Sexual Harassment Litigation: Risk Management Implications

by William J. Warfel, Ph.D., CPCU, CLU, and J. Tim Query, Ph.D., ARM

Since 1976, when sexual harassment was first recognized by a court as a legitimate cause of action based on sexual discrimination, sexual harassment law has evolved, and the trend of authority is toward increasing legal responsibility for employers with respect to acts of sexual harassment. This trend of authority toward increasing legal responsibility has resulted in sexual harassment claims being filed against employers in record numbers. In each year since 2000, the Equal Employment Opportunity Commission (EEOC), which investigates and attempts to resolve sexual harassment claims and makes an assessment concerning whether a victim has a “right to sue,” has handled more than 25,000 sexual discrimination charges. Anecdotal evidence seems to suggest that the dollar value of jury verdicts and settlements in sexual harassment cases can be substantial. In Arango v Mazda North America, Inc., No. 96-2750 (S.D., Fla. Feb. 17, 1999), Employ. Discrim. Rep. No. 9 (Mar. 3, 1999), for example, a jury awarded in excess of $4 million to a female employee who was wrongfully terminated when she refused a male supervisor’s request to be his “girlfriend.” More generally, including defense costs, sexual harassment costs a typical Fortune 500 company about $6.7 million per year, or $282 per employee.

While sexual harassment claims against employers may be based on the conduct of non-supervisors (i.e., co-workers, customers, vendors, independent contractors), the majority of complaints alleging sexual harassment concern the conduct of immediate supervisors and upper-management employees who have the authority, or the apparent authority, to make adverse employment decisions that affect the victim. More specifically, about two-thirds of complaints alleging sexual harassment are made against immediate supervisors and upper-management employees.

Abstract
The trend of authority is toward increasing legal responsibility for employers with respect to acts of sexual harassment by immediate supervisors and upper-management employees. In this article, a historical perspective concerning sexual harassment law is provided, and several recent court rulings that clarify an employer’s legal responsibility with respect to claims that allege a hostile or offensive environment are discussed. The risk management implications of these recent court rulings are identified and discussed.
immediate supervisors and upper-management employees, and most of these complaints are valid. This data seems to be consistent with the notion that sexual harassment is not about sex, but rather is about abuse of power. Most importantly, the trend of authority toward increasing legal responsibility for employers with respect to acts of sexual harassment is largely confined to those cases involving immediate supervisors and upper-management employees, as eluded to above. On the one hand, in those cases involving non-supervisors, a negligence standard applies that largely focuses on whether the employer (1) knew, or should have known, of the harassment, and (2) failed to undertake appropriate remedial measures on a timely basis. On the other hand, in cases involving immediate supervisors and upper-management employees, notice is not a requirement for the imposition of liability. Thus, this article focuses solely on sexual harassment law as it applies to cases involving complaints filed against immediate supervisors and upper-management employees.

In this article, a historical perspective concerning sexual harassment law is provided in which the two types of sexual harassment claims are identified and discussed (i.e., job detriment claims and work environment claims). Also, several recent court rulings that clarify an employer’s legal responsibility with respect to work environment claims are identified and discussed. Finally, the risk management implications of these recent court rulings are identified and discussed.

**Historical Perspective**

Title VII of the Civil Rights Act of 1964 contains a prohibition against discrimination based on sex. This federal legislation makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .” (42 U.S.C. Section 2000e – 2(a)(1)). Most importantly, per the legislation, the term “employer” includes any “agent” of the employer. For this reason, an employer can be held vicariously liable in those cases where an employee alleges sexual harassment by an immediate supervisor or upper-management employee. So long as the context in which the acts of sexual harassment occurred was work-related, liability may be imputed to the employer even in the absence of notice. In construing the phrase “compensation, terms, conditions, or privileges of employment,” EEOC guidelines provide that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits or perks, creates a hostile or offensive working environment. The courts have embraced these guidelines:

