

**EEOC RELEASES ENFORCEMENT GUIDANCE ON
VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL
HARASSMENT BY SUPERVISORS**

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EEOC Releases Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

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On June 18, 1999, the U.S. Equal Employment Opportunity Commission (the "EEOC") released an enforcement guidance on vicarious employer liability for unlawful harassment by supervisors. The enforcement guidance is based on two recent decisions by the U.S. Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). In those companion cases, the Supreme Court set forth the standard under which employers will be vicariously liable for unlawful sexual harassment by supervisors. The enforcement guidance ("Guidance") sets forth how the EEOC interprets those cases and how it will apply them in its enforcement of federal laws prohibiting discrimination.

The Guidance goes beyond the Supreme Court's decisions in several respects.

The Guidance has received substantial publicity in the media. It is important to employers because it will be cited by plaintiffs in litigation, and often given deference by the courts. Although the Guidance is not controlling upon the courts and does not receive the same deference as EEOC regulations, the courts will look to the Guidance in their analyses as "a body of experience and informed judgment." *Smith v. Midland Brake, Inc.*, ___ F.3d ___, 1999 WL 387498 at *6 n. 5 (10th Cir. June 14, 1999) (citing *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) and *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381 (1994)). This deference is significant because the Guidance in several important respects goes beyond the holdings and even the dicta in *Burlington Industries* and *Faragher*:

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- Following the lead of numerous lower courts, the Guidance expands the application of the liability formulas from sexual harassment to harassment on the basis of race, color, religion, national origin, age 40 or older, disability, or protected activity under the discrimination statutes. The Supreme Court decisions dealt only with discrimination on the basis of sex.
- The Guidance suggests that there should be automatic employer liability in situations where an employee submits to a supervisor's unwelcome sexual demand and thereafter receives a benefit. The Court decisions do not address this scenario, focusing instead on adverse action resulting from the rejection of the supervisor's proposition.
- The Guidance suggests that team leaders, working forepersons and other employees who direct day-to-day work, even temporarily, are "supervisors" even though they do not have the power to take or even recommend adverse employment action or are outside the chain of command. The individual in *Faragher* was a life guard captain whose authority in a para-military structure was clearly that of a supervisor or boss. His supervisory status was never at issue.
- The Guidance suggests that there should be automatic liability if a supervisor recommends a tangible employment action. The Court decisions require that the tangible employment action be taken.
- The Guidance takes the position that an employee does not "unreasonably fail to take advantage of preventive or corrective opportunities" if a complaint is filed with the EEOC, a state agency or with a union rather than with the employer. The rationale for the Court's decisions, Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees," is thwarted by interjecting an administrative agency or union in the complaint process. Employers will be unable to respond promptly to complaints if they do not learn of them directly.

It is not unexpected that the EEOC has taken an aggressive interpretation of the *Faragher* and *Burlington Industries* decisions. In litigation it is for the employer to carefully distinguish for the court what the Supreme Court decided and what the EEOC or private plaintiff asserts that it decided.

While the Guidance properly emphasizes the importance of a comprehensive harassment prevention program, including training and effective complaint procedures, some of the recommended elements of the program should be carefully considered before adopting them.

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In its Guidance, the EEOC suggests that an anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- a clear prohibition against harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). To convey the seriousness of the prohibitions, the prohibitions should emanate from upper management. **MLB supports this recommendation.**
- a clear explanation of prohibited conduct. **MLB supports this recommendation.**
- assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation. **MLB supports this recommendation. Employers should remember, however, that they retain the right to take disciplinary action in the case of false complaints or those not made in good faith.**
- a clearly described complaint procedure that provides accessible avenues of complaint. "Accessible" in this context refers to ease in making complaints and may require that the complaint taker work the same shift and in the same location as the complaining employee. Other requirements cited by the EEOC as rendering a complaint procedure inaccessible include rigid, burdensome, expensive or intimidating complaint procedures, requiring the employee to try to resolve the matter with the harasser, and requiring the employee to participate in a mandatory ADR or mediation process. The procedure should include at least one official outside an employee's chain of command to take complaints. **MLB supports these recommendations.**
- The EEOC also recommends including, in the complaint procedure, information about the time frames for filing charges of unlawful harassment with the EEOC or state agency and an explanation that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved. **MLB believes this Guidance goes too far as the clear intent of the Court decisions is to encourage employees to bring complaints to the employer.**
- encouragement to report harassment before it becomes severe or pervasive. The EEOC opines that to discharge its duty of preventive care, the employer must make clear that it will stop harassment before it rises to the level of a violation of federal law. **MLB supports this recommendation.**

