INTER ALIA

A Plaintiffs' Attorney's View of Sexual Harassment Rulings

By Nancy Richards-Stower

Editor's Note: Earlier this year, two U.S. Supreme Court decisions provided greater definition to sexual harassment law, which has been in a state of flux since modern employment law was first codified in Title VII of the Civil Rights Act of 1964. The following article presents a context as to how the area of law has evolved, and offers a perspective on the decisions' implications on employment law practice.

IN THE WAKE of the Kennedy assassination and in the midst of continuing racial strife, President Johnson used his bully pulpit to create a historic civil rights bill. Attempts by southern senators to kill the bill by adding sex as a protected category failed and The Civil Rights Act of 1964 became law. Its employment provisions were codified in Title VII that also created the Equal Employment Opportunity Commission (EEOC).

In 1980, the EEOC declared sexual harassment to be a form of sex discrimination. Its guidelines divided sexual harassment into two types, which eventually became known as "*quid pro quo*" and "hostile atmosphere." The former exists "when submission to or rejection of unwanted sexual conduct is used as the basis for an employment decision." The latter exists "when the unwelcome conduct unreasonably interferes with an individual's job performance," or, creates an "intimidating, hostile or offensive working environment" even if no tangible or economic job consequences result.

Six years later, the United States Supreme Court affirmed those guidelines in *Meritor Savings Bank, FSB v. Vinson*. The Meritor decision focused on the "unwelcomeness" of the conduct, not whether it was "voluntary." Significantly, the court affirmed that actionable harassment need not be accompanied by economic injury because, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult."

On employer liability, *Meritor* rejected automatic supervisory liability as well as a lack of notice defense. Instead, the court invited an "agency analysis". The court noted that an employee's failure to use the in-house grievance procedure was "relevant" but "not necessarily dispositive," chiding Meritor for its uninviting grievance procedures.

In 1991, following Anita Hill's testimony at the confirmation hearings of Supreme Court Justice Thomas, President Bush signed into law The Civil Rights Act of 1991 (substantially the same legislation he had vetoed the preceding year), amending Title VII to provide for jury trials, punitive damages, and compensatory damages. Two years later, in *Harris v. Forklift Sys., Inc.*, Justice O'Connor, writing for a unanimous Supreme Court, reiterated that sexual harassment was actionable without the need to show either economic harm nor psychological harm: "So long as the environment would reasonably be perceived as hostile or abusive... there is no need for it also to be psychologically injurious."

> *The rulings "open the door to plaintiff's discovery of the employer's response to other complaints since those responses are relevant to determine the policy's adequacy."*

This spring, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex sexual harassment is actionable under Title VII, and reconfirmed the need to focus on the victim's point of view.

While the definition of sexual harassment may have been clarified since the 1986 Supreme Court ruling in the *Meritor* case, the federal courts have dispensed conflicting tests for employer liability, as plaintiffs Kimberly Ellerth and Beth Faragher learned. Ellerth was a salesperson for a Chicago office of Burlington Industries who rejected her supervisor's advances, was promoted anyway, but quit her job after 15 months. The supervisor had made numerous, sexual remarks to her, rubbed her knee, cajoled her into joining him for a drink, and repeatedly indicated that her career would advance if she dressed more provocatively. Ellerth did not use Burlington's in-house sexual harassment complaint procedure and lost at trial on the issue of notice. The Seventh Circuit reversed via eight lengthy and conflicting decisions which dramatized the confusion over employer liability for supervisory harassment.

Beth Ann Faragher worked as a lifeguard for the City of Boca Raton, Florida. She sued after completing her summer job, alleging that her supervisors had created a hostile atmosphere through uninvited touching, repeated vulgarities, sexually-explicit remarks, and threats of retaliation ("date me or clean the toilets for a year"). Although Boca Raton had a written sexual harassment policy, it was not widely disseminated, and neither the harassing supervisors, nor Faragher, were aware of it. Faragher won at trial, but lost on appeal when the Eleventh Circuit applied the "outside the scope of the agency" principle to the supervisors' actions.

Addressing Conflicting Decisions

On June 26, 1998, the U.S. Supreme Court responded to the chaos with two decisions providing employee-victims with a huge victory (*Burlington Industries v. Ellerth*) and *Faragher v. City of Boca Raton*. Writing for the 7 to 2 majorities (Justices Thomas and Scalia dissenting), Justice Souter (in *Faragher*) and Justice Kennedy (in *Ellerth*) held that employers were strictly liable for a supervisor's harassment when it was accompanied by a "tangible employment action." In *Ellerth*, Justice Kennedy included as "tangible employment actions" all economic injuries (i.e., denial of a raise or promotion, failure to hire, termination, or a decision causing a significant change in benefits), as well as several non-economic injuries (an undesirable reassignment, a less distinguished title or significantly diminished material responsibilities).

A Multi-Step Test for Liability

Justices Kennedy and Souter issued an identical, multi-stepped test for determining an employer's vicarious liability when there is no "tangible employment action." The employer must prove (I) that it exercised reasonable care to prevent *and* to promptly correct the sexually harassing behavior, and (II) that the plaintiff unreasonably failed to avoid harm, including by unreasonably ignoring any in-house complaint procedures.

