


Examining the Title VII *Ellerth/Faragher* Affirmative Defense in the "Me Too" Era

By Valeri Pappas and Jennifer Tiedeken

Over the past year, discussions surrounding the reporting of sexual assault and abuse have arguably become much more commonplace than they ever were before. Just over a year ago, the New York Times published an explosive article that detailed rape and sexual harassment allegations against Hollywood mogul Harvey Weinstein.[1] Many of the rapes and sexual harassments that victims reported shortly thereafter had occurred years—some decades—ago and yet were just being reported by the victims for the first time. Then, at the end of September of this year, another explosive decades' old sexual assault allegation made headlines when Christine Blasey Ford testified before the Senate Judiciary Committee that Supreme Court nominee, Brett Kavanaugh (now a confirmed Supreme Court Justice), had sexually assaulted her as a teenager.[2]

If one thing has become apparent in mainstream discussions, it is that victims of sexual assault do not always report the assault right away—and oftentimes, do not report the assault at all. A 2016 study conducted by the Equal Employment Opportunity Commission reported that roughly three in four people experiencing such harassment never tell anyone in authority about it.[3] The EEOC stated that victims instead often "avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior."[4] Despite this recognition, the law has not factored the reality of delayed reporting into the standard for employer liability for sexual harassment and assault at the hands of a supervisor, thereby making claims much more difficult for plaintiffs alleging sexual assault at the hands of their bosses.

In 1998, the U.S. Supreme Court issued two decisions, *Faragher v. Boca Raton* and *Burlington Industries, Inc., v. Ellerth*,[5] which still define the extent of employer liability for a supervisor's harassment or sexual assault of an employee under Title VII.[6] Under *Faragher* and *Ellerth*, if a supervisor's harassment results in a "tangible employment action," such as "discharge, demotion, or undesirable reassignment," the employer is strictly liable. Even in extremely egregious situations where an employee has been raped by the supervisor, the employee must still show an "official action" taken or sanctioned by the employer in order to satisfy the "tangible employment action" standard.[7] Absent such tangible employment action, the employer is entitled to assert what has become known as the *Ellerth*/*Faragher* affirmative defense: if the employer can prove that 1) it exercised reasonable care to prevent and correct harassing behavior and 2) the employee unreasonably failed to take advantage of the employer's preventative and corrective opportunities, the employer shall not be held liable.[8] The focus of this article is on the second prong of the *Ellerth*/*Faragher* affirmative defense, which employers have generally satisfied by showing that employees did not properly or promptly report the harassing behavior[9]—a standard that appears to be at odds with what we now know about the reporting patterns of victims. This standard has long made it difficult for plaintiffs to litigate claims and often impossible when they did not immediately report the abusive behavior. As discussed in detail below, in certain circumstances, the failure to report harassment or assault may be excused, but the vast majority of the time, failure to report will act to bar otherwise valid claims of harassment against employers.

The Tenth Circuit follows the typical rule that a "generalized" fear of retaliation (or other generalized fears) cannot excuse a delayed reporting of sexual harassment or assault, even if the delay is only a short period of time.[10] The supposed rationale for this is that the main purpose of Title VII is to avoid harm, not to provide redress.[11] However, research has shown that "generalized" fear of retaliation is very real—and one of the primary reasons victims of harassment and assault delay in reporting.[12] Perhaps that is because experience has shown there is good reason to generally fear retaliation. When comedian Rebecca Corry reported that she was sexually harassed by fellow comedian Louis C.K., and Louis C.K. even **admitted** he had done what he was being accused of, the backlash against Corry was still severe and immediate.[13] As recently as the end of October 2018, Corry defended herself in response to a tweet by Sarah Silverman, stating "I can't seem to live my life without getting rape & death threats, harassed & called [obscenities] regularly for simply telling the truth."[14] Monica Lewinsky, who has just recently stated

she is coming to terms with the power dynamics that were at play (and harassment that occurred) when she had her infamous affair with Bill Clinton, was berated across the internet and television for the better part of twenty years, even though Bill Clinton admitted to the affair. Lewinsky was publicly called "a ditsy, predatory White House intern who might have lied under oath for a job at Revlon," a "little tart," a "young tramp looking for thrills," and "a little twerp."[15] In 2014, Lewinsky authored an essay in which she recounted that she could not find work despite having graduated from a top tier school due to the massive fallout from the Clinton affair—the fallout that began when Lewinsky reported the affair to Linda Tripp, a fellow White House staffer.[16]

