While the legal advantage to being sexually harassed by a supervisor is slight, however, the practical disadvantage is substantial and, therefore, on balance, most informed employees should continue to prefer to be harassed by co-workers. It also remains true that it is probably better to have a good left-jab, right-cross combination than a good court case.