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The Affirmative Defense to a Vicarious Liability Sexual Harassment Claim

Ten years after *Faragher/Ellerth*, an uncertain road for employers

Ten years ago, the United States Supreme Court issued its landmark decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), which laid out the path for when an employer will be vicarious liable for sexual harassment by a supervisor under Title VII of the Civil Rights Act of 1964 ("Title VII"). The initial determination under the court's analysis is whether the supervisor's conduct constituted a "tangible" or "intangible" employment action.

If "tangible" — hiring, firing, failing to promote, reassigning with significantly different responsibilities, making a decision causing a significant change in an employee's benefits — then the employer will be held vicariously liable and an affirmative defense will not be available. On the other hand, if the conduct involved "intangible" employment action — such as the creation of a hostile work environment — then protection from liability can be afforded to an employer if it can establish a two-pronged affirmative defense, which has become known as the *Faragher/Ellerth* defense.

To do so, the employer bears the burden of showing: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. (It should be noted that all states have not embraced the *Faragher/Ellerth* defense under state fair employment practices laws. While not officially adopting the defense, New Jersey courts have been amenable to its application.)

How have employers fared after 10 years under this framework? On many occasions, employers have successfully utilized the defense by demonstrating effective policies, prompt remedial action and an employee's failure to exhaust available avenues. One byproduct is that more employers have enacted harassment policies and conducted employment training. However, as shown by the *Faragher* and *Ellerth* decisions and their progeny, courts will look beyond the surface before providing employers with the benefit of the defense.

To utilize the affirmative defense, the employer must first show that "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior." The key to satisfying this prong is the distribution and implementation of an effective antiharassment policy. A well-designed policy generally contains a detailed definition of conduct constituting harassment and a complaint structure. Training has also become a key component of an effective policy, especially supervisory training. This is equally so under New Jersey law. *Gaines v. Bellino*, 173 N.J. 301 (2002). Merely having a policy and conducting training alone, however, will not be sufficient to meet the defense, and courts will look at several factors to determine whether the employer's burden has been fulfilled.

In terms of the dissemination of the policy, it is important that every employee receives a copy of the policy and that records of receipt are kept. This is especially important if a revised policy is issued that makes consequential changes. The court in *Frederick v. Sprint/United Mgmt Co.*, 246 F.3d 1305 (11th Cir. 2001), denied summary judgment on the *Faragher/Ellerth* defense, in part, because there was a question of fact over the distribution of a revised harassment policy that changed the persons to whom complaints should be made, thereby raising a question of notice to the employees.

Courts have given a lot of attention to the effectiveness of the complaint

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procedure. An effective policy should provide several avenues for an aggrieved employee to report a complaint — especially one that bypasses the harasser. Courts have also looked favorably on policies that provide a second avenue of review of the complaint if an employee is not satisfied with the resolution, and have upheld the use of the defense when the employee fails to utilize the follow-up procedure. *Lauderdale v. Texas Dep't of Criminal Justice, Institutional Div.*, 512 F.3d 157 (5th Cir. 2007); *Madray v. Publix Supermarkets*, 208 F.3d 1920 (11th Cir. 2000).

In determining whether a given policy is effective, courts have considered the needs of the specific workplace, and in some cases, raised the standard. For instance, the Seventh Circuit recently denied the application of the defense in two cases involving the restaurant industry, finding that the antiharassment policies were ineffective because they were not designed for the specific understanding of the teenage workforce typically found in that industry. *See Doe v. Dairy*, 456 F.3d 704 (7th Cir. 2006); *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007). Other employers have been chided for requiring complaints to be made to people who work during the day, thereby having no one accessible for people on alternate shifts.

Additionally, most courts have also made it clear that a reasonable antiharassment policy will not absolve an employer of vicarious liability under Title VII if the employer fails to promptly and thoroughly investigate an employee's harassment complaint. Some of the deficiencies noted by courts have been the failure to investigate a complaint, the timeliness of the investigation, the thoroughness of the investigation — including the failure to interview the alleged harasser and appropriate supervisors, the qualifications of the investigator, and the actions (or lack thereof) taken as a result of the investigation. For instance, in *Clegg v. Falcon Plastics, Inc.*, 174 Fed. Appx. 18 (3d Cir. 2006), the Third Circuit denied summary judgment because of a question of fact regarding the employer's diligence and actions during the investigation.

The second prong of the affirmative defense requires the employer to prove that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid harm. There are generally three subissues to the second prong: (1) did the employee complain?; (2) was the complaint timely made in order to allow an employer to take necessary steps towards remedying the situation?; and (3) was the complaint made to the appropriate person in a properly communicative fashion?

While the U.S. Supreme Court in *Faragher* and *Ellerth* conveyed that an employee's failure to use any complaint procedure will "normally suffice" for the employer to prove the second prong, such is not always the case. For instance, the District Court of New Jersey in *Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789,(D.N.J. 2002), held that the employee's failure to complain of the specific conduct at issue could be excused by a jury because she had previously observed on several occasions her employer's failure to take seriously previous harassment complaints.

Similarly, the Third Circuit in *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), which involved a national origin hostile environment claim, held that an employee's significant delay in reporting harassing conduct is not necessarily unreasonable where the employee has a legitimate fear of aggravating a situation. Courts, however, have required that any such fear be "credible," based on "more than the employee's subjective belief." *See Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001). Courts have also looked at the relationship between the alleged harasser and the individuals responsible for investigating complaints, as well as threats made by the alleged harasser or others in the company about the impact a complaint can have on future employability.

Regarding the complaint itself, an employee is generally required to complain of harassment to those persons listed in the reporting section of an antiharassment policy. As previously mentioned, "bypass" language providing employees with alternative reporting contacts is required in order to avoid a problem where the harasser is the same person named in the policy for receiving complaints. Employers should use caution in wording their policies, however, as broad language might place a duty on all supervisors and managers to report incidents of harassment. *See Clark v. United Parcel Serv.*, 400 F.3d 341, 349-51 (6th Cir. 2005). Courts have also been lenient on what constitutes a complaint, finding that even an informal complaint, without mention of "harassment," can be sufficient. *Olson v. Lowe's Home Ctrs., Inc.*, 130 Fed. Appx. 380 (11th Cir. 2005).

While 10 years of post-*Faragher/Ellerth* case law have provided a foundation upon which employers can construct and implement antiharassment policies which will serve to protect against liability for supervisory conduct, many courts are nonetheless holding employers to a high standard and are willing to chip away at the application of the defense.

As a result, employers should take special care to implement a well-designed, well-publicized antiharassment policy, conduct periodic harassment training, and promptly and thoroughly investigate and remediate any incidents of harassment. The test of time will show the strengths (or weaknesses) of the *Faragher/Ellerth* defense. ■