Roundtable Retrospective 2007: Dealing with Sexual Harassment

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Roundtable Retrospective 2007: Dealing with Sexual Harassment

Abstract
A review of sexual harassment case law was presented at the 2007 Labor and Employment Roundtable at the Cornell University School of Hotel Administration. The foremost lesson is that employers should take steps to prevent harassment, but failing that, an employer should maintain and follow a strong policy on sexual harassment and immediately make an effective response to a complaint.

Keywords
labor law, sexual harassment

Disciplines
Hospitality Administration and Management | Labor and Employment Law | Labor Relations

Comments
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A review of sexual harassment case law was presented at the 2007 Labor and Employment Roundtable at the Cornell University School of Hotel Administration. The foremost lesson is that employers should take steps to prevent harassment, but failing that, an employer should maintain and follow a strong policy on sexual harassment and immediately make an effective response to a complaint.

**Keywords:** labor law, sex harassment

**Summary**

This year’s Labor and Employment Roundtable reviewed recent developments in labor law. Looking at the difficulties faced by employers whose employees allege sexual harassment in the workplace, the roundtable participants concluded that the key is for employers to respond promptly and effectively to sexual harassment claims. It is also important to maintain a strong policy on harassment. Many claims are settled through negotiations rather than in court. When a case does go to a judge, courts in various jurisdictions have made their own interpretation of the existing case law, creating a sometimes challenging environment for employers (and also for those making a complaint). However, the attorneys reported that when a case goes before a jury, an employer is better off if it has offered training in avoiding sexual harassment and has provided toll-free reporting lines. In the end, the best policy is to prevent harassment before it occurs by creating an atmosphere where harassment is not tolerated and brings swift and sure consequences.

On May 18, 2007, the Center for Hospitality Research at Cornell University’s School of Hotel Administration held its seventh annual Labor and Employment Law Roundtable. As in the past, the participants included...
private practice lawyers, labor and employment law faculty from a number of different colleges and law schools, and in-house counsel and human resources executives from hospitality companies. The participants discussed four topics at this year’s roundtable: (1) sexual harassment; (2) the state of employee retaliation one year after the Supreme Court’s *Burlington Northern & Santa Fe Railway, Co. v. White* decision; (3) the results of the hotel industries’ 2006 union negotiations; and (4) an update on the *Restatement of Employment Law*, a treatise authored by two roundtable participants. The purpose of this article is to examine the first topic, sexual harassment, by discussing the law, revealing preliminary results of new research, identifying dilemmas that employers face, and relaying the consensus of the roundtable participants.

**Sexual Harassment Nine Years after *Ellerth* and *Faragher***

In 1998, the U.S. Supreme Court issued two decisions that defined employer liability in workplace sexual harassment cases. In *Faragher v. City of Boca Raton*¹ and *Burlington Industries, Inc. v. Ellerth*,² the Supreme Court held that employers are liable for their supervisors’ sexual harassment if the harassment resulted in a tangible loss to the employee (e.g., termination, demotion). In this instance, employers have no defense. Employers can also be liable when there is no tangible loss. In this situation, however, they can escape liability if they satisfy a two-prong affirmative defense. To avoid liability, employers must prove that (1) the employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and (2) the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³

As is often the case, commentators reacted swiftly and intensely to the new affirmative defense, with the word *unreasonable* being a key point. Management-side lawyers and commentators opined that to satisfy the first prong of the defense, employers would have to (1) train all employees and (2) create a toll-free “discrimination hotline.” The commentators also predicted that employers would be unlikely to prevail when they seek a summary judgment because (1) employees who did not report would argue that such a failure was reasonable based on the circumstances and that the court would let juries decide such issues, and (2) employees who did report could not be, by definition, unreasonable.

Eighteen months after the *Ellerth* and *Faragher* decisions, three participants in the center’s 2001 roundtable, Cornell Law School Professor Michael Heise, MIT Ph.D. candidate Zev Eigen, and I, conducted a study of the first seventy-two summary judgment motions in which a court based its decision on the new affirmative defense. The results, published five years ago in the *Fordham Law Review*, ran counter to the conventional wisdom, as espoused by the early commentators (Sherwyn, Heise, and Eigen 2001). First, employers did not need to train employees or have a toll-free number to satisfy the reasonable-care standard. Instead, every court to analyze the new defense found that promulgating a “good policy” constituted reasonable care. A sexual harassment policy was considered “good” if it was written, disseminated to all employees, and did not require the employee to report harassment to the harassing supervisor. Second, employees who failed to report were found to be “unreasonable” if the company had a good policy. In fact, in situations where the employers “exercised reasonable care” and the employee failed to

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³. *Id.* at 745.
report, we found that employers prevailed in all thirty-one cases. Third, employers prevailed even when the employee did report in twenty-six out of thirty-one cases. In fact, the data showed that courts found reporting employees unreasonable if the employer responded well.

