

Feature Article

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Employer Liability for Supervisor Sexual Harassment – A Comparison of Federal and State Standards

I. Introduction

The Illinois Human Rights Act (the “Act”) prohibits sexual harassment in the work place by declaring that a civil rights violation occurs whenever an employer, employee, employment agency or labor organization engages in such conduct. 775 ILCS 5/2-102(D).

Sexual harassment is defined by the Act as including:

any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) the submission to such conduct is made either directly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment. 775 ILCS 5/2-101(E).

As to the standards for the imposition of liability against the employer for such a civil rights violation, the statute provides for strict liability against employers for sexual harassment of employees by supervisory personnel, regardless of whether the employer was aware of such conduct. *Board of Directors, Green Hills Country Club v. The Human Rights Commission*, 162 Ill. App. 3d 216, 220, 514 N.E.2d 1227, 1230 (5th Dist. 1987).

For instances of sexual harassment of an employee committed by a non-managerial or non-supervisory employee, however, the statute imposes liability upon an employer only where “the employer becomes aware of the conduct and fails to take reasonable corrective measures.” 775 ILCS 5/2-102(D).

The statute’s federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”), declares “it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” 42 U.S.C. § 2000(e)-2(a)(1).

As such, Title VII treats sexual harassment as a form of gender-based discrimination in the workplace, rather than as a specific civil rights violation as it is described under the Illinois Human Rights Act. Further, Title VII does not contain specific provisions that address the nature or scope of an employer’s liability in sexual harassment cases. Instead, Title VII simply sets forth an agency-based definition of employer (“a person engaged in an industry affecting commerce . . . and any agent of such a person . . .”) and leaves it to case law to define the nature and scope of an employer’s liability for instances of sexual harassment, both by supervisory personnel and others.

Twin decisions from the United States Supreme Court in the 1998 cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), set the standard for the imposition of liability upon employers under Title VII for sexual harassment committed by a supervisor.

Under *Ellerth* and *Faragher*, an employer is subject to vicarious liability to a victimized employee under Title VII for acts of harassment committed by a supervisor with either immediate or successively higher authority over the victimized employee. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. If the victim suffered a tangible employment action (a demotion, termination or other adverse job action), the employer's liability is strict. *Id.* If, however, no such tangible job action occurred, the employer may raise an affirmative defense to the harassment claim, which is composed of two elements, both of which the employer has the burden of proving: first, that the employer exercised reasonable care to prevent, and to properly correct, any sexually harassing behavior on the part of the supervisor; and second, that the victimized employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer, or to otherwise avoid the harm allegedly suffered. *Id.*

Thus, strict liability under Title VII for supervisor sexual harassment is dependent upon the nature of the working relationship between the parties (*i.e.* supervisory/subordinate) as well as the presence of a tangible, adverse employment action taken against the victim, and arising from the offending conduct. Even where a supervisory/subordinate situation exists, but no adverse job action resulted from the conduct, the employer can defend the harassment claim by demonstrating the reasonableness of its response to the situation, coupled with the victim's failure to participate in preventative or corrective measures.

II. Traditional Standards for Employer Liability in Illinois for Supervisor Harassment Claims

Like its Title VII federal counterpart, the Illinois Human Rights Act recognizes a cause of action for both "*quid pro quo*" sexual harassment by a supervisor, as well as instances in which such conduct creates or constitutes a "hostile work environment." 775 ILCS 5/2-101(E).

Quid pro quo harassment is defined as conduct including unwelcomed sexual advances, requests for sexual favors or (broadly) any conduct of a sexual nature when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," or where "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . ." *Id.*

Any unwelcomed conduct of a sexual nature by a supervisor that adversely impacts the "terms, conditions or privileges of employment" of a subordinate is considered actionable as *quid pro quo* harassment. *See Old Ben Coal Co. v. The Human Rights Commission*, 150 Ill. App. 3d 304, 501 N.E.2d 920 (5th Dist. 1986).

