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Who's Responsible? Employer Liability for Supervisors' Hostile-Environment Sexual Harassment: An Analysis of *Faragher v. City of Boca Raton*

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Who's Responsible!?

Employer Liability for Supervisors' Hostile-Environment Sexual Harassment

by Barbara J. Fick

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mining employer liability when supervisory sexual harassment creates a hostile environment. It is that issue the Supreme Court addresses in this case.

ISSUE

What is the appropriate standard of employer liability for a supervisor's hostile-environment sexual harassment?

FACTS

Beth Ann Faragher was employed from September 1985 to May 1990 as an ocean lifeguard by the City of Boca Raton, Florida (the "City"). She worked part-time and summers while attending college. During her term of employment, she and other female lifeguards were subjected both to physical touching and verbal comments of a sexual nature severe and pervasive enough to create a hostile work environment. The per-

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Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in the terms and conditions of employment based on sex. 42 U.S.C. § 2000e-2 (1994). Sex discrimination for purposes of Title VII includes sexual harassment as the Supreme Court held in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

There are two types of sexual harassment. *Quid pro quo harassment* is unwelcome verbal or physical conduct of a sexual nature in which the victim's submission is made the basis for employment decisions. *Hostile-environment harassment* is unwelcome verbal or physical conduct of a sexual nature that creates an abusive and hostile workplace.

The federal appeals courts have held uniformly that employers are strictly liable — liable without fault — for *quid pro quo* harassment by their supervisory personnel, but these same courts are sharply divided over the standard to apply in deter-

Case at a Glance

Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace. Most courts agree that employers are strictly liable for supervisor misconduct constituting *quid pro quo* harassment. This case asks the Supreme Court to decide under what circumstances an employer is liable for a supervisor's sexual harassment that creates a hostile work environment.

BETH ANN FARAGHER V. CITY OF
BOCA RATON, FLORIDA
DOCKET NO. 97-282

ARGUMENT DATE:
MARCH 25, 1998
FROM: THE ELEVENTH CIRCUIT





petrators of the conduct were Bill Terry and David Silverman.

Terry was Chief of the Marine Safety Section (the "Safety Section" or the "Section") of the City's Parks and Recreation Department. The Safety Section consisted of all the ocean lifeguards. Silverman was a lieutenant and, subsequently, a captain in the Section.

Both men held supervisory positions with respect to the lifeguards employed in the Section. As Chief of the Safety Section, Terry had authority to interview and recommend applicants for hire; he also supervised all aspects of the lifeguards' work assignments and was responsible for discipline and annual performance evaluations. Silverman had authority to make work assignments and disciplinary decisions and had input on employee evaluations.

While employed, Faragher complained to Marine Training Captain Robert Gordon about Terry and Silverman's sexual harassment. As a Training Captain, Gordon held a supervisory position within the Safety Section. Gordon's response to Faragher was that there was nothing he could do and that the City "didn't care."

No other City official was informed of the problem until April 1990, one month before Faragher quit, when a female coworker wrote a letter to the City's Director of Personnel detailing her problems with Terry and Silverman. The Personnel Director conducted an investigation and subsequently disciplined both men.

The City, at all relevant times, had a written policy against sexual harassment. However, the City had not disseminated its policy either to supervisors or employees of the

Safety Section. Moreover, it did not have a complaint procedure in place until after learning of Terry and Silverman's misconduct.

Faragher sued the City in federal district court in 1992, alleging sexual harassment under Title VII. The district court found Terry and Silverman's misconduct severe and pervasive enough to have created a hostile and abusive work environment.

The court then determined that even though the City had no actual knowledge of the harassment, it was liable nonetheless based on three different theories. The first theory was premised on constructive knowledge; in the court's view, the sexually harassing conduct was so pervasive that it gave rise to an inference that the City knew what was happening.

The second theory relied on by the district court was based on the concept of *respondeat superior*; that is, in light of the supervisory authority over the workplace the City gave to Terry and Silverman, they were acting as the City's agents when they harassed Faragher and that made the City liable.

The third theory utilized by the district court was based on imputed knowledge. Training Captain Gordon, by virtue of his supervisory authority, was an agent of the City. Because Faragher's complaint informed Gordon about the harassment, the court concluded that his knowledge was imputed to the City. 864 F. Supp. 1551 (S.D. Fla. 1994).

