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February 26, 2019

Blog Post | 107 KY. L. J. ONLINE | February 26, 2019

#MeToo and Minarsky: The Evolution of the Faragher-Ellerth Affirmative Defense

S. Patrick Riley^[1]

As a result of the #MeToo movement, the bell now tolls for sexual harassers across America.^[2] Nonetheless, traditionally conservative courts are still hesitant to adopt a more employee-friendly standard for sexual harassment claims. For the past twenty years, the standard afforded employers in the seminal Supreme Court companion cases of *Faragher v. City of Boca Raton*^[3] and *Burlington Industries, Inc. v. Ellerth*^[4] has limited the imputation of vicarious liability from a harassing employee to an employer.^[5] However, this might soon be changing with the recent case from the Third Circuit Court of Appeals: *Minarsky v. Susquehanna County*.^[6]

Minarsky: The Facts

In July 2018, the Third Circuit Court of Appeals reviewed the sexual harassment case of Plaintiff Sheri Minarsky. Minarsky was a part-time secretary to the Director of Susquehanna County's Department of Veterans Affairs, Thomas Yadosky (Defendant).^[7] Minarsky worked a part-time schedule: Mondays, Wednesdays, and Fridays.^[8] On Fridays, Minarsky worked directly with Yadosky.^[9] Separated from other employees, Yadosky and Minarsky were fairly isolated in the office building.^[10]

Almost immediately after gaining employment, Minarsky was sexually harassed regularly by Yadosky: including attempted kisses on the lips, unwanted embraces from behind, groping, fondling, and massaging.^[11] Additionally, Yadosky was sending sexually explicit messages to Minarsky from his work email and calling to inquire about her whereabouts during her lunch breaks and days off.^[12] These behaviors only intensified over the four years of Minarsky's employment.^[13]

With a young daughter suffering from cancer, Minarsky feared reporting any incidents of ongoing harassment and, consequently, losing her job.^[14] Coupled with the fear for the financial means to support her daughter, Minarsky also agonized that nothing would be done if she reported the harassment to her superiors.^[15] On more than one occasion, Yadosky had been disciplined and reprimanded for his harassment of other women in the office, and each time Yadosky laughed it off.^[16]

After four excruciating years, Minarsky, at the behest of her doctor, finally reported the harassment.^[17] In an email to Yadosky, Minarsky laid out the general details of harassment and ended with a plea for Yadosky to cease and desist.^[18] Upon receiving the email, Yadosky only cared about the appearance of impropriety on his part—the injury to his reputation if someone were to read the email.^[19] Concomitantly, Yadosky was fired soon thereafter upon the notification of the County Commissioners of Yadosky's behavior—for (at the very least) the third time.^[20] After Yadosky was fired, Minarsky's workload increased, and her relationship with her new supervisor was strained.^[21] Consequently, Minarsky resigned.^[22]

The Faragher-Ellerth Affirmative Defense

Five elements must be satisfied for a sexual harassment claim based on a Title VII hostile work environment: (1) plaintiff suffers intentional discrimination because of sex; (2) the discrimination is severe or pervasive; (3)



Contact Us

620 S. Limestone
40508 Lexington, Kentucky

editors@kentuckylawjournal.org

(859) 257-1678



plaintiff is detrimentally affected by discrimination; (4) a reasonable person in like circumstances would also be detrimentally affected; and (5) vicarious liability (*respondeat superior*) exists.[23] In *Minarsky*, the Court focused solely on the fifth element of the sexual harassment Title VII hostile work environment claim.[24] Vicarious liability can be described as the liability a supervisor (employer) incurs based on the actionable conduct of a subordinate (employee) that arises through the supervisory nature of the employer-employee relationship.[25] Avoiding vicarious liability hinges upon an affirmative defense; therefore, an analysis of the *Faragher-Elleerth* defense is appropriate.[26]

To assert the *Faragher-Elleerth* affirmative defense, the employer must demonstrate reasonable care in (a) preventing and/or correcting harassment and the employer must demonstrate (b) the employee's unreasonable care in their efforts to report the harassment.[27] With the *Faragher-Elleerth* defense, the coin of the realm is reasonableness.[28]

Of note, one flaw in the programs implemented by employers in the wake of meeting the *Faragher-Elleerth* standard is that "policies for reporting sexual harassment are generally underutilized." [29] Furthermore, and this bears emphasis, "[t]he failure to report is not unreasonable." [30] Much like Minarsky's own experiences, such non-reporting typically results from the retaliation victims endure: "from the workplace itself, such as being denied a promotion or being transferred . . . and socially from one's peers, which can manifest in such treatment as being blamed, becoming the subject of gossip, or labeled as a trouble-maker." [31]

Prior to reaching the Third Circuit Court of Appeals, the District Court granted summary judgment to the employer on all counts, accepting the recommendation of the Magistrate Judge. [32] The Magistrate Judge found the employer's actions reasonable insofar as maintaining an anti-harassment policy in the company handbook. [33] Also, the Magistrate Judge found the reprimands of Yadlosky on several occasions—and his eventual termination—reasonable. [34] In contrast, the Judge found Minarsky's failure to report the harassment to her supervisors as unreasonable. [35] Ultimately, the District Court fully adopted the Report and Recommendation of the Magistrate Judge. [36]

