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HR Connection

Can Faragher-Ellerth survive the #MeToo movement?

After a brief absence from this column to launch a new HR consulting firm, I find myself once again wading into the potentially dangerous waters of the #MeToo movement. Dangerous for me because: 1) I'm a middle-aged man, and 2) even more damning, I'm a middle-aged man. While I've researched the topic extensively, investigated several disturbing claims of workplace sexual misconduct, presented countless sexual harassment prevention trainings, and supported women who have suffered sexual misconduct, I have never experienced it firsthand.

There is no doubt the #MeToo movement has had an important and thought-provoking impact on society. Individuals, primarily women, have come forward to describe incidents of sexual harassment — some incidents being years or even decades old — in record numbers. #MeToo has also been the impetus behind new laws and regulations aimed at eliminating workplace sexual harassment. In turn, employers are revising and implementing policies and reporting procedures that meet or exceed the requirements; conducting sexual harassment prevention training for employees, supervisors, and management; quickly investigating allegations of inappropriate behaviors; and taking a hardline approach to discipline.

With its citing of the #MeToo movement in *Minarsky v. Susquehanna County.,* No. 17-2646, slip op. (3d Cir., Jul. 3, 2018), the U.S. Court of Appeals for the Third Circuit (covering Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands) showed that #MeToo now has the attention of the federal judiciary. Further, with this decision the court has called into question the viability of a keystone defense used by employers faced with claims of sexual harassment, the so-called Faragher-Ellerth affirmative defense. Taking its name from two 1998 Supreme Court decisions (*Faragher v. City of Boca Raton,* 524 U.S. 775, and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742). This defense is available only where the sexual harassment has not resulted in a tangible employment action, such as termination of employment, demotion or failure to promote, reassignment with significantly different responsibilities, or actions causing a significant change in benefits.

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Based in part on an employee's obligation to notify their employer if they are being harassed and seek internal remedies, an employer may avoid liability by showing:

- It exercised reasonable care to prevent and promptly correct the harassing behavior (i.e., having a harassment prevention policy, including clear and accessible reporting procedures, in place; thoroughly investigating all allegations of harassment, taking immediate and appropriate actions to stop harassing behaviors, etc.); and
- The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, or to otherwise avoid harm (i.e., failing to utilize the reporting procedures to notify their employer of the harassment).

Harassment started almost immediately

Sheri Minarsky was hired in 2009 as a part-time administrative assistant for the Susquehanna County (Pa.) Department of Veterans Affairs. She worked with Thomas Yadlosky every Friday, in an area isolated from other employees. Almost immediately, Yadlosky began sexually harassing Minarsky — attempting to kiss her, pulling her against him from behind, massaging her shoulders, questioning where she went during lunch, calling her at home to ask personal questions and sending her sexually explicit emails.

When she was hired, Minarsky signed her employer's General Harassment Policy which explained that employees should report any harassment to their supervisor or may report to the chief county clerk or a county commissioner if the supervisor is the source of the harassment. Although she was harassed by her supervisor for four years, Minarsky did not report the harassment to Sylvia Beamer, the chief county clerk, or to any of the county commissioners.

But why did the harassing behaviors go unreported for so long? According to Minarsky, she feared retaliation because Yadlosky had repeatedly warned her to not trust the County Commissioners or Beamer. Further, Minarsky was aware that Beamer had reprimanded Yadlosky for virtually identical behaviors — to no avail.

After enduring almost four years of Yadlosky's inappropriate behaviors, Minarsky's doctor urged her to report the harassment. Instead, she sent Yadlosky an email, which read, "I want to just let you know how uncomfortable I am when you hug, touch and kiss me. I don't think this is appropriate at work, and would like you to stop doing it. I don't want to go to Sylvia [Beamer]. I would rather resolve this ourselves."

Yadlosky responded that he never meant to make her uncomfortable or offend her in any way, and that he would "STOP IMMEDIATELY." He expressed confusion that, although he had been "affectionate" to her and others "almost from the first day" she started, "only in a friendly manner, no other way intended," it took almost four years for Minarsky to express her discomfort. Further, and "most importantly," he thought they "had a very good working relationship" where they could discuss "any matters." He concluded by writing that he was disturbed that Minarsky put her concerns in an e-mail and not talked to him. "If you wanted to do this in writing, for proof, you could have typed this out and I would have signed it and you could have kept it."

The harassment was eventually reported to Beamer after a supervisor overheard two of Minarsky's co-workers discussing Yadlosky's ongoing harassment of Minarsky. During the ensuing investigation Yadlosky admitted to the allegations, which ultimately resulted in the termination of his employment.

However, the story doesn't end there. Minarsky subsequently quit her job claiming she was uncomfortable in her role after Yadlosky was fired — because her workload increased and her new supervisor questioned her about Yadlosky and who else she had caused to be fired. Minarsky then filed suit in federal District Court, claiming violations of several state and federal anti-discrimination laws.

Although the District Court concluded that the employer had met its burden under the Faragher-Ellerth affirmative defense — it maintained an anti-harassment policy and despite a complaint procedure, Minarsky never reported Yadlosky's harassing behavior — the Third Circuit disagreed. But, why? I'll give you a hint. The Appeals Court focused on a single word that is the cornerstone of this defense. In part two of the article I'll explain the court's decision and what it may mean for employers and HR professionals going forward.

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