Yet, the law is clear that a generalized fear of such retaliation in the workplace is not sufficient to justify a delay in or failure to report harassment. Instead, the *Ellerth/Faragher* affirmative defense is "premised on a cooperative framework wherein the employee reports sexual harassment and the employer remedies the improper conduct."[17] There is at least some good reasoning behind this because it provides protection to employers from rogue supervisors' bad conduct. The Tenth Circuit has said "an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists."[18] Thus, even though the courts acknowledge that raising harassment with an employer can be "uncomfortable" for the employee, an employee's generalized fear of retaliation will not justify the delay in or failure to report.[19]

Therefore, in *Pinkerton v. Colorado Department of Transportation*, the employer could not be liable pursuant to the *Ellerth/Faragher* affirmative defense where the plaintiff did not report severe harassing comments made by her boss for two months, when the only reason presented for her delay in complaining was her fear that her boss would retaliate against her.[20] In that case, the Tenth Circuit appeared to believe that the more serious the harassment, the less adequate the excuse for the delay in reporting: "an employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment… however, far from involving minor incidents, this case involves inappropriate comments that were perceived by [the plaintiff] to be so serious that she felt physically ill…"[21] This is interesting, given that research shows that victims of rape and sexual assault will often fail to report altogether, even though the abuse is extremely egregious. Likewise, in another Tenth Circuit case, the court found that a mere three-week delay in reporting harassment was inexcusable.[22]

So, when is the delay in or failure to report harassment or assault excusable under the law? In the Tenth Circuit, if a fear of complaining is not merely "general" or "nebulous," but is based on "concrete reasons to apprehend that complaint would be useless or result in affirmative harm to the complainant," the failure to complain may be excusable—in such a case, it is up to a jury to decide.[23] In order to show "concrete reasons," there must be specific evidence an employee can point to that suggests she or he was intimidated or bullied into not reporting the harassment or specific evidence that proves complaining is punished by the employer.[24] In other words, "a combination of threats and actions taken with the design of imposing both economic and physical harm sufficient to dissuade [an employee] from making or supporting a charge of discrimination" may be enough to excuse a failure to report the harassment to the employer.[25]

In *Kramer v. Wasatch County Sherriff's Office*, the Tenth Circuit overturned the Utah district court's ruling that an employee's failure to report repeated rape and abuse by her superior barred her Title VII claim. There, after having been repeatedly sexually assaulted by her superior, the plaintiff, Ms. Kramer, was told by her abuser to "be quiet" and "not say anything" or it would "be a career ender."[26] He also told her "if I go down, you go down. I'm not going to be alone…," threatened to give her poor evaluations if she told anyone, and called her, texted her, and followed her home from work regularly. The Tenth Circuit noted that if found to be credible by the jury, this would be evidence of a persistent theme of a supervisor who was an "intimidating person with job-related power over [the plaintiff] who would sexually harass her and then threaten that she would lose her job if she complained."[27] Furthermore, Ms. Kramer presented concrete evidence that her "workplace culture was one in which women who spoke out about inappropriate conduct were 'ostracized' and given undesirable assignments, while men who had engaged in misconduct were promoted or unaffected."[28] Specifically, when another female employee complained about pornography being displayed on a male co-worker's computer, the male employee was promoted while the female employee was given "undesirable assignments" and ultimately quit.[29] The employer admitted that the male employee had watched pornography at work and that the female employee ultimately quit.[30]

In finding that it was a triable question for the jury whether Ms. Kramer acted reasonably when she failed to complain about the sexual assaults perpetrated by her boss, the Tenth Circuit explicitly rejected the lower court's holding that Ms. Kramer could have avoided some

of the encounters that led to assaults because she "voluntarily" went to the abuser's home more than once.[31] This rationale is one that is often advanced as part of what has become known as "victim-blaming rhetoric"—how can we believe the allegation when the woman stayed close to her abuser after the abuse?[32] The Tenth Circuit rejected such a position, stating "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, **is not a defense to a sexual harassment suit brought under Title VII.** The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[33] The court also noted that it is debatable whether sex-related conduct with a supervisor is ever truly "voluntary."[34]

What does this mean for plaintiff's employment litigators, practically speaking?

