

Quid Pro Quo Sexual Harassment and Consensual/Coercion Sex Harassment Cases
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Handling a sexual harassment and consensual/coercion sexual harassment case are challenging but are winnable with the right facts, right plaintiff and especially if the harasser is a supervisor. After handling these cases I have learned that sexual harassment is not about sex but about power in a corporate setting. Screening is very important as in all employment law cases. I hope to help you understand what is important in these cases.

Let's talk some history. In 1980, the EEOC issued guidelines stating that "sexual harassment" is a form of sex discrimination that is prohibited by Title VII. The EEOC guidelines explain that sexual harassment could take the form of either a (1) An economic "quid pro quo" where an employers' subjection to sexual conduct is linked to the grant or denial of job benefits, such as getting or retaining a job, or receiving a favorable performance review or promotion; or (2) creating a "hostile environment", where the sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. See 29 C.F.R. § 1604.11(a) and *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-2406. It is important to note in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) the Supreme Court held that sexual harassment creating an intimidating or hostile working environment, but not resulting in any tangible loss of job, position, or benefit, still violates Title VII. These latter cases are harder to win, as there is the *Ellerth/Faragher* affirmative defense available as described below.

Prior to decisions in landmark case *Burlington Industries, Inc. v. Ellerth*, (1998) 524 U.S. 742 757, 118 S. Ct. 2257, the courts followed the "quid pro quo" and "hostile environment" type of analysis in Title VII cases. After *Burlington*, the Supreme Court questioned the utility of the "quid pro quo" and "hostile environment" distinction. The Court held that cases based on threats that are carried out are often referred to as quid pro quo cases, as distinct from attention to sexual remarks that are sufficiently severe or pervasive to create a hostile work environment. "The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those which are not absent altogether, but beyond this are of limited utility." See *Burlington Industries, Inc. v. Ellerth*, supra, 524 U.S. at 751, 118 S.Ct. at 2264.

Sexual harassment cases often still discuss quid pro quo and hostile work environment. It is important to look whether the harassment resulted in any

adverse “tangible employment action against the employee” and if so then, (1) if it did result in tangible employment against the employee the employer is automatically vicariously liable for the harassment, and (2) if the harassment did not involve tangible employment action against the employer, the employer can avoid vicarious liability for the supervisor’s conduct by raising and proving the “*Ellerth/Faragher* affirmative defense”.

The “*Ellerth/ Faragher* defense” under Title VII is simply stated as follows: “unless there is tangible employment action taken against the employee, the employer may avoid liability under Title VII for supervisors harassment of an employee by proving; (1) the employer exercised reasonable care to prevent and correct properly any sexually harassing behavior, and (2) the plaintiff employee unreasonable failed to take advantage of the preventive or corrective opportunities proved by the employer or to avoid harm otherwise” See *Burlington Industries v. Ellerth*, supra; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 806-807, 118 S.Ct. 2275, 2292-2293. It is important to note that the “*Ellerth/ Faragher* defense” applies only to harassment or discrimination occurring outside the scope of employment. If the employer authorized the harasser, such as a supervisor there is no such defense available to the employer. (See *Burlington Industries v. Ellerth*, supra, 524 U.S. 757, 758, 118 S. Ct. 2267).

What is amazing to me is that employers often make a mistake in initial pleadings to assert the “*Ellerth/ Faragher* defense”. I love to see them make this mistake. This defense makes a mistake when it fails to consider the disadvantage for asserting it when there is a case of a defective human resource (HR) department that has had prior history of incompetence with a history other numerous acts of discrimination in the workplace. It is still shocking how many of these situations occur today. I actually had a 32 year veteran HR manager testify in deposition he did not know what a his employer’s discrimination policy was nor did he know if the policy prohibited clearly offensive conduct in a recent case. If the head HR administrator does not know the HR discrimination policy, how can there be a policy actually implemented? How can the employees know of the policy? Talk about miscommunication! I always ask employees and supervisors about the HR policy and am constantly surprised by the responses that express total ignorance of any policy whatsoever.

You have to learn to be a legal ninja warrior in these cases. I had a case of extreme racial discrimination. The defense firm noticed over 50 video depositions and even wanted to double-track them of all employees at all levels—apparently falsely informed there were no problems with discrimination in the workplace. I remember being really taken aback. But I knew there were multiple problems and the defendant’s plead the *Ellerth/Faragher* defense. The scorch- the-earth technique backfired. Each deposition was a disaster for the employer as each worker had a

vivid story of past discrimination. Some minority female employees actually were crying as the told of the HR's department failure to protect them in a clearly hostile work environment for women and African-Americans. The CEO actually took the Fifth Amendment in his video deposition allowing me to ask multiple questions about outrageous acts of racial discrimination he approved in violation of federal and state law. The case settled after the depositions were sent to the licensing board of the employer.