- **Job Detriment Claims**—In *Priest v George Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986), for example, the plaintiff sought wage loss, recovery of attorney fees and other costs of suit, and injunctive relief under Title VII. Upon being hired by George Rotary (hereinafter referred to as Rotary), who owned the Fireside Motel and Coffee Shoppe, as a cocktail waitress, the plaintiff was instructed by Rotary to wear sexually suggestive attire. Because of a failure to comply with this directive, the plaintiff was reassigned several days after commencing employment and worked as a waitress in the Fireside Coffee Shoppe for about six months. During the plaintiff’s tenure at the Fireside Motel and Coffee Shoppe, the plaintiff was (1) subjected to unwelcome sexual harassment by Rotary on a number of occasions, and (2) precluded from working in the dining room and lounge where gratuities typically were substantially higher than was the case in the coffee shoppe, as well as denied various perks afforded to other waitresses. According to evidence presented at trial, waitresses who reacted favorably to Rotary’s sexual
advances and other conduct of a sexual nature received favorable assignments and various perks (e.g., the work rule forbidding socializing in the lounge was waived); waitresses, including the plaintiff, who reacted unfavorably to Rotary's sexual advances and other conduct of a sexual nature received unfavorable assignments and were denied various perks (e.g., the work rule forbidding socializing in the lounge was enforced). Ultimately, the plaintiff was terminated based on purportedly legitimate nondiscriminatory reasons (e.g., violation of the work rule forbidding socializing in the lounge). In finding that the plaintiff was wrongfully terminated, the court ruled that the purportedly legitimate nondiscriminatory reasons, alluded to above, were pretextual (i.e., the real reason the plaintiff was terminated was because of her unfavorable reaction to Rotary's sexual advances and other conduct of a sexual nature). Thus, with respect to a job detriment claim, the plaintiff must establish that (1) a tangible job benefit was conditioned on acquiescence to requests for sexual favors or other conduct of a sexual nature, or (2) avoidance of a tangible job detriment was conditioned on acquiescence to requests for sexual favors or other conduct of a sexual nature. While a tangible job benefit (or a tangible job detriment) may be economic in nature, perks that are not economic in nature also can be used to support a job detriment claim.

- Work Environment Claims—In *Meritor Savings Bank, FSB v Vinson*, 477 U.S. 57 (1986), 106 S. Ct. 2399, 91 L.Ed. 2d 49 (1986), for example, the plaintiff filed a sexual harassment suit against her employer based on a violation of Title VII even though the evidence indisputably indicated that a tangible job benefit (or the avoidance of a tangible job detriment) had not been conditioned on acquiescence to requests for sexual favors or other conduct of a sexual nature. Moreover, the evidence indisputably indicated that the plaintiff was terminated for a legitimate nondiscriminatory reason (i.e., excessive use of sick leave), and the plaintiff was never denied an economic benefit or perk based on an unfavorable reaction to alleged conduct of her supervisor that clearly was inappropriate and sexual in nature (e.g., fondling the plaintiff in front of other employees, following the plaintiff into the women's restroom when she went there alone, exposing himself to the plaintiff in public places, forcibly raping the plaintiff on several occasions). Furthermore, the plaintiff contended that she voluntarily had sexual relations with her supervisor on numerous occasions because she feared an adverse employment decision in the event that she did not comply with his requests. Finally, evidence existed that suggested that the plaintiff dressed in a sexually provocative manner and had publicly expressed sexual fantasies. While the plaintiff's employer had a policy prohibiting general discrimination (although it did not address sexual harassment as such), the grievance procedure specified that the complaint be filed with the employee's supervisor. Because the offender happened to be the plaintiff's supervisor, the plaintiff never filed a complaint and, thus, the