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SEXUAL DISCRIMINATION- “LIABILITY FOR ACTS OF SUPERVISORS: STRICT LIABILITY”

Severe shudders nationwide blew through the management community when the United States Supreme Court ruled that in certain instances employers could be held vicariously liable for a sexually hostile work environment created by supervisory personnel. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Before *Faragher* the rule had been simple: If an employer knew or should have known of the sexual harassment, and failed to do anything about it, then liability would attach. The knee-jerk reaction from the employment community was that the *Faragher* case created some form of “strict liability” in all instances where the problem results from acts of supervisory personnel.

These fears were somewhat unfounded from the very start, although *Faragher* lowered the hurdle for plaintiffs in a goodly number of circumstances. This article will briefly explore the *Faragher* standard, and how the Eleventh Circuit Court of Appeals (the Federal Court of Appeals for Georgia, Florida and Alabama) has addressed the issue. Lastly, some practical considerations on how best to prevent liability are discussed.

THE FARAGHER STANDARD

Taking its first great leap into the Title VII vicarious liability arena, the Supreme Court in *Faragher* came down with the following rule:

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 employee may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two (2) 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

In short, strict liability only occurs under those circumstances where no factual dispute exists as to the harassing actions themselves (or the trier of fact determines such actions to have occurred), and where either the employer failed in its efforts to prevent the harassment/ failed in its duty to immediately correct the problem, and where significant adverse employment action has been taken.

APPLYING THE FARAGHER STANDARD

While it seems Parts (a) and (b) are two completely different concepts, upon closer inspection it is apparent they are both cut from the same cloth. These standards evidence the Supreme Court’s recognition that once an employer puts into place a policy prohibiting sexual harassment, and reasonable measures for reporting same, then the onus must shift to the injured employee to ensure that the incident is reported. For, it is unreasonable to expect management to know of every impropriety perpetrated by lower level employees.

Along these same lines, courts recognize the tremendous difficulties faced by victims of sexual harassment in bringing such matters to light. Courts are not unmindful of the enormous difficulties involved in lodging complaints about discrimination in the workplace, including complaints of sexual harassment. Courts recognize the great psychological burden it places on one who is already the victim of harassment to require that person to complicate further his or her life with the ramifications, both legal and otherwise, of making a complaint.

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Federal law has now attempted to correct the problem of workplace discrimination, but it cannot be done without the cooperation of the victim, notwithstanding that it may be difficult to make such effort. When an employer has taken steps such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999).

Assuming the existence of an appropriate policy and reporting mechanism, trouble really begins for the employer where the employee follows the appropriate procedures to report wrongdoing, and nothing is done about it. It is there, (where the legitimately complaining employee, having received no relief, is left feeling chastened, and even less inclined to press her complaint, and thus even more compromised in her ability to perform unimpeded the tasks and responsibilities for which she was hired) that the courts will apply the strict vicarious liability standard if the plaintiff makes out the rest of her case. (*Id.* at 1368, Judge Barkett, concurring).

"TANGIBLE EMPLOYMENT ACTION"

The affirmative defenses made available by the Faragher Court are unavailable to an employer where "tangible employment action" is taken against the employee by the supervisor. In such instances, the strict liability concept becomes a reality. A tangible employment action is one that:

constitutes 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 there has been such adverse action, the employer has no affirmative defense to a claim of harassment; unless it disproves there was harassment, it is vicariously liable as a matter of law. *Faragher*, 524 U.S. at 808.

A "tangible employment action" is a punitive, coercive or intimidating action a supervisor takes against an employee which affects that employee directly and, in most cases economically. *Burlington Industries, Inc. v. Ellerth*, 542 U.S. 748, 760-764, 118 S Ct. 2257, 2268-69, 141 L.Ed.2d 633 (1998). See also, *Leslie v. United Technologies Corp.*, 51 F. Supp. 2d 1332 (S.D. Fla. 1998) (forcing plaintiff to take a medical leave of absence, resulting in decrease of pay, was a tangible job action within the meaning of *Burlington* and *Faragher*). Not every employment decision made by a supervisor against an employee is actionable, and when the employee fails to demonstrate any loss of benefits, prestige, salary, or any significant change in job duties, the courts have found no violation. See, *Miller v. Regents of the University of Colorado*, 1999 U.S. App. LEXIS 16712 (10th Cir.) (allegations of removal of job duties; failure to provide a recommendation, and voluntary termination did not rise to level of "tangible employment action"); *Bowman v. Shawnee State University*, 2000 U.S. App. LEXIS 16678 (6th Cir.) (no violation when removal of title resulted in no loss of salary or prestige); *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1998) (no tangible employment action when employment action is taken but harassing supervisor did not take those actions).