- If the potential plaintiff did not report the harassment or assault to her employer, your case is much more difficult.
- If the potential plaintiff waited any amount of time (more than a day or two) to report the harassment or assault, your case is more difficult.
- If the potential plaintiff waited a longer time period than is set forth in an employer's complaint policy to report harassment or assault, your case is much more difficult.
- The only way to overcome a defense of delay in reporting or failure to report harassment or assault is to have specific evidence of intimidation, bullying, and/or potential physical harm that prevented the employee from making a complaint. In the Tenth Circuit, the following specific evidence was sufficient to get the plaintiff to trial in *Kramer*:
  - Verbal threats to personal safety or job safety;
  - Stalking behavior;
  - Poor performance reviews/threat of poor performance reviews; or
  - Denying leave time and other employment benefits.

Courts have weighed, on the one hand, the uncomfortable position in which employees are put when they are required to report harassment or assault by a supervisor with, on the other hand, the employers' right to know about the harassment or assault before being held liable. Those courts have determined that prompt reporting is required, absent specific threats to the employee. The law has also, for the time being, rejected generalized fear of retaliation as an excuse for failure to report, even though such fear appears to be justified. What impact the "Me Too" movement will have on these requirements, if any, is yet to be seen. For now, if the employee does not report the harassment, or takes too long, the employer likely has no liability. ▲▲▲

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Endnotes:

[1] Kantor, Jody and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, The New York Times, Oct. 5, 2017, available at https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?action=click&contentCollection=Business%20Day&module=RelatedCoverage&region=EndOfArticle&pgtype=article.

[2] Paschal, Olivia and Madeleine Carlisle, *The 17 Most Striking Moments From the Kavanaugh Hearing*, The Atlantic, Sept. 27, 2018, available at https://www.theatlantic.com/politics/archive/2018/09/kavanaugh-ford-hearing/571501/.

[3] Engel, Beverly, *Why Don't Victims of Sexual Assault Come Forward Sooner*, Psychology Today, Nov. 16, 2017, available at https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

[4] *Id.;* U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref59.

[5] *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 633 (1998); *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

[6] Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2.

[7] *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 744 (10th Cir. 2014) ("harasser's sexual assault 'did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense… [because] the supervisor's behavior involved no official actions.'").

[8] *Faragher,* 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

[9] *See, e.g., Pinkerton v. Colorado Dept. of Transp.*, 563 F.3d 1052, (10th Cir. 2009).

[10] *Pinkerton v. Colorado Dept. of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009).

[11] *Id.*

[12] Engel, Beverly, *Why Don't Victims of Sexual Assault Come Forward Sooner*, Psychology Today, Nov. 16, 2017, available at https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

[13] Corry, Rebecca, *Louis CK Put Me in a Lose-Lose Situation*, The Vulture, May 24, 2018, available at http://www.vulture.com/2018/05/louis-c-k-put-me-in-a-lose-lose-situation.html.

[14] Evans, Greg, *Louis C.K. Accuser Rebecca Corey Challenges Apologetic Sarah Silverman,* Deadline, Oct. 22, 2018, available at https://deadline.com/2018/10/rebecca-corry-sarah-silverman-louis-ck-twitter-apology-howard-stern-1202487468/.

[15] Cooney, Samantha, *Here's What Monica Lewinsky is Doing 20 Years Later*, Time Magazine, June 4, 2018, available at http://time.com/5130921/monica-lewinsky-now/.

[16] *Id.*

[17] *Pinkerton v. Colorado Dept. of Transp*., 563 F.3d 1052, 1063 (10th Cir. 2009).

[18] *Id*.

[19] *Id.*

[20] *Id.* at 1064.

[21] *Id.*

[22] *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276, 281 (10th Cir. 2004).

[23] *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726 (10th Cir. 2014).

[24] *Id.*

[25] *Id*. at 752.

[26] *Id*. at 751.

[27] *Id.*

[28] *Id.* at 752.

[29] *Id.*

[30] *Id*.

[31] *Id.* at 753.

[32] Dewan, Shaila, *Why Women Can Take Years to Come Forward with Sexual Assault Allegations*, The New York Times, Sept 18, 2018, available at https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html.

[33] *Id*., citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986) (italics in original).

[34] *Id.* at 754.