

ELLERTH AND FARAGHER: APPLYING THE SUPREME COURT'S "DELPHIC PRONOUNCEMENTS" ON EMPLOYERS' VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

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Sexual harassment is an employment law problem unrestricted by regional boundaries. Since moving to Northern Michigan in 1985, I have encountered some issues that had been major areas in my Detroit practice less frequently north of the 45th parallel. Complaints about sexual harassment, however, have proved to be as prevalent in Northern Michigan as they are elsewhere in Michigan. Probably, this will remain an important area of employment law, subject to interpretations and reinterpretations, in the coming decades.

Last summer, the U.S. Supreme Court issued two decisions, *Burlington Industries, Inc v Ellerth* and *Faragher v City of Boca Raton*, which provided additional guidance on an employer's liability for sexual harassment perpetrated by a supervisor with authority over the plaintiff-employee. [1](#) In dissent, Justices Thomas and Scalia criticized the majority for issuing "Delphic pronouncements" that provided "shockingly little guidance about how employers can actually avoid vicarious liability." The dissent predicted increased litigation, "to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance." [2](#) A review of several post-*Ellerth* and *Faragher* cases reveals that the lower courts have taken differing approaches in applying the *Ellerth* and *Faragher* standards, giving some credence to the dissenters' concerns. This article briefly summarizes these new standards, discusses their applicability under Michigan law, and reviews some of the more significant opinions applying *Ellerth* and *Faragher*.

VICARIOUS LIABILITY AND THE COURT'S GUIDANCE ON THE AFFIRMATIVE DEFENSE

Essentially, in *Ellerth* and *Faragher*, the Court held that when a supervisor's sexual harassment culminates in a tangible employment action, such as dismissal, an undesirable reassignment, or an actionable hostile environment, the employer is vicariously liable. However, the Court did leave open an affirmative defense to the employer:

"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 employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see FR Civ P 8 (c). The defense comprises two 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise." [3](#) (Emphasis added.)

The Court said (somewhat disingenuously, based on this practitioner's experience) that an employer did not necessarily have to have a sexual harassment policy with a complaint procedure in order to establish the first element of the affirmative defense (reasonable preventive care and prompt corrective action), and that the need for such a policy "may appropriately be addressed in any case when litigating the first element of the defense." The Court further explained that the second element is not limited to proof that an employee unreasonably failed to use an employer's complaint procedure (although it is not readily apparent what else it would encompass), but that such proof normally would satisfy the employer's burden under the second element. [4](#)

APPLICABILITY IN MICHIGAN

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Last fall, the Michigan Court of Appeals, in *Chambers v Trettco, Inc*, a two-to-one decision, applied the holdings of *Ellerth* and *Faragher* to a sexual harassment claim under Michigan's Elliott-Larsen Civil Rights Act. [5](#) Thus, regardless of whether an employee brings a sexual harassment claim under Title VII or under the Elliott-Larsen Act, Michigan attorneys must concern themselves with *Ellerth's* and *Faragher's* redefined standard for employer liability.

TANGIBLE EMPLOYMENT ACTION

When a supervisor's harassment culminates in a tangible employment action, the employer cannot avoid liability through the affirmative defense. [6](#) The U.S. Supreme Court defined 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." [7](#)

In *Durham Life Ins Co v Evans*, the Third Circuit found that an employee, who resigned her employment following several incidents of sexual harassment, suffered a tangible employment action. [8](#) Specifically, the court found the following to be tangible adverse employment actions:

- The loss of a private office;
- The dismissal of her secretary;
- The mysterious disappearance of files critical to performing her work; and
- Assignment to a project that resulted in a 50 percent decrease in her earnings. [9](#)

In an attempt to avoid liability, the employer argued that the first time someone made a discriminatory remark to her, the plaintiff should have complained under the sexual harassment policy. If she had, the employer asserted, it could have prevented her from suffering a tangible action and, consequently, it should have prevailed under the affirmative defense. The court disagreed. Rather, the court held, "when harassment becomes adverse employment action, the employer loses the affirmative defense, even if it might have been available before." [10](#)

That an employee suffered an adverse employment action may not, however, always preclude an employer from raising the affirmative defense, if someone other than the alleged harasser caused the tangible employment action. In *Fierro v Saks Fifth Avenue*, for example, the district court held that even though the plaintiff was discharged, the employer could raise the affirmative defense to the plaintiff's national origin harassment claim because the alleged harasser played no role in the plaintiff's discharge. [11](#) Under these circumstances, the court reasoned, the "alleged harassment did not 'culminate' in plaintiff's discharge" and, therefore, the affirmative defense was available. [12](#)

APPLYING THE AFFIRMATIVE DEFENSE

Summary Disposition: Appropriate or Not?

