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Employment Advisory: First Circuit Reinforces Faragher-Ellerth Defense by Refusing to Hold Employer Liable for Unreported Harassment

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The First U.S. Circuit Court of Appeals ruled recently in *Chaloult v. Interstate Brands Corporation* that an employer could not be held vicariously liable for sexual harassment, despite the fact that the plaintiff's co-worker who witnessed the incidents failed to report them as required under the employer's policy.

Under Title VII, an employer is vicariously liable for sexual harassment perpetrated by a supervisor against a subordinate employee where the harassment results in a tangible, detrimental employment action. An employer may also be liable even where the harassment does not result in a tangible employment action; the employer may defend against this liability, however, with the so-called *Faragher-Ellerth* defense. As articulated by the United States Supreme Court, this defense may be used to shield the company from vicarious liability where (i) its own actions to prevent harassment were reasonable, and (ii) the employee's actions in seeking to avoid harm were not.

In *Chaloult*, the employer's policy required all supervisors to report any incidents of harassment to management. The plaintiff, an entry-level supervisor, was allegedly subjected to her own supervisor's repeatedly suggestive and inappropriate language and sexual propositions. The plaintiff's co-worker, also an entry-level supervisor, witnessed much of this misconduct, but did not report the incidents as required by company policy.

The plaintiff argued that her claim was not subject to the *Faragher-Ellerth* defense. Conceding that her own actions in seeking to avoid harm were unreasonable, in that she failed to report her supervisor's conduct despite several opportunities to do so, the plaintiff argued that the defense was nonetheless unavailable to her employer. Specifically, the plaintiff argued that because the co-worker failed to report the harassment as required under the policy, the co-worker's knowledge of the harassing incidents should be imputed to the company and, it then follows, the company's failure to take corrective action was also unreasonable.

The court disagreed. Finding the company's actions to be reasonable for purposes of the *Faragher-Ellerth* defense, the court found that the company's policy—which required *all* supervisors to report *any* incidents of harassment to management—went well beyond legal requirements. To impose liability on the company for trying to implement protections greater than necessary, the court held, would discourage employers from instituting voluntary efforts to prevent harassment that go beyond the requirements of the law.

Action Items for Employers

The *Chaloult* court refused to narrow the scope of the *Faragher-Ellerth* defense when it refused to find the company's failure to follow its internal policies "unreasonable" as a matter of law. The court could easily have gone the other way—and other courts certainly may. Regardless, the *Chaloult* decision reinforces the importance of establishing reasonable anti-harassment policies and procedures for reporting alleged misconduct, in order to increase the company's chance of success under the *Faragher-Ellerth* defense. Further, to maximize the likelihood that the *Faragher-Ellerth* defense will be available if they are sued, employers should review their anti-harassment policies and ensure that employees are familiar with the policy and the procedure for reporting alleged harassment. Proper employee training can help accomplish this goal. Employers are encouraged to contact Mintz Levin immediately with any questions about their harassment policies and procedures and the training of employees.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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