COMMENTARY SECTION

"Zero Tolerance" for Sexual Harassment by Supervisors in the Workplace: Employers Don't Have a Real Choice

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ABSTRACT. Unquestionably, the broad scope of employer liability for sexually harassing acts by supervisors has been expanded. In two decisions issued on the same date in 1998, the U.S. Supreme Court established that employers are strictly liable for sexual harassment committed by supervisors that affects tangible employment benefits. Employers now, more than ever, must continue to take preventive measures in providing a workplace free from sexual harassment and to take appropriate corrective action when harassment does occur. There is every indication that the field of harassment law is thriving, and will continue to develop. A "zero tolerance" policy for acts of sexual harassment by supervisors is a prudent deterrent that all employers should consider

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to avoid the pitfalls and liabilities in this developing area of the law.

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As a veteran practicing employment lawyer representing management, I have been on the front lines in defending companies against claims of sexual harassment ever since the U.S. Supreme Court's recognized such claims as violative of Title VII in *Meritor Savings Bank v. Vinson* (1986). From a risk management standpoint, sexual harassment claims have become increasingly costly and difficult to defend regardless of the underlying merits. At the same time, monetary settlements and court awards (including lost income, compensatory and punitive damages and attorney's fees) are ever increasing for plaintiffs in sexual harassment litigation. In these circumstances, employers can ill afford to show any tolerance for behaviors that could create the nucleus or even support claims of sexual harassment. Deterrence should be the goal of every employer. Prudent employers must be vigilant in adopting practices that will appropriately punish those supervisors whom the company reasonably believes to be culpable for acts of sexual harassment.

The legal definition of "sexual harassment" continues to evolve and broaden. Courts have struggled to establish uniform legal standards for determining what conduct constitutes workplace sexual harassment and under what circumstances employers should be held responsible for such conduct. Part of the difficulty has arisen from the rapid change in societal awareness of sexual harassment and its various manifestations. Today, sexual harassment takes myriad forms and some uncertainty as to what is sexual harassment still exists.

In the few years since the U.S. Supreme Court issued two landmark sexual harassment decisions–*Burlington Industries, Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998)–both federal and many state courts have followed the principles enumerated in those cases. These Supreme Court rulings make it plain that an employer's best protection against such claims is a clear, strictly enforced "zero tolerance" policy against sexual harassment and a well-communicated and accessible internal-company complaint process. To be clear, a zero tolerance policy need not require the discharge of each employee accused of sexual harassment. Employers are essentially obligated to take steps as reasonably likely to prevent such mis-

conduct from reoccurring. Thus, every workplace sexual harassment policy must provide for appropriate and immediate measures to be taken to deter conduct that might be deemed sexual harassment, to discipline offenders and to prevent recurrence of violations.

It is now established that employers have no absolute immunity from being charged with sexual harassment claims. In the *Ellerth* and *Faragher* cases, the Supreme Court ruled that employers could be held liable for the harassing behavior of their supervisory employees even if the company is unaware of the alleged misconduct, has a state of the art sexual harassment policy, and provides sexual harassment training to supervisors. This is called strict or vicarious liability. Exacerbating the employer's plight is that harassment may now be judged from the complainant's perspective and defined by the harm caused that individual rather than the nature of the offensive conduct.

The Supreme Court in *Ellerth* and *Faragher* identified two categories of harassment: those involving a "tangible employment action" and those involving a "hostile work environment." They ruled that an employer is strictly liable under Title VII for any sexual harassment by a supervisor that results in a "tangible employment action." The *Ellerth* 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."

If the harassment does not result in a tangible job "detriment"–i.e., a demotion, termination, denial of benefits, and the like–an employer still may be liable for a hostile work environment and/or sexual harassment engaged in by managers or supervisors. However, the Supreme Court announced that in such a circumstance, the employer may affirmatively avoid liability if it can show that (1) it used reasonable care to prevent and correct any harassment (such as by having a sexual harassment policy containing a complaint procedure of which employees were aware), and (2) the employee unreasonably failed to make a complaint under the policy or to avoid harm otherwise. The affirmative defense outlined in *Ellerth* and *Faragher* will not apply if the employer failed to take reasonable steps to prevent and correct harassing behavior. In California, the Fair Employment & Housing Act has been interpreted as imposing strict liability even if the allegation is a hostile work environment caused by a supervisory employee.

