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Managing Sexual Discrimination/Harassment Claims in the #Me Too Era

I. Background

Many people think they know or would know sexual harassment if they saw it happening—whether to themselves or another. Case decisions have revealed that this form of unlawful conduct has been occurring for decades in the American workplace under such guises as banter, horseplay, innocent teasing, and initiation rights and employees of all ranks, including those at management level have ignored or facilitated the harassment or simply are unaware that the conduct is offensive.

The famous Anita Hill/Clarence Thomas Senate hearings brought this issue to national attention in the early 1990s and by doing so encouraged greater awareness of the problem, better reporting by victims and more stringent enforcement of laws governing this form of discrimination. In addition, employers now understand that they can be prosecuted and embarrassed and end up paying large sums of money for harassing actions of their workers and supervisors. As a consequence, more employers have become anxious about the threat of litigation, though not necessarily more enlightened about the kind of gender-based conduct that is no longer acceptable in the workplace.

II. What Exactly Is Sexual Harassment?

A good starting point for answering this question is the law that defines and regulates such conduct and provides remedies to successful claimants. Title VII of the Civil Rights Act of 1964, and its 1991 amendments, prohibit, among other things, discrimination based upon gender. Interestingly, sexual harassment is not mentioned by name in Title VII; however, the EEOC published Guidelines in 1980, and in them declared that harassment of individuals based upon their gender is a form of sex discrimination covered by Title VII. Since then, federal courts have routinely applied the EEOC Guidelines in Title VII claims of sexual harassment.

The EEOC and the cases interpreting the Guidelines have broadly defined sexual harassment as workplace conduct which includes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” usually directed against ab employee by another employee. The EEOC and the courts have used this description as a

general barometer and then applied it to create two different categories of prohibited conduct, one called "*quid pro quo*" and the other referred to as "hostile work environment." Common to both kinds of prohibited harassment is that the conduct directed to the employee(s) is both *sexual in nature and unwelcome.*

III. Quid Pro Quo Sexual Harassment

Quid Pro Quo sexual harassment occurs when one employee, usually in a supervisory or managerial position giving that person control over another's employment conditions, demand, either directly or indirectly, that a subordinate employee provide sexual favors as a condition of receiving or keeping some particular tangible employment benefit. Those benefits can include a promotion, a raise, good evaluations, and continued employment. The subordinate who fails to acquiesce to the sexual demands of the supervisor or manager may suffer the consequence of a demotion, a poor evaluation or even discharge from employment.

IV. Hostile Work Environment

A hostile work environment is created when the workplace is so tainted with sexual content that employees experience an unreasonable interference with their work performance and find themselves facing an "intimidating, hostile or offensive working environment." (EEOC Guidelines) The content can arise from such conduct as sexually-laden jokes, posters, threats or other offensive materials.

V. Same Sex Harassment

The majority of complaints of sexual harassment are brought by women against men. However, the reverse situation does occur. The Supreme Court has recognized that same sex harassment is also prohibited under Title VII. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998).

VI. Employer Liability For Supervisory Harassment

As a general rule, an employer will be automatically liable for the sexual harassment of the worker by another when there is an abuse of authority such as when a supervisor threatens to fire a subordinate if she refuses sexual advances or actually takes some other negative work-related action against the subordinate because of her refusal to respond to his demands. In such situations, the supervisor is deemed to be equivalent to the employer itself because of the degree of control that the supervisor has over the terms and conditions of the subordinate's employment. *Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257 (1998)

Who Qualifies as a Supervisor?

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee (EEOC Guidelines). This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee. *Parkins v. Civil Constructors of Illinois, Inc.,* 163 F. 3d 1027, 1034 (7th Cir. 1998). An individual is also qualified as a supervisor if he or she is authorized to direct another's

employee's daily work activities, even if that individual does not have authority to undertake or recommend tangible job decisions. (EEOC Guidelines). For example, in G*rozdanich v. Leisure Hills Health Center,* 25 F. Supp. 2d 953, 973 (D. Minn. 1998), the court held a "charge nurse" who had authority to control an employee's daily activities and recommend discipline was considered a "supervisor" for Title VII purposes. The court in G*rozdanich*stated, "[I}t is evident that the Supreme Court views the term 'supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing and promotion." However, an individual who merely relays another supervisor's instructions regarding work and reports back or is in charge of only a limited number of tasks or assignments is not consider a "supervisor." Yet an individual with apparent authority over an employee may qualify as a "supervisor" for Title VII purposes. *Liampallas v. Mini-Circuit Lab, Inc.,* 163 F.3d 1236, 1247 (11th Cir. 1998).

What Supervisory Conduct Will Implicate the Employer?

The United States Supreme Court issued two decisions now twenty years ago for determining when an employer is liable for sexual harassment by its supervisors. Under these standard, employers can be liable for supervisory sexual harassment even if they neither know, nor had any reason to know, the harassment was occurring.

In *Burlington Industries v. Ellerth,* 118 S.Ct. 2257 (1998), Kimberly Ellerth alleged that she was subjected to repeated offensive remarks and gestures from her supervisor, Theodore Slowik, including threats that he would deny her tangible job benefits if she did not submit to his sexual advances. Ellerth rejected Slowik's advance, yet suffered no detriment. In fact, she was even promoted. Even though Burlington had a policy against sexual harassment, Ellerth never complained about Slowik's actions to anyone in authority. After Ellerth resigned, she sued Burlington for sexual harassment.