Whether you represent employers or employees, one of the most important issues is the summary disposition standard. Because the affirmative defense requires an employee's unreasonableness, some judges have questioned the appropriateness of deciding cases on summary disposition when the affirmative defense is involved.

For example, in *Lissau v Southern Food Service Inc*, the majority of the Fourth Circuit panel stated that the new standard would not preclude summary judgment, but one judge, concurring, disagreed, noting that, because the defense "is especially fact-intensive when the reasonableness of conduct is in question, summary judgment is rarely appropriate because juries have 'unique competence in applying the reasonable person standard' to the facts of the case." [13](#)

That view prevailed in *Phillips v Taco Bell*, in which, reversing summary judgment for the employer and remanding to the district court, the Eighth Circuit held that whether a written sexual harassment policy posted at all stores, which plaintiff reviewed and signed, satisfies the first element of the affirmative

defense "is best left to the finder of fact." [14](#) This was so, even though the plaintiff waited three months to complain, Taco Bell investigated the plaintiff's complaint, and Taco Bell suspended and then fired the harasser, only after which plaintiff nonetheless decided to resign.

When an employer had a sexual harassment policy, but failed to prove that it distributed the policy to the employees involved, or that it provided any training to management employees, two courts ruled that the affirmative defense is unavailable in the context of ruling on whether the plaintiff's case fails as a matter of law. [15](#) One of those cases, *Nuri v PRC, Inc*, highlights the necessity of communicating the policy to all employment locations and of obtaining signed receipts from employees. The Nuri court acknowledged that:

"PRC had a comprehensive policy that was vigorously enforced, and that provided alternative avenues of redress...PRC also established that it sent out two mailings —one in 1993 and another in 1995 —detailing PRC's sexual harassment policy, but the evidence reflected that three employees who worked in the Montgomery office never received any such mailings. PRC also published an article about sexual harassment in its June 1995 newsletter, but the article did not detail the procedures one would use to report sexual harassment at PRC, and there was also no confirmation that any of the employees in the Montgomery office saw the article. Finally, PRC presented evidence that it conducted a live, new employee orientation for employees beginning work in its Virginia office, and that the company did sexual harassment training for some of its offices, but these also appear to have missed Montgomery." [16](#)

In short, a good policy may avail an employer naught, unless it is communicated to all employees everywhere and there is an evidentiary trail to establish that the plaintiff received that communication.

The majority's opinion in *Chambers* suggests that deficiencies in an employer's policy and procedure may be a basis for negating, as a matter of law, a defendant employer's assertion of the affirmative defenses in a motion for summary disposition:

"Similarly, in Faragher, the plaintiff was subjected to a hostile work environment created by two supervisors, and a plaintiff reported the behavior to another supervisor, who took no action against the other two supervisors. Further, the employer failed to disseminate its policy against sexual harassment among its employees and its officials made no attempt to keep track of the conduct of supervisors, such as the two involved in this case. The employer also failed to include any assurance that the harassing supervisors could be bypassed in registering complaints. Faragher, supra, p 689. The Supreme Court held, as a matter of law, that, under those circumstances, the defendant could not be found to have exercised reasonable care to prevent the supervisors' conduct Id., p 690." [17](#)

The First Element: The Employer's Reasonable Care

An employer must initially establish that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Today, most employers have established and distributed policies prohibiting sexual harassment. Whether an employer can satisfy its burden of proving that it exercised reasonable care merely by establishing such a policy has varied from case to case.

In some cases, the courts have held, as a matter of law, that the employer met the first element of the affirmative defense by distributing a policy of which plaintiff was aware. [18](#) Indeed, in *Fierro*, the court, in granting summary judgment for the employer, recognized that 'the employer's promulgation of 'an antiharassment policy with complaint procedure' is an important, if not dispositive, consideration." [19](#)

In contrast, some courts have denied summary judgment even though the employer has a policy and distributed it to the employees. In *Lancaster v Sheffler Enterprises*, the district court said that having a policy alone was not enough:

"Simply forcing all new employees to sign a policy does not constitute 'reasonable care'. The employer must take reasonable steps in preventing, correcting and enforcing the policy. Reasonableness requires more than issuing a policy." [20](#)

The Second Element: The Employee's Unreasonableness

The second part of the affirmative defense requires an employer to show "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." [21](#) In *Fierro*, the court categorized this second element as "the crucial inquiry" and held that the employee's failure to report alleged harassment because of "conclusionary assertions of fear of repercussions" will not defeat the affirmative defense.