Claims for supervisor sexual harassment are also recognized by the Illinois Human Rights Act where "such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 775 ILCS 5/2-10-1(E).

Under both Illinois law and federal law, hostile work environment claims generally arise from a series of events, rather than a single incident. *See Sangamon County Sheriff's Department v. The Illinois Human Rights Commission*, 233 Ill. 2d 125, 141-142, 908 N.E.2d 39, 47 (2009) (citing Illinois law regarding hostile work environment claims, and citing federal law, which states that "[a] hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.'"); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002), quoting 42 U.S.C. §2000e-5(e)(1).

Illinois courts have traditionally imposed strict liability upon an employer for the harassment of an employee by another employee having direct supervisory authority over the complaining party, regardless of whether the employer was aware of the offending conduct, *see Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill. 2d 507, 639 N.E.2d 1273 (1994), and regardless of whether the offending conduct constitutes *quid pro quo* sexual harassment, or creates a hostile work environment. *See Board of Directors, Green Hills Country Club v. The Human Rights Comm'n*, 162 Ill. App. 3d 216, 220, 514 N.E.2d 1227, 1230 (5th Dist. 1987).

As previously mentioned, a higher standard for imposing liability against an employer for sexual harassment was required when the offending conduct was committed by non-managerial or non-supervisory personnel, in which case, the employer would only be strictly liable for one employee's sexual harassment of another if it first became aware of the conduct and then failed to take reasonable corrective measures. 775 ILCS 5/2-102(D).

III. The Sangamon County Sheriff's Department Case

A. Prior Law

The aforementioned framework for the imposition of strict liability in Illinois upon an employer for the sexual harassment of a subordinate by a supervisor left open the question of whether strict liability could be imposed upon the employer when the person committing the offense was, indeed, a supervisor, but was not the victim's supervisor.

Under federal law, pursuant to the standards created by the *Faragher* and *Ellerth* cases, the answer would be "no," since under Title VII the strict liability of an employer for the sexual harassment of a subordinate was dependent upon the harasser's status relative to the victim. The United States Supreme Court had ruled in *Faragher* and *Ellerth* that an employer is subject to vicarious strict liability to a victimized employee only where the offending conduct is committed by a supervisor having either immediate, or successively higher, authority over the complaining employee.

The Seventh Circuit Court of Appeals, in following the standards of strict liability created by the United States Supreme Court in *Faragher* and *Ellerth*, ruled that to impose strict liability upon an employer for a supervisor's sexual harassment violation of Title VII, the supervisor must possess "the authority to directly affect the terms and conditions of a victim's employment." See *Hall v. Bodine Electric Co.*, 276 F.3d 345, 355 (7th Cir. 2002) (*emphasis in original*).

Similarly, under traditional Illinois law, strict liability for a supervisor's sexual harassment had been imposed on employers only in situations in which the supervisor who committed the harassment had authority or control over the victim as well as the condition of the victim's employment. See *e.g. Geise*, 159 Ill. 2d at 511, 639 N.E.2d at 1274; *Green Hills*, 162 Ill. App. 3d at 218, 514 N.E.2d at 1229.

In *Sangamon County Sheriff's Department v. Illinois Human Rights Commission*, 375 Ill. App. 3d 834, 875 N.E.2d 10 (4th Dist. 2007), the appellate court faced a matter of first impression with regard to the interpretation of the Illinois Human Rights Act concerning the question of who constituted a managerial or supervisory employee for purposes of imposing strict liability upon an employer for harassment of a subordinate. Perhaps following the examples set by federal courts in interpreting Title VII, the Sheriff's Department argued that it could not be held strictly liable for its supervisor's harassment because he was not the victim's supervisor, and therefore, presumably had no power to adversely impact the terms or conditions of her employment. 375 Ill. App. 3d at 846. The victim, along with the Illinois Human Rights Commission, argued that under the Illinois Human Rights Act, as long as the harasser was a supervisor, it was immaterial that he was not the victim's supervisor. *Id.*