Because employers may be strictly liable for harassing conduct by supervisors, an important issue in sexual harassment cases is defining who is a "supervisor." The Equal Employment Opportunity Commission (EEOC) has issued guidelines defining the scope of employer liability for harassment by supervisory employees (EEOC, 1999). According to these guide-

lines, an individual qualifies as a "supervisor" if: (1) he or she has authority to undertake or recommend tangible employment decisions affecting the employee or, (2) he or she has authority to direct the employee's daily work activities. In addition, liability may occur even if the harasser does not have actual authority over the employee, but the employee reasonably believes the harasser has such power. An individual may be a "supervisor" even if he or she is not the final decision maker in a decision to hire, fire, promote, demote or reassign the employee, if the individual's recommendation is given substantial weight. Also, an individual who is temporarily authorized to direct another employee's daily work activities qualifies as the employee's "supervisor" during that period of time.

The following cases demonstrate the broad scope of the potential liabilities for employers confronted with litigated claims in the sexual harassment arena.

- In *Green v. Administrators of Tulane Educational Fund* (2002), the Court of Appeals held that sexual harassment may occur after the plaintiff has a consensual sexual relationship with the harasser. After the plaintiff decided to end a one-year casual affair with her supervisor, the supervisor disrupted the plaintiff's performance of her job duties, reassigned many of those duties to himself, cursed at her and humiliated her, ultimately prompting her to resign. After finding that the jury had sufficient evidence to conclude that the supervisor's conduct was severe and pervasive, the court rejected the defendant's argument that the alleged harassment was not based on sex but rather was based upon the supervisor's personal animosity arising out of the terminated relationship. The fact that the supervisor's conduct started only after the relationship ended and there was evidence that the supervisor wanted the relationship to continue was sufficient to establish that the plaintiff was exposed to disadvantageous terms or conditions of employment to which members of the opposite sex were not so exposed.
- In *Beard v. Southern Flying J, Inc.* (2001), an employer's affirmative defense was rejected in a case involving the sexual harassment of female restaurant employees by a male supervisor. Upon receiving the first complaint about the supervisor's harassing behavior, the company conducted an investigation, but was unable to confirm the allegations. The company nonetheless warned the supervisor that his alleged behavior must cease. Less than two weeks later, five other female employees reported varying degrees of inappropriate behavior by the same supervisor. After an investigation, the company sus-

pended the supervisor with pay. Shortly thereafter, however, the company reinstated the supervisor, concluding that the women had conspired to remove him from his position and that he had not engaged in any misconduct. In response to the first female's lawsuit, the company claimed it took reasonable care to prevent harassment and addressed any harassment that did occur. In rejecting the company's defense, the court "second-guessed" the company, noting that the company did not interview any other female employees, and did not further discipline the supervisor.

- In *O'Rourke v. City of Providence* (2001), a female firefighter complained of harassing conduct by her fellow firefighters and commanding officer. The conduct included the supervisor passing around a videotape of a coworker having sexual intercourse with his girlfriend, asking the female if she was on birth control so that the male firefighters could "bang" her at a union party later in the week, and displaying pornographic magazines and posters of nude women. She complained of the conduct to the chief and the city's EEO department, but the harassing conduct continued. The Court of Appeals found that the *Ellerth* defense was not available because the city failed to monitor its supervisors' conduct.
- In *Sheppard v. River Valley Fitness One* (2001), a federal court ruled that an employee alleging a hostile work environment may introduce evidence of the alleged harasser's conduct toward other women in the workplace to provide support for her claim. The employee claimed that her male coworker kissed her on her cheek, told sexual jokes, and made constant sexual comments to her. She also claimed that the male's conduct toward other women contributed to the hostile work environment because he leered at women in the fitness center and rubbed his genitals. The court allowed her to present such evidence, ruling that the male's conduct towards other women was relevant.
- In *Worth v. Tyler* (2001), the Court of Appeals found actionable harassment when a supervisor placed his hand down an employee's dress and touched her breast for several seconds.
- In *Howley v. Town of Stratford* (2000), the Court of Appeals found that a single obscene verbal attack did constitute sexual harassment towards a female firefighter. Her lawsuit was based upon the conduct of a male firefighter at a firefighters' association meeting. During the meeting, the female was subjected to an extended barrage of verbal abuse. He called her a "f___ing, whining ____," made comments about her menstrual cycle, and told her she only made lieutenant, not assistant chief, because she did not perform fellatio good enough. The