Still, because employers were best off if the employee did not report at all, our tongue-in-cheek conclusion was simple: exercise reasonable care, but not too much. The reason for this conclusion was that employers who exercised reasonable care and made it too easy to report harassment could lose if the employee did, in fact, report (for instance, maintaining a toll-free line makes reporting eminently easy). Conversely, employers who had a policy, but did not train or have a toll-free line would limit the number of reports and, thus, increase their chances of prevailing.

We therefore titled our article: “Don’t Train Your Employees and Cancel Your 1-800 Discrimination Hotline.”

Despite the title, our main conclusion, was not, of course, that employers should skip training employees and supervisors regarding sexual harassment. Instead, we argued that the law was problematic because employers with good HR practices aimed at eliminating harassment in the workplace could be in a worse position than those employers who did the bare minimum. Consequently, we advocated for a change in the law. Specifically, we argued for a new standard that required employers to exercise reasonable care to prevent and correct harassment, but without a requirement that the employee had to unreasonably fail to take advantage of the employer-provided services.

We based our conclusion on several factors. First, our analysis found that regardless of the law, variables associated with employers’ actions affected court decisions, while those stemming from employees’ actions did not. Second, the question of when an employees’ actions were considered unreasonable was unwieldy and difficult. Was reporting two weeks after an occurrence unreasonable? How about two months? Six months? Six years? Where should courts draw the line? The cases yielded no clear consensus, and employers and employees alike were, therefore, operating in a world of uncertainty. Next, we did not see the point of examining employer behavior. We did not see why an employer who did all it could to prevent harassment and who responded to a complaint well should have its liability determined by whether a report was, for example, timely or tardy. Moreover, along these same lines, it seemed that such a ruling provided a perverse incentive for employers to make the reporting system cumbersome enough to subtly discourage or confuse employees. Finally, it seemed that the key to the law was to prevent harm, rather than to judge employees who have been harassed. We opined that even an employee who waits years to report harassment should be compensated if the employer fails to properly respond. But that same employee should not prevail if the employer does respond well.

When we presented this study at the 2001 roundtable, Joe Baumgarten, of Proskauer Rose, accepted our conclusions but stated that he would like us to repeat the study in five years to see whether courts had changed the standards. Joe agreed with our analysis but believed that courts would soon require employers to do more than have a “good policy.” Furthermore, he predicted that courts would soon find nonreporting employees to be reasonable. While we were unsure about Joe’s predictions, we thought repeating the study was an excellent idea.

We began updating the study in summer 2006, five years after the first study, as suggested by Baumgarten. By this point, of course, the case law had expanded. Instead of 72 cases, we now had more than 500
cases to code and analyze. In our preliminary 2006 study, we analyzed a total of 133 cases. These 133 cases consisted of all of the circuit cases since June 1998, along with the most recent district court cases where an employer sought summary judgment based on the Ellerth/Faragher defense. At the recently conducted 2007 roundtable, we presented the extremely preliminary results from these 133 cases. Analysis of these cases revealed, to the surprise of many, little change to the 2001 data. Courts still do not require employers to have anything more than a “good policy,” employees who do not report are almost always considered unreasonable, and employees who do report will often be found to be reasonable if the employer responded well. Put simply, an employer will prevail if it has a “good policy” and either (1) the employee does not report or (2) the employer responds well to the complaint. There is no need to train or have a toll-free number. Employers must, however, respond well.

Exhibit 1 sets forth our preliminary results. First, as it relates to an employer’s satisfaction of the first prong, second prong, and prevailing in a summary judgment motion, two variables—one involving the employer and the other the employee—appear salient. Good things happen to employers that respond well. Conversely, bad things happen to employees who fail to report the alleged harassment. Second, our admittedly preliminary results largely confirm findings from our initial study.

Once again, the 2007 roundtable participants agreed with the conclusions but provided a different take on the way this information should be considered by employers.