After recognizing that the text of the Illinois Human Rights Act provided no guidance "as to who is a manager or supervisor for purposes of imposing strict liability on an employer for the actions of a managerial or supervisory employee," the Illinois Appellate Court turned to the dictionary definitions of "supervisor" and "manager." *Id.*, 375 Ill. App. 3d at 847, 875 N.E.2d at 20. Noting the association of those definitions with the power to hire, promote, discipline or discharge an individual (powers that the supervisor did not have over the subordinate in the case before the appellate court), the harasser was characterized as a "co-employee" of the complainant, and the higher standard of proof was imposed upon the claimant, *i.e.* to demonstrate that the Sheriff's Department either knew or should have known of the harassment and failed to take reasonable corrective measures. Because of the corrective action taken by the Sheriff's Department, which included a prompt investigation into the alleged harassment along with a suspension and fine imposed against the harasser, the Human Rights Commission's order awarding damages and attorneys' fees was reversed.

B. The Illinois Supreme Court Speaks to the Standards for Supervisor Harassment

Both the complainant and the Commission filed petitions for leave to appeal the *Sangamon County Sheriff's Department* case to the Illinois Supreme Court, which accepted the petitions and consolidated the actions for review. The supreme court framed the issue as “whether an employer is strictly liable . . . for the ‘hostile environment’ sexual harassment of its supervisory employee, where the supervisor has no authority to affect the terms and conditions of the complainant’s employment,” a question that the court answered with a simple “yes.” 233 Ill. 2d 125 at 137, 908 N.E.2d 39 at 45.

Regarding the strict nature of the liability imposed upon employers for the sexual harassment of one of its employees by another, the court noted that the only exception to strict liability was in instances of harassment by non-employees, non-managerial or non-supervisory personnel, which required awareness on the part of the employer of the harassment, combined with its failure to take reasonable corrective measures, in order for strict liability to be imposed. 233 Ill. 2d at 137.

Because, however, the offender was undeniably a supervisor, albeit not that of his victim, the Illinois Supreme Court stated that the question of whether the harasser had direct supervisory authority over his victim was irrelevant under the language of the Illinois Human Rights Act. *Id.*

The Sheriff’s Department argued that the federal standards for the imposition of vicarious liability under Title VII should be applied, which limit an employer’s strict liability for sexual harassment in supervisor/subordinate situations to those in which a supervisor could directly affect the terms and conditions of the victim’s employment. 233 Ill. 2d at 138.

The Illinois Supreme Court found no such limitations in the plain words of the Illinois Human Rights Act, and declined to create such a limitation, distinguishing the language of the Illinois Human Rights Act from the prohibitions against sexual harassment as found in Title VII of the Civil Rights Act of 1964, and in the cases construing it. *Id.*

IV. The Unanswered Question: Who is a “Supervisor”?

A. Illinois Law

While it is abundantly clear that the Illinois Supreme Court’s decision in the *Sangamon County Sheriff’s Department* case imposes strict liability upon Illinois employers for supervisor harassment, regardless of whether or not the harasser was the victim’s direct supervisor, what remains to be clarified is the question of which employees fall within the category of “supervisor.” Given the fact that liability can be imposed upon an employer for any supervisor’s sexual harassment regardless of the employer’s lack of knowledge of the offending conduct, and regardless of the corrective measures taken by the employer in response to the harassment, the question of whose conduct can expose the employer to vicarious liability takes on an even greater significance now than it has in the past.

The *Sangamon County Sheriff’s Department* case gives little instruction on this issue, perhaps because the harasser’s status as a “supervisor” in that case (albeit one arguably without the authority to directly impact the terms and conditions of his victim’s employment), was essentially unquestioned. Therefore, the issue of the scope of the term “supervisor” was not before the supreme court, other than to declare that the harasser need not be the victim’s supervisor in order for liability to be imposed upon the employer.

Guidance on the scope of the term “supervisor” may be found in a trio of decisions from the Illinois Human Rights Commission, one of which involves the charge of harassment that was the genesis of the Supreme Court’s decision in the *Sangamon County Sheriff’s Department* case.