Establishing the unreasonableness of the employee's conduct is, of course, easiest when the employee has not complained about the harassment at all. Thus far, where the employer has disseminated an antiharassment policy and the complainant knows of it, most courts have had little sympathy for employees who failed to use the policies to make their employers aware of the harassment. [22](#) Such was the case in *Speight*, where an employee was aware of the policy against sexual harassment; knew the procedure for reporting misconduct; had multiple opportunities to disclose the alleged harassment until the day she quit; and even then, refused to identify the alleged harasser. The court granted summary judgment to the employer on the basis of the *Ellerth* and *Faragher* affirmative defense. [23](#) According to the *Fierro* court, such policies are "useless" if employees fail to use them:

"At some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment. Without such a requirement, it is difficult to see how Title VII's deterrent purposes are to be served, or how employers can possibly avoid liability in Title VII cases. Put simply, an employer cannot combat harassment of which it is unaware." [24](#)

Of course, an employee may have a reasonable explanation for why he or she did not complain about the alleged harassment. To avoid summary disposition, however, an employee will have to articulate specific facts that support the reason for not complaining. [25](#) Thus far, simply alleging, in conclusory fashion, that he or she did not complain because of fear of retaliation has been ineffective in avoiding summary judgment, especially when the policy stated that "reprisals against the reporting employee would not be tolerated." [26](#)

More problematic are those cases in which a significant delay occurs between the alleged harassment and the employee's complaint to management. While some delays may be so long that, on their face, they are unreasonable, in many instances, whether a delay is long enough to be unreasonable is a question the courts have left to the trier of fact. [27](#)

PROMPT REMEDIAL MEASURES

Before *Ellerth* and *Faragher*, an employer often could avoid liability, "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." [28](#) The Supreme Court did not address this method for avoiding liability and the effect that *Ellerth* and *Faragher* were meant to have on it. The courts so far have attributed varying significance to an employer's prompt remedial action.

In *Gunnell v Utah Valley State College*, the district court granted the employer summary judgment because it stopped the harassment after the plaintiff complained. [29](#) The Tenth Circuit reversed and remanded for further proceedings in light of *Ellerth* and *Faragher*, stating that "an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment." [30](#) The Tenth Circuit directed the district court to consider such factors as whether those "who caused such a hostile work environment were Gunnell's supervisors; whether UVSC had a reasonable policy in place to prevent and correct promptly such sexually harassing behavior; and whether Gunnell unreasonably failed to take advantage of such policies or to avoid harm otherwise." [31](#)

In contrast, in *Indest v Freeman Decorating, Inc*, the Fifth Circuit held that the employer was not vicariously liable because it took prompt remedial measures in response to the plaintiff's complaint, which the court characterized as "presenting only an incipient hostile environment" that was not, of itself, a tangible adverse employment decision. [32](#) The Fifth Circuit relied on the fact that the Supreme Court: (1) reaffirmed its holding in *Meritor Savings Bank v Vinson*, [33](#) that an employer is not "automatically" liable for a hostile environment created by a supervisor; and (2) acknowledged that *Meritor* "furthers the twin

deterrent and compensatory aims of Title VII." The Fifth Circuit concluded that "imposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor*, but Title VII's deterrent policy."

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Arguably, the Michigan Court of Appeals' decision in *Chambers* supports the latter approach. The Court held that the defendant could not establish the *Ellerth* and *Faragher* affirmative defense because, "the jury specifically found that the defendant failed to take prompt remedial action after it knew or should have known that the plaintiff had been sexually harassed." -- [35](#)

CONCLUSION

Time will tell whether Justice Thomas's and Justice Scalia's criticisms of the Supreme Court's holdings in *Ellerth* and *Faragher* were warranted. Regardless of one's view of the precision of the majority's guidance, one message is clear: Employers must vigorously address the issue of sexual harassment in the workplace if they wish to avoid liability.

RECOMMENDATIONS

At a minimum, an employer must establish and distribute an anti-harassment policy, with alternate avenues of relief, to its employees. The employer also should have employees sign a receipt for the policy to prevent an employee from subsequently claiming that he or she never received the policy. Simply distributing the policy is probably not enough and the employer should provide supervisors and managers with sexual harassment training or, at the very least, train them regarding the employer's policy.

If there is a complaint, an employer should investigate and take prompt remedial action to end the alleged harassment. At best, such action may be a defense to any claim and, at worst, it may limit the employer's liability.