The City appealed to the Eleventh Circuit. A three-judge panel of that court upheld the district court's factual finding that the supervisors' misconduct created a hostile environment but rejected the holding that the City was liable for their

misconduct. While agreeing that an employer can be liable based on a constructive-knowledge theory, the court held that the facts in this case were not sufficient to prove such knowledge. Just because sexual harassment is pervasive cannot by itself justify a finding that the employer should have known that the harassment was occurring. In this case, said the panel, the lifeguards' work site was remote from the seat of City management, and there was very little contact between the lifeguards and City management. Accordingly, there was no factual basis to conclude that the City should have known what was happening on the beach.

The Eleventh Circuit panel also rejected the *respondeat superior* rationale. The panel held that a mere showing that an individual is acting as an agent for a third party is not sufficient to attach liability to the third party. It also must be shown that either the agent was acting within the scope of employment when committing the complained-of act or that the agent was assisted in committing the act by the agency relationship. According to the panel, there was no evidence in the record to support either contention.

The panel then rejected the district court's view that Gordon's knowledge could be imputed to the City on the ground that he was not a high management official of the City. 76 F.3d 1155 (11th Cir. 1996).

Faragher petitioned for a rehearing *in banc* (see Glossary), and the petition was granted. Faragher, however, lost again; a seven-judge majority essentially agreed with the panel's decision that the City was not liable for Terry and Silverman's hostile-environment sexual harassment. 111 F.3d 1530 (11th Cir. 1996).



The Supreme Court granted Faragher's petition for a writ of certiorari to address the question of employer liability for a supervisor's hostile-environment sexual harassment. 118 S. Ct. 438 (1997).

CASE ANALYSIS

The Supreme Court in *Meritor* declined to establish a definitive rule for employer liability for supervisory sexual harassment in the hostile-environment context. It did, however, suggest that employers should not be held strictly liable and instructed "courts [to] look to agency principles for guidance," keeping in mind that such "principles may not be transferable in all their particulars to Title VII. . . ." 477 U.S. at 72.

Courts and litigants since *Meritor* have advanced several theories for imposing liability on employers for hostile-environment harassment by supervisory-level personnel. These theories can be grouped into two categories: direct liability and indirect liability. Under the direct-liability theories, the lower courts uniformly agree an employer is liable for supervisory harassment if it knew or should have known of the supervisor's misconduct and failed to take appropriate steps to stop it. Disagreements arise, however, over what constitutes actual or constructive (should have known) knowledge.

Faragher argues that an employer is charged with the knowledge of an agent concerning any matter as to which the agent has a duty to inform the employer. It is irrelevant how the agent acquired the knowledge, e.g., that the agent was informed in his or her capacity as an agent or as a friend of the informant.

It also is irrelevant, says Faragher, whether the agent actually informed the employer; the agent's knowledge is imputed to the employer, i.e., it is effectively the employer's knowledge. According to Faragher, when she informed Gordon that Terry and Silverman had harassed her, that information constituted actual notice to the City.

Faragher maintains that the Eleventh Circuit's requirement that an employee must complain to high officials not only misstates agency law but ignores the reality of the workplace. Given the justified fear of retaliation with respect to reporting workplace sexual harassment, it is both likely and reasonable that the victim would be more comfortable informing an agent known to the complainant or someone close to the complainant's own level, such as an immediate supervisor. Given Gordon's supervisory authority, Faragher contends it was reasonable for her to believe he was authorized to receive workplace complaints.

The City responds by asserting that Faragher spoke to Gordon as a friend, not a supervisor, and she did not expect him to pass her complaint along. Moreover, says the City, Gordon made it clear that he would not be doing so. Under agency principles, knowledge cannot be imputed to the employer if it is clear that the employee knows the agent will not notify the employer.

Faragher replies that the City can be charged at least with constructive knowledge because the harassment was so pervasive that the City should have known about it. Moreover, if the City did not know about Terry and Silverman's misconduct, it is because it intentionally remained ignorant.

Faragher supports her position by pointing to agency-law principles requiring employers to exercise reasonable care to prevent harm to employees. In Faragher's view, sexual harassment in the workplace is a known and foreseeable problem, and the City's failure to disseminate and enforce an effective anti-harassment policy indicates a failure to exercise reasonable care, thereby creating constructive knowledge.

