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EMPLOYMENT LAW

Court Addresses Sexual Harassment Claim in Context of #MeToo Movement

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Special to the Legal

Over the past year, as sexual harassment has been prominently in the news, many friends have said: "Wow, as an employment lawyer, you must see so many more harassment cases." But the reality is, apart from raising awareness through speeches and client training, #MeToo has not resulted in a significant uptick in the case mix we are seeing. The recent decision by the U.S. Court of Appeals for the Third Circuit in *Minarsky v. Susquehanna County*, No. 17-2646 (3d. Cir. July 3, 2018), explicitly references #MeToo as it relates to affirmative defenses to sexual harassment claims in the Third Circuit and may help change that dynamic—particularly as it relates to women not coming forward with complaints against their male supervisors.

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ONGOING HARASSMENT

Sheri Minarsky worked part-time as a secretary for Thomas Yadlosky, the former director of Susquehanna County's Department of Veteran's Affairs for many years. Although Yadlosky made unwanted sexual advances toward Minarsky for roughly four years, she never reported this conduct despite the department's anti-harassment policy, of which she was aware. When she first reported Yadlosky's behavior, he was terminated.

Minarsky subsequently brought suit against Yadlosky personally under the Pennsylvania Human Relations Act and against Susquehanna County seeking to hold the latter vicariously liable under Title VII and the PHRA for Yadlosky's behavior. At the close of discovery, the county moved for summary judgment on the basis of the *Faragher-Ellerth* affirmative defense. This defense, initially set forth in the U.S. Supreme Court's decision *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998), allows an employer to defend against liability for a supervisor's sexual harassment if it is able to show that it "exercised reasonable care to avoid harassment and to eliminate it when it might occur" and that the plaintiff "failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided." The district court granted summary judgment in favor of the county, finding that it had established these two elements, thus avoiding liability for Yadlosky's behavior. The Third

Circuit, in a reported decision, reversed and remanded the matter for trial.

RECENT NEWS SETS THE CONTEXT

The Third Circuit noted that "this appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time the conduct occurred."

The court continued: "While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser … there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims chose not to report the harassment." The court further noted statistics that "nearly a quarter of American women has experienced unwanted sexual advances from men who had influence over the conditions of their employment" and "three out of four women who have been harassed fail to report it." The court cited to an EEOC select task force report that "those employees who face harassing behavior did not report this experience 'because they feared disbelief of their claim, inaction on their claim, blame or social or professional retaliation.'"

In explicitly considering the *Faragher-Ellerth* defenses in the context of the real-world experiences that have often been reported over the past year, the court examined the details of the Yadlosky's actions, the county's response thereto and the context of Minarsky's failure to report Yadlosky's advances for many years.

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AFFIRMATIVE DEFENSE IN QUESTION

Specifically, the court found that Yadlosky's supervisor, county clerk Sylvia Beamer, was aware of at least two other instances where Yadlosky had made unwanted sexual advances to female employees. While Beamer each time admonished Yadlosky that this behavior must stop, the court characterized this response as a "slap on the wrist." Further, Beamer herself, as well as another female county commissioner, had experienced Yadlosky's sexual advances first-hand. While the county had a well-defined anti-harassment policy, the court found that "county officials were faced with indicators that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward Yadlosky's harassment." In this light, despite its anti-harassment policy, the court found that the county had failed to establish that it had "exercised reasonable care to prevent and correct promptly any sexual harassing behavior."

DELAY IN REPORTING EXCUSED

The court went on to address the second element of the *Faragher-Ellerth* defense: Minarsky's failure to report Yadlosky's conduct during their four years of working together.

While the court acknowledged its "case precedent has routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable, … mere failure to report one's harassment is not per se unreasonable. Moreover, the passage of time is just one factor in the analysis." Specifically, the court observed

that "workplace sexual harassment is highly circumstance-specific." The test, under the circumstances is "if a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial."

The court also observed that Minarsky had a "pressing financial situation" due, in part, to her daughter's cancer treatment, evidencing that the job, albeit part-time, was important to her and her family—thereby providing some level of justification for her fear of speaking up if she reasonably believed that doing so would jeopardize her employment. The court specifically referenced what is often referred to as the "power dynamic" between Yadlosky and Minarsky, finding that "the degree of control specific power dynamic can offer context the plaintiff's subjectively held fear of speaking up."

Nevertheless, the court found that the employee who fails to report harassment must have evidence supporting a legitimate fear of retaliation. "A generalized fear of retaliation is insufficient to explain a long delay in reporting sexual harassment." This fear of retaliation, however, need not be specifically related to complaints of alleged harassment. In this matter, the court found that Minarsky had identified circumstances where she had complained about various aspects of her job to Yadlosky and he had made "her working conditions even more hostile," as well as the fact that Yadlosky led her to "believe that she should not protest his conduct" to the very people to whom she would have reported his harassment under the anti-harassment policy. Minarsky had testified that Yadlosky's comments "made it very hard for her to think of going to them" with complaints. In this context, the court found that "the reasonableness of Minarksy's nonreporting is for the jury, not the court, to decide."

VIGILANCE FROM EMPLOYERS

It is easy to place Minarsky in the context of those matters involving celebrities and policies so much in the news. Minarsky presented a fact-pattern that is almost a perfect small-scale replica of those matters reported in the news—a woman in a vulnerable position, harassed and intimidated by her male supervisor, with management being less-than-aggressive in taking action against reported behavior.

For employers, the messages from *Minarsky* are clear: First, simply having an anti-harassment policy is not enough to satisfy the first *Faragher-Ellerth* prong. While such a policy is absolutely necessary, it should provide multiple avenues of complaint and should be reinforced by training. But even then, *Minarsky*'s message is that actions will speak louder than words. Simply admonishing an alleged harasser to "cut it out" may not be enough to demonstrate "reasonable care to prevent and correct promptly any sexual harassing behavior." In this light, each and every allegation of harassment should be investigated and, if established, the action taken should be calculated to reasonably send the message that the behavior is intolerable. And if a second event occurs, *Minarsky* teaches that more must be done—particularly in light of the potential "power dynamics" in play.

Without the employer's "reasonable care" as to the its commitment to prevent and correct harassing behavior in the workplace, *Minarsky* portends that the bar will be significantly lowered for a harassed employee to report the behavior. Employers would be well advised not to wait for the final harassment conflagration before dealing with the brush fires that set its stage. •