There must also be a causal link between the harassing conduct and the change in job status. See, *Walton v. Younce*, 1999 U.S. Dist. LEXIS 3077 (E.D.N.C.). Also, the change in job status must result from an action taken by the supervisor. Where the employment action taken was the result of a voluntary request or act on the part of the employee, there is no violation. The "tangible employment action" must be the result of some act of the supervisor; thus, even if the transfer or resignation is motivated by harassment, it is not a "tangible employment action" for purposes of *Burlington* and *Faragher*. See *Janowicz v. Martin*, 1999 U.S. Dist. LEXIS 21192 (D. N.H.) (plaintiff's voluntary transfer not "tangible job action" because the change in status was not result of action by supervisor; he must do something else which causes or creates a job detriment).

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Transfers made without significant negative impact on an employee's position and economic status are not typically actionable, and a transfer from one position to another position within the organization, so long as "the transfer does not negatively affect the condition of the victim's employment," often serve as a sensible and appropriate response to complaints of harassing conduct. *Marsicano v. American Society of Safety Engineers*, 1998 U.S. Dist. LEXIS 14314 (N.D. Ill.). Transfer resulting in significantly different job duties, or a loss of benefits or compensation, affecting the employee directly and economically, are "tangible employment actions" in violation of *Faragher and Burlington*. See, *Carney v. City of Shawnee*, 38 F. Supp. 2d 905 (D. Kan. 1999). However, there is evidence that a transfer resulting in no economic loss but which does result in a loss of prestige, may also be actionable. Two civil rights cases predating *Burlington and Faragher* have been cited by the Fifth Circuit to support the premise that a "tangible employment action" (demotion) can be shown when the transfer is from a more prestigious position, the former position is "more interesting" and has "better working hours." *Forsyth v. City of Dallas, Texas*, 91 F.3d 769 (5th Cir. 1996). Even when a transfer is accompanied by an increase in pay, a violation may be shown when the new position "[is] not as interesting or prestigious" and when other employees subjectively view such a transfer as punishment or a demotion. "Money alone ...does not buy happiness." *Click v. Copeland*, 370 F.2d 106, 109 (5th Cir. 1992).

PREVENTATIVE CONSIDERATIONS

Step one, obviously, is that employers should have a written sexual harassment policy in place. Equally as obvious, is that the sexual harassment policy provide a clear, uninhibited mechanism for the lodging of complaints of sexual harassment. This pretty much goes without saying.

Recent wisdom in some circles suggests that the sexual harassment policy not only be included in a company's employee manual/policies and procedures handbook, but be independently printed and distributed, as well. Rest assured, this is not going to create a frenzy of activity on the "reporting" front. The people of this world are by now well aware of the existence of Title VII, and are "pretty much" aware that it must be reported in most instances in order to obtain relief therefrom.

The problem with many policies created in the late 1980s, early 1990s is that they do not clearly delineate the mechanism by which an aggrieved employee need travel where their complaints fall on deaf ears. After all, many times the very person whom the employee is to report the harassment to is the very harasser himself. Hence, the policy must afford alternative avenues for reporting. Additionally, the employee need be put on notice that it is her responsibility to see that the information gets up the chain if she harbors the belief nothing is being done about her complaint. One such solid policy was recently quoted in federal court down in Savannah. The Wolf Camera policy in this regard was quoted as follows:

Anyone who believes that he or she is being subjected to harassment or who has witnessed such conduct, must immediately notify his or her manager. If the problem is not immediately resolved, that associate should contact the Personnel Department. If an associate's manager is involved, the associate need not contact that manager first, but may, instead proceed directly to the Personnel Department. A confidential investigation will be conducted and there will be no retaliation against victims or witnesses for notifying Wolf Camera about such conduct. *Breda v. Wolf Camera, Inc.*, 1999 U.S. Dist. LEXIS 15633 (S.D. Ga.).

CLOSING THOUGHTS

While the sky did not fall, *Faragher* certainly reiterated the need for every company in America to promulgate efficient sexual harassment policies which provide clear, distinct mechanisms for reporting such matters.

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The Supreme Court has struck a fairly reasonable balance between the difficulties encountered by aggrieved employees in bringing forth such allegations with the fact a company cannot do anything about such matters unless it is aware of them. Of course, should a supervisor take adverse employment action against an employee as the fallout from the harassment itself, then tangible employment action will be deemed to have taken place, and, yes, strict liability would appear to be in place.

Obviously, preventative measures are best. A solid policy, and solid training on the policy (to both supervisory and bottom line personnel) is part of an overall preventative policy in this regard.