The City agrees that constructive knowledge can exist if a reasonable employer would have been aware of a supervisor's misconduct. But, argues the City, the mere fact that sexual harassment is pervasive enough to create a hostile environment does not mean a reasonable employer would be aware of it. According to the City, such circumstances as the location of the harassment and its duration and frequency must be considered in deciding what a reasonable employer should know.

The City argues that in this case the sexual harassment occurred intermittently, over a period of years, at a location remote from City officials. These factors, says the City, militate against a finding that it had constructive knowledge.

Addressing its alleged lack of a sexual-harassment policy, the City maintains that Title VII does not impose a duty on an employer to disseminate such a policy. Accordingly, the failure to do so cannot form the basis for employer liability under Title VII.

The second group of theories dealing with employer responsibility for supervisory-level sexual harassment can be categorized as indirect liability. Indirect liability is based on the premise that when a principal

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(either an individual or an entity) employs a person to act on its behalf (the agent), the principal is liable for the agent's acts.

Entities such as businesses or municipal governments can act only through individuals. Thus, when such an entity hires a person to be a supervisor, the entity can be liable for the supervisor's misconduct vis-à-vis its employees.

The principal is not absolutely liable for all the acts of its agent, however, and three factors limit a principal's indirect liability. The principal is liable when the agent (1) acts within the scope of his or her employment; (2) acts outside the scope of his or her employment, but the agent purports to act on behalf of the principal, and others relied on this apparent authority; or (3) is aided in perpetrating the misconduct in question by the existence of his or her agency authority.

Faragher contends that Terry and Silverman acted within the scope of their employment as supervisors. The City gave them broad authority over its lifeguard employees with the discretion to use that authority to direct and control their work and workplace conditions.

Terry and Silverman proceeded to use their supervisory authority to create a hostile work environment. In Faragher's view, the mere fact that the City did not specifically authorize the harassing conduct or that the misconduct itself was illegal does not place the misconduct outside the scope of employment.

The City asserts that the scope-of-employment theory requires an agent's acts to be tied closely to what the agent was hired to do and be in furtherance of the employer's interest. Conduct bearing no rela-

tion to the work the agent was hired to perform is outside the scope of employment.

The City argues that supervisors who create a hostile work environment are pursuing their own agendas. Sexually inappropriate physical or verbal conduct does not further the job for which supervisors are hired nor does it promote an employer's interests. As such, it cannot serve as the basis for employer liability.

Faragher asserts that Terry and Silverman had apparent authority to create a hostile environment, and the City is liable for that reason. A supervisor, by virtue of his or her authority in the workplace, possesses leverage and power over employees. The supervisor need not explicitly remind the employees of this power; employees are well aware of it. In the absence of a disseminated and effectively enforced antiharassment policy, it is reasonable for employees to believe that the supervisor's harassing conduct is tolerated or even condoned by the employer and thus within the supervisor's authority. That is sufficient, argues Faragher, to hold the City liable.

The City disagrees and argues that for apparent authority to exist, the employer must have done something to give employees a reasonable basis to believe the supervisor had authority to engage in sexual harassment. Some affirmative act by the employer is required. Argues the City, the lack of a policy against sexual harassment is not such an affirmative act. Moreover, no reasonable employee could believe that an employer has authorized a supervisor to engage in sexual harassment.

Faragher claims in closing that employer liability is appropriate when a supervisor is aided in perpetrating harassment by the existence of the authority he or she possesses through the employer-supervisor agency relationship. In many cases, a supervisor's authority in the workplace facilitates the ability to harass; the employee-victim reasonably believes there will be retaliation if a complaint is made.

Harassment is about power, argues Faragher, and the employee who is the victim of supervisory harassment often is powerless to object. A determination that supervisory authority assists the supervisor in engaging in harassment is based on the facts of each case — the extent and nature of the supervisor's powers, the circumstances of the harassment, and the efficacy of the employer's antiharassment policy. In this case, argues Faragher, Terry and Silverman possessed the authority to control her work assignments and were in a position to make effective recommendations concerning discipline and pay raises. Because of this power, it was reasonable, says Faragher, for her to believe that Terry and Silverman would use their authority to retaliate against her if she objected, particularly since the City never communicated to employees that sexual-harassment complaints would be taken seriously and that those who complained would be protected from retaliation.