plaintiff immediately filed a written complaint the next day. However, the town took no action for five weeks. When it finally did act, it suspended the male for two days for "unbecoming conduct," and only recommended, not required, that he apologize. The court found that although the male made obscene comments on only one occasion, he did so at length, loudly, and in front of a large group. In addition, the female firefighter was the only woman there. The court sent the case back to the lower court for trial, noting that a jury could view the incident as serious and humiliating enough to alter the female firefighter's working conditions.

- In *Mallinson-Montague v. Pocrnick* (2000), the Court of Appeals broadened the definition of "tangible employment action," therefore, increasing the potential for employers to be found strictly liable. Two female loan officers claimed that a male senior vice president began sexually harassing them soon after they began working with him. On one occasion, he asked one of the loan officers to meet him in a park to discuss business matters. When she arrived, he pressed himself against her, kissed her, and asked her if she could feel his erection. After she rebuffed his advances, he began denying her the business leads he had earlier promised her and began rejecting loans that she originated. The second loan officer complained of similar conduct. As a result of the vicepresident's disapproval of their loans, both loan officers lost commissions and were denied bonuses. Although both women failed to utilize the bank's sexual harassment policy, the court found that the vice president's disapproval of loans constituted a tangible employment action because the women's compensation potential was adversely affected.
- In *Nuri v. PRC, Inc.* (1998), the court in analyzing the company's defense considered not only whether it had an anti-harassment policy, but also whether the policy had been effectively communicated to supervisors and employees. Although the company had a "comprehensive, vigorously enforced policy" against sexual harassment, the employee presented substantial evidence that the policy was not well-known and, in fact, was not known at all to employees in her particular facility. The court noted that "because having its employees be aware of the policy is so crucial to having a policy that is effective . . . it is seriously doubtful that [the employer] could be said to have 'exercised reasonable care to prevent and correct promptly any sexually harassing behavior.'"

Unquestionably, employer liability for sexually harassing acts by supervisors has been expanded. The upshot of these rulings is that U.S. employers are compelled to have zero-tolerance sexual harassment policies. Any employer faced with a lawsuit alleging sexual harassment is in a "no-win" situation. Accordingly, employers must make it very clear to all supervisory personnel that they are to consciously avoid any conduct that could even arguably be defined as sexual harassment. Zero tolerance policies are needed to send this most important message to its managers.

An employer should not be held liable for wrongful termination after it disciplined or even discharged an employee for sexual harassment, when the employer reasonably believed in good faith that the harassment had occurred (*Cotran v. Rollins Hudig Hall Int'l, Inc.,* 1998). In *Cotran,* after the company terminated its vice president for sexually harassing two female employees, the vice president filed suit, alleging that he had been wrongfully discharged in violation of his employment contract. He contended that the company could only show that it had good cause to terminate his employment if it could prove that he actually had engaged in the sexual harassment. The court rejected his contention, and ruled that in order to establish good cause, the employer instead need only demonstrate that it acted reasonably and in good faith (after an appropriate investigation of whether the employee had engaged in the conduct) under the circumstances known to the employer at that time. The jury's role is only to "assess the objective reasonableness of the employer's factual determination of misconduct."

Similarly, in *Silva v. Lucky Stores, Inc.* (1998), a store manager was discharged following the company's investigation of claims by female employees that he had sexually harassed them. He then filed suit for wrongful termination. Rejecting the store manager's claim that the investigation was flawed and his termination therefore wrongful, the court noted that the company undertook a month-long investigation conducted by a human resources representative who interviewed numerous witnesses. Further, the manager was informed of the witnesses' comments and given the opportunity to respond to them. Therefore, the employer had ample and reasonable grounds for making its findings and discharging the manager.

No employer wants to endure the high legal costs and distraction resulting from even the most non-meritorious sexual harassment lawsuits. The best defense to any potential sexual harassment claim is to discourage any conduct that might be deemed offensive from the perspective of gender and to nip any such claims in the bud. Deterrence should be the foundation of all workplace sexual harassment policies. While in the abstract a zero tolerance sexual harassment policy may appear to be overkill, it is "smart business."

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