In Re: Cunningham and Wal-Mart, 1992 CF 0496 (April 16, 1998) is the first such opinion, and the one most often cited in defining and distinguishing the terms “supervisor” and “manager” for purposes of liability under Section 2-102(D) of the Illinois Human Rights Act. *Cunningham* involved a series of verbal and physical abuses committed by a manager of a Wal-Mart receiving department upon a clerical employee in the

department. The employer, in its defense to the charge of harassment by a supervisory employee, challenged the alleged status of the offender as either a manager or a supervisor.

Noting that the Act imposes liability upon an employer for the sexual harassment of its employees by non-managerial and non-supervisory personnel “only if the employer becomes aware of the conduct and fails to take reasonable corrective measures” (see 775 ILCS 5/2-102(D)) the Commission undertook a review of the harasser’s authority as a “receiving manager,” in light of the statute’s definition regarding whose conduct could lead to a finding of vicarious liability on the part of the employer.

The Commission first noted that the Illinois Human Rights Act uses the terms “non-managerial” as well as “non-supervisory” in describing the status of employees whose misconduct would result in liability for the employer only upon a showing of knowledge of the offending conduct on the part of the employer, coupled with the failure to reasonably address the offending conduct. The Commission concluded that “there must be a conceptual difference between managers and supervisors,” since both terms are used in the Act, and fundamental rules of statutory construction require every word in a statute to be given meaning. *Id.* at p.27.

The Commission determined that the scope of the term “supervisor” was broader than that of “manager,” and that the mere fact that the harasser is not among the managerial team of the company does not mean that he or she does not possess sufficient supervisory authority over the victim to justify the imposition of vicarious liability against the employer for the supervisor’s harassing conduct. The fundamental question in determining the employer’s liability, according to the Commission, is not whether the harasser is a member of the company’s management staff, but whether the offender had authority over the complainant so as to empower the offender to affect the terms and conditions of the complainant’s employment. If the offender can legitimately tell the complainant what he or she must do, and how he or she must do it, the relative authority of the offender over the victim is such that the offender speaks on behalf of the company, and thereby, provides a basis for the imposition of vicarious (and strict) liability against the company for the harassing conduct. *Id.* at p.30.

Five years after the *Cunningham* opinion came the decision entitled *In Re: Feleccia v. Sangamon County Sheriff’s Department*, 1999 CF 0713 (September, 2003), which is the harassment charge that gave rise to the Illinois Supreme Court’s decision in the *Sangamon County Sheriff’s Department* case six years later. The Administrative Law Judge in the *Feleccia* matter recognized that strict liability under the Illinois Human Rights Act was not dependant upon the offender’s status as the direct supervisor of the complainant, since the language of section 2-102(D) of the Act does not limit its definition of supervisory employees to those having direct supervision of the victim of harassment. (*Feleccia*, slip op. at 15).

The Administrative Law Judge went on to rule, however, that simply placing a “supervisory” label on the offender did not establish vicarious liability upon the employer, unless there was also evidence that the offensive conduct had the purpose or effect of substantially interfering with the victim’s work performance, or if it created an intimidating, hostile or offensive work environment. Despite the recognition by the Administrative Law Judge that the harasser need not be the complainant’s direct supervisor in order for liability to be imposed upon the employer, he focused on the absence of the offender’s authority to “hire, fire, demote, promote, transfer, discipline or give . . . orders” to the complainant to justify a recommendation that the complainant’s charge of sexual harassment be dismissed with prejudice, a result (and rationale) ultimately reversed by the Illinois Supreme Court six years later. *Id.* at 28; see also *Sangamon County Sheriff’s Department v. The Illinois Human Rights Commission*, 233 Ill. 2d 125, 908 N.E.2d 39 (2009).