employer was not put on notice. The U.S. District Court dismissed the suit without resolving the factual issues because (1) the plaintiff did not set forth a job detriment claim, and (2) the employer was never put on notice concerning the alleged offensive conduct of the supervisor. In reversing this decision and remanding the case for further proceedings, the U.S. Court of Appeals followed EEOC guidelines and recognized the validity of a work environment claim. Unwelcome sexual advances or other conduct of a sexual nature that is pervasive and creates an offensive or hostile work environment is a violation of Title VII irrespective of whether or not it is directly linked to a job benefit (or a job detriment). All that is required is for the conduct to be unwelcome and unreasonably interfere with the victim's work performance or create an intimidating, hostile, or offensive working environment.
In reaching this decision, for whatever reason, the Court of Appeals noted that evidence pertaining to the plaintiff’s allegedly sexually provocative dress and public expression of sexual fantasies, as alluded to above, “had no place in the litigation” even though such evidence would appear to have a bearing on the issue concerning whether the supervisor’s alleged sexual advances and other sexual conduct, as alluded to above, were unwelcome. Most importantly, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel irrespective of notice. The U.S. Supreme Court affirmed this decision and remanded the case for further proceedings, but concluded that the Court of Appeals was wrong in terms of (1) the admissibility of evidence pertaining to the plaintiff’s allegedly sexually provocative dress and speech, and (2) imposing absolute liability on the part of the employer irrespective of notice. First, while the Court acknowledged that the plaintiff’s voluntary participation in sexual relations with the supervisor was irrelevant in terms of whether the supervisor’s alleged sexual advances and other conduct of a sexual nature, as alluded to above, were unwelcome, the Court held that evidence pertaining to the plaintiff’s allegedly sexually provocative dress and speech was relevant. The EEOC guidelines stress that a fact finder must assess whether the sexual advances or other conduct of a sexual nature was unwelcome in view of “the record as a whole” and “the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” Second, while the Court acknowledged that a supervisor is an agent of the employer and that lack of notice does not necessarily insulate an employer from liability, agency principles impose some limits on liability. Imposition of absolute liability on an employer for the acts of its supervisors, regardless of the circumstances in a particular case, is inappropriate. Assuming that the plaintiff (1) had a reasonably available avenue of complaint regarding the sexual harassment claim, and (2) utilization of the grievance procedure was reasonably likely to result in an equitable resolution of the sexual harassment claim, a failure on the part of the plaintiff to utilize this procedure and, thus, an absence of notice of the part of the employer, should preclude employer liability. In ruling in this particular case that the existence of a policy against discrimination and a grievance procedure, along with the plaintiff’s failure to utilize the procedure and put the employer on notice, did not insulate the employer from liability, the Court was influenced by the fact that (1) the discrimination policy was general in nature and did not address sexual harassment in particular, with the result being that employees were unaware of the employer’s interest in eradicating sexual harassment, and (2) in those cases where the alleged perpetrator was the employee’s supervisor, the employee did not have a reasonably available avenue for filing a sexual harassment complaint. In other words, for a policy prohibiting sexual harassment and a grievance procedure to insulate an employer from liability in those cases where the employer was not put on notice, the policy and procedure must be calculated to encourage victims of sexual harassment to come forward. Unfortunately, the Court declined to issue a definitive rule on employer liability, reasoning that a court should look to agency principles for guidance in this area.

