Supreme Court Clarifies Employer Liability For Sexual Harassment by Supervisors

The United States Supreme Court decided two long awaited employment discrimination cases on June 26, 1998, clarifying the law with respect to employer liability for acts of sexual harassment by supervisors.[1] The new decisions may have a significant impact on current sexual harassment claims that you may be litigating and on programs that you have established to prevent and/or remedy sexual harassment in the workplace. The purpose of this *Client Alert* is to summarize the Court's decisions and to focus on their practical effect, both on litigation and sexual harassment prevention.

The Decisions

In *Burlington Industries, Inc. v. Ellerth* and *Farragher v. City of Boca Raton*, the Court did *not* consider the question of what constitutes improper sexual harassment. In each case, the Court assumed that the plaintiffs had been subjected to harassment by supervisors that was sufficiently severe and pervasive to violate Title VII. Instead, the key question was whether the employer could be held vicariously liable for the harassment, even though such harassment was contrary to the employer's stated policy, because the challenged conduct had been allegedly perpetrated by the employer's supervisors.

The cases arose in two different factual contexts. *Farragher* involved a so-called "hostile environment" case in which the plaintiff allegedly had been subjected to repeated sexually charged comments, requests for dates and/or sexual favors, and frequent, unwelcome physical touching. The individuals responsible for this conduct were plaintiff's first and second level supervisors, who had authority to make recommendations on hiring, to schedule and supervise daily assignments, and to administer verbal discipline.

Burlington Industries, by contrast, involved a so-called *"quid pro quo"* case, where a plaintiff alleged either that a tangible job benefit was offered in exchange for sexual favors or a job detriment was threatened for refusing sexual advances. In this case, the plaintiff claimed that on three occasions her second level supervisor had threatened to deprive her of tangible job benefits if she resisted his advances. It was undisputed that none of the threats was actually carried out.

The Supreme Court agreed to review these two cases because of the substantial confusion in lower courts concerning an employer's vicarious liability for the harassing acts of its supervisors. For many lower courts, as the Supreme Court noted, a determination of the scope of an employer's liability turned on whether the harassment was classified as *quid pro quo* or hostile environment. In the former situation, a number of lower courts had held that an employer was strictly liable for a supervisor's harassment, even if the employer had a well-publicized sexual harassment policy that the plaintiff had failed to invoke. By contrast, in hostile environment cases, a number of courts had applied a more relaxed standard, finding an employer liable only in instances where the employer had been negligent, either in failing to promulgate an appropriate sexual harassment policy or in not investigating and remedying complaints of harassment. The opinions in *Burlington Industries* and *Farragher* now offer a significant clarification of the law on these issues.

Quid Pro Quo v. Hostile Environment is No Longer Controlling

The holding of the Court in both opinions essentially eliminates the distinction between *quid pro quo* and hostile environment for purposes of assessing an employer's vicarious liability. As the Court noted in *Burlington Industries*, "[t]he terms... are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." (The terms probably also remain helpful for training purposes to help employees understand the different types of harassment that are prohibited by Title VII.)

But the new focus is on whether plaintiff claims to have suffered a "tangible employment action" as a result of sexual harassment. Both opinions make clear that if a plaintiff has suffered such an action, the employer is strictly liable under Title VII, and no affirmative defense based on the existence of a sexual harassment policy is available. The Court defines a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

If, on the other hand, there is no tangible employment action — as was the case in both *Burlington Industries* and *Farragher* — then a different analysis applies. In analyzing an employer's vicarious liability under these circumstances, the Court conducted an extensive review of the principles set forth in the Restatement of Agency, which authorizes employer liability where:

(1) the supervisor was acting within the scope of his employment;

(2) the conduct violated a non-delegable duty;

(3) the supervisor had apparent authority from the employer to perform the acts in question;

(4) the supervisor was aided in accomplishing the harassment by the agency relationship, i.e. by his or her status as a supervisor; or

(5) the employer was negligent.

The Court rejected the first three bases for imposing vicarious liability on an employer. In particular, the Court rejected the claim that harassing supervisors act within the scope of their employment when engaging in sexual harassment, because in such cases the supervisor is not normally motivated, even in part, by a purpose to serve the employer.

This left only the last two bases for imposing employer liability. Ultimately, the Court held that an employer is vicariously liable for harassment committed by a supervisor, because the supervisor is aided by his supervisory position in carrying out such harassment. As Justice Souter somewhat colorfully put it:

"When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor whose 'power to supervise — [which may be] to hire and fire, and to set work schedules and pay rates — does not disappear... when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.'"

