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**Harassment by Consensual Sex**

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The comedian George Carlin once asked, "If you try to fail and succeed, which have you done?" A similar question arises in the context of sexual harassment: If a supervisor demands sexual favors of his subordinate and she silently acquiesces to keep her job, does she have a claim of sexual harassment against her employer? Despite the Supreme Court's many pronouncements on sexual harassment, the answer to that precise question is still unresolved.

A partial, but critically incomplete answer was given in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, a bank employee named Vinson claimed that her supervisor made repeated demands for sexual favors and, because she feared losing her job if she refused, she had engaged in voluntary sexual intercourse with this supervisor on 40 or 50 occasions. The decision in *Meritor* made clear that even a consensual sexual relationship can become actionable sexual harassment if the sexual episodes are unwelcome and so severe or pervasive as to alter the terms and conditions of employment. But was the employer liable to Vinson for the successful sexual importunings of its supervisory employee?

To a minority of three Justices, the answer was clearly yes, since each supervisor is "understood to be clothed with the employer's authority," 477 U.S. at 97 (Marshall, J., concurring), but the seven-justice majority (Justice Stevens joined both opinions) "decline[d] . . . to issue a definitive rule on employer liability," saying, somewhat cryptically, that the courts should "look to [common-law] agency principles for guidance." *Id.* at 72.

**'*Ellerth*' was an 'unfulfilled threat' case**

The opportunity for clarity – but not its fulfillment – came a decade later in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), which one court later characterized as an "unfulfilled threat" case. In *Ellerth*, the companion to *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the plaintiff had alleged threats to deny her tangible job benefits if she did not acquiesce to her supervisor's sexual demands. In particular, the supervisor warned Ellerth that she should "loosen up" because he could make her life at work "very hard or very easy" – as he commented on her breast in a hotel lounge during a business trip. The "loosen up" comment was repeated in a promotion interview, as he reached over and rubbed her knee. Ellerth spurned these advances and was in fact promoted, but some time later quit, she said, because of her supervisor's offensive behavior. Ellerth sued her employer for illegal sexual harassment even though she never informed anyone in authority of her supervisor's conduct and even though the employer had a policy against sexual harassment and she knew it.

It was in this context that the Court held in *Ellerth* (and *Faragher*) that, absent a "tangible employment action" (such as discharge, demotion, or undesirable reassignment), an employer may raise an affirmative defense to liability or damages for the sexually harassing behavior of its supervisory employees "if the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the employee unreasonably failed to take advantage of "preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 764-65. The Court concluded that while the employer was subject to potential vicarious liability for the supervisor's actions, it should have the

opportunity to assert the newly established affirmative defense – necessarily implying that what happened to Ellerth was not a "tangible employment action."

Unanswered in *Ellerth* is what the rule for employer liability would be if Ellerth (like Vinson) had reluctantly consented to her supervisor's unwelcome demands and continued in employment. Just such a "submission" case was presented to the Second Circuit in *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002), where Jin alleged that her manager had made repeated crude sexual remarks, "offensively" touched her and then required Jin to attend weekly meetings held after business hours in his locked office, at which time they engaged in sexual acts. Jin alleged that she acquiesced to these sexual demands out of fear of losing her job and threats of physical harm.

After trial, the district court entered a judgment for the employer based on a special jury verdict which found that while Jin was subjected to unwelcome sexual harassment, she suffered no "tangible adverse action" affecting her employment and unreasonably failed to take advantage of the corrective opportunities made available to her by her employer. The Second Circuit reversed.

