LEVETT, ROCKWOOD & SANDERS
PROFESSIONAL CORPORATION
Attorneys at Law

NEWSLETTER
A Courtesy To Our Clients and Friends July, 1998

LIABILITY STANDARD CLARIFIED IN SEXUAL HARASSMENT CASES

On June 26, 1998, The United States Supreme Court released its decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton,* which address the issue of an employer's vicarious liability in sexual harassment cases.

The Plaintiffs' Claims

Kimberly Ellerth quit her job at Burlington Industries, claiming that she had been subjected to constant sexual harassment by one of her supervisors. She refused his advances, but suffered no tangible retaliation and was even promoted. Although aware of the company's policy against sexual harassment, she never informed anyone in authority about the supervisor's conduct.

The Supreme Court ruled that she was entitled to a trial on her claim, but also ruled that her employer could defend the claim by establishing that it had procedures in place designed to limit or remedy harassment and that she had failed to avail herself of these procedures.

Beth Ann Faragher, a former lifeguard for the City of Boca Raton, claimed that she and other female lifeguards were repeatedly subjected to uninvited and offensive touching, rude remarks and other similar conduct by their supervisors. The City had a policy against sexual harassment, but it was not communicated to beach employees and included no assurance that harassing supervisors could be bypassed in registering complaints. Faragher never complained to the City, but did complain to a non-harassing supervisor, who did nothing.

The Court ruled in Faragher's favor, finding, based on the facts before it, that the City would be unable to prove that its procedures were reasonable or that Faragher's failure to complain to City officials was unreasonable under the circumstances.

Quid Pro Quo *vs* Hostile Environment

Sexual harassment claims generally fall into two categories. "Quid quo pro" claims involve a supervisor who demands sexual favors and explicitly or implicitly threatens to alter terms and conditions of employment unless the employee acquiesces. If the employee refuses the advances, and the threats are carried out, the employer will be held strictly or vicariously liable for the supervisor's conduct, regardless of the employer's knowledge or complicity. In these cases, the supervisor is deemed to be acting as the employer's agent in altering the terms and conditions of employment. Adverse job consequences can include firing, demotion, failure to promote, transfer, or any other action likely to be viewed objectively as a tangible, adverse employment action.

"Hostile environment" claims, by contrast, need not involve a supervisor and a subordinate. Unwelcome conduct of a sexual nature, which is "severe and pervasive", can be the basis of a hostile environment claim. In these cases, the employer will be liable only if it knew or should have known about the conduct and did nothing to prevent it or stop it. Traditionally, in hostile environment cases, the complaining employee has the burden of proving that the employer should be held responsible for the hostile environment.

When A Supervisor Creates A Hostile Environment

In *Ellerth* and *Faragher,* the Court preserved the distinction between *quid quo pro* and *hostile environment* claims, but clarified the circumstances in which an employer will be held liable.

[over ☞]

It assumed that an employer will be vicariously liable for a hostile environment created by a supervisor "with immediate (or successively higher) authority over the employee". The employer will be strictly liable, without knowledge of or complicity in the wrongful conduct, in *quid quo pro* cases in which an employee suffers adverse job consequences for refusing the sexual advances or demands of a supervisor.

However, in those cases where there has been no tangible employment action -- in other words, the threats have not been carried out -- the employer may defend the claim by proving (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise".

In other words, where the hostile environment is created by an immediate (or successively higher) supervisor, the employer must establish that it has a defense. This is in direct contrast to those cases which involve conduct by a co-worker, where the claimant must prove that the employer should be held responsible for the co-worker's conduct.

What Should Employers Do?

Ellerth and *Faragher* have not changed the law. They have merely clarified it. And these new rulings may in fact provide well-intentioned, pro-active employers with better defenses against frivolous claims.

The basic rules for employers remain the same:

- Train your supervisors.
- Make it clear to supervisors – and to all employees – that sexual harassment will not be tolerated in the workplace.
- Have published policies which prohibit sexual harassment in the workplace.
- Make sure that your policies and complaint procedures are disseminated to all employees.
- Make your complaint procedures user-friendly. In particular, assure that employees have alternate avenues of complaint, and are not compelled to complain first to a harassing supervisor.
- Take complaints of sexual harassment seriously, respond promptly, and take reasonable corrective action.
- Periodically remind supervisors of your policies and procedures. Give pep talks and circulate memos.

No employer is immune from sexual harassment claims, but a pro-active posture will stand you in good stead. The Supreme Court has helped those employers who help themselves – and their employees.

If you have any questions, want information about our training program or would like assistance in preparing a notice or a sexual harassment policy, please contact **Dorit Heimer or Judy Rabkin** of our office at (203) 222-0885.

33 Riverside Avenue · Westport, CT 06880 · (203) 222-0885