The Court's Analysis

Regarding the first element of the *Faragher-Elleerth* affirmative defense, the Court of Appeals disagreed with the District Court determination that the employer, Susquehanna County, had used reasonable care "to prevent and correct promptly any sexually harassing behavior." [37] While the County maintained an anti-harassment policy and while Yadlosky was disciplined twice and eventually fired, the Court of Appeals determined that these actions were not enough to satisfy the first element. [38] The Court cited to incidents of harassment that Yadlosky also perpetuated on County Commissioners that went unprimanded. [39] The County Commissioners were aware of a pattern of misconduct, yet turned a blind eye to Yadlosky's inexcusable behavior. [40] Therefore, the Court concluded that there was enough issues of material fact to present to a jury as to whether the County satisfied the first element. [41]

Regarding the second element of the *Faragher-Elleerth* affirmative defense, whether or not reporting the harassment was reasonable, the Court also found issues with affirming the District Court's grant of summary judgment. [42] Citing to the #MeToo movement and several instructive articles on sexual harassment, the Court emphasized that failing to report sexual harassment is not *per se* unreasonable. [43] The Court continued by stating that workplace sexual harassment is very context-specific and, therefore, is often a question for the jury. [44] For a variety of reasons, the Court concluded that Minarsky had a reasonable belief that she could not trust her superiors and that reporting the harassment would be futile. [45]

In conclusion, the Court determined that a jury could find much of Minarsky's behavior reasonable and, therefore, summary judgment was inappropriate. [46]

Minarsky: Watershed Moment or Drop in the Bucket?

The bell has tolled in the Third Circuit Court of Appeals. With the #MeToo movement firmly imprinted on the zeitgeist of a nation, even traditionally conservative courts—such as the Third Circuit—have felt the persuasive power of change. Now, it appears that at least one Circuit Court of Appeals is willing to admit that previously-held standards of reasonableness – such as, anti-harassment training and anti-harassment policies in employee manuals – are no longer *per se* defenses for employers who have sexual harassment charges lodged against them. On one hand, employers may have valid concerns that the pendulum is shifting toward employee-friendly jurisprudence that heightens liability for companies without much guidance from the courts. [47] However, for employees, this is astoundingly welcome news as a variety of factors often preclude immediately reporting sexual harassment to a supervisor. [48] Future decisions from other Courts of Appeals – and, ultimately, the Supreme Court – will serve as the main litmus test for the evolving direction of the *Faragher-Elleerth* standard.

[1] J.D. expected May 2020, University of Kentucky College of Law. I would like to sincerely thank Managing Partner Matthew T. Lockaby of Lockaby PLLC for encouraging me to write about this important and timely topic.

[2] See, e.g., Jessica Bennett, *After #MeToo, The Ripple Effect*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/arts/what-is-next-metoo-movement.html> ("If there are phases to this movement, it feels like we've cycled through a number of them: First it was just a few women, then it was an army of them, followed by the collective recognition that perhaps those women should be believed. That was accompanied by – and still is – the staccato of men toppling, one after the next, and of proclamations of #MeToo around the world")

[3] 524 U.S. 775 (1998).

[4] 524 U.S. 742 (1998).

[5] *Minarsky v. Susquehanna Cty.*, No. 17-2646, 2018 WL 3234243, *1 (3d Cir. July 3, 2018).

[6] *Id.*

[7] *Id.* at *1.

[8] *Id.* at *2.

[9] *Id.* at *2-3.

[10] *Id.* at *3.

[11] *Id.*

[12] *Id.* at *3-4.

[13] *Id.* at *4.

[14] *Id.*

[15] *Id.* at *5-6.

[16] *Id.* at *6.

[17] *Id.* at *7.

[18] *Id.* at *8.

[19] *Id.* at *8-9.

[20] *Id.* at *9.

[21] *Id.*

[22] *Id.*

[23] *Id.* at *11-12 (quoting *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013)).

[24] *Id.* at *12.

[25] *Vicarious Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[26] *Minarsky*, 2018 WL 3234243, at *12.

[27] *Id.* at *13 (quoting *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).

[28] *Id.*

[29] Lauren Stiller Rikleen, *Faragher-Ellerth at 20: How Far Have We Come? And Where Do We Need to Go?*, 46 AM. B. ASS'N LAB. & EMPLOYMENT L. 10 (2018). ("Based on an analysis of existing data, the U.S. Equal Employment Commission (EEOC) stated that: ". . . approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct." Rather, the EEOC noted, those who experience sex-based harassment are more likely to avoid the harasser, deny or downplay their experience, or try to ignore or endure the behavior.").

[30] *Id.*

[31] *Id.*

[32] Minarsky, 2018 WL 3234243, at *14.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at *15.

[37] *Id.* at *16 (quoting Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765).

[38] *Id.* at *16-17.

[39] *Id.* at *17-18.

[40] *Id.* at *18.

[41] *Id.*

[42] *Id.*

[43] *Id.* at *20.

[44] *Id.*

[45] *Id.* at *20-27.

[46] *Id.*

[47] See Rikleen, *supra* note 29, at 1. (“If the #MeToo Movement and the revelations over the past 6 months have taught us anything, it is that standard sexual harassment policies and related training are woefully inadequate.”).

[48] See *supra* notes 29-31 and accompanying text.

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Chynna Hibbitts

