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U.S. SUPREME COURT ISSUES ADA AND SEXUAL HARASSMENT DECISIONS

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The United States Supreme Court issued three decisions at the end of the 1997–98 term dealing with important matters of employment law. The first case, *Bragdon v. Abbott*,[1] did not arise in the employment context, but has significance for the rights of HIV positive individuals under the Americans with Disabilities Act (ADA) in the workplace. The second and third cases, *Faragher v. City of Boca Raton*[2] and *Burlington Industries, Inc. v. Ellerth*[3], set new standards for employer liability in sexual harassment cases arising under Title VII of the Civil Rights Act of 1964. This bulletin provides a summary of the Court's rulings.

The ADA Case

The plaintiff in this case was infected with the human immunodeficiency virus (HIV), but had not shown serious symptoms—that is, she was asymptomatic. She went to the defendant's office for a dental examination and disclosed her HIV infection. The dentist discovered a cavity and informed her of his policy against filling cavities of HIV-infected patients in his office. He offered to perform the work at a hospital at no extra charge, though she would have to pay for use of the hospital's facilities. She declined and filed suit under the Americans with Disabilities Act (ADA), which prohibits discrimination against any individual "on the basis of disability in the . . . enjoyment of the . . .services . . . of any place of public accommodation by any person who . . . operates [such] a place,"[4] but qualifies the prohibition by providing: "Nothing [herein] shall require an entity to permit an individual to participate in or benefit from the . . . accommodations of such entity where such individual poses a direct threat to the health or safety of others." [5]

1. No. 97-156 (U.S. Supreme Court, June 25, 1998).
2. No. 97-282 (U.S. Supreme Court, June 26, 1998).
3. No. 97-569 (U.S. Supreme Court, June 26, 1998).
4. 42 U.S.C. Sect. 12182(a).
5. Sect. 12182(b)(3).

The Supreme Court held, in an opinion by Justice Kennedy in which four other Justices joined, that although the woman's HIV infection had not progressed to the symptomatic phase, it was a disability under the ADA, in that it constituted a physical impairment that substantially limits one or more major life activities. From the moment of infection and throughout every stage of the disease, HIV infection satisfies the statutory and regulatory definition of a physical impairment, held the Court. The medical literature reveals that the disease follows a predictable and unalterable course from infection to inevitable death. It causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even during the intermediate stage when its attack is concentrated in the lymph nodes. Thus, HIV infection must be regarded as a physiological disorder with an immediate, constant, and detrimental effect on the hemic and lymphatic systems, the Court concluded.

The life activity upon which the plaintiff relied, her ability to reproduce and to bear children, constitutes a major life activity under the ADA, the Court ruled. The plain meaning of the word "major" denotes comparative importance and suggests that the touchstone is an activity's significance. Reproduction and the sexual dynamics surrounding it are central to the life process itself. Rejecting the defendant's claim that Congress intended the ADA only to cover those aspects of a person's life that have a public, economic, or daily character, the Court ruled that nothing in the definition suggests that activities without such a dimension may somehow be regarded as so unimportant or insignificant as not to be "major." Rather, the Court held, HIV infection substantially limits the defendant's major life activity within the ADA's meaning.

The Court remanded the case to the First Circuit Court of Appeals, with instructions that it determine, as a matter of law, whether the plaintiff's HIV infection posed a direct threat to the health and safety of others, based on medical or other objective, scientific evidence.

The Sexual Harassment Cases

The first sexual harassment case decided by the Court, *Faragher v. City of Boca Raton*, arose when a female city employee who worked as a lifeguard brought an action against the City and her immediate supervisors, alleging that the supervisors had created a sexually hostile atmosphere at work. She alleged they had repeatedly subjected her and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms, and that this conduct constituted discrimination in the "terms, conditions, and privileges" of her employment in violation of Title VII of the Civil Rights Act of 1964.[6]

The question before the Court was whether, applying traditional principles of agency law, the City could be held liable for the harassment of its supervisory employees because the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge" of it. The Supreme Court held, in an opinion by Justice Souter, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer joined, that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim.

Although the Court had previously recognized that Title VII prohibits a sexually-hostile working environment,[7] Justice Souter noted that the federal courts had established few definitive rules for determining when an employer was liable for such an environment. The Court's only discussion of the standards of employer liability came in 1986 when it held in *Meritor Savings Bank v. Vinson*[8] that traditional agency principles were relevant for determining employer liability. The Court noted that Title VII cases in the lower courts have typically assumed that supervisory sexual harassment falls outside the scope of employment because it is motivated solely by individual desires and serves no purpose of the employer. These cases stood in contrast to those of other lower courts which defined the scope of the employment broadly to hold employers vicariously liable for employees' intentional torts, including sexual assaults, that were not done to serve the employer, but were deemed to be characteristic of its activities or a foreseeable consequence of its business. This split in authority, Justice Souter wrote, is the result of differing judgments regarding the desirability of holding an employer liable for a subordinates' wayward behavior. The proper analysis, in the Court's view, calls for an inquiry into whether it is proper to conclude that sexual harassment is one of the normal risks of doing business that an employer should bear.