In summary, in those cases where an employee (1) files a work environment claim (as opposed to a job detriment claim), and (2) fails to utilize the grievance procedure contained in the policy prohibiting sexual harassment, with the result being that the employer was not put on notice, there was a question in terms of exactly what was required for the employer to escape (or at least minimize) liability. Recent court decisions seem to clarify this issue.
Recent Court Rulings

As alluded to above, in those cases where an employee (1) files a work environment claim (as opposed to a job detriment claim), and (2) fails to utilize the grievance procedure contained in the policy prohibiting sexual harassment, with the result being that the employer was not put on notice, recent court decisions seem to clarify exactly what is required for the employer to escape (or at least minimize) liability:

- In *Faragher v City of Boca Raton*, 864 F.Supp. 1552 (S.D. Fla. 1994), 118 S. Ct. 2275 (1998), the plaintiff filed a complaint against the city alleging that two of her supervisors had created a sexually hostile environment by repeatedly subjecting her and other female lifeguards to “uninvited and offensive touching,” by making lewd remarks, and by speaking of women in offensive terms. While this complaint contained specific allegations concerning threats conveyed to the plaintiff alluding to future potential adverse employment decisions (e.g., “date me or clean toilets for a year,” a woman would never be promoted to the rank of lieutenant), the record indicates that no tangible employment action was taken by the perpetrators. For this reason, the plaintiff sought a judgment against the city only for nominal damages, costs, and attorney fees. Furthermore, according to the record, the plaintiff had informal conversations concerning the behavior of the perpetrators with a lower-level supervisor, who was lower on the hierarchy than the perpetrators, but never filed a formal complaint with upper management. Also, the lower-level supervisor, alluded to above, never alerted upper management concerning this behavior. The United States District Court held that the city was vicariously liable for the sexual harassment of its supervisory employees under Title VII, reasoning that (1) the sexual harassment was so pervasive that an inference could be drawn that the city had “knowledge, or constructive knowledge” of it, (2) the supervisory employees were acting as the city’s agents when they committed the acts of sexual harassment, and (3) the lower-level supervisor’s knowledge of the sexual harassment, alluded to above, provided a further basis for imputing liability to the city. The Court of Appeals reversed this decision, reasoning that (1) the supervisory employers were acting outside the scope of employment, and, most importantly, their agency relationship with the city did not facilitate their acts of sexual harassment because no tangible employment action was taken by them, and (2) the record indicated that the city in fact did not have notice (i.e., the sexual harassment occurred intermittently, over a long period of time, at a remote location; the lower-level supervisor, alluded to above, did not alert upper management concerning the acts of sexual harassment; and the city could not be charged with constructive knowledge simply because it failed to disseminate its sexual harassment policy among the lifeguards). The U.S. Supreme Court reversed this decision, and the case was remanded for reinstatement of the judgment of the District Court. In so doing, the Court adapted agency concepts to the practical objectives of Title VII. While Title VII seeks to compensate victims of sexual harassment, its primary objective is not to provide redress, but rather to avoid harm. Consistent with this primary objective, the EEOC (1) adopted regulations as early as 1980 advising employers to “take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment,” and (2) issued a policy statement in 1990 enjoining employers to establish a complaint procedure “designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.” In short, given the emphasis on avoiding harm, employees have a duty to avoid or mitigate harm, and
employers must be given an incentive to prevent and eliminate violations. Thus, the Court, while acknowledging the legal foundation provided in the *Meritor* decision and the importance of following this legal precedent, recognized the need to articulate a manageable standard to govern employer liability for hostile environment harassment perpetrated by supervisory employees. In so doing, the Court fashioned an affirmative defense that may be asserted by an employer in those cases where an employee (1) files a work environment claim (as opposed to a job detriment claim), and (2) fails to utilize the grievance procedure contained in the policy prohibiting sexual harassment, with the result being that the employer was not put on notice. This affirmative defense comprises two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In this particular case, the Court ruled that this affirmative defense was not available to the city as a matter of law. The city failed to exercise reasonable care to prevent and correct promptly the acts of sexual harassment because (1) the supervisors were granted virtually unchecked authority over their subordinates and were not properly monitored, and the lifeguards were completely isolated from the city's upper management, (2) the city failed to disseminate its sexual harassment policy among the lifeguards, and (3) the complaint procedure was defective because it did not assure employees that an offending supervisor could be bypassed in registering a complaint. In summary, this decision highlights the importance of providing a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to employees without undue risk or expense.9