Roundtable participants explained that while summary judgment motions are important, they are not the end that drives the case. The vast majority of sexual harassment cases settle before the case ever reaches a judge or a summary judgment. Thus, employers’ and plaintiffs’ lawyers are always positioning themselves for settlement discussions. In these discussions, the management’s lawyer will contend that the case will never survive summary judgment. Contesting that argument, the plaintiff’s lawyer will then argue that if this case gets to a jury the plaintiff will receive a windfall. This argument is the key element, because, as the management lawyers at the table argued, when you get in front of a jury you want to show that you did everything you could do to prevent or remedy harassment. Training, 800 numbers, and strong investigations are what juries want to see. In fact, as these trial lawyers explained, juries and judges often act similarly by rendering “result-orientated holdings.”

“Result-oriented holdings” is a term used by lawyers to describe situations where the judge or jury first decides who should win and then “makes the law” fit that desired result. Our 2001 study provided a number of examples where judges seemingly engaged in such a process. Specifically, we found that judges “made” employees sound unreasonable even when they reported. For example, under literal reading of the Ellerth defense, it would seem that an employer cannot possibly prevail on a summary judgment motion in a case in which the employee reported the alleged harassment because it would seem that an employee who reported harassment cannot have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Indeed, a few courts did mechanically apply the defense by denying summary judgment to defendant-employers even when the employers did all that they could have done to prevent and correct harassment. For example, in Moore v. Sam’s Club, the plaintiff alleged that the co-manager of the store harassed and then raped her.4 As related in the case documents, the conduct occurred either in late March or

early April, and the plaintiff complained on April 25. On May 1, the employer asked the plaintiff to provide a detailed statement. The company then investigated and suspended the harasser on May 3. The suspension ended on June 15, and the company then demoted and transferred the harasser. The plaintiff then requested a

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**Exhibit 1:**
(Preliminary) Outcomes of Sexual Harassment Complaints (Ordinary Least Squares)

<table>
<thead>
<tr>
<th>Employer Satisfied Prong One</th>
<th>Employer Satisfied Prong Two</th>
<th>Employer Summary Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employer:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Had a policy</td>
<td>3.743</td>
<td>—</td>
</tr>
<tr>
<td>Disseminated policy</td>
<td>−0.177</td>
<td>0.555</td>
</tr>
<tr>
<td>Offered alternative ways to report</td>
<td>0.377</td>
<td>−0.097</td>
</tr>
<tr>
<td>Had a good policy</td>
<td>0.994</td>
<td>−0.091</td>
</tr>
<tr>
<td>Had training program</td>
<td>1.090</td>
<td>1.047</td>
</tr>
<tr>
<td>Had an 800 emergency report number</td>
<td>0.778</td>
<td>1.392</td>
</tr>
<tr>
<td>Exerted additional effort</td>
<td>1.280</td>
<td>−0.323</td>
</tr>
<tr>
<td>Responded well</td>
<td>3.047</td>
<td>2.668</td>
</tr>
<tr>
<td><strong>Employee:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failed to report</td>
<td>3.440</td>
<td>3.811</td>
</tr>
<tr>
<td>Failed to timely report</td>
<td>−0.331</td>
<td>−0.822</td>
</tr>
<tr>
<td>Reported well</td>
<td>−0.357</td>
<td>−0.353</td>
</tr>
<tr>
<td><strong>Court:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Circuit case</td>
<td>1.279</td>
<td>0.436</td>
</tr>
<tr>
<td>Analyzed employee’s report</td>
<td>0.120</td>
<td>−1.112</td>
</tr>
<tr>
<td>Analyzed employer’s response</td>
<td>0.038</td>
<td>0.547</td>
</tr>
<tr>
<td>Constant</td>
<td>−6.648</td>
<td>−3.548</td>
</tr>
<tr>
<td>N</td>
<td>133</td>
<td>133</td>
</tr>
</tbody>
</table>

*Note: Cases are clustered at circuit court level. Robust z-statistics in parentheses.*

*p < .01.*
transfer from New York to Florida, and the company consented. The plaintiff moved to Florida but did not report to work, choosing instead at this point to sue.