In *Faragher v. City of Boca Raton,* 118 S. Ct. 1115 (1998), Beth Ann Faragher worked as a lifeguard for the City of Boca Raton. She alleged that two lifeguard supervisors subjected her to unwanted touching and offensive sexual comments. According to Faragher, one of the supervisors told he would never promote a woman to the rank of lieutenant. The other supervisor told her, "date me, or clean the toilets for a year." Faragher told another supervisor about the incidents but she regarded these discussions as informal conversations, not formal complaints, and he did not tell anyone about his conversations with Faragher. Although the City has a sexual harassment policy, it was never given to the Marine Safety Section of the City, consequently, Faragher's supervisors were not aware of the policy.

In deciding these two cases, the Supreme Court announced the standards which now govern employer liability for supervisory sexual harassment. The Court first held that if supervisory harassments results in a "tangible employment action" such as firing or demotion, the employer is liable for harassment and damages *even if the employer did not know about the harassment.* This holding confirmed the majority view of the lower federal courts.

In considering employer liability for supervisory harassment that does not result in a tangible employment action, however, the Court departed from the majority view of the time and adopted an expanded standard. Employers are now liable for this type of harassment, also known as "hostile work environment harassment," whether or not they knew or should have

known of the misconduct, unless the employer can establish: (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

Applying this new standard to the case before it, *Faragher* held that because the City had a sexual harassment policy, but it had not been given to supervisory employees, the City failed to exercise reasonable care to prevent the supervisors' harassing behavior. *Ellerth* was sent back to the lower court for a determination as to whether the employer could demonstrate that it exercised reasonable care, and that Ellerth unreasonably failed to avail of the remedies provided.

VII. Tangible Job Detriment

In *Ellerth* and *Faragher,* the Supreme Court defined tangible job detriment as a "significant change in employment status" and recognized that the change in employment status need not be averse to be actionable. While the EEOC Guidelines state that tangible job detriment may include a substantial change in work assignment, the Court of Appeals for the Fourth Circuit held assigning extra work to an employee and denying her the opportunity to attend a professional conference after the employee rejected her supervisor's sexual advances is not a tangible job detriment. *Reinhold v. Commonwealth of Virginia,* 151 F. 3d 172, 175 (4th Cir. 1998).

In addition, altering an employee's job title qualifies as tangible employment action only if there is a coinciding change in salary, benefits, duties or prestige. *Flaherty v. Gas research Institute,* 31 F. 3d 451. 457 (7th Cir. 1994). Insignificant changes in employment status are not considered tangible. The tangible job detriment must also be the result of the discriminatory motive in order to be actionable. *Newton v. Caldwell Laboratories,* 156 F. 3d 880, 883 (8th Cir. 1998).

VIII. What Defenses are Available to an Employer?

The Supreme Court revised this standard in *Ellerth* and *Faragher.* The Court ruled that an employer will be liable for a supervisor's harassment, unless it can prove by a preponderance of the evidence: (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive measure or corrective opportunities provided by the employer, or to avoud harm otherwise.

Employer Exercised Reasonable Care

In F*aragher,* the Court held that because the City had a sexual harassment policy, but it had not been given to supervisory employees, the City failed to exercise reasonable care to reven the supervisors' harassing conduct. *Ellerth* was sent back to the lower court for a determination as to whether the employer could demonstrate that it exercised reasonable care, and that Ellerth unreasonably failed to avail herself of the remedies provided.

The Supreme Court standard does not require that an employer's response to an employee's complaint of supervisory sexual harassment successfully prevent subsequent harassment, only that the employer's actions were reasonably likely to check future harassment. *Savino v. C.P. Hall Co.,* 1999 WL 1172892 (7th Cir. 1999); *Parkins v. Civil Construction of Illinois,* 163 F. 3d 1027, 1036 (7th Cir. 1999). In other words, an employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct. *Caridad v. Metro-North Commuter R.R.,* 191 F. 3d 283, 295 (2d Cir. 1999).

Employers who have adequate policies on sexual harassment and reporting and corrective procedures in place should be able to satisfy the first element of this defense in Title VII sexual harassment cases. However, even the best policy and complaint procedures will not alone satisfy the employer's burden of proving reasonable care if, in the particular circumstances of the claim, the employer failed to implement the process effectively. (EEOC Guidelines).

Employee Unreasonably Failed to Use the Employer's Complaint Procedures

The second element of the Supreme Court's standard is more problematic for employers defending sexual discrimination and harassment cases. Although the Supreme Court recognized proof that an employee unreasonably failed to use the complaint procedure should be enough to satisfy the second element, it did not address the circumstances under which the employee's failure to do so will be considered "unreasonable." While proof that an employee unreasonably failed to use the employer's complaint procedures will usually satisfy the employer's burden, an employee who failed to complain does not carry the burden of proving the reasonableness of that decision. (EEOC Guidelines). The employer must demonstrate the employee's failure to complain was unreasonable.

In determining whether or not an employee reasonably took advantage of preventive or corrective opportunities or tried to avoid harm, lower federal courts and the EEOC Guidelines have recognized that an employee's complaint of sexual harassment will not automatically indicate an employee acted reasonably. For example, if an employee did not provide information to support his or her allegation of sexual harassment, gave false information or did not cooperate in the investigation, the complaint would not qualify as a reasonable effort to avoid harm. (EEOC Guidelines). In *Scrivner v. Socorro Independent School District,* 169 F. 3d 969, 971 (5th Cir. 1999), the court held an employee acted unreasonably where the harassment began during the summer but the plaintiff did not complain about the harassment until the following March and also misled investigators by lying about the harassment.

However, an employee may be held to have acted reasonably even if he or she did not use the employer's complaint process immediately. For example, an employee may wait to complain or fail to use the employer's complaint process because he or she reasonably feared retaliation for complaining, reasonably believed the complaint process mechanism was ineffective or reasonably saw obstacles to making a complaint, such as undue expense or inaccessibility. (EEOC Guidelines).