• In *State Department of Health Services v Superior Court (McGinnis)*, November 24, 2003, California Supreme Court, S103487, the plaintiff filed a work environment claim against her employer alleging that her supervisor sexually harassed her (i.e., the behavior included inappropriate comments and unwelcome physical touching) from early 1996 until late 1997. While the supervisor alluded to a threat concerning a future potential adverse employment decision in July 1997 in the event the plaintiff did not react favorably to a sexual advance (i.e., he would overlook an alleged attendance problem if the plaintiff would let him touch her vagina—he then immediately proceeded to grab her crotch), the record indicates that no tangible employment action was taken by the supervisor. The plaintiff shared with a co-worker concerns about the supervisor’s behavior in 1996, but delayed utilizing her employer’s internal complaint procedure until November 1997, at which time she bypassed her supervisor and filed a complaint with upper management. This complaint triggered an internal investigation by her employer’s Office of Civil Rights, and her supervisor opted for early retirement rather than respond to a disciplinary action that had been commenced against him. The plaintiff filed a sexual harassment and sex discrimination complaint against her employer based on a violation of the Fair Employment and Housing Act (FEHA). Like Title VII, the FEHA permits individual suits for damages to enforce its provisions, but the primary objective is prevention and deterrence of sexual harassment. Unlike Title VII, the FEHA expressly and separately prohibits workplace harassment based on sex. In addition, the FEHA (1) specifically defines “employer” to include “any person acting as an agent of an employer” (which would include a supervisor), (2) specifically requires an employer “to take all reasonable steps necessary to prevent discrimination and harassment from occurring,” and (3) specifically requires an employer “to distribute educational
material to their employees regarding sexual harassment law and company procedures.” The employer moved for a summary judgment based on its (1) compliance with the FEHA provisions, alluded to above, (2) prompt response to the plaintiff’s internal complaint, and (3) the plaintiff’s alleged unreasonable delay in filing the internal complaint. This motion for summary judgment was denied, and the employer petitioned the Court of Appeal for a writ of mandate. In denying this petition, the Court of Appeal held that a complete defense based on (1) the reasonable care of the employer to prevent and correct promptly sexual harassment, and (2) the employee's failure to utilize the internal complaint procedure on a timely basis, would be inconsistent with the statutory language (i.e., the FEHA contains a negligence standard for co-worker sexual harassment and, thus, a strict liability standard is implied for agents or supervisors) and the legislative intent of the FEHA. In reversing the judgment of the Court of Appeal and remanding the case for further proceedings, the California Supreme Court ruled that, while the employee's failure to avoid (or mitigate) harm by utilizing the internal complaint procedure on a timely basis was irrelevant with respect to the liability issue, it was relevant with respect to the damages issue. Assuming that (1) the employer took reasonable steps to prevent and correct promptly workplace sexual harassment, and (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided, the recoverable damages would not include those damages that could have been avoided with reasonable effort and without undue risk, expense, or humiliation. Application of the doctrine of avoidable consequences, under which an employee is not compensated for damages that the employee could have avoided by reasonable effort or expenditure, is consistent with the primary objective of the FEHA, which is to prevent and eliminate sexual harassment, rather than provide redress. The employer bears the burden of pleading and proving a defense based on the avoidable consequences doctrine, and it is available only if the employer exercised reasonable care in preventing and correcting promptly workplace sexual harassment. Most importantly, while this defense creates an incentive for the employee to avoid (or mitigate) harm and utilize the internal complaint procedure on a timely basis, it does not contemplate that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to upper management through the internal grievance mechanism. The employer may lack an adequate sexual harassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees (e.g., the employee may reasonably believe that filing a complaint may lead to termination, demotion, being labeled as a “troublemaker,” or being transferred to an undesirable position). Moreover, in some cases, an employee’s natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor. Delays attributable to an employee's initial attempts to address and resolve a sexual harassment issue by informally negotiating with an offending supervisor, avoiding encounters with the offending supervisor, etc. may or may not be reasonable depending on the circumstances. Clearly, in asserting the avoidable consequence defense, at a minimum, the employer must demonstrate that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees. In a particular case, the fact finder may appropriately consider whether the employer prohibited retaliation for reporting violations, whether the
employer's reporting and enforcement procedures protect employee confidentiality to the extent practical, and whether the employer consistently and firmly enforced the policy in the past. Assuming that these safeguards are in place, a clear message is sent throughout the workplace that sexual harassment is not tolerated, in which case a delay in reporting a violation is likely to be deemed by a fact finder to be unreasonable. Even though this decision is based on California law, it may be influential nationwide because of California's leadership in articulating novel approaches to emerging, complex public policy issues.