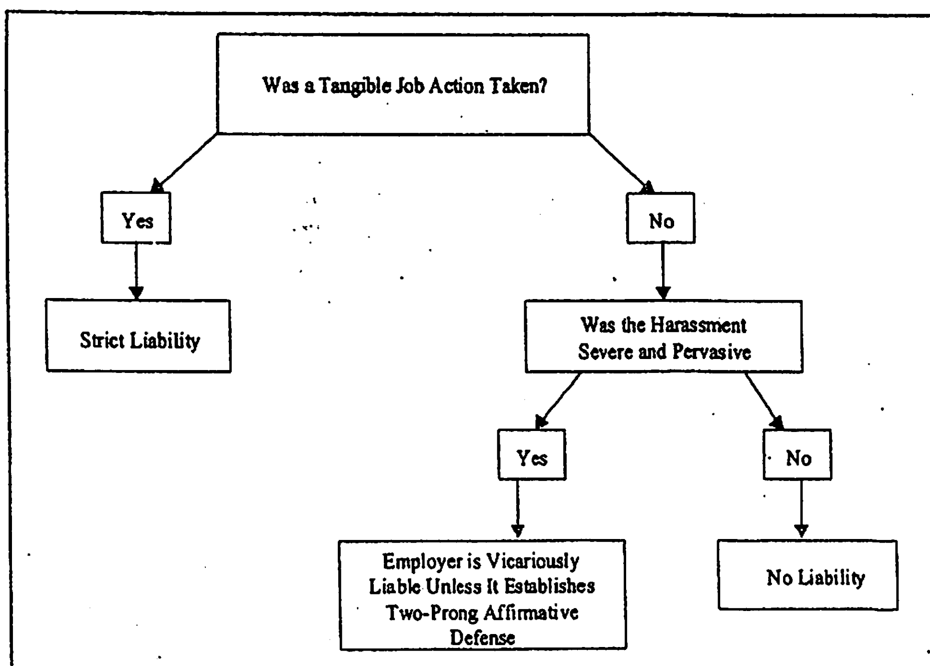
At the same time, the Court recognized that holding employers strictly liable in all circumstances where supervisors commit acts of harassment that are somehow aided by their supervisory status would run counter to several important policies of Title VII, including the statute's encouragement of sexual harassment prevention policies with an emphasis on prompt investigation and resolution of complaints.

In light of this, the Court recognized an affirmative defense comprising two essential 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.

The Court further observed:

"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."

To summarize, in analyzing claims of sexual harassment allegedly perpetrated by a supervisor, the approach depicted in the chart on this page now applies.



The Implications for Litigation

The most immediate need for clients who are currently litigating sexual harassment cases involving supervisor harassment is to seek leave to amend their answers to assert the affirmative defense recognized by the Court. Since such leave under the rules is to be liberally granted, and the affirmative defense is a newly recognized one, prompt amendment should pose no problem.

The real question is what impact the decision will have on motions for summary judgment and on the trial of sexual harassment cases. As to the former, one of the dissenting justices specifically observed that:

"What the statements mean for district courts ruling on motions for summary

judgment — the critical question for employers now subject to the vicarious liability rule — remains a mystery. Moreover, employers will be liable despite the affirmative defense, *even though they acted reasonably* so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm... In practice, therefore, employer liability may be the rule. [emphasis in original]"

Of course, it is the usual practice of dissents to "parade the horribles" that can be expected to result from the Court's majority opinion. As a practical matter, we do not expect winning summary judgment to be materially more difficult under the standards set forth in *Burlington Industries* and *Farragher*, especially in cases where the employer has a well-publicized complaint procedure that the plaintiff has failed to use.

The fact that the Court has characterized the issue as an affirmative defense also means that an employer will bear the burden of proof on both elements of the affirmative defense at trial, and juries will be so instructed. Given the relatively low threshold of the preponderance of the evidence standard that applies to burden of proof in civil cases, this represents a problem for defendants, but not a huge one.

Implications for Sexual Harassment Policies

Burlington Industries and *Farragher* make it more important than ever that employers have a state-of-the-art sexual harassment prevention policy in place in order to be able to establish the two-part affirmative defense recognized by the Court. We have the following specific recommendations:

- Disseminate a written sexual harassment policy to every employee of the company — also include language prohibiting harassment of all other protected classes because courts will likely analyze such claims under the newly announced standards;
- Get a signed acknowledgment from each employee that he or she has read the policy and understands it. Place a copy of the acknowledgment in the employee's personnel file;
- Include a disciplinary section for violation of the policy, up to and including termination;
- Periodically (at least once a year), disseminate a list of names and phone numbers indicating where employees can direct sexual harassment complaints, including a "fail-safe" Human Resources contact outside the regular chain of command;
- Communicate to the workforce that no member of the organization, including the chief executive officer, high ranking officers, and all other officials and members of management, is immune from prosecution under the policy;
- Provide appropriate training to managers and employees concerning the Company's sexual harassment policy; and
- Inform employees of their obligation to report concerns of sexual harassment.
- A sample policy is enclosed for your review. You should, of course, review it carefully with counsel and customize it to respond to the particular needs of your workplace.

Conclusion

The lessons from these opinions underscore the advice we have consistently provided in the area of sexual harassment, while reemphasizing the need for aggressive enforcement of policies and procedures. Now that the Supreme Court has clarified the standards by which employers will be judged, these measures should be taken in order to gain some protection from potentially costly, reputation damaging litigation. Carefully drafted policies, combined with trained personnel, should enable employers to reduce litigation expenses and increase the likelihood of obtaining favorable decisions.

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[1] The Supreme Court decisions only interpret federal law. The law of a particular state may differ.