Recognizing that the employer is entitled to the *Ellerth/Faragher* affirmative defense if "no tangible employment action is taken," 310 F.3d at 92, the Second Circuit distinguished *Ellerth* because Jin's supervisor used her submission to his demands for sexual acts as a basis for "granting" her the job "benefit" of continued employment. *Id*. at 97. While it might seem strained to equate the employer's non-action of not firing Jin with the "tangible employment action" of "granting" continued employment, the Second Circuit was apparently determined not "to punish the victims of sex harassment who surrender to unwelcome sexual encounters." 310 F.3d at 99. As the Second Circuit saw it, it would be "anomalous" to find an employer liable when an employee refused a supervisor's sexual demands and provoked termination or other adverse employment action, but find no liability when "the employee was unable to refuse and was actually subjected to sexual abuse." *Id.*

Just recently, the courts, in another "submission" case apparently saw no such anomaly. In *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217 (M.D. Fla. 2004), a former civilian employee of the Lakeland Police Department consented to the unwanted sexual advances made by Chin, a police sergeant, who was at the time assigned to a different squad. Not long after this sexual relationship began, Speaks voluntarily transferred into Chin's squad, placing herself under Sergeant Chin's direct supervision. Speaks continued to acquiesce to Chin's demands, she said, because she feared physical harm, being fired from her employment or transfer to a less desirable assignment. About a year after the sexual relationship began, an argument ensued, Chin threatened to transfer Speaks, Speaks confessed to her husband, and her husband reported Chin's misconduct.

The police department's subsequent investigation determined that, while Speaks and Chin had engaged in an inappropriate relationship, there was insufficient evidence to conclude that the relationship was "unwelcome." Chin was disciplined and Speaks transferred to another position with the city. After approximately six months in her new position, Speaks resigned due to "health issues."

Given the facts presented, it would not be a stretch to conclude that Speaks's relationship with Chin was not all that unwelcome. It is surely not unheard of that married people caught by their spouses in ongoing sexual liaisons with co-workers profess the relationship to be something other than it was. The court, however, granted summary judgment to the employer not because no sexual harassment had occurred, but because the city prevailed on the *Faragher/Ellerth* affirmative defense.

**No 'tangible employment action' against Speaks**

Speaks, the court reasoned, had not suffered a "tangible employment action" just because Chin used supervisory authority to induce her consent to their sexual activities, since so holding would impermissibly revert to the pre-*Faragher/Ellerth* law when employers were always vicariously liable for what was then called "*quid pro quo*" harassment. 315 F. Supp. 2d at 1225. Further, argued the district court, *Ellerth* required that an employee claiming a tangible employment action must have experienced a "significant change in status," and such requirement is not met by an employee who, despite the harassment experienced, "continues to work with the same job, pay, benefits, and responsibilities." *Id*. The court might have noted as well that if (as the Second Circuit reasoned in *Jin*) the "grant" of "continued

employment" is a "tangible employment action" and the "*quid*" for the "*quo*" of consenting to unwelcome sexual acts, it is also the "*quid*" for tolerating sexist jokes, lewd comments, leers, and verbal abuse, thus obliterating the distinction between the two types of sexual harassment – hostile work environment and tangible employment action – that the Supreme Court adopted in *Faragher/Ellerth*.

The Florida district court also reasoned that strict liability for a "submission" case "undermines the concept of an employee having a coordinate duty to avoid harm." *Id*. This was, the court aptly noted, one reason why the Supreme Court adopted the *Faragher/Ellerth* affirmative defense in the first place. It could well be argued that no duty of avoidance should be imposed on an employee subjected to the type of conduct alleged in *Jin*, but the Supreme Court did not make the outrageousness of the supervisor's conduct the determinant for allowing the employer an affirmative defense.

The Supreme Court's recent decision in *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), which held that "constructive discharge" is not a tangible employment action absent an "official act" of the employing entity that adversely affects the harassed employee, may tip the balance toward finding that supervisory-induced consent to sexual activity is not a tangible employment action that precludes the *Faragher/Ellerth* affirmative defense. But the Second Circuit in *Jin* ruled that it was, even though the law in that circuit anticipated the holding in *Suders*. So, nearly 20 years after the issue was first raised in *Meritor*, it is still unclear whether the employer is liable to a woman who acquiesces to having sex with her supervisor because he threatens her with losing her job but does not complain about it to anyone else in authority.

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