

10.4 Civil Rights—Title VII—Hostile Work Environment—Harassment

Comment

The Supreme Court addressed the law of harassment claims under Title VII in two companion cases, *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) [collectively, *Ellerth/Faragher*]. Although those cases relate to sexual harassment, the Committee does not discern any conceptual difference between harassment because of sex and harassment because of race or any other protected status. Accordingly, the following instructions are applicable to harassment based on race, color, sex, religion, and national origin.

Ellerth/Faragher clarified the standards governing an employer's liability for harassment. Essentially, when an employee suffers a tangible employment action resulting from a direct supervisor's harassment, the employer's liability is established by proof of the harassment and a resulting tangible employment action. See *Faragher*, 524 U.S. at 807-08. No affirmative defense is available to the employer in those cases. When no tangible employment action has been taken, the employer may interpose an affirmative defense to defeat liability by proving (a) that the employer exercised reasonable care to prevent and correct promptly any discriminatory conduct, and (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Id.*; *Ellerth*, 524 U.S. at 764-65; see also *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1166-67 (9th Cir. 2003); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). See Instruction 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense). In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137-38 (2004), the Supreme Court applied the framework of *Ellerth/Faragher* to a case of constructive discharge due to a hostile work environment. In such a case, the *Ellerth/Faragher* affirmative defense is available to the employer, unless an official act, *i.e.*, a tangible employment action, of the employer precipitated the employee's decision to resign. *Id.* at 148.

If, however, harassment is committed by a co-worker or a nondirect supervisor of the plaintiff's, the employer is liable only under a negligence theory. In this situation, the employer may not invoke the *Ellerth/Faragher* affirmative defense. See *Swinton*, 270 F.3d at 803-04 (noting that principle embodied in affirmative defense is contained in requirements for prima facie case based on negligence). See also Instruction 10.8 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence).

An employer may be held liable for the actionable third-party harassment of its employees or customers when it ratifies or condones the conduct by failing to investigate and remedy it after learning of it. See *Christian v. Umpqua Bank*, 984 F.3d 801, 811-12 (9th Cir. 2020). Title VII prohibits discrimination against any individual and makes no distinction

between managers and other employees; both are entitled to its protection. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

Revised March 2021