The City counters that apparent authority aids the supervisor's sexual harassment only when the supervisor affirmatively capitalizes on that authority. That a supervisor has authority does not mean it was used to harass. According to the City, Faragher wrongly focuses on whether the employee-victim reasonably fears that the harassing



supervisor will use that authority to harass. The correct focus, argues the City, is whether the supervisor actually used his or her authority for that purpose.

Several friends of the court supporting the City propose a standard for employer liability based on the existence of an antiharassment policy. If an employer has an effective, widely disseminated, and uniformly enforced policy, it cannot be held liable for supervisory hostile-environment sexual harassment unless (1) the victim utilizes the policy's complaint mechanisms or (2) the employer has actual knowledge of the supervisor's conduct and failed to take immediate and appropriate corrective action.

SIGNIFICANCE

The magnitude of the problem of sexual harassment is such that whenever the Supreme Court confronts the issue, its decision will have an immediate and widespread impact. Studies indicate that between 40 and 90 percent of all working women have experienced sexual harassment during their careers. A study of the federal workplace for the Merit System Protection Board, an executive branch agency, stated that victims of sexual harassment lose \$4.4 million in wages annually.

The lower federal courts are almost unanimous in holding that individual agents of an employer are not personally liable under Title VII. This means that victims of hostile-environment sexual harassment cannot sue the individual supervisor under Title VII for damages (see Glossary) caused by the supervisor's harassment. If the employer is not held liable for the conduct of its supervisors, victims risk being uncompensated for their injuries.

According to a Fortune 500 study, almost two-thirds of all sexual-harassment complaints are brought against supervisory personnel or another person with greater workplace power than the victim. Given the frequency with which it appears supervisors sexually harass employees, imposition of employer liability likely will result in an increase in claims and lead to unforeseen and, perhaps, unpredictable monetary costs.

On the other hand, if employers realize they can be held liable for supervisory hostile-environment harassment, this would create a powerful incentive to develop and disseminate antiharassment policies and more effectively police the workplace to prevent such misconduct. The result certainly would serve the deterrent purpose inherent in Title VII.

Adding to the crosscurrents, free speech advocates are concerned that heightened policing efforts will cause employers to prohibit and punish speech that does not rise to the level of harassment on the theory of "better safe than sorry." It's apparent that whatever the outcome here, the standard of employer liability the Court establishes will have a far-reaching impact on the American workplace.

ATTORNEYS OF THE PARTIES

For Beth Ann Faragher (William R. Amlong; Amlong & Amlong; (954) 462-1983).

For the City of Boca Raton, Florida (Peter Buscemi; Morgan, Lewis & Bockius; (202) 467-7190).

AMICUS BRIEFS

In support of Beth Ann Faragher

American Federation of Labor and Congress of Industrial Organizations (Counsel of Record: Laurence Gold; (202) 833-9340);

Joint brief: Lawyers' Committee for Civil Rights Under Law and American Civil Liberties Union (Counsel of Record: Richard T. Seymour; Lawyers' Committee for Civil Rights Under Law; (202) 662-8600);

National Employment Lawyers Association (Counsel of Record: Margaret A. Harris; Butler & Harris; (713) 526-5677);

Joint brief: National Women's Law Center, Equal Rights Advocates, and Women's Legal Defense Fund (Counsel of Record: Lois G. Williams; Howrey & Simon; (202) 783-0800);

Joint brief: United States and Equal Employment Opportunity Commission (Seth P. Waxman, Solicitor General; Department of Justice; (202) 514-2217).

In support of the City of Boca Raton, Florida

Chamber of Commerce of the United States of America (Counsel of Record: Stephen A. Bokart; National Chamber Litigation Center, Inc.; (202) 463-5337);

Equal Employment Advisory Council (Counsel of Record: Ann Elizabeth Reesman; McGuinness & Williams; (202) 789-8600);

Joint brief: National Association of Manufacturers and Manufacturers Alliance for Productivity and Innovation (Counsel of Record: William J. Kilberg; Gibson, Dunn & Crutcher; (202) 955-8500);

Society for Human Resource Management (Counsel of Record: Allan H. Weitzman; Proskauer Rose; (561) 241-7400).