In addressing the summary judgment motion, the court first held that Sam’s Club had exercised reasonable care both in formulating its policy and in responding to the complaint. The court then held, however, that Sam’s Club could not prevail on the second prong of the defense because the plaintiff took full advantage of the preventative measures provided, and therefore had not acted unreasonably. Thus, Sam’s Club did everything it could have done, but lost because the plaintiff also had acted appropriately.5

Whether this is a just ruling is a matter of opinion. What is clear, however, is that (1) it is the proper application of the defense and (2) it is not the way the majority of courts have ruled in such cases.

In both of our studies, we found that the most courts interpreting the affirmative defense have refused to hold employers who responded properly to complaints of sexual harassment liable for the actions of their supervisors. Instead, most courts rewarded employers for doing what they should to prevent and correct harassment. These courts based their holdings solely on whether the employer fortuitously employed someone who failed to act reasonably by not reporting. Thus, judges drafted result-oriented opinions in which they had to comport their conclusions, which were based exclusively on the employer’s actions (i.e., prevention and response to harassment), with the language of Ellerth and Faragher. Doing just that, these courts justified this seemingly anomalous result in one of two ways. Some courts created new law, while others judged the report to “find” a rationale for making the employee unreasonable.

A prime example of a court creating new law is found in Indest v. Freeman Decorating, Inc., where the Fifth Circuit held that the Ellerth/Faragher defense is does not apply when an employee follows an employer’s policies.6 Instead, the court created what essentially amounts to a new defense for employers: employers who swiftly respond to complaints of sexual harassment are not liable for the actions of their supervisors. Applying this standard, the court held that because she promptly complained of Arnaudet’s harassing conduct, and because the company promptly responded, disciplined Arnaudet appropriately and stopped the harassment, the district court properly granted judgment as a matter of law to Freeman. Even if a hostile work environment claim had been stated, which is dubious, Freeman’s prompt remedial response relieves it of Title VII vicarious liability.7

Hence, in the Fifth Circuit, an employer who exercises reasonable care in responding to a complaint of sexual harassment will be able to prevail on the affirmative defense and avoid liability even if the conduct was severe or pervasive. It seems that the Indest court was loath to rule against “good actor” employers, and so it distinguished the case from Ellerth and Faragher. While this may be problematic to some, it is not nearly as

5. The court noted that the second prong of the Ellerth/Faragher defense “does not apply here.” Id. at 192. The court also noted that “it is thus unclear how the {Ellerth/Faragher} defense, on its own terms, would apply here” because the factual scenario of those cases are distinct from those in Moore. Id. at 193. The court may have been penalizing Sam’s Club because of the relatively minor punishment that the company meted out to a supervisor who raped an employee. If so, the case is even more problematic because other courts could follow the stated rationale—that employers cannot prevail when the employee reports—even when the employer provided the utmost care and gave out appropriate discipline.

6. 164 F.3d 258 (5th Cir. 1999).

7. Id. at 267.
objectionable as basing a liability decision on an analysis of the employee’s report. Unfortunately, most courts presiding over cases in which the employee reported harassment and the employer responded properly have granted the employer’s motion for summary judgment by evaluating the plaintiff’s report and concluding it to be untimely or otherwise defective.8

In numerous cases from both the original and current samples, courts found plaintiffs to have acted unreasonably because they delayed reporting the harassment.9 In some cases, there was a delay of one year or more between the first harassing action and the report.10 In other cases, however, the delay was a matter of months or even weeks. For example, in *Nuris Guerra v. Editorial Televisa-USA, Inc.*, the plaintiff, who began working on May 28, 1996, was harassed every day from her first week of work until she complained on June 20, 1996.11 In dismissing the case, the court held that the delay, combined with the employer’s prompt and proper response, satisfied the second prong of the defense. Similarly, in *Mirakhorli v. DFW Management Co.*, it was unclear whether the harassment began two months or eight months before the plaintiff complained.12 The court was unconcerned with the discrepancy because it found a delay of either two or eight months to be unreasonable as a matter of law. Finally, in *Dedner v. Oklahoma*, the plaintiff waited three months to report the harassment because she did not think the employer’s procedures would be effective and because she thought the supervisor would stop the harassing behavior. Again, the court found the delay unreasonable and granted summary judgment.13

Delay is not the only rationale that courts use for finding that employees who reported harassment nonetheless acted unreasonably. Several decisions hold that reporting to the wrong party constitutes an unreasonable failure to take advantage of the employer’s policies and procedures. In *DeCesare v. National Railroad Passenger Corp.*, the plaintiff complained by mentioning the sexual harassment to her union representative instead of using the company’s procedures. The court found this to be unreasonable.14 In *Masson v. School Board*, an employee filed multiple complaints to people who were not designated to hear sexual harassment complaints.15 Moreover, she complained of being replaced, not sexually harassed. The court dismissed the case.

