

HARASSMENT IN THE WORKPLACE

***Interpreted by EEOC & S.Ct. to be prohibited by Title VII**

***No longer limited to gender discrimination; may be based on any protected status (e.g., race, religion, national origin, disability, age, etc.)**

Formerly, TWO TYPES:

1) "*Quid pro quo*"

Latin phrase meaning "what you give for what you get"

Example: Supervisor asks for sex in return for promotion

2) "Hostile environment"--unwelcome, sufficiently "severe and pervasive" verbal or physical conduct, involving some element of protected class status, which a reasonable person would find

a) creates intimidating, hostile, or offensive working environment

b) unreasonably interferes with job performance

c) otherwise adversely effects employment cond'ns/opportunities

(Note: Analysis is still probably valid re: individual liability, but recent U.S. Supreme Court cases--*Faragher* and *Ellerth*--substantially change the picture re: employer's vicarious liability)

Employer's Vicarious Liability for Harassment by Supervisory Employee

Overview: In *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* (1998), the U.S. Supreme Court set forth new standards for analyzing an employer's vicarious liability for the harassing conduct of its *supervisory* personnel. The analysis follows these two steps.

1) Did the plaintiff (alleged victim) suffer a "tangible employment action" in connection with the harassment?

A) If so, the employer is strictly liable (i.e., has no defense) for damages caused by the harassing supervisor;

B) If not, the employer may raise, and attempt to prove, the following affirmative defense--

i) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and

ii) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise unreasonably failed to avoid harm

HOWEVER,

Recent caselaw brought into question the viability of this defense in California, and in *McGinnis v. Dept. of Health Services (2003)*, the California Supreme Court held that the *Faragher/Ellerth* defense is applicable to FEHA claims only to mitigate damages under the "avoidable consequences" doctrine, but is not otherwise a defense to liability.