Subsequently, in the matter of *Stephanie Ginn and Grayline Tours*, 2002 CF 0882 (June 28, 2005), the Administrative Law Judge hearing the complainant’s charge of sexual harassment by an alleged supervisor again stated, as in *Cunningham*, that the mere fact that the harasser was not a member of the employer’s management team did not prevent the imposition of liability upon the employer if the offender could be categorized as a supervisor. The harasser’s authority to reprimand the complainant was deemed sufficient to establish his supervisory status, and thus was also deemed sufficient to serve as the basis for a recommendation of substantial damages against the employer for the emotional harm caused by the supervisor’s offending conduct. *Id.* at pp.23-24.

B. Federal Law

Under federal law, the establishment of supervisor status is likewise an important component of an employer's strict liability for sexual harassment. The focus, however, is on whether the supervisor's conduct culminates in a tangible employment action which, if shown, serves as the basis for the imposition of strict liability upon the employer. Such a showing negates the affirmative defense otherwise available to the employer for harassment by non-supervisory personnel in which case a reasonable response on the part of the employer to prevent or correct the harassment, coupled with an unreasonable failure of the victim to avail herself of the employer's prevention or corrective policies, can serve as a means to avoid liability. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Title VII does not define the term "supervisor," and the United States Supreme Court has held that supervisory status cannot be determined by "a mechanical application" of agency law, but instead is dependant upon "an inquiry into the reasons that would support a conclusion that harassing behaviour ought to be held within the scope of a supervisor's employment" *See Faragher*, 524 U.S. at 797.

More simply stated, federal courts will look to the nature and scope of the authority delegated by the employer to the harasser, rather than to such aspects as job titles, to determine whether actual or apparent supervisory authority exists. The greater the magnitude of authority that serves to assist the harasser in explicitly or implicitly carrying out the offending conduct, the more likely that supervisory status will be found to exist.

The most obvious hallmark of supervisory status according to the federal courts is the authority to undertake or recommend tangible employment actions relative to the victim. As the Seventh Circuit has stated:

The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes of imputing liability to the employer.

Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1034 (7th Cir. 1998).

In addition to instances of actual authority, an employer may be charged with vicarious liability for a supervisor's misuse of apparent authority, where the victim reasonably relies upon the perception of the harasser's power even where actual authority to impact the terms and conditions of the victim's employment does not exist. As the court stated in *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 500 (7th Cir. 1997), "an employer may also be held liable where a supervisor's *quid pro quo* threat exceeds his actual authority, but the victim reasonably relies on the supervisor's threat because of his apparent authority."

The "apparent authority" argument is limited, however, by the reasonableness of the victim's belief in the ability of the harasser to impact his or her employment status. As the court noted in *Jansen* case, "only where it would be reasonable for a victim of harassment to believe that the authority used to harass had been delegated to the supervisor would liability ensue." 123 F.3d at 500.

V. Conclusion

The dissenting opinion in the *Sangamon County Sheriff's Department* case, in discussing Illinois' departure from the principles governing sexual harassment claims under federal law, commented that the court's construction of the Illinois Human Rights Act "imposes a standard of liability which appears to be without precedent in any jurisdiction of the United States." 233 Ill. 2d at 146, 908 N.E.2d at 50.

By interpreting the Illinois Human Rights Act in such a way that exposes an employer to strict liability for supervisor harassment, even where there is no direct line of supervisory authority between the harasser and the victim, the Illinois Supreme Court has distinguished Illinois law from its federal counterpart, and imposed upon employers a wider risk of potential exposure for inappropriate conduct by managerial and supervisory personnel..

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William G. Beatty is co-chair of *Johnson & Bell's* Employment group. He concentrates his practice in product liability and employee benefits/employment litigation. He has extensive experience representing manufacturers of heavy equipment used in several different industries, as well as manufacturers of electronic equipment and scientific instruments. He also has successfully defended employers, insurers and third-party administrators in ERISA in various matters. Mr. Beatty has represented a broad spectrum of employers and insurers in federal and state courts and before administrative agencies in employment-related claims. His success as a trial attorney has been recognized by his peers, who have honored him with an AV rating from Martindale-Hubbell.

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