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LEGAL ALERT



## Legal Alert: Tennessee Supreme Court Clarifies Individual Liability and Retaliation under State Law

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The Tennessee Supreme Court recently issued a decision clarifying the standard for the imposition of individual liability of supervisors for sexual harassment under the Tennessee Human Rights Act (THRA). See *Allen v. McPhee*. The Court also defined the elements of a *prima facie* case of retaliation under the THRA.

In this case, Allen, an administrative assistant in the president's office at Middle Tennessee State University (MTSU), claimed the university president, McPhee, sexually harassed her. Allen filed a sexual harassment complaint against McPhee with the Tennessee Board of Regents (TBR). In a letter accompanying the complaint, Allen's attorney explained that the complaint was filed with the TBR rather than with the MTSU director of Equal Opportunity as required by MTSU's anti-harassment because the policy did not provide a procedure to be followed when the president is accused of harassment.

The TBR investigated the allegations and determined that although McPhee's conduct did not subject Allen to a tangible job detriment, McPhee subjected Allen to a hostile work environment. Subsequently, McPhee was placed on leave without pay for twenty days, subjected to a \$10,000 decrease in salary for one year, and required to participate in eight hours of sexual harassment training. McPhee was retained as president of MTSU, and Allen was transferred to the position of coordinator in MTSU's Development Office, where she would report directly to the Vice President for Development.

Allen subsequently filed an action for discrimination and retaliation in state court against McPhee and the state of Tennessee. The trial court granted summary judgment in favor of McPhee and the State. The Tennessee Court of Appeals affirmed the trial court's decision and the Tennessee Supreme Court granted Allen's application for permission to appeal.

### **Availability and Application of the *Faragher/ Ellerth* Defense**

The Tennessee Supreme Court rejected Allen's argument that the *Faragher/ Ellerth* defense was unavailable to the State in defending the hostile work environment claim because McPhee, the president of a state university, was the alter ego or proxy of the State. Allen argued that the 5th, 7th, 9th, and 10th Circuits have ruled as such when dealing with the same issue under Title VII. The Tennessee Supreme Court noted that although Tennessee courts generally interpret the THRA "coextensively" with Title VII, "we believe that a

careful reading of *Faragher* and *Ellerth* demonstrates that the United States Supreme Court did not intend to create an alter ego or proxy exception to the affirmative defense.” Thus, the Court held that the availability of the *Faragher/Ellerth* affirmative defense was not affected by the harasser’s status as “proxy” or “alter ego” of the employer.

Applying the *Faragher/Ellerth* standard, the Court held that the State’s corrective actions were reasonable as a matter of law. The Court also found that the State’s efforts to disseminate the anti-harassment policy at MTSU also were reasonable. However, since MTSU’s policy failed to provide a method of removing McPhee from the decision-making process in situations in which he was the alleged harasser, the Court found that Allen reasonably could have believed that complaining would have been futile or counterproductive. Therefore, because there were genuine issues of material fact with regard to whether the State’s anti-harassment policy contained reasonable complaint procedures, the Tennessee Supreme Court held that the State failed to establish the first prong of the *Faragher/Ellerth* defense, and reversed the lower court’s summary judgment in favor of the State.

### **Liability of McPhee for Discrimination Under the THRA**

Allen argued that McPhee was personally liable for discrimination under the THRA as well. The THRA states that “[i]t is a discriminatory practice for a person or for two (2) or more persons to . . . (2) [a]id, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory by this chapter.” Tenn. Code Ann. § 4-21-301(2) (2005). The Court rejected this argument, noting that McPhee did not try to inhibit or impair the investigation that was conducted by the TBR, did not discourage or prevent the State from taking remedial measures, and accepted the sanctions that were imposed upon him. Thus, the Court held, “we decline to extend individual liability to supervisors who participate in the behavior creating the hostile work environment absent a showing that the supervisor’s conduct encouraged the employer to engage in employment-related discrimination or prevented the employer from taking corrective action.”

### **Retaliation Under the THRA**

The Tennessee Supreme Court noted that in *Burlington N. & Santa Fe Ry. Co. v. White*, the U.S. Supreme Court expanded the definition of “materially adverse employment actions” in retaliation cases under Title VII. The Tennessee Supreme Court then held, as a matter of first impression, that in order to state a *prima facie* case of retaliation under the THRA, “an employee must demonstrate: 1) that she engaged in activity protected by the THRA; 2) that the exercise of her protected rights was known to the defendant; 3) that the defendant thereafter took a materially adverse action against her; and 4) there was a causal connection between the protected activity and the materially adverse action.” The Court noted that *White* did not change the burden-shifting analysis that follows the establishment of a *prima facie* case.

Applying the new standard, the Tennessee Supreme Court noted that while Allen established a *prima facie* case of retaliation, the record supported the State’s assertion that she was transferred for a legitimate, non-discriminatory reason – protecting her from further harassment by McPhee – which was not pretextual. While a reasonable person could have concluded that Allen was assigned to a position that was less desirable than her previous position, her reassignment was clearly superior to the alternative of remaining in a position

in which she would be forced to interact closely with her harasser. Thus, the Court concluded that the State was entitled to summary judgment on this issue.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Bill Singleton, an attorney in our Memphis office, at 901-291-1520 or [bsingleton@fordharrison.com](mailto:bsingleton@fordharrison.com).