- In *Pennsylvania State Police v Suders*, 2004 U.S. Lexis 4176 (June 14, 2004), the plaintiff filed a complaint against the Pennsylvania State Police alleging that she had been subjected to a continuous barrage of sexual harassment that equated to constructive discharge. The alleged conduct of her supervisors was particularly egregious over a period of time, and it culminated in the implementation of an elaborate scheme that was designed to result in the plaintiff being arrested for “theft” (which would presumably result in her termination). Shortly after the plaintiff was detained by her supervisors for “theft,” she tendered her resignation, and theft charges were never filed against her. Prior to implementation of this scheme, her supervisors allegedly had perpetrated various acts of sexual harassment over a period of time, which eventually prompted the plaintiff to seek the counsel of the Equal Employment Opportunity Officer. This initial meeting, which was informal in nature, did not prompt (1) the officer to put the employer on notice, or (2) the plaintiff to file a formal grievance in accordance with the procedure identified in her employer's sexual harassment policy. The plaintiff and the officer merely agreed to stay in contact in the event that the alleged sexual harassment did not stop. About two months subsequent to this initial meeting, the plaintiff again sought the counsel of the officer. Upon learning that the alleged sexual harassment was ongoing, the officer instructed the plaintiff to file a formal grievance. In so doing, however, the officer allegedly (1) displayed an insensitive and unhelpful attitude toward the plight of the plaintiff, and (2) failed to supply the plaintiff with the form utilized to file a formal grievance, the combined effect of which was to discourage the plaintiff from filing a formal grievance. The theft incident, alluded to above, which prompted the immediate resignation of the plaintiff, occurred two days subsequent to this second meeting with the officer. Because of the short time that elapsed between the second meeting and the resignation, the District Court granted the defendant’s motion for summary judgment that had been filed in response to the plaintiff’s sexual harassment/constructive discharge claim. In so doing, the court alluded to the affirmative defenses announced in both the *Faragher* and *Ellerth* decisions, concluding that the plaintiff unreasonably had failed to utilize the defendant’s internal procedure for reporting sexual harassment. Given the short time that elapsed between the second meeting and the resignation, the defendant was not provided a reasonable opportunity to respond to the grievance and undertake appropriate corrective measures. Significantly, the District Court did not address the plaintiff’s constructive discharge claim which, if valid, arguably could convert a work environment claim into a job detriment claim, in which case the affirmative defenses, alluded to above, would not be available. In reversing this decision and remanding the case for further proceedings, the Court of Appeals for the Third Circuit reasoned that (1) assuming the affirmative defenses, alluded to above, were available, factual issues existed concerning whether the defendant’s sexual harassment policy and procedure were sufficiently calculated to encourage victims of sexual harassment to come forward, and (2) the District Court erred in not
addressing the plaintiff’s constructive discharge claim, which, if valid, would result in automatic vicarious liability on the part of the defendant. Contrary to previous rulings by the Courts of Appeals for the Second and Sixth Circuits, respectively, the Court held that a constructive discharge claim, if valid, converts a work environment claim into a job detriment claim. In other words, constructive discharge based on the existence of aggravated sexual harassment constitutes a tangible employment action. For a constructive discharge claim based on sexual harassment to be a violation of Title VII, the plaintiff must prove (1) the sexual harassment was so intolerable that a reasonable person in the same position would have felt compelled to resign, and (2) the decision to resign was reasonable given the totality of the circumstances. In this particular case, the Court determined that factual issues existed concerning the validity of the plaintiff’s constructive discharge claim. To resolve the disagreement among the Circuits concerning whether the existence of aggravating circumstances converts a work environment claim into a job detriment claim, the U.S. Supreme Court granted certiorari. In vacating the Third Circuit’s decision and remanding the case for further proceedings, the Court ruled that a work environment claim is not converted into a job detriment claim based on the existence of aggravating circumstances. In so ruling, the Court alluded to the list of examples of tangible employment actions in the \textit{Faragher} and \textit{Ellerth} decisions, all of which were official acts undertaken by supervisors that cannot be effected in the absence of authority vested by the employer (e.g., hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits). Because constructive discharge need not be effected through an employer-sanctioned adverse action changing an employee’s employment status or situation, it was purposely omitted from the list of examples of tangible employment actions. While constructive discharge based on aggravated sexual harassment is aided by the agency relationship between the employer and the offending supervisor, it is not driven by this relationship. The extent to which the agency relationship aided the supervisor’s misconduct is less certain than in cases involving official actions, and this uncertainty justifies making the affirmative defenses, alluded to above, available to employers. In the event, however, that an employer is unable to successfully assert an affirmative defense, a constructive discharge is treated as a formal discharge for purposes of determining damages. The plaintiff may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay, as well as the compensatory and punitive damages now provided for Title VII claims generally. Thus, while the existence of aggravating circumstances does not preclude an employer from raising an affirmative defense, assuming liability, it is highly relevant from a damages standpoint.