When attorneys assess and investigate a sexual harassment claim, the following should be the focus: Did the employer have a sexual harassment policy? If so, did the employer distribute and/or post it? Can it be proved that the complainant knew of the policy? Did the policy provide that complaints could be brought to someone other than the complaint's supervisor? Did the employee complain about the alleged harassment? If not, or if a significant delay occurred between the alleged harassment and the employee's complaint, did the employee have a reasonable explanation for inaction? Did the employer make a full investigation and then take prompt remedial measures? Had other employees complained about sexual harassment? If so, how did management handle these complaints?

Whether a sexual harassment claim arises in a metropolitan area or in a smaller community, the legal standards are the same and employees and employers alike must heed the guidance, such as it is, in *Ellerth* and *Faragher*.

Endnotes

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1. *Burlington Industries, Inc v Ellerth*, 524 US 724; 118 S Ct 2257, 2264-2265; 141 L Ed 2d 633 (1998); *Faragher v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998). For an excellent discussion of these cases, see Timothy G. Hagan, *Recent Developments in the Law of Hostile Work Environment*, Mich BJ October 1998, 1050-1052.

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2. *Ellerth*, *supra*, at 2274.

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3. *Ellerth*, *supra*, at 2270, *Faragher*, *supra*, at 2292-2293.

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4. *Id.*

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5. *Chambers v Tretco, Inc*, 232 Mich App 560, 562; ____ NW2d____(1998).

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6. *Ellerth, supra*, at 2270, *Faragher, supra*, at 2293.

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7. *Ellerth, supra*, at 2268.

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8. *Durham Life Ins Co v Evans*, 166 F3d 139 (CA 3, 1999).

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9. *Id.*

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10. *Id.* at 1446.

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11. *Fierro v Saks Fifth Avenue*, 13 F Supp 2d 481, 491 (SD NY, 1998).

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12. *Id.*

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13. *Lissau v Southern Food Service, Inc*, 139 F3d 177, 184 (CA 4, 1998).

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14. *Phillips v Taco Bell Corp*, 156 F3d 884, 889 (CA 8, 1998).

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15. *Booker v Budget Rent-a-Car*, 17 F Supp 2d 735 (MD Tenn 1998) (racial harassment); *Nuri v PRC, Inc*, 13 F Supp 2d 1296 (MD Alaska, 1998).

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16. *Nuri, supra*, at 1305-1306.

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17. *Chambers, supra*, at 567-568.

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18. See *Speight v Albano Cleaners, Inc*, 21 F Supp 2d 560, 564 (ED Va, 1998), *Montero v AGCO Corp*, 19 F Supp 2d 1143, 1146 (ED Cal, 1998), and *Fierro, supra*, at 491-492 (national origin harassment), citing *Faragher*.

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19. *Fierro, supra*, at 491.

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20. *Lancaster v Sheffler Enterprises*, 19 F Supp 2d 1000, 1003 (WD Mo, 1998), citing *Ellerth and Faragher*.

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21. *Ellerth, supra*, at 2270.

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22. *Speight, supra*, at 564, *Fierro, supra*, at 492.

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23. *Speight, supra*, at 564.

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24. *Fierro, supra*, at 492.

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25. *Booker, supra*, at 748 (Given the atmosphere at Budget and the other employees' fear of retaliation, the employer failed to show that the employee acted unreasonably in not reporting the alleged harassment).

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26. *Montero, supra*, at 1146, *Fierro, supra*, at 492.

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27. Compare *Montero, supra*, at 1146 (Holding, as a matter of law, that the employee acted unreasonably when she waited two years to complain) with *Phillips, supra*, at 889 and *Fall v Indiana University Board of Trustees*, 12 F Supp 2d 870, 884 (ND Ind 1998) (Both holding that whether the employee acted unreasonably by waiting three months to complain is a question of fact).

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28. *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146, 148 (1991).

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29. *Gunnell v Utah Valley State College*, 152 F2d 1253, 1261 (CA 10, 1998).

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30. *Id.*

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31. *Id.*

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32. *Indest v Freeman Decorating, Inc.*, 164 F3d 258, 265 (CA 5, 1999). Two of the judges concurred in the opinion only, and one of those two reserved the right to file a separate opinion at a later date.

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33. *Meritor Savings Bank v Vinson*, 477 US 57, 72; 106 S Ct 2399, 2408; 91 L Ed 2d 49, 60 (1986)

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34. *Indest*, *supra*, at 266.

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35. *Chambers*, *supra*, at 568 (1998).

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