

# The Supreme Court's Sexual Harassment Standard

By Thomas S. Gill, Esq.

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By now, almost every business person has seen a news story or editorial discussing the Supreme Court's sexual harassment rules. In two cases, the Supreme Court put the burden of proof on the **employer**. Both cases deal with employer responsibility for supervisor harassment.

Before looking at what employers can do, it is helpful to get an idea of the cases the Supreme Court actually decided. Those cases are:

## ***Burlington Industries, Inc. V. Ellerth***

Kimberly Ellerth quit her job after 15 months as a sales person in one of Burlington's many divisions. According to Ms. Ellerth, her supervisor's supervisor, Ted Solowik, repeatedly made boorish and offensive remarks to her. During a business trip, Mr. Solowik met her in a hotel lounge, and when she gave no encouragement to his remarks about her breasts, told her to "loosen up" and warned, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington." When she was being considered for a promotion, Mr. Solowik expressed reservations during the promotion interview because she was not "loose enough". The comment was followed by reaching over to her and rubbing her knee. Nevertheless, Ms. Ellerth received the promotion. Subsequently when her supervisor warned her about not returning customer calls, she quit. During her tenure with Burlington, Ms. Ellerth did not inform anyone in authority about Mr. Solowik's conduct despite knowing Burlington had a policy against sexual harassment. In fact, she chose not to inform her immediate supervisor (not Mr. Solowik) because; "It would be his duty as my supervisor to report any incidents of sexual harassment."

The Supreme Court specifically noted that Ms. Ellerth suffered no tangible job detriment as a result of Mr. Solowik's harassment. The Supreme Court also noted that Ms. Ellerth admitted she had never complained to anyone about Mr. Solowik's behavior. The court stated:

"An employer is subject to vicarious liability for 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 Fed. R. Civ. P. 8(c). The defense comprises two necessary elements: (a) that the employer exercise 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 to avoid harm otherwise. While proof that an employer had

promulgated an anti-harassment policy with complaint procedure is not necessary in every instance is a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense and while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

The Supreme Court sent the case back to district court to allow Burlington to prove it should not be liable based on an affirmative defense.

### ***Faragher V. City of Boca Raton***

Beth Faragher worked part-time during the summer as an ocean lifeguard for the City of Boca Raton. During that period, she alleged that her two supervisors, Mr. Terry and Mr. Silverman, created a "sexually hostile atmosphere" by repeatedly subjecting her to uninvited and offensive touching, by making lewd remarks, and by speaking of women in offensive terms. Mr. Terry once said that he would never promote a woman to the rank of lieutenant. Mr. Silverman said to Ms. Faragher, "Date me or clean the toilets for a year." The City had a sexual harassment policy which it disseminated to a number of its employees, but not to Ms. Faragher's supervisors. Ms. Faragher never complained to higher management about Mr. Terry or Mr. Silverman. Two months after Ms. Faragher resigned, another lifeguard complained and Mr. Terry and Mr. Silverman were disciplined.

Applying the same principles it had in *Burlington Industries*, the court in this case said:

"While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The district court found that the City entirely failed to disseminate its policy on sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Mr. Terry and Mr. Silverman. The record also makes clear that the City's policy did not include assurance that the harassing supervisors could be bypassed in registering complaints. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct. Unlike the employer of a small work force, who might expect that sufficient care to prevent tortuous behavior could be exercised informally, those responsible for City operations could not reasonably have thought that precautions against hostile environments in any one of

many departments in its far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure."

Although the City might not have won if it had disseminated its complaint procedure, without such a procedure, it loses automatically.

## **What To Do**

More and more employers every day are being sued for sexual harassment. The two cases selected by the Supreme Court for review are similar to over 60% of all of the cases brought. The common elements are:

- \* An employee resigns or is terminated.
- \* The employer has no record of any complaint of sexual harassment by the employee while he or she was employed.
- \* The employee sues alleging sexual harassment by a supervisor or co-worker.

With these facts the employer will almost certainly lose unless it has a well-defined sexual harassment policy which it disseminates to all its employees and rigidly enforces.

To understand why these rules are so bad for employers, it is important to know that there are two ways sexual harassment cases are disposed of. The first is summary judgment. The second is trial. In a summary judgment motion, the employer says: "Even if you believe everything the employee says, he or she is not entitled to a remedy." At trial, a jury tries to figure out the truth. While employers win almost half of the summary judgment motions they bring, they lose well over 70% of all trials. A jury in a sexual harassment case, regardless of the instructions from the judge, tries to figure out whether the employee received fair treatment. Frequently the jury decides based on this. A young woman sits on the witness stand, crying, and tells the jury that her supervisor regularly made lewd remarks to her and attempted to peer down her blouse. The supervisor takes the stand and denies that he ever did any such thing. The jury is then left to decide whether to believe the tearful young woman or the supervisor.