Clearly, these recent court rulings have important risk management implications for employers.

\textbf{Risk Management Implications}

The recent court rulings greatly emphasize the increased importance of maintaining, distributing, and implementing a sexual harassment policy. A sexual harassment policy should include the following elements:

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  \item \textbf{A Statement of Zero Tolerance}—The creation of a culture in which sexual harassment is not tolerated by anyone means that a delay in reporting an incident is unreasonable. A victim has no reason to fear termination, demotion, being labeled as a “troublemaker,” being transferred to an undesirable position, etc.
\end{itemize}
• **A Description of Conduct That Constitutes Sexual Harassment**—The different types of sexual harassment claims should be clearly defined (i.e., job detriment claims and work environment claims). Most importantly, examples of the kinds of conduct that constitute sexual harassment should be provided (e.g., explicit demands for sexual favors, unwelcome touching, continued or repeated verbal abuse of a sexual nature, graphic or degrading comments concerning an individual’s appearance).

• **A Complaint Procedure**—First, employees must be required to promptly report sexually harassing conduct they experience, learn of, or witness. Failure of a victim to comply with this procedure may be an affirmative defense or, at a minimum, reduce a potential damages award or settlement. Second, alternative avenues of complaint must be established. An employee should not be required to complain first to his or her supervisor who may be the offender or a person perceived by an employee to be unsympathetic. A human resources person who has an unbiased relationship with employees should be designated as a possible person to receive a complaint. Designating people of both sexes as possible complaint receivers also may encourage a victim to come forward (i.e., an employee may be more comfortable filing a complaint pertaining to sexually offensive behavior with a person of the same sex). Third, a victim should not be required to put his or her complaint in writing, at least initially. Flexibility in terms of the mode of communication may encourage a victim to come forward. Fourth, in view of the fact that employees who are victims of sexual harassment oftentimes sever an employment relationship rather than file an internal complaint, exit interviews should be utilized to determine why an employee has elected to quit. In some cases, an exit interview may prompt a sexual harassment complaint, in which case appropriate corrective measures can be undertaken, and the employee can be encouraged to continue the employment relationship. In other cases, an exit interview may allow the employer to document an employee’s nondiscriminatory reasons for severing the employment relationship, which could be helpful for defense purposes in the event of a subsequent sexual harassment lawsuit. At a minimum, exit interviews can be helpful in terms of successfully raising the affirmative defense that a former employee turned plaintiff was unreasonable in failing to utilize the internal complaint procedure. To maximize effectiveness, for reasons alluded to above, exit interviews should be conducted by a human resources person of the same sex as the employee who is perceived to have an unbiased relationship with employees in general.

• **A Statement That the Employer Will Investigate Complaints Thoroughly and Promptly**—Such a statement will encourage a victim to come forward and file a complaint promptly. A victim has no reason to fear that he or she will not be believed and, thus, a delay in reporting an incident is unreasonable.

• **A Statement Regarding the Confidential Nature of the Investigation**—Such a statement is essential because (1) it will encourage a victim to come forward and file a complaint promptly and eliminate an excuse for failing to do so, and (2) it will serve as evidence that the employer was not being malicious in conducting an investigation of a sexual harassment complaint, which could be important if an alleged offender files a defamation suit. Most importantly, confidentiality should be promised only to the extent that is practical (as opposed to absolute confidentiality). In conducting an investigation of a sexual harassment complaint, the employer must reveal information concerning the source and nature of the allegations to those persons who have a “need to know.”
• A No-Retaliation Statement—Such a statement will encourage a victim to come forward and file a complaint promptly and eliminate an excuse for a delay in reporting an incident.

• A Statement That Offenders Will Be Subject to Corrective Action, Including Discipline, Up To and Including Termination—Such a statement is essential because (1) it demonstrates the employer’s commitment to a zero-tolerance policy, (2) it preserves the right of the employer to take disciplinary action, and (3) it preserves the “procedural fairness” appearance of the investigation, which is important in the event an alleged offender challenges the integrity of the investigation.

A sexual harassment policy that includes these elements is likely to be viewed as effective by a court in terms of the employer pleading an affirmative defense to a sexual harassment claim.

While a sexual harassment policy must include the elements alluded to above to be effective, it also must be widely disseminated and communicated among all employees. Wide dissemination and communication are necessary to protect an employer’s ability to plead the affirmative defense of having exercised reasonable care to prevent and correct sexual harassment. The sexual harassment policy should be included in the employee handbook, posted in conspicuous places throughout the workplace, etc. Moreover, documentation verifying that the sexual harassment policy has been distributed is important.

Finally, for a sexual harassment policy to be effective, it must be implemented effectively. Effective implementation is important in terms of pleading the affirmative defense of having exercised reasonable care to prevent and correct sexual harassment. Sexual harassment training is important so that employees are educated in terms of their duty to report any sexual harassment and thereby ensure that the employer has an opportunity to investigate and undertake effective remedial action before a suit is filed by a victim. Monitoring the conduct of supervisory personnel is important so that corrective action can be taken promptly in the event of inappropriate conduct before a complaint is filed by a victim. Finally, an audit should be conducted periodically to determine if the employer’s policies and procedures are adequate to prevent and correct sexual harassment conduct.

While indemnification and defense coverage with respect to a sexual harassment suit is provided under the employment practices liability insurance policy, poor loss experience will likely result in a substantially higher premium, a reduced policy limit, or the cancellation (or nonrenewal) of coverage. In an extreme case, coverage may not be available at an affordable price. Most importantly, a sexual harassment suit, as opposed to a slip-and-fall suit, for example, is likely to result in adverse publicity and loss of goodwill. Such is the case even if the employer prevails from a legal standpoint. Normally, adverse publicity and loss of goodwill translates into declining revenues, difficulties in attracting quality employees, etc. In summary, from a risk management standpoint, the sexual harassment exposure warrants greater attention than has been the case historically.
Conclusion

