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# NEW TWISTS IN SEXUAL HARASSMENT?

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Since June 26, 1998, when the Supreme Court announced new standards for determining an employer's liability for sexual harassment in *Burlington Industries v. Ellerth*[1] and *Faragher v. City of Boca Raton*,[2] much has been written about the decisions and their effect on a decidedly unsettled area of law. Some heralded the decisions as a victory for plaintiffs; others read them as providing protection for employers willing to take preventive measures. The varied responses illustrate that, even after *Burlington* and *Faragher*, many issues regarding sexual harassment remain unsettled. There is, however, some consensus, including Justice Thomas's and Justice Scalia's dissents in *Burlington, that the Supreme Court's decisions may increase litigation as the lower courts struggle to apply the new analysis.*[3] With the passage of even a few months' time, the decisions can now fairly be seen as providing direction in some areas while leaving other issues unresolved, and arguably creating new questions.

## THE NEW ANALYSIS

In *Burlington*, the plaintiff was allegedly subjected to sexual harassment by her supervisor. In addition to offensive remarks and gestures, some of the supervisor's comments, *e.g.*, "I could make your life very hard or very easy at Burlington," could be construed as threats to deny the plaintiff tangible job benefits.[4] Analysis of this case was difficult, and distinguishable from an ordinary quid pro quo case, because the threats were never carried out although the plaintiff rejected her supervisor's advances. In fact, instead of any tangible job *detriment*, the plaintiff received a promotion.[5]

In *Faragher* a former lifeguard sued the city of Boca Raton for a hostile environment allegedly created by her supervisors. The plaintiff had never complained to city officials about the alleged job site harassment, and no quid pro quo harassment was alleged.[6]

Prior to *Burlington* and *Faragher*, in the 8th Circuit and in Minnesota, an employer could avoid liability for a supervisor's harassment, absent a quid pro quo demand for sexual favors, if the employer did not know of the harassment or if, upon learning of the harassment, the employer took prompt remedial action.[7] If the supervisor had engaged in quid pro quo harassment, that is, if the supervisor had conditioned a tangible job benefit on submission to sexual demands, the employer was absolutely liable for the supervisor's actions.[8]


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*Burlington* and *Faragher* changed the analysis for a sexual harassment claim under Title VII. Now, the first question is whether a supervisor with authority over the employee created an actionable hostile environment. That is, was there "severe or pervasive" harassment?[9] If not, there is no liability. If the harassment was severe or pervasive, did it culminate in a tangible employment action? If so, the employer is absolutely liable. If there was no tangible employment action, the employer has a two-part affirmative defense to vicarious liability:

a. that the employer exercised 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.[10]

## I. DIRECTION PROVIDED

In *Burlington* and *Faragher*, the Supreme Court provided direction in two significant areas. First, the Court confirmed the principle, already held by most circuits, that an employer is absolutely liable when an employee suffers a tangible job detriment as a result of failure to submit to a sexual demand.[11] Second, the Court rejected the previous negligence standard used to determine employer liability for a hostile environment, and held that an employer could be vicariously liable even without a tangible job detriment and without knowledge of the harassment.[12] However, in that setting, the Court established an affirmative defense, thereby preserving a means for employers to escape liability.[13]

## II. ISSUES UNRESOLVED

Some of the hardest issues in sexual harassment cases are unaffected by the Supreme Court's decisions. Those are the fact-intensive questions that make these cases especially difficult to resolve short of trial. What *really* happened? Was the conduct "severe or pervasive?" Is there a causal relation between the alleged conduct and a subsequent tangible job action? Now, the same difficult case-by-case analysis will also be required with respect to the new affirmative defense: Was the employer's care "reasonable?" Were corrective actions taken "promptly" enough? Was the plaintiff's failure to report "unreasonable?"

## III. NEW QUESTIONS

For employers, employees, and trial lawyers the most interesting aspect of the Supreme Court's decisions are the questions created by the attempt to clarify the law. The *Burlington* and *Faragher* decisions may have actually created more questions than they resolved.