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6. 42 U.S.C. Sect. 2000e-2(a)(1).

7. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

8. 477 U.S. 57 (1986).

An employer can reasonably anticipate the possibility of sexual harassment occurring in the workplace, Justice Souter noted, and this might justify the assignment of the costs of this behavior to the employer rather than to the victim. Two factors argue against such an approach, however. First, there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope of employment and acts amounting to what the older law called frolics or detours from the course of employment. Second, the lower courts, by uniformly judging employer liability for co-worker harassment under a negligence standard, have implicitly treated such harassment as outside the scope of employment.

The Court held that the lower court erred in rejecting a theory of vicarious liability based on Sect. 219(2)(d) of the Restatement, which provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." It makes sense, Justice Souter noted, to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by use of his supervisory authority, and the aided-by-agency-relation principle of Sect. 219(2)(d) provides an appropriate starting point for determining liability for the kind of harassment presented here. In a sense a supervisor is always assisted in his misconduct by the supervisory relationship; however, the imposition of liability based on the misuse of supervisory authority must be squared with *Meritor's* holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination.

There are two basic alternatives to counter the risk of automatic liability. The first is to require proof of some affirmative invocation of that authority by the harassing supervisor; the second is to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment. The problem with the first alternative is that there is not a clear line between the affirmative and merely implicit uses of supervisory power; such a rule would often lead to close judgment calls and results that appear disparate if not contradictory, and the temptation to litigate would be hard to resist. The second alternative would avoid this particular temptation to litigate and implement Title VII sensibly by giving employers an incentive to prevent and eliminate harassment and by requiring employees to take advantage of the preventive or remedial apparatus of their employers.

Thus, the Court adopted the following holding in this case and in *Burlington Industries, Inc. v. Ellerth*, discussed below: an employer is subject to vicarious liability to 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, such as dismissal or transfer, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[9] The defense comprises two necessary elements: (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 or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as 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 an 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. A affirmative defense is not available, however, when the supervisor's harassment culminates in a tangible employment action.

Under this standard, the Court concluded, the lower court's judgment against the plaintiff must be reversed. The degree of hostility in the work environment rose to the actionable level and was attributable to the supervisors, and it is clear that these supervisors were granted virtually unchecked authority over their subordinates and that the plaintiff and her colleagues were completely isolated from the City's higher management. 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 had entirely failed to disseminate its sexual harassment policy among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors. Under such circumstances, the Court held as a matter of law that the City could not be found to have

9. See Fed. Rule Civ.Proc. 8(c).

exercised reasonable care to prevent the supervisors' harassing conduct.

The second case decided by the Court, *Burlington Industries v. Ellerth*, involved a claim brought by an employee who quit her job after fifteen months as a salesperson in one of petitioner Burlington Industries' many divisions, allegedly because she had been subjected to constant sexual harassment by one of her supervisors. Against a background of repeated boorish and offensive remarks and gestures allegedly made by the supervisor, the plaintiff placed particular emphasis on three incidents in which the supervisor's comments could be construed as threats to deny her tangible job benefits. She refused her supervisor's advances, yet suffered no tangible retaliation and was, in fact, promoted once. Moreover, she never informed anyone in authority about her supervisor's conduct, despite knowing Burlington had a policy against sexual harassment.

The Court held, in an opinion by Justice Kennedy, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer joined, that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense. The employee's claim, which involved only threats, was properly classified as a hostile work environment claim, not a quid pro quo claim, the Court held. In determining liability, then, the Court relied on principles of agency law.

In order to accommodate the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, the Court held that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. Reiterating the standard in *Faragher*, the Court held that 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. The affirmative defense comprises two necessary elements: (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 or to avoid harm otherwise. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

In addressing the broad question of employer liability for sexual harassment, the Court rejected the labels quid pro quo and hostile work environment as controlling for employer-liability purposes. Rather, the proper inquiry in all cases is whether the employer should be liable under the agency standard set forth above.

The Court remanded the plaintiff's claim to give her an opportunity to prove she has a claim, which would result in vicarious liability. Although she did not allege she suffered a tangible employment action at her supervisor's hands, which would deprive Burlington of the affirmative defense, this is not dispositive. In light of the Court's decision, Burlington is still subject to vicarious liability for the supervisor's activity, but should have an opportunity to assert and prove the affirmative defense, the Court concluded.

Conclusion

The Court may have made the task of sorting out liability for sexual harassment somewhat easier under the standard set forth in *Faragher* and *Ellerth*. And by holding that asymptomatic HIV-positive individuals are protected under the Americans with Disabilities Act, the Court has affirmed the approach previously taken by most lower courts. Further decisions of the lower courts as they apply these standards will clarify the limits of employer liability.