Clearly, the trend of legal authority is toward increasing legal responsibility for employers with respect to acts of sexual harassment by supervisory personnel. Such particularly is the case with respect to work environment claims. Assuming, however, that a tangible employment action was not taken by an offending supervisor, which oftentimes is the case, recent court rulings clarify that an employer may plead a complete or partial affirmative defense. In order to plead this defense successfully, however, a comprehensive risk management program that addresses the sexual harassment liability exposure is essential.
Endnotes

1. See Williams v Saxbe, 413 F.Supp. 654 (D.D.C. 1976), reversed and remanded on other grounds sub nom Williams v Bell, 587 F.2d 1240 (D.C. Cir. 1978). In this particular case, the victim suffered a tangible job detriment for refusing unwelcome sexual advances. The victim's refusal to submit to requests for sexual favors resulted in an adverse employment decision that affected the victim.


3. Id.

4. See Ronni Sandroff, “Sexual Harassment in the Fortune 500,” Working Woman, December 1988, pp. 69–73. While the data presented in this article are based on the results of a 1988 sexual harassment survey of human resources executives, the conclusions reached based on this data most likely are still valid.

5. Id.

6. See e.g., Marentette v Michigan Host, Inc., 506 F.Supp. 909 (E.D. Mich. 1980). In this particular case, the cocktail waitresses of a restaurant alleged that they were subject to sexual harassment by customers because their employer implemented a sexually provocative dress code. The complaint alleged that the employer was aware of the sexual harassment, yet failed to undertake corrective measures in refusing to revise the dress code.

7. In this particular case, George Rotary was sued both individually and in his capacity as the owner of the Fireside Motel and Coffee Shoppe. The lawsuit filed against Mr. Rotary in his individual capacity was based on California state tort law and alleged false imprisonment, assault and battery, and intentional infliction of emotional distress (for which the plaintiff sought compensatory and exemplary damages). The lawsuit filed against Mr. Rotary in his capacity as the owner of the Fireside Motel and Coffee Shoppe was based on Title VII and set forth a job detriment claim (for which the plaintiff sought wage loss, recovery of attorney fees and other costs of suit, and injunctive relief).

8. With respect to job detriment claims, agency principles clearly indicate that, even in the absence of notice, absolute liability should be imposed on employers. Where a supervisor or upper-management employee exercises the authority actually delegated to him by his employer, by conditioning a job benefit (or avoidance of a job detriment) or acquiescence to requests for sexual favors or other conduct of a sexual nature, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor or upper-management employee to undertake them.

9. In a companion case decided on the same day as the Faragher decision (i.e., June 26, 1998), the U.S. Supreme Court used identical language to set forth the standard for determining employer liability in a work environment case in which no tangible employment action has occurred. See Burlington Industries, Inc. v Ellerth, 524 U.S. 742 (1998), 118 S. Ct. 2257 (1998). Justice Souter wrote the Faragher decision; Justice Kennedy wrote the Ellerth decision. In Ellerth, the plaintiff filed a complaint against her employer alleging that she had been subjected to constant sexual harassment by one of her supervisors, a mid-level manager who had authority to hire and promote employees, subject to higher approval. The complaint emphasized three incidents where the supervisor’s comments could be construed as threats (albeit unfulfilled threats) to deny her tangible job benefits. In fact, the plaintiff refused all of the supervisor’s sexual advances, yet suffered no tangible retaliation and was promoted once during her tenure with Burlington Industries. For whatever reason, the plaintiff did not use Burlington’s internal complaint procedure, but rather simply severed the employment relationship and subsequently explained in a letter that she quit because of the supervisor’s behavior. While the U.S. District Court found the supervisor’s behavior severe and pervasive enough to create a hostile work environment, it granted a summary judgment to Burlington. In so doing, the court alluded to the plaintiff’s failure to use Burlington’s internal complaint procedure and cited Burlington’s lack of constructive knowledge concerning its supervisor’s conduct. The Court of Appeals reversed this decision, and the judges seemed to agree that the plaintiff could recover if the supervisor’s unfulfilled threats to deny her tangible job benefits were sufficient to impose vicarious liability on Burlington. These judges, however, could not agree on the standard for an employer’s liability for such a claim. On certiorari, the U.S. Supreme Court defined the standard, and affirmed the judgment of the Court of Appeals to reverse the U.S. District Court’s grant of summary judgment again the plaintiff. In remanding the case for further proceedings, the Court ruled that Burlington should have an opportunity to assert and prove the affirmative defense announced in both the Faragher and Ellerth decisions.