Legal Alert: Minnesota Adopts Ellerth and Faragher Affirmative Defense for Claims of Sexual Harassment Under State Law

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On May 30, 2008, the Minnesota Supreme Court held for the first time that the standard established by the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), for employer liability for sexual harassment committed by a supervisor applies to claims of sexual harassment under the Minnesota Human Rights Act ("MHRA"). *See Frieler v. Carlson Marketing Group, Inc.* (Minn., May 30, 2008).

Both Title VII and the MHRA prohibit sexual harassment in the workplace. In 1998, the U.S. Supreme Court established, in *Ellerth* and *Faragher*, the standard under which an employer may be held vicariously liable under Title VII for sexual harassment allegedly perpetrated by a "supervisor." The Supreme Court held in *Ellerth* and *Faragher* that an employer is strictly liable for any harassment in which the employer has taken tangible employment action against the employee. On the other hand, the standard articulated in *Ellerth* and *Faragher* provide the employer with an affirmative defense to the sexual harassment claim in cases where no tangible employment action has been taken if the employer can prove that 1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Until the *Frieler* case, the Minnesota Supreme Court had addressed whether the *Ellerth* and *Faragher* affirmative defense applied to claims under the MHRA. The MHRA had initially stated that an employer could be liable for a supervisor's sexual harassment only if it "knew or should have known" about the harassment and failed to take appropriate corrective action. In 2001, however, the Minnesota legislature amended the MHRA, at the request of the Minnesota Department of Human Rights, to delete the "knew or should have known" language from the statute, without explicitly stating whether by doing so, it intended to adopt the *Faragher* and *Ellerth* affirmative defense.

In *Frieler*, a female employee alleged that a supervisor inappropriately touched and fondled her on multiple occasions, but that the harassment did not result in any tangible employment action. The employee filed suit alleging sexual harassment under the MHRA as well as assault and battery. The district court granted summary judgment for the employer on all counts. As to the sexual harassment claim, the lower court held that the MHRA requires a

plaintiff to prove that the employer "knew or should have known" of the supervisor's sexual harassment at the time it occurred, and that Frieler failed to meet her burden of proof with respect to this element. With regard to assault and battery, the court held that the supervisor's actions were not foreseeable to the employer. The court of appeals affirmed.

On appeal to the Minnesota Supreme Court, Frieler argued that, based on the 2001 amendment to the MHRA, she was not required to prove that her employer "knew or should have known" of the supervisor's acts of sexual harassment. Frier argued that the 2001 amendments to the MHRA resulted in strict liability for employers in cases where the plaintiff proves that a supervisor committed sexual harassment. Frieler further argued that, due to the general pervasiveness of sexual harassment in all workplaces, the Minnesota Supreme Court should find sexual harassment foreseeable as a matter of law, for determining employer liability for assault and battery under the theory of *respondeat superior*.

In rejecting Frieler's arguments and adopting the *Ellerth* and *Faragher* defense, the Minnesota Supreme Court examined the legislative history of the MHRA. The Court found that by amending the MHRA in 2001 to delete the "knew or should have known" standard, the Minnesota Legislature intended for the *Ellerth* and *Faragher* standard to apply to the MHRA. In adopting the *Ellerth* and *Faragher* standard, the Court refused to adopt a strict liability rule, but provided the employer with the affirmative defense available to defendants in Title VII sexual harassment cases.

With regard to the assault and battery claims, a majority of the Court refused to hold that sexual harassment is foreseeable as a matter of law. The majority held that for a plaintiff to survive summary judgment on a tort claim against an employer under the theory of respondeat superior, the plaintiff must present sufficient evidence to raise a genuine issue of material fact with respect to the foreseeability of the conduct. The mere fact that an employer has a sexual harassment policy is not sufficient evidence that sexual harassment in the workplace was foreseeable.

The Minnesota Supreme Court's refusal to find that the existence of a sexual harassment policy is evidence of the foreseeability of sexual harassment in the workplace and its adoption of the *Ellerth* and *Faragher* standard provides a good opportunity for Minnesota employers to revisit their sexual harassment policies and practices and make any revisions necessary to allow the employer to utilize the *Ellerth* and *Faragher* defense in the event an employee files a sexual harassment suit based on a supervisor's conduct.

If you need assistance in revisiting your sexual harassment policies or have any questions regarding this decision or other labor or employment related decisions, please contact the author of this Alert, Jody Ward, at jward@fordharrison.com or 612-486-1707 or the Ford & Harrison attorney with whom you usually work.