- assurance that the employer will protect the confidentiality of harassment complaints and related records to the extent possible. The EEOC specifically notes that honoring a complainant's request that a complaint be kept confidential and no action be taken on it can lead to employer liability. **MLB supports this recommendation.**
- The EEOC suggests providing a phone line so employees can discuss questions or concerns about harassment on an anonymous basis. The EEOC states that to avoid any questions as to whether a complaint over the phone line creates a duty to investigate, the employer should make clear that the person who takes the call is not a management official and can only answer questions and provide information, and further that an investigation will proceed only if a complaint is made through the internal complaint process or if management otherwise learns about the alleged harassment. **MLB believes this recommendation is problematic because of the difficulty of ensuring the quality of responses by a nonmanagement employee and the risk that a reviewing court would perceive the complaint as putting the employer on notice, thus triggering a duty to act.**
- a mechanism for a prompt, thorough, and impartial investigation of the alleged harassment by well trained investigators who are not under the control of the alleged harasser, with detailed fact-finding as necessary including interviews with the complainant, alleged harasser, and third party witnesses who could reasonably be expected to have relevant information. The investigation should commence no matter how the employer learned of the complaint (*e.g.*, receipt of EEOC charge) and even if no complaint has been filed, if the conduct is clearly unwelcome (*e.g.*, racist graffiti). It may be necessary to take intermediate measures to prevent further harassment during the investigation, such as placing the alleged harasser on paid administrative leave. **MLB supports this recommendation.**
- assurance that the employer will take immediate and appropriate corrective action, when it determines that harassment has occurred, which is designed to stop the harassment, and correct its effects on the employee. The remedial measures do not have to be those the employee requests or prefers as long as they are effective. **MLB supports this recommendation.**
- The EEOC further recommends that a report of the determination be provided to both the complainant and alleged harasser. **MLB believes this recommendation goes too far because of the risk of employer liability for invasion of privacy and defamation.**

- The EEOC also recommends releasing general information about corrective and disciplinary measures undertaken to stop harassment. **MLB believes the Guidance's reference to "general" is unclear and raises privacy concerns.**

Other reasonable steps to prevent and correct harassment, identified by the EEOC as part of an employer's duty to exercise reasonable care, include:

- drafting the policy and complaint procedure in a way that will be understood by all employees. A copy should be provided to every employee and redistributed periodically. **MLB support this recommendation.**
- periodic training of supervisors and managers. The training should explain the type of conduct that violates the employer's anti-harassment policy, the seriousness of the policy, the responsibilities of supervisors and managers when they learn of harassment and the prohibition on retaliation. **MLB supports this recommendation and advises that all employees, not just supervisors, should receive training on the company policy and procedures.**
- instructing supervisors to address or report to appropriate officials complaints of harassment, regardless of whether they are officially designated to take complaints and regardless of whether a complaint conforms with the company's complaint procedures. **MLB supports this recommendation.**
- keeping track of supervisor's and manager's conduct to ensure they meet their responsibilities under the company's anti-harassment program and including such information in formal evaluations. **MLB supports this recommendation.**
- screening applicants for supervisory jobs to see if they have a record of engaging in harassment. **MLB supports this recommendation.**
- keeping a record of all harassment complaints. **MLB supports this recommendation.**
- correcting harassment regardless of whether an employee complains, if the conduct is clearly unwelcome. **MLB supports this recommendation.**

Morgan, Lewis & Bockius LLP has designed diversity training and sexual harassment prevention training programs for supervisors and rank-and-file employees. They can be used as part of a comprehensive review of human resource policies and practices to assess the work place, reduce the possibility of a hostile environment, and create a level of civility and

respect that will make successful complaints of employment discrimination less likely.

The text of the EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors can be found on the Internet at <http://www.eeoc.gov> under the date of June 21, 1999. Should you have any questions about this Guidance or about how to establish, publicize, and enforce an effective anti-harassment policy and complaint procedure suitable for your company's circumstances, do not hesitate to contact the attorneys identified below or any other member of the Labor and Employment Section of the firm.

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