

Supreme Court Clarifies Employers' Liability for Sexual Harassment

By Karen Sutherland

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Supreme Court Changes Sexual Harassment Standards under Title VII

In 1998, the United States Supreme Court issued two decisions interpreting the federal sexual harassment law under Title VII. The decisions, *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), held that an employer is liable for the unwelcome and threatening sexual advances if a supervisor toward a subordinate employee *even if the employer did not know that the conduct was occurring*, and even though the employee who refuses the advances suffers no adverse, tangible job consequences.

The Supreme Court also addressed vicarious liability for sexual harassment by supervisors and allowed an employer's adoption of a sexual harassment policy to be an affirmative defense to a harassment claim under certain circumstances.

New Court Decisions Interpret Faragher and Burlington Industries

Employment law attorneys for both plaintiffs and defendants appreciated the Supreme Court's guidance on the subject, but the real test for most practitioners is how the Supreme Court's rulings will be interpreted by the Ninth Circuit Court of Appeals (which does not always strictly follow the guidance of the Supreme Court) and the U.S. district courts in the Ninth Circuit.

The most detailed analysis appears in *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1148 (E.D. Cal. 1998), where the court held that the employer's sexual harassment policy and response to plaintiff's claim met the criteria for an affirmative defense under *Faragher* and dismissed plaintiff's sexual harassment claim.

Practical Advice from the Eastern District of California

Though the *Montero* decision has no controlling precedential value in this district, it is a great source of practical advice on implementing the affirmative defenses in *Faragher*. Summarizing and quoting from *Faragher*, the *Montero* court held,

"an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim."

Id., quoting *Faragher*, 118 S. Ct. at 2279.

Implementing this test, the *Montero* court held:

AGCO has met its burden of establishing by a preponderance of the evidence that (1) it exercised reasonable care to prevent and correct promptly the sexually harassing behavior, and (2) plaintiff unreasonably failed to take advantage of the corrective and preventive measures provided by AGCO.

Explaining its holding (and providing good practical guidance for employers hoping to achieve the same result) the court stated:

AGCO exercised reasonable care to prevent sexual harassment by maintaining and distributing a policy prohibiting sexual harassment and by providing a mechanism for employees to report such conduct directly to the Human Resources Department. Moreover, AGCO immediately investigated plaintiff's complaints and acted to correct the same. Conversely, plaintiff unreasonably failed to take advantage of the preventive corrective opportunities provided by AGCO or to otherwise avoid harm.

U.S. Dist. LEXIS 15134 at *12.

Drafting an Effective Sexual Harassment Policy after Faragher

The elements of AGCO's policy and manner in which it conducted its investigation can be seen as a blueprint for a how employers should conduct themselves to avoid potential liability. The policy, which was set forth in the Employee Handbook and several internal memoranda, had the following key elements:

- sexual harassment is "unacceptable;"
- sexual harassment includes unwelcome sexual advances and verbal or physical conduct of a physical nature when such conduct has the purpose or effect of unreasonable interference with an individual's work performance or creating an intimidating, hostile or offensive working environment;
- employees who wish to file a complaint should do so through the Human Resources Department or their supervisors;
- allegations of sexual harassment will be investigated thoroughly;
- substantiated acts of sexual harassment will be met with appropriate disciplinary action up to and including termination;
- all information regarding any specific incident will be kept confidential within the necessary boundaries of the fact-finding process; and
- no reprisals against the employee reporting the allegation of sexual harassment will be tolerated.

Id. at *3-*4.

The Faragher Affirmative Defense Prevails on Summary Judgment Despite Plaintiff's Factual Claims

Despite the anti-harassment policy described above, Montero waited two years before making a complaint. Explaining the delay to the court, she stated that she did not believe the complaint would be "kept away" from her supervisor. The court noted that the supervisor would learn of the complaint during the fact-finding process, but pointed to the confidentiality and anti-retaliation language of the policy and the lack of any evidence to support plaintiff's fear of retaliation. The court further noted that the policy was followed by the employer, and that disciplinary action had been taken, including terminating one employee and "severely warning" two others.

The grant of summary judgment in the *Montero* case shows that at least one court in the Ninth Circuit has taken the *Faragher* decision seriously by ruling that the affirmative defense was sufficient as a matter of law.

Other Decisions Interpreting Faragher and Burlington Industries

The other decisions from courts in the Ninth Circuit citing *Faragher* and *Burlington Industries* are less instructive. In *Hardin v. City of Concord*, 1998 U.S. App. LEXIS 26950 (9th Cir.), an unpublished opinion, the Ninth Circuit Court of Appeals held that the jury instructions in the case regarding vicarious liability of employers in Title VII were consistent with the law of the Ninth Circuit and with the Supreme Court's recent opinions in *Burlington Industries* and *Faragher*. *Id.* at *4-*5. However, the court failed to quote or describe the jury instructions at issue, thereby providing little guidance to anyone reading the opinion.

In *Foster v. Nevada*, 1998 U.S. Dist LEXIS 14744 (D. Nev.), a magistrate held that "where the hostile work environment results from the acts of a supervisor, liability is attributed to the employer, *Faragher v. City of Boca Raton*, 141 L.Ed. 2d 662, 118 S.Ct. 2275, 2292-93 (1988) *as if the employer had enacted a systemic discriminatory policy.*" *Id.* at *12 (emphasis added). The highlighted language, which is not taken from the *Faragher* opinion, is important in the context of the statute of limitations because continuing violations of Title VII can be proved where the conduct is either "systemic" (such as a *de facto* policy) or "serial" (a continuous chain of connected events). The court's rumination on this subject, however, proves to be dicta, as it analyzed the plaintiff's case under a serial theory of continuing violations instead.

Ninth Circuit Refuses to Decide Burlington Industries' Applicability to Retaliation Claims

In one other decision worth mentioning, the Ninth Circuit Court of Appeals was faced with a retaliation-based hostile work environment claim in *Gregory v. Widnall*, 153 F.3d 1071, 1998 U.S. App. LEXIS 21449 (9th Cir. 1998). In *Gregory*, the court cited Ninth Circuit authority regarding the elements of a hostile work environment claim and then stated, "We decline to decide at this juncture whether the recent decision in *Burlington Indust., Inc. v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) applies to retaliation-based hostile work environment claims." LEXIS 21449 at *10.

Primary Benefit is Guidance on Preventive Law

The net effect of these cases is to provide employers and employment lawyers with some guidance on preventive law, and some assistance in evaluating the Title VII employment

complaints that are brought to their attention. As more decisions are issued interpreting *Burlington Industries* and *Faragher*, this complex area of the law should become clearer, to everyone's benefit.

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