Many employers will find it difficult to meet the affirmative defense burdens of *Ellerth* and *Faragher*. The "reasonable care" test requires the employer to prove that it exercised reasonable care to prevent the harassment. Accordingly, the universal publication of an anti-harassment policy (whether written or not) appears mandated; in addition, the policy must encourage victims to come forward without fear of reprisal. A wall poster crammed with notices of multiple federal and state statutes won't cut it.

The policy should include educational efforts aimed at all levels of the workforce, with additional directives to supervisors. An employer will be unable prove "reasonable care to prevent harassment" if it fails to upgrade its enforcement efforts following new reports of harassment.

Opening Up Discovery of Past Incidents

The employer's obligation to prove that it exercised reasonable care to prevent and correct harassing behavior provides the plaintiff employee with a very powerful weapon: the right to discover the employer's other sexual harassment complaints to determine if, upon notice of earlier cases, the employer took reasonable steps to prevent plaintiff's ha-

rassment. In *Faragher*, the Supreme Court ruled as a matter of law that the city failed this test because its policy had never been distributed to the harassers, it lacked a "no-retaliation" assurance, and the city had failed to keep track of its lifeguard supervisors. Another element of the employer's obligation, to prove that it exercised reasonable care in responding to the harassment complaint, opens the door to plaintiff's discovery of the employer's response to other complaints since those responses are relevant to determine the policy's adequacy.

Heretofore, discovery of other complaints was fiercely contested and, if discovered, often ruled inadmissible. Now such evidence will be offered routinely in supervisory harassment cases lacking "tangible job action" components. Now the jury may be exposed to numerous episodes of harassment, so any negative peculiarities of the plaintiff can be neutralized.

Was Failure to Complain 'Unreasonable?'

Even if the employer meets both aspects of the "reasonable care" test, it faces another hurdle. For an affirmative defense to succeed, it must also prove that the plaintiff unreasonably failed to take advantage of the employer's harassment complaint procedure "or otherwise avoid harm." If the plaintiff recoiled from using the employer's complaint procedure because of knowledge that other victims suffered retaliation after making a complaint, the defense vaporizes. Again, the plaintiff will have discovery and evidentiary rights pertaining to the experiences of others regarding the "reasonableness" of ignoring the policy.

Significantly, the new affirmative defense does not offer protection to the employer for harm suffered on account of supervisory harassment, when the harm occurs before the victim can reasonably register an in-house complaint. As Justice Thomas noted in his dissent:

> "[E]mployers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm..." (*Burlington Industries v. Ellerth*)

The *Ellerth* and *Faragher* decisions provide important victories for plaintiffs, but also create a conditional safe harbor for employers who invest the resources to create, publish and implement strong sexual harassment policies with sensitive complaint procedures and repeated training sessions.

The new liability standards have already been applied to race cases and will likely be applied to all other protected categories. In addition, the new standards will be adopted by those states, like New Hampshire, which look to federal law for guidance in interpreting their own discrimination laws.

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Request for Proposal

New Hampshire Bar Association *Pro Se* Study

THE BAR'S COMMITTEE on Cooperation with the Courts has appointed a *Pro Se* Study Subcommittee to oversee a study of *pro se* litigation in New Hampshire courts and formulate a report. The subcommittee is soliciting requests for proposals to conduct and compile three surveys:

- A survey of *pro se* litigants themselves, seeking to learn why they chose to proceed without a lawyer, involving *pro se* parties from each of the ten Superior Courts, the two Family Courts, the Supreme Court, and selected District and Probate Courts. The courts will provide the names and addresses to the study committee.
- A survey of a sample of New Hampshire attorneys, with particular emphasis on family law practitioners;
- A survey of judges, marital masters, and court clerks.

The impact of a perceived increase in *pro se* litigation in New Hampshire's court system is an issue of great concern to judges, lawyers and court staff throughout the state. However, the actual nature and extent of *pro se* litigation has never been determined by empirical studies. Rather than relying on genuine but anecdotal accounts of problem as we formulate policy recommendations, the subcommittee seeks through this study to gather data that will provide us with reliable information about the true scope of the *pro se* phenomenon in New Hampshire.

Similar studies have been conducted in other states and the subcommittee has gathered a considerable amount of information about these efforts, which will be helpful as we conduct our surveys, analyze the results and make policy recommendations. The person or organization that conducts our surveys will also be asked to help analyze the data. Experience in conducting surveys and familiarity with New Hampshire" legal system are highly desirable.

Please submit proposals to by December 7, 1998 to John E. Tobin, Jr., Chair, Pro Se Study Committee, c/o Virginia Martin, New Hampshire Bar Association, 112 Pleasant Street, Concord, NH 03301. If you need further information, please contact John Tobin at (603) 644-5393 ext. 5112.

The *pro se* study effort is being supported by a grant from the New Hampshire Bar Foundation.