2003 WL 22999369
United States District Court,
C.D. California.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
Robert L. REEVES and Associates, A Professional Corporation, Defendants.

No. CV0010515DTRZX. | Dec. 8, 2003.

Synopsis
Background: Equal Employment Opportunity Commission (EEOC) sued employer and its principal under Title VII, the Pregnancy Discrimination Act, and Title I of the Civil Rights Act of 1991, alleging sex discrimination.

Holdings: On the EEOC's motion for partial summary judgment as to two affirmative defenses raised by the employer, the District Court, Tevrizian, J., held that:

[1]*Ellerth/Faragher* affirmative defense is not available to an employer whose proxy/alter ego engaged in harassment, but

[2] genuine issues of material fact existed as to whether the principal was also the primary or sole sexual harasser.

Motion granted in part and denied in part.

Attorneys and Law Firms

Anna Y. Park (Regional Attorney), Dana C. Johnson, Gregory McClinton and Samantha Blake (Trial Attorneys), Los Angeles, CA, for Plaintiff EEOC.

Ballard, Rosenberg, Golper & Savitt LLP, Linda Miller Savitt, John P. Schaedel, Universal City, CA, Robert L. Reeves & Associates, APLC, Richard M. Wilner, Pasadena, CA, for Defendant, Reeves & Associates.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT'S AFFIRMATIVE DEFENSES, NOS. 14 & 15

TEVRIZIAN, J.

I. *Background*

A. Factual Summary
***1** This action is brought by Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") against Defendant Robert L. Reeves and Associates, a Professional Corporation ("Defendant") under Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy Discrimination Act of 1978 and Title I of the Civil Rights Act of 1991 to correct alleged unlawful employment practices on the basis of sex, and to provide appropriate relief to certain females who were adversely affected by such practices ("Claimants").

The following facts are undisputed and relevant to the issues currently before this Court:[1]

Robert L. Reeves ("Reeves") started the Reeves Firm over twenty years ago. (Uncontroverted Fact ("UF") No. 1.) Reeves is Defendant firm's chief executive officer and president. (UF No. 2.) From 1996 until September of 2001, Mr. Reeves was the sole shareholder of the Defendant corporation. (UF No. 3.) Prior to 1997, Mr. Reeves was the sole director of Defendant firm. From 1997 through 1999, he and another attorney, Daniel Hanlon, were Defendant firm's two directors. (UF No. 4.) When Mr. Hanlon ceased serving as a director in 1999, Mr. Reeves again became the only director, and remained so until September of 2001, at which time five other individuals joined the director ranks at the same time. (UF No. 5.) Reeves remains a director of Defendant firm/corporation to the present day. (UF No. 6 .) Between 1996 and 2000, Reeves held the ultimate authority for hiring, firing, promotions, demotions and lay-offs. (UF No. 7.) Reeves also participated in formulation of company policies. (UF No. 8.)

This matter began on August 11, 1997, when Judith Quilaton filed a charge of Discrimination with the EEOC on the grounds that she was terminated because she was pregnant. On June 20, 2000, the EEOC issued a Letter of Determination finding that:

> pregnant females as a class, were terminated in violation of Title VII of the Civil Rights Act of 1964, as amended and that females as a class, were subjected to frequent harassment that was intimidating, hostile and offensive and unreasonably interfered with work performance in violation of Title VII of the Civil Rights Act of 1964, as amended.

After "conciliation" failed, the EEOC filed this lawsuit on September 29, 2000, against Defendant firm alleging, *inter alia,* sexual harassment of a group of Defendant firm's female employees.

B. Procedural Summary

On September 29, 2000, the EEOC filed the Complaint for Civil Rights Employment Discrimination in the United States District Court for the Central District of California, which was assigned to District Judge Dickran Tevrizian as Case No. CV 00–10515 DT (RZx).

On December 5, 2000, Defendant filed an Answer to the Unverified Complaint.

On June 11, 2001, Defendant filed a Motion for Leave to Amend Answer, which this Court granted on July 9, 2001.

On June 26, 2001, the EEOC filed a Motion for Review and Reconsideration of Magistrate Judge's Order on Plaintiff's Motion to Compel, which this Court denied on July 27, 2001, and further ordered a clarification of the Magistrate Judge's protective order.

***2** On August 31, 2001, Defendant filed a Motion for Partial Summary Judgment as to Claimants Catuira and Preciado.

On September 25, 2001, this Court entered an Order Granting Defendant Robert L. Reeves and Associates' Motion for Partial Summary Judgment as to Claimants Catuira and Preciado.

On October 18, 2001, Defendant filed the Statement of Fact and Conclusions of Law as to Claimants Catuira and Preciado.

On October 19, 2001, this Court entered a Partial Summary Judgment Following September 24, 2001 Ruling.

On November 1, 2001, Defendant filed a Motion for Attorneys' Fees, which this Court denied on November 26, 2001.

On November 27, 2001, Defendant filed a Motion for Partial Summary Judgment as to Claimants Quilaton, Silva, Saez, Wang, Arai and Eum, which this Court granted on January 22, 2002. This Court's Order Granting Defendant's Motion was thereafter entered on January 23, 2002.

On January 25, 2002, EEOC filed a Motion for Partial Summary Judgment on Defendant's Fourteenth and Fifteenth Affirmative Defenses.

On January 28, 2002, Defendant filed an Ex Parte Application for Leave of Court to File Final