

## SEPTEMBER 1998 NRPA LAW REVIEW

### CITY FAILED TO PREVENT SEXUAL HARASSMENT BY LIFEGUARD SUPERVISORS

On June 26, 1998, the Supreme Court of the United States issued its opinion in the sexual harassment case of *Faragher v. Boca Raton*, No. 97-282, \_\_\_ U. S. \_\_\_ (1998). This decision effectively overturns an earlier federal appeals court decision described in the October 1996 NRPA Law Review, entitled "Former Lifeguards Claim City's Workplace Abusive to Females."

### LIFEGUARDS UNAWARE OF SEXUAL HARASSMENT POLICY

In *Faragher*, the Supreme Court held that an employer may be held liable for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment. In so doing, the Court stated it would consider "the reasonableness of the employer's conduct as well as that of a plaintiff victim." As described by the Supreme Court, the facts of the case were as follows:

Between 1985 and 1990, while attending college, Beth Ann Faragher worked part time and during the summers as an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton, Florida (City). During this period, Faragher's immediate supervisors were Bill Terry, David Silverman, and Robert Gordon. In June 1990, Faragher resigned...

[T]hroughout Faragher's employment with the City, Terry served as Chief of the Marine Safety Division, with authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline. Silverman was a Marine Safety lieutenant from 1985 until June 1989, when he became a captain. Gordon began the employment period as a lieutenant and at some point was promoted to the position of training captain. In these positions, Silverman and Gordon were responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training.

The lifeguards and supervisors were stationed at the city beach and worked out of the Marine Safety Headquarters, a small one-story building containing an office, a meeting room, and a single, unisex locker room with a shower. Their work routine was structured in a "paramilitary configuration," with a clear chain of command. Lifeguards reported to lieutenants and captains, who reported to Terry. He was supervised by the Recreation Superintendent, who in turn reported to a Director of Parks and Recreation, answerable to the City Manager. The lifeguards had no significant contact with higher city officials like the Recreation Superintendent.

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In February 1986, the City adopted a sexual harassment policy, which it stated in a memorandum from the City Manager addressed to all employees. In May 1990, the City revised the policy and reissued a statement of it. Although the City may actually have circulated the memos and statements to some employees, it completely failed to disseminate its policy among employees of the Marine Safety Section, with the result that Terry, Silverman, Gordon, and many lifeguards were unaware of it.

From time to time over the course of Faragher's tenure at the Marine Safety Section, between 4 and 6 of the 40 to 50 lifeguards were women. During that 5-year period, Terry repeatedly touched the bodies of female employees without invitation, would put his arm around Faragher, with his hand on her buttocks, and once made contact with another female lifeguard in a motion of sexual simulation. He made crudely demeaning references to women generally, and once commented disparagingly on Faragher's shape. During a job interview with a woman he hired as a lifeguard, Terry said that the female lifeguards had sex with their male counterparts and asked whether she would do the same.

Silverman behaved in similar ways. He once tackled Faragher and remarked that, but for a physical characteristic he found unattractive, he would readily have had sexual relations with her. Another time, he pantomimed an act of oral sex. Within earshot of the female lifeguards, Silverman made frequent, vulgar references to women and sexual matters, commented on the bodies of female lifeguards and beachgoers, and at least twice told female lifeguards that he would like to engage in sex with them.

Faragher did not complain to higher management about Terry or Silverman. Although she spoke of their behavior to Gordon, she did not regard these as formal complaints to a supervisor but as conversations with a person she held in high esteem. Other female lifeguards had similarly informal talks with Gordon, but because Gordon did not feel that it was his place to do so, he did not report these complaints to Terry, his own supervisor, or to any other city official. Gordon responded to the complaints of one lifeguard by saying that "the City just doesn't care."

In April 1990, however, two months before Faragher's resignation, Nancy Ewanchew, a former lifeguard, wrote to Richard Bender, the City's Personnel Director, complaining that Terry and Silverman had harassed her and other female lifeguards. Following investigation of this complaint, the City found that Terry and Silverman had behaved improperly, reprimanded them, and required them to choose between a suspension

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without pay or the forfeiture of annual leave.

In 1992, Faragher brought an action against Terry, Silverman, and the City, asserting claims under Title VII, 42 U. S. C. In pertinent part, Title VII of the Civil Rights Act of 1964 provides as follows:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U. S. C. Section 2000e-2(a)(1).

In her complaint, Faragher alleged that Terry and Silverman created a "sexually hostile atmosphere" at the beach by repeatedly subjecting Faragher and other female lifeguards to "uninvited and offensive touching," by making lewd remarks, and by speaking of women in offensive terms. The complaint contained specific allegations that Terry once said that he would never promote a woman to the rank of lieutenant, and that Silverman had said to Faragher, "Date me or clean the toilets for a year."

The federal district (i.e., trial) court concluded that "the conduct of Terry and Silverman was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment." In so doing, the court ruled that the following three points provided justification for holding the City liable for the harassment of its supervisory employees:

First, the court noted that the harassment was pervasive enough to support an inference that the City had "knowledge, or constructive knowledge" of it. Next, it ruled that the City was liable under traditional agency principles because Terry and Silverman were acting as its agents when they committed the harassing acts. Finally, the court observed that Gordon's knowledge of the harassment, combined with his inaction, "provides a further basis for imputing liability on the City."

The district court awarded Faragher nominal damages on her Title VII claim. The City appealed. The appeals court reversed the judgment against the City. While acknowledging that "Terry's and Silverman's conduct was severe and pervasive enough to create an objectively abusive work environment," the appeals court, nevertheless, overturned the district court's determination and ruled in favor of the City based upon the following:

Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment...[T]hey were not aided in their actions by the agency relationship... [T]he City had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon's actual knowledge.

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Faragher petitioned the Supreme Court to review this decision. In granting Faragher's petition, the Supreme Court noted that federal courts "have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees."

### ABUSIVE WORKING ENVIRONMENT?

As described by the Supreme Court, sexual harassment violates Title VII when it is "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." On the other hand, the Court noted that these "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'."

[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance... Title VII does not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."... [S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.

Moreover, "in implementing Title VII," the Supreme Court found it reasonable to hold an employer liable for sexual harassment by a supervisor, particularly when such misconduct is "made possible by abuse of his supervisory authority."

The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior.

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When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker.

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose power to supervise -- which may be to hire and fire, and to set work schedules and pay rates -- does not disappear when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

On the other hand, the Supreme Court found the employee also has a duty to avoid or mitigate harm, "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute.

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Accordingly, the Supreme Court held that "[a]n 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." The Court, however, noted that a defendant employer may avoid such liability if the following two points can be established:

- (a) that the employer exercised reasonable care to prevent and correct

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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 anti-harassment policy with 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.

No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment..

Applying these rules to the facts of the case, the Supreme Court held “as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.”

The District Court found that the degree of hostility in the work environment rose to the actionable level and was attributable to Silverman and Terry. It is undisputed that these supervisors "were granted virtually unchecked authority" over their subordinates, directly controlling and supervising all aspects of Faragher's day-to-day activities. It is also clear that Faragher and her colleagues were "completely isolated from the City's higher management”...

The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints...

Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective

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without communicating some formal policy against harassment, with a sensible complaint procedure.

The Supreme Court, therefore, reversed the judgment of the appeals court and ordered that the judgment of the district court in favor of Faragher be reinstated