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For example, under the new analysis, what is the standard of liability to be applied when there is sexually harassing behavior that (1) is not a sexual demand or threat; and (2) is not severe or pervasive; but (3) does result in a tangible job detriment? Is the employer absolutely liable for sexual harassment by virtue of the tangible job detriment? Or, has the employee failed to state an actionable harassment claim because the harassment itself was not severe or pervasive? Is the correct cause of action gender discrimination (disparate treatment), subject to the *McDonnell Douglas* analysis[14] — which also provides absolute liability for a supervisor's discriminatory action resulting in a tangible job detriment?

Another perplexing issue is whether the new analysis can be applied to cases brought under the Minnesota Human Rights Act ("MHRA"). Because of the substantial similarities between the MHRA and Title VII, Minnesota courts often apply Title VII case law to actions brought under the MHRA.[15] Minnesota courts may be barred from adopting the *Burlington* and *Faragher* analysis, however, because the MHRA's definition of sexual harassment expressly make employer knowledge of the harassment, and failure to correct the action, part of the plaintiff's prima facie case.[16] Without knowledge by the employer and a subsequent failure to act, there is no actionable harassment under the MHRA.[17] Thus far, there is no reported decision as to whether *Burlington* can or will convert these factors into an affirmative defense in claims made under the MHRA.

Perhaps the most important new question was raised by Justice Thomas in his dissent in *Burlington*. Read literally, the newly created affirmative defense requires an employer to prove both that the employer took care to prevent and correct any harassment *and* that the employee failed to take advantage of any corrective opportunities. The dissent was critical of this requirement, noting that "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty or reasonable care to avoid harm."[18] Was a literal reading intended? Or, will the contours of the affirmative defense be modified in response to Justice Thomas's criticism?

## PRACTICAL EFFECTS

The Supreme Court's rulings raise new concerns for counsel prosecuting or defending sexual harassment claims. Counsel for plaintiffs, more than ever, must be certain that their clients follow the procedural requirements of Title VII to preserve their federal claim in the event that the new analysis is found not to apply to claims brought under the MHRA. To avoid the new affirmative defense, counsel for plaintiffs should also make sure that a client has diligently followed any procedures in the employer's sexual harassment policy for reporting harassment.


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As for employers, because the new analysis shifts the burden to them to prove what previously was the plaintiff's burden, counsel for defendants must be certain to plead and marshal evidence to support their affirmative defense. More fundamentally, an employer must act to prevent a lawsuit altogether, and to ensure that it can prove its affirmative defense should it be sued, by implementing a comprehensive written policy prohibiting harassment. The policy should be disseminated to all employees and, ideally, the employees should sign a written acknowledgment of the policy. Any complaints of harassment should be taken seriously and dealt with promptly through an investigation and corrective action, if necessary. Each action by the employer should be well-documented as it will be necessary to prove that its conduct was reasonable.

While bringing some clarification to the sexual harassment arena, *Burlington* and *Faragher* have also created new questions and left others unanswered. Whether the Court's attempt at clarification will be successful or, as the dissent predicted, a catalyst for more litigation, remains to be seen. Likewise, whether the decisions were good news for employees, or employers, or just for trial lawyers, remains an open question.

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[1] 118 S. Ct. 2257 (1998).

[2] 118 S. Ct. 2275 (1998).

[3] 118 S. Ct. at 2274-75.

[4] *Id*. at 2262.

[5] *Id*.

[6] 118 S. Ct. at 2280.

[7] See *Callanan v. Runyun*, 75 F.3d 1293, 1297 (8th Cir. 1996); *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 559-60 (Minn. App. 1993).

[8] *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995).

[9] *Meritor Saving Bank, FSB v. Vinson*, 106 S.Ct. 2399 (1986).

[10] 118 S. Ct. at 2270.

[11] 118 S. Ct. at 2270.

[12] *Id.*

[13] *Id.*, 118 S. Ct. at 293.

[14] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973).

[15] *Siguardson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986).

[16] Minn. Stat. § 363.01, subd. 41(3).

[17] See *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 559-60 (Minn. App. 1993).

[18] 118 S. Ct. at 2274.


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