Employers prefer summary judgment. To win, the employer has traditionally had to show that the supervisor or co-worker acted outside the scope of his or her employment, and that the employer did not know anything about it. If the supervisor demanded sex for pay or promotion, of course, the employer lost. Where the harassment was less blatant, however, the employer could win summary judgment by showing lack of knowledge.

The Supreme Court's decision turns the knowledge issue completely around. An employer will always be liable for supervisory sexual harassment unless it can show it had a policy forbidding such harassment and that it was unreasonable for the employee

who was harassed not to report it. In other words, the employer must prove that the employee should have reported sexual harassment but didn't. If an employer is going to win a summary judgment motion in a sexual harassment case, it must take a very aggressive stance on sexual harassment.

For some time, I have been recommending to clients that they make reporting sexual harassment mandatory. The following is one type of policy which does this:

## **Sexual Harassment Policy**

XYZ Company simply does not tolerate sexual harassment. To make sure that it does not go on here, any employee who is aware of any sort of sexual harassment is required to report it. Any employee who is guilty of sexual harassment will be disciplined, and will probably be discharged.

Reporting sexual harassment is not voluntary. We require all sexual harassment to be reported. Whether the sexual harasser is a co-worker, your supervisor, or a high-level manager, you must report it. Failure to report sexual harassment can result in discipline. On the other hand, our promise to you is this. **If you report sexual harassment, we will absolutely protect you from retaliation.** Your report of sexual harassment will not affect your career in any way.

If you believe you have been sexually harassed, or if you witness sexual harassment, you should report it to [usually the personnel manager]. If there is some reason why you cannot report it to [the personnel manager], then you may report it to the president of the company or to any other management person.

Sexual harassment means unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

If you are in doubt whether some conduct is sexual harassment, report it. It is better to report it and have it cleared up, than to let it go because you do not think it is serious enough.

In addition to adopting this type of policy, it is important that an employer enforce the policy vigorously.

One radical change I suggest is the requirement that an employee report sexual harassment, and make a written statement to that effect, whether the employee wants to or not. The Supreme Court's decision requires the employer to prove: "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." If the employee has the discretion whether or not to report sexual harassment, it might be reasonable for the employee not to report it. Where it is a term or condition of employment that sexual harassment be reported, however, it is certainly not reasonable to fail to report.

I recommend to employers that they require employees to prepare a written account of sexual harassment and to sign that account. Preparing a written account prevents the employee from "enlarging" on his or her report of sexual harassment at some later time. If the employer is going to be held responsible for reasonable corrective action, the employer must know exactly what it is correcting. On the other hand, it is very important to assure the employee that there will be no retaliation and to mean it. If the employee is fearful of discipline, or even less favorable working assignments, not reporting might be reasonable. If the employee fears that his supervisor will get back at him for making a "false" harassment claim, then it might be reasonable for the employee not to make such complaint at all. Businesses that want to defend themselves against sexual harassment complaints must make reporting the rule and failure to report a disciplinary offense.

If you think that this new sexual harassment law makes supervisors the victims, you are right. The Supreme Court has changed the relationship between employers and supervisors. Supervisors traditionally ask the employer to "support" them. The Supreme Court has said no. Supervisors, the Supreme Court says, have substantial power over people's lives. Because they do, they must be subject to special scrutiny. Employers who want to survive sexual harassment lawsuits must take a new look at supervisors.

The following are key points for sexual harassment survival in 2001:

- \* Tell every employee who his supervisor is. Frequently "group leaders", "team leaders", and others act as if they have supervisory authority when they do not. If the employer does nothing to explain to the employee about who has supervisory authority, the employer could end up being liable for the conduct of someone it considered a co-worker.
- \* Train all supervisors to follow the employer's sexual harassment policy. There is almost no way a supervisor in 2001 can have an out-of-work social relationship with his subordinate without raising at least the specter of a lawsuit. Some employers require a supervisor and subordinate who wish to date to sign a release form acknowledging that the relationship is voluntary and consensual, and absolving the employer from any liability arising out of the relationship. The better practice, if possible, is to forbid any such relationship. Supervisors need to learn to limit their discussions with employees to work-related issues.

- \* Any decision by a supervisor which will have a negative effect, especially on someone of the opposite sex, should be reviewed by another management official for sexual harassment compliance. Any present or past social relationship between the supervisor and the subordinate subject to the negative personnel action should be explored.
  
- \* Any sexual harassment complaint against a supervisor should be investigated by someone who is not "on the supervisor's side". Employers must be prepared to terminate the employment of any supervisor, regardless of how valuable, if there is evidence that the supervisor has engaged in sexual harassment.

These recommendations undoubtedly seem harsh and they are. The alternative is costly and expensive lawsuits with a specter of losing at the end.