Judging the reasonableness of a complainant’s actions creates numerous problems. In certain circumstances, it makes little sense to hold that an employee’s waiting several months to report harassment is unreasonable. Pursuing a sexual harassment complaint can be difficult. Regardless of the

8. Reports are considered defective because they are either untimely or reported to the wrong party. A defective report, according to numerous courts, indicates an unreasonable employee response. See infra notes 145, 146, and 149.
9. It must be noted that in each of these cases the employer responded with reasonable care according to the court.
13. 42 F. Supp. 2d 1254 (E.D. Okla. 1999). While a delay may be unreasonable as a matter of law to some courts, others have denied summary judgment motions so that a jury could decide if the plaintiffs’ delays were reasonable. See *Watts v. Kroger Co.*, 170 F.3d 505, at 507-08 & n.1, 510 (5th Cir. 1999) (noting that reasonableness of plaintiff’s one-and-a-half month delay was a question for the jury); *Fall v. Indiana Univ. Bd. of Trs.* , 12 F. Supp. 2d 870, 884 (N.D. Ind. 1998) (noting plaintiff’s three month delay).
company’s procedures, employees may wonder whether they are being overly sensitive by misinterpreting innocent banter, or whether they can resolve the issue without the angst and difficulty associated with pursuing a formal complaint. While it makes sense to encourage early complaints of harassment that may squelch the harassment before it blooms to an unlawful level, such reporting of claims should not be required for a plaintiff’s case to survive summary judgment. Employees should not have to endure the stress of what results in, for all intents and purposes, a two-month statute of limitations on harassment.

While “judging the report” may seem to have little or no negative connotations for employers, it is not the panacea it seems. Some courts have found that the question of whether a report is defective to be a question for a jury. When such cases survive summary judgment employers must either settle or face a jury. Employers believe and fear that juries will also provide result-oriented holdings. Unfortunately, because jury decisions are not written, there is little solid data to support this conclusion. Anecdotal evidence, however, strongly supports the conclusion that juries do, in fact, ignore the law and focus on “justice.” The problem for employers is that juries’ theory of justice may differ from that of the majorities of courts. Juries, most employers fear, will find for a plaintiff who has suffered sexual harassment regardless of whether an employer has acted properly to prevent and correct harassment. Thus, an employer who fails to prevail at summary judgment may lose at trial even if it had a good policy and responded well. While this theory has not been (and likely cannot be) tested, it drives management lawyers to the following conclusion: employers should do everything in their power to prevent harassment. While offering training and toll-free reporting lines may lead to more complaints, most courts will not find against an employer who responded well, and juries will only find for employers only if they have done all they could to prevent and correct harassment. Thus, the roundtable participants agreed that the cost of increased claims and the small chance of losing even in the face of good response are outweighed by fact that extra prevention will reduce the likelihood of a jury finding for the plaintiff. The other benefit to the training and other extra measures stems from the main point of all of this law, that is, ridding the organization of sexual harassment.

Preventing harassment in the first place benefits all involved. Our “in-house” lawyers and other company executives argued that their goal was not to win cases but to create an atmosphere where employees knew that harassment was not tolerated and that harassers would be identified and either punished or terminated. These participants explained that their goals were to create a culture of respect, so that employees trusted the company. In this light, increased complaints were seen as a positive development, because it allowed the company to address problems, while at the same time, those complaints need not lead to lawsuits when addressed well.

Conclusion

Our preliminary study showed that employers who have a policy to prevent sexual harassment will prevail in summary judgment motions if either (1) the employee does not report or (2) the employer responded well. There remains no need for training or a toll-free report line. However, when the case goes to a jury, the situation is different. Our 2007 roundtable participants reported that they prevailed in jury trials because they had training and toll-free reporting lines. Consequently, they advise their clients that these extra measures not only are favorable for juries, but they are the best way to rid the
organization of harassment, will help the employer in settlement negotiations, will be vital at trial, and will have a minimal if any negative effect at summary judgment. Thus, the inescapable conclusion is that employers should do all they can to prevent harassment.

Reference


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