When a defendant makes the "Ellerth/ Faragher defense", it will open the door for plaintiff to introduce evidence of the employer's prior mishandling of unrelated incidences of sexual harassment that might otherwise be excluded on the ground of unfairness, prejudice or confusion or of misleading the jury under F.R.E. 403. If the plaintiff can prove that the employer ignored or mishandled prior incidences of sexual harassment evidence from prior unrelated incidences of sexual harassment those other incidents will then be admissible to show that the plaintiff's failure to complain was not unreasonable because it would not have been futile given the employers prior inaction.

It is also a good practice to plead a defective policy where the employer has a defective HR policy, the lack of a viable policy and a custom/practice of a failure to investigate. You should be able to get in prior claims that you may otherwise not be able to admit when an employer asserts the element of the "Ellerth/ Faragher defense". It is also important to note that the "Ellerth/ Faragher defense" is an affirmative defense that must be affirmatively plead by the employer. The employer bares the burden of proof by preponderance of the evidence. See *Burlington Industries v. Ellerth*, supra; *Faragher v. City of Boca Raton cited supra*. It is also important to note that then the *McDonnell Douglas* burden shifting analysis does not apply in discrimination cases of whether the conduct might have otherwise had some legitimate motive but was in fact based on discriminatory motive. But here there is no possible justification for harassment in the workplace, thus the *McDonald Douglas* framework should not apply. The employer can only deny the charge or prove that the "Ellerth/ Faragher defense" and not argue that the harassment was in some way warranted.

A single incident of an unwelcome sexual advance by a supervisor linked to the granting or withholding of job benefits may support a quid pro quo claim. Unlike hostile environment cases it is not necessary for the supervisor's harassment to be ongoing or pervasive (see *Burlington Industries v. Ellerth*, supra). Plaintiff must prove that the conduct at issue is not "merely tinged with events of sexual connotations, but actually constitutes discrimination...because of sex." *Oncale v. Sundowner Offshore Services, Inc.*, (1998) 523 U.S. 75, 81, 118 S.Ct. 998, 1002. A supervisor's express or implied threat must have been carried out. In consensual sexual relationships and sexual harassment there is a split of authority

of whether a plaintiff in a prior consensual relationship with a supervisor may still claim quid pro quo harassment by that supervisor. In other words, the plaintiff claims that the supervisor continued to demand sexual favors and retaliated against plaintiff for ending the relationship. There must be coercion express or implied and that must be plead and proved by veiled statements or the supervisor's insistence on sexual demands after plaintiff has declined the advances. See *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F3d 1158.

Several federal courts have held that a jilted paramour seeking retribution is not sexual harassment. The supervisor's treatment of plaintiff is not based on plaintiff's gender, but rather on the animosity created by the termination of their relationship. Plaintiff's gender was held to be merely coincidental to the harassment. See *Succar v. Dade County School Bd.* (SD FL 1999) 60 F.Supp.2d 1309, 1314; *Huebschen v. Department of Health & Social Services* (7th Cir. 1983) 716 F2d 1167, 1172. However, other courts have allowed for recovery where the supervisor did not disclose to the employer the reasons for the action taken against the jilted paramour. See *Williams v. Civiletti* (D DC 1980) 487 F.Supp. 1387. However a practice pointer to note is that even if a sexual harassment claim may fail under such circumstances, the plaintiff who engages in consensual sex is retaliated against may be able to maintain a retaliation claim against his or her employer. See *Lipphardt v. Durango Steakhouse of Brandon, Inc.* (11 Cir. 2001) 267 F3d 1183. Such a retaliation claim is often a easier case to prove since you don't have to prove the sexual harassment or discrimination in fact happened and you can still win based on the retaliation claim.

A typical consensual sex harassment case involves sexual advancement or a proposition by a supervisor with an express or implied threat that if the employee refuses, he or she will be terminated or demoted or loss other job related benefits or that the employee maybe promised better treatment, such as a promotion, transfer, raise or favorable recommendation if the employee submits to sexual advances. The supervisor's request for sexual favors does need not to be expressed. It is enough that the individual making the unwelcome sexual advances to plaintiff by the supervisor and a link to employment benefits can be inferred under the factual circumstances, statements of fact that the supervisor persist in the demands after the plaintiff has declined or stated that he or she is not interested is sufficient. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F3d 1178 "Such a claim may lie even either the continued employment has been expressly conditioned on participation in sexual acts or when the supervisor's words or conduct would communicate to a reasonable woman in the employee's position that such participation is a condition of employment." *Holly D. v. California Institute of Technology*, cited supra.

A female employee was told her that her continued successes were dependent on her agreeing to a supervisor's sexual demands was held as a additional condition of employment imposed on her because of her gender and in violation of Title VII. *Tomkins v. Public Service Elec. & Gas Co.* (3rd Cir. 1977) 568 F2d 1044, 1047. In another case a supervisor repeatedly made sexual remarks to female employee and promised her job enhancement if she cooperated in a sexual affair and that her job was eliminated because she rebuffed his advances. *Barnes v. Costle* (DC Cir. 1977) 561 F2d 983, 985 In *Holly D*, cited *supra* the employee alleged when she reacted negatively to a supervisors sexual remarks at work he gave her a negative performance report and she believed there was a connection between the two. Due to her financial difficulties and needed to keep her job she decided that if the supervisor requested sex "she would have to comply and ultimately did so". If a reasonable woman in an employee's position would believe that sexual submission was necessary to save her job, the employee would be entitled to relief against her employer as per *Holly*. The court also held that the mere fact that a supervisor was interested in sex and desired to have sex is simply not enough.

To prove the Title VII violation on the grounds of quid pro quo, an employee must prove:

- (1) the employee was subject to *unwelcome* sexual advances, conduct or comments by a supervisor with immediate or successively higher authority over the employee;
- (2) the harassment complained of was based on sex; and
- (3) the harassment affected tangible aspects of the employee's compensation, terms, or conditions of employment. See *Henson v. City of Dundee* (11th Cir. 1982) 682 F2d 897; *Karibian v. Columbia Univ.* (2nd Cir. 1994) 14 F3d 773.

Where the alleged coercion was implied rather than expressed, courts require more than conclusory allegations that the supervisor proposed a sexual submission and the employee agreed in order to retain her job. The courts examined such charges "with the utmost care." *Holly D. v. California Institute of Technology*, cited *supra*. When the above requirements of quid pro quo sexual harassment are met, the employer is vicariously liable for the supervisor's harassment. In other words, it is immaterial whether the employer was aware or should have been aware or was negligent in failing to prevent it. See *Burlington Industries, Inc. v. Ellerth*, cited *supra*. In contrast, a co-workers harassment uses a negligence standard to assess employer liability. See *Swinton v. Potomas*, 270 F.3d 794 (9th Cir. 2001). The rationale is that an employer is strictly liable for a supervisor's harassment culminating in a tangible employment action against the victim because it placed the supervisor in a position to take such action: "The supervisor has been

empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.” *Burlington Industries, Inc. v. Ellerth*, cited supra

Note however where there is no tangible employment action taken by the defendant the employer may raise an affirmative defense of the “*Ellerth/ Faragher* defense”, namely that (a) an employer exercised reasonable care to prevent or correct properly any sexual harassing behavior and (b) the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Note that the voluntary nature of a sexual relationship is not determinative because acquiescence in sexual advances is not fatal to a claim of sexual harassment as long as the advance itself was unwelcome. Thus, if the plaintiff submitted to a ‘voluntary’ relationship only out of fear of losing a job benefit, he or she can still state a claim for harassment, as pointed out in *Meritor Savings Bank, FSB v. Vinson*, cited supra:

“(T)he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether the actual participation in sexual intercourse was voluntary.”

To be successful in such consensual sexual harassment cases, proof of coercion or widespread sexual favoritism is required. *Tenge v Phillips Modern Ag Co.*, 446 F.3d 903 (8th Cir. 2006) (Plaintiff had consensual sex with supervisor and fired to allay wife’s fears but no proof of coercion or widespread sexual favoritism, insufficient to fall under Title VII. *Hall v Gus Constr. Co.*, 842 F. 2d 1010 (8th Cir. 1988) (evidence of sexual harassment of other employees held relevant to prove existence of hostile environment.)

Caps in such cases must be weighted carefully. These can be large quantum cases and the caps on damages under Title VII can be problematic. Academic settings under Title IX allows for recovery of uncapped compensatory damages. (See Title IX Education Amendments of 1972 Sect. 901-902 as amended, 20 U.S.C. Sect. 1681-1688.) Potential uncapped state law claims for intentional or negligent infliction of emotional distress, negligent hiring and supervision, assault and battery, sexual battery state claims with unlimited compensatory damages must be considered. Pleading of pendant state law discrimination claims in a federal court complaint is always advised as a possible solution to get around this cap on damages in the case with a small number of defendant/employees with a low cap on damages under Title VII.

