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Labor & Employment Bulletin

A bulletin designed to keep clients and other friends informed on labor and employment law matters

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SUPREME COURT DECIDES EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BY SUPERVISORS

During the last week of its 1997-98 Term, the U.S. Supreme Court issued three important decisions defining the scope of an employer's liability for the sexual harassment of its supervisors and employees. Although the Court had not issued a sexual harassment decision since 1993, this trio of decisions amounts to four opinions this year defining the scope of sex harassment law.

The first of the four decisions, issued earlier this year, held that the proscription against sexual harassment under Title VII of the Civil Rights Act of 1964 includes harassment when harasser and harassee are of the same gender. *Oncale v. Sundowner Offshore Services, Inc.* (March 4, 1998).

The latest decisions focus on the extent of employer liability for the conduct of its agents.

In *Gebser v. Lago Vista Independent School District* (June 23, 1998), the issue was under what circumstances a school district can be held liable in damages for the sexual harassment of a student by a teacher. A student who was having a sexual relationship with her high school teacher sued the school district under Title IX, the federal law prohibiting sexual discrimination by educational programs that receive federal money. The school district had no knowledge of the teacher's misconduct until police officers discovered the student and teacher having intercourse. The student had not complained, but the district had not promulgated a policy prohibiting sexual harassment or providing for the receipt of sexual harassment complaints.

The student argued that the district should be vicariously liable for the conduct of its teacher, whether or not district

officials knew of the misconduct. Alternatively, the student argued for liability if the district knew or should have known of the harassment. The Supreme Court rejected both standards and adopted a more restrictive one. The Court held that the district is liable only if a district official empowered to take corrective action has actual notice of the harassment and deliberately fails to respond. Finding neither circumstance in this case, the Court rejected the student's federal claim.

The Court's other two decisions arose under Title VII, the principal federal employment discrimination law, and came out much differently. In *Ellerth v. Burlington Industries* (June 23, 1998), a female salesperson was the victim of a constant barrage by her male supervisor of sexual comments, touching and threats of adverse job actions if she did not accede to his sex-related requests. The plaintiff rebuffed his advances but suffered no tangible job detriment as a result. Nor did she lodge any formal complaint under the company's sex harassment policy and complaint procedure, of which she was aware.

As defined by the Court, the issue was whether an employer has vicarious liability when a supervisor creates a sexually hostile work environment by unfulfilled threats of adverse job action. In deciding this issue, the Court made several important pronouncements. First, it characterized sexual harassment consisting of unfulfilled threats as a form of hostile work environment harassment and that such harassment, unlike *quid pro quo* harassment, requires a showing of pervasiveness and severity. Second, the Court endorsed the principle that an employer has strict liability for the conduct of a supervisor who makes a tangible employment decision based on an employee's acceptance or rejection of sexually harassing conduct. Third, the Court decided the specific issue in the case. The Court held that even absent a tangible job action, an employer is vicariously liable for a hostile work environment created by a supervisor with authority over the employee. However, the employer can avoid liability if it can prove that it exercised reasonable care to prevent and correct sexually harassing behavior and the employee unreasonably failed to take advantage of any preventive or corrective opportunities.

On the same day it decided *Ellerth* the Court decided *Faragher v. City of Boca Raton* raising much the same issue. In that case a female lifeguard was subjected to a

hostile work environment created by her male supervisors through repeated touching, sexually explicit invitations and demeaning comments about women. The plaintiff had not reported the harassment to her harassers' managers. However, the City had not disseminated a sexual harassment policy to its lifeguards. The City argued that it was not liable in the absence of knowledge of the harassment. Consistent with *Ellerth*, the Court rejected that position and adopted a broader view of employer liability, holding that an employer is liable for hostile work environment harassment by its supervisor unless the employer can show it took appropriate action to prevent and cure the harassment and the employee failed to utilize those opportunities. The Court stated that an employer who does not have a suitable anti-harassment policy and complaint process will normally be unable to meet its defense burden, while proof that an employee failed to invoke an effective complaint process will normally suffice to meet that element of the employer's defense.

These cases expand employer liability for hostile work environment harassment under Title VII beyond the "know or reason to know" standard previously adopted by many lower courts. The cases also underscore the importance of having and disseminating an effective anti-harassment policy and complaint procedure. Because now, an employer who does not have such a policy faces liability for any actionable sexual harassment by its supervisors, whether or not the employer knows of the misconduct.

For further information about these decisions and their impact on your business, please call Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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