Breakout Sessions – Series 4

TRAINING WITH HINDSIGHT

WHAT YOUR EMPLOYMENT LITIGATOR WISHES YOU HAD TRAINED YOUR WORKFORCE TO DO

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The “loose cannon” management employee. The one who makes inappropriate jokes. The one who likes to suggest after-work activities that always involves alcohol. The one who does not seem to understand boundaries. You know sooner or later this individual will go too far. Who knows that the fallout will be? What do you do? How do you contain this individual?

Whether it is Harvey Weinstein, American Apparel’s Dov Charney, former Mayor of San Diego Bob Filner, or just a mid-management employee with no boundaries, this scenario is all too familiar. For over 20 years, employers who find themselves on the end of a sexual harassment lawsuit have been able to avoid liability for the harassing behavior of these individuals if they can show: (1) reasonable attempts at detecting and correcting these harassing behaviors, and (2) unreasonable failure of the harassed individual to take advantage of these protections. This is known as the Faragher/Ellerth defense. By understanding Faragher/Ellerth and planning strategically, human resources professionals and in-house employment counsel can position their organizations to avoid or reduce liability in certain situations.

I. What is the Faragher/Ellerth Defense?

The Faragher/Ellerth affirmative defense is available for employers to avoid liability for hostile work environment sexual harassment claims brought by employees. Stemming from two 1998 Supreme Court cases of Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth, the Faragher/Ellerth defense precludes vicarious liability for employers in cases of sexual harassment when the employer can prove:

1. no tangible adverse employment action was taken against the plaintiff;
2. the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and
3. the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

The Faragher/Ellerth defense is now a staple of employment litigation, sometimes successfully shielding the employer and other times not. In the 20+ years since Faragher and Ellerth were decided, courts have explored the precise requirements for employers to successfully raise the Faragher/Ellerth defense. In June 2018, the Pennsylvania Department of Transportation successfully employed the Faragher/Ellerth defense to avoid liability by showing it maintained a policy for reporting harassment. Additionally, the court cited the employer’s affirmative actions in quickly initiating an investigation, reassigning the alleged harasser to work on different sites, and disciplining the harasser, as reasons for the success of the Faragher/Ellerth defense. However, in October 2018, the Port Authority of New York and New Jersey suffered a $1.3 million adverse verdict due to its unsuccessful assertion of the Faragher/Ellerth defense. The defense failed here in part because the plaintiff was able to show that supervisors and management had an obligation to monitor the environment where the harassment occurred, indicating that the employer “knew or should have known of the harassment and failed to take prompt remedial action.” Employers must do everything they can to shore up their Faragher/Ellerth defenses in light of this exposure.1

1 While these decisions generally allow for employers to raise the Faragher/Ellerth defense in cases arising under Title VII, some states – such as New York, California, and Pennsylvania – do not permit this defense for cases arising under their respective state laws. Thus, it is important to consider your location’s acceptance of this defense (and any limitations suggested by case law), before incorporating it into your anti-harassment policies and trainings.
Overall, employers successfully raise the Faragher/Ellerth defense when they enforce strong anti-harassment policies. In Provensal v. Gaspard, a Louisiana court found an employer successfully raised the defense when it had a policy that explicitly prohibited sexual harassment and charged employees that “it is your responsibility to promptly notify someone that can address the issue.” In Leopold v. Baccarat, the defense was successful when the policy not only explicitly prohibited any form of sexual harassment, but also explicitly listed examples of prohibited sexual harassment such as “repeated, offensive sexual flirtation, advance or propositions; continual or repeated verbal abuse of a sexual nature; [and] graphic verbal commentaries about an individual’s body.” Meanwhile, in Crawford v. BNSF Ry. Co., the Eighth Circuit Court of Appeals affirmed the success of a Faragher/Ellerth defense in light of the company’s “comprehensive anti-harassment policy and its prompt and effective response” to the plaintiff’s complaints. This “effective response” included meeting with the alleged harasser, counseling him on appropriate workplace behavior, and requiring him and others involved to attend a seminar on workplace harassment.

The Faragher/Ellerth defense can often be successfully raised in cases claiming other types of harassment. This was seen in Stapp v. Curry County Board of Commissioners, where the employer successfully raised the defense against a claim of age harassment. There, in addition to reasonable anti-harassment policies, another element of the successful defense was the plaintiff’s failure to report the alleged harassment to the specific person designated in the policy. Meanwhile, the Eleventh Circuit likewise upheld a successful Faragher/Ellerth defense against a claim of disability discrimination in Cooper v. CLP Corporation. In much the same manner, the success of the employer’s defense there rested on its anti-harassment policy that “strictly prohibited discrimination or harassment based on disability” and which “required an employee who believed he has been subjected to discrimination or harassment to immediately report the harassment.” The court also noted the plaintiff’s failure to report the alleged harassment to the proper managerial employer as laid out in the policy (the HR director) as another reason for a successful Faragher/Ellerth defense.

II. Using Faragher/Ellerth in Policies and Training

To successfully employ the Faragher/Ellerth defense, employers must always maximize efforts to demonstrate “reasonable” actions taken to prevent or address potential harassment, and show that any potential plaintiffs acted “unreasonably.” Employers should take the following steps if they want to take advantage of this defense:

- Institute and disseminate a strong anti-harassment policy
- Train employees on your organization’s policy
- Give employees multiple avenues to complain—not just one
- Investigate complaints immediately
- Quickly resolve complaints and communicate the resolution

A. Policies

Setting your organization up to defend against harassment lawsuits utilizing Faragher/Ellerth begins with strong policies. The key is to initiate and maintain the proper tone of zero-tolerance in your workplace. Failing to set the proper tone often results in a failed assertion of Faragher/Ellerth. For instance, in Katt v. City of New York, the plaintiff won $400,000 when the City’s assertion of Faragher/Ellerth failed. There, the plaintiff showed that
the chief of police allowed a “work atmosphere with a lot of sexual innuendos.” Here are some tips to facilitating such a workplace culture:

- Establish policies highlighting zero tolerance for sexual harassment.
- Maintain an “open door” policy to keep open lines of communication for complaints.
- Create a plan before there is an issue.
- Conduct periodic training and “reminders” of policies prohibiting sexual harassment such as having employees read and sign your anti-harassment policy annually.
- Consider contractual incentives for compliance (e.g., include reporting requirements in “for cause” provision of management employment agreements).

Drafting and maintaining strong policies prohibiting sexual harassment is vital. However, a sexual harassment policy is too important for the overall wellbeing of your organization to simply draft and stick in a drawer. It needs to provide real-world, day-to-day guidance. What distinguishes employers whose sexual harassment policies actually protect them? One court attempted to answer this question by saying, “To be deemed sufficiently preventative, an anti-harassment policy must be comprehensive, well-known to employees, vigorously enforced, and provide alternative avenues of redress.”

B. Training

No matter how well drafted your anti-harassment policy may be, it is ultimately useless if it sits in a drawer. In order to reach the level of prevention envisioned by the Faragher/Ellerth defense, employers must not only have strong sexual harassment policies, but ensure that each employee and supervisor knows precisely what is required by those policies. This means regular policy training sessions are essential.

Employers need to utilize different types of training. Of course, employers should plan on training all employees on anti-harassment policies and reporting procedures on a regular basis. However, it is equally important that employers train supervisors specifically on what to do when they receive a complaint of sexual harassment or when they suspect or fear harassment without a formal complaint. Below are some general principles to bolster the “reasonableness” inquiry under Faragher/Ellerth concerning a company’s training:

- Training for general employees should be easily accessible and easily understood.
- Trainings should give concrete steps to take when one witnesses objectionable behavior.
- Trainings should tie-in your organization’s relevant non-retaliation policy.

Given the high levels of employee turnover in today’s workplace, frequent training and retraining is encouraged.

C. Awareness of Complaints

The vast majority of sexual harassment lawsuits arise from conduct which is not clearly harassing, but instead resides in a debatable “gray area.” Accordingly, the most important parts of sexual harassment training for managerial or supervisory employees are:
1. Training on how to identify conduct or facts that might give rise to a claim of sexual harassment; and
2. Training on what actions a supervisor should take should he/she identify any such conduct.

Identification of potential sexually harassing behavior is vital. Courts have long held that employees need not lodge a formal “complaint” to hold an employer liable for sexual harassment. Failure to train supervisors on how to spot potentially harassing behavior can have disastrous results for an employer. For example, in Gentry v. Export Packing Co., the employer’s Faragher/Ellerth defense failed when the plaintiff told the company’s benefits coordinator that she felt uncomfortable with some of the discussions in the office and the prevalence of uncomfortable touching. The key there was that a single discussion, to a supervisor not typically charged with handling such complaints, “should have raised suspicions” sufficient for the company to investigate. In articulating this result, the court said this type of complaint “should be sufficient to alert an employer about a potential harasser, assuming the proper sexual harassment policy and training are in place.”

In identifying complaints of sexual harassment, it is always best to err on the side of over-documenting. The key to identifying complaints of sexual harassment requires maintaining multiple clear lines of communication, not only for the victim, but also for any manager who might receive a complaint. Under certain circumstances, an investigation may be required even in the absence of a complaint. For instance, if a supervisor overhears harassing conduct at work, the employer would be obliged to investigate even though no one complained. Inaction will often doom an employer’s chances at asserting the Faragher/Ellerth defense. This was the case in Gyulakian v. Lexus of Watertown Inc., where a Massachusetts court held the defense was not warranted in light of testimony that a manager “honestly didn’t believe” the victim’s complaints. This case resulted in a $540,000 verdict against the employer.

D. Investigations

High-profile investigations of sexual misconduct concerning popular figures such as Ohio State football coach Urban Meyer and presidential candidate Cristin Gillibrand shows the importance of an unbiased investigation. Failure to investigate is often viewed as automatic preclusion of the Faragher/Ellerth defense. For example, in Miller v. Woodharbor Molding & Millworks, Inc., although the employer utilized a strongly worded anti-harassment policy, the court held that the employer’s failure to investigate allegations of sexual harassment were “dispositive” in denying the defense.

For purposes of the Faragher/Ellerth defense, a timely investigation shows the court and/or jury that the employer acted reasonably to promptly identify and correct any improper behavior. Furthermore, failure to timely investigate a complaint leaves an employer vulnerable to new instances of harassment against the same victim or new victim/claimants of the same harasser while simultaneously telegraphing to a potential jury that the employer did not take the harassment seriously. Measures that should be considered to expedite investigations include:

1. Establishing appropriate deadlines at the outset of the investigation;
2. If possible, interviews should commence soon after the receipt of the complaint; and
3. The investigation should be completed as soon as possible.
If an investigation cannot be completed quickly, it is important for the employer to advise the complainant of any delay. Employers should consider identifying external resources to handle investigations in advance of receipt of any complaints, in order to ensure that such investigations are handled as quickly and efficiently as possible.

Further, in order to successfully present a Faragher/Ellerth defense, the company's investigation must be eminently fair on its face. In order to convince a jury of the fairness of an investigation, some core principles must be observed:

- The investigator must be objective and unbiased – this means that the investigator cannot take the side of either the complainant or the accused.
- The investigator should not have a personal relationship with the complainant or the accused.
- The investigator should not have a personal or professional stake in the outcome of the investigation.

A fair investigation also means that the accused will be fully informed of all the charges made against him or her and will be given a meaningful chance to respond. The complainant, the accused, and all witnesses should be given the opportunity to offer any and all relevant evidence to ensure that all such evidence is fairly considered.

Finally, it is important to convince a jury of the thoroughness of your investigation in order to take advantage of the Faragher/Ellerth defense. All individuals with knowledge of the relevant facts must be interviewed and all relevant documents must be reviewed. Relevant documents to most investigations include:

- Personnel files of the accused and/or the complainant
- Files relating to prior investigations of similar complaints made against the accused and/or made by the complainant
- Managers’ files and notes concerning the complainant and the accused
- Relevant company policies
- Any relevant electronic communications—such as emails and texts
- Any surveillance videotapes or other tangible records that may contain information relevant to the investigation

While time is of the essence in conducting workplace investigations, the thoroughness of the investigation should not be compromised. In some instances, this may entail second interviews or interviewing former employees who might have knowledge of relevant events.

E. Resolution of Complaints

While often an after-thought, arriving at a conclusion and communicating that conclusion are equally important steps as initiating an investigation in the first place. An employer’s prompt resolution often means the difference between a successful and unsuccessful assertion of the Faragher/Ellerth defense, as in Nzabandora v. Rectors and Visitors of University of Virginia. There, the employer successfully asserted the defense based on its prompt action to change the victim’s shift to avoid working with the alleged harasser, shielding itself from liability.

When an investigation concludes, appropriate members of management, representatives from human resources and, where appropriate, legal counsel, should review the
investigator’s report. Again, while timeliness is a goal of the interview process, the review process should not be rushed. A deliberate review of the investigator’s report shows that the employer’s investigation is reasonable, indicating that the company’s final decision is likewise reasonable. As a general practice, the results of the investigation must be communicated to both the complainant and the accused.

- Where the complaint is found to have merit, the complainant should be informed generally of the fact that disciplinary action was taken against the accused and of any remedial/preventative measures being implemented by the employer.

- Where the complaint could not be substantiated or it was found that the complaint was without merit, the complainant should be advised of the employer’s commitment to maintaining a workplace free of discrimination and harassment and to encouraging reports of such conduct.

To bolster the Faragher/Ellerth defense, the employer should take appropriate remedial action to minimize the risk of recurrence. Such actions might include:

- Training programs for senior leaders and other employees
- Re-distribution of the employer’s programs for EEO/sexual harassment policies
- Issuance of communications from senior leaders about the company’s commitment to these policies and prohibitions against retaliation
- Periodic monitoring of the workplace and documented follow-up communications with the complainant

III. Conclusion

While the #MeToo movement has brought claims of sexual harassment back to the forefront of the national consciousness, employers can protect themselves from these bad actors. The lodestone of the Faragher/Ellerth defense is reasonableness. If an employer institutes reasonable policies, conducts reasonable training, and performs reasonable investigations, then the company has a good chance at invoking the Faragher/Ellerth defense and avoiding liability for the bad acts of bad actors.
Training With Hindsight: What Your Employment Litigator Wishes You Had Trained Your Workforce to Do

Presenters
Jacqueline R. Barrett (Philadelphia) and Timothy A. Garnett (St. Louis)

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Faragher v. Boca Raton

- Supervisors subjected lifeguards to unwanted and offensive touching
- Employer was liable because it could not show it took reasonable care to prevent the harassment
**Burlington Industries v. Ellerth**

- Ellerth’s supervisor made offensive remarks and gestures and threatened to deny her job benefits
- The court held Burlington could be liable for his actions

**What Did Faragher and Ellerth Have in Common?**

- Both were victims of supervisor harassment
- Both did not report the harassment while they were employed
The Employer Defense

- Reasonable attempts at detecting and correcting these harassing behaviors, and
- Unreasonable failure of the harassed individual to take advantage of these protections.

What Must the Employer Prove?

- No tangible adverse employment action was taken
- Employer exercised reasonable care to prevent and promptly correct the harassing behavior
- Employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm
Successful Use of the Affirmative Defense

Unsuccessful Use of the Affirmative Defense
Your Defense Checklist

1. Distribute your anti-harassment policy
2. Give employees multiple avenues to complain
3. Investigate complaints immediately
4. Quickly resolve complaints and communicate the resolution
5. Train employees

Your Defense Checklist

1. Distribute your anti-harassment policy
   - Annually
   - Paper or electronic distribution
   - Be able to prove receipt by each employee
Your Defense Checklist

2. Give employees multiple avenues to complain
   - The obvious—HR and supervisor
   - Other options—Ethics hotline, ombudsperson, CEO

Your Defense Checklist

3. Investigate complaints immediately
   - It’s a priority!
   - How fast do you investigate serious accidents?
   - Should you separate accuser and accused?
Your Defense Checklist

4. Quickly resolve complaints and communicate the resolution
   - Be thorough but don’t jump to conclusions
   - Unexplained delays count against you
   - No need to communicate ALL the details

Your Defense Checklist

5. Train employees
   - All employees: California, New York, Delaware and Maine
   - Supervisors: California, Connecticut and Maine
Tommy’s conduct before the meeting started was not sexual harassment because no work was being performed?

- True
- False
How did Crystal communicate that Tommy’s comments were unwelcomed?

A. She put her hand up  
B. She said “stop”  
C. She rolled her eyes  
D. All the above

What if Crystal regularly engages in sexual bantering herself—does that matter?

☐ Yes  
☐ No
Since the sexual proposition occurred away from work, it is not unlawful sexual harassment?

- [ ] True
- [x] False
It’s all about Respect

TRAINING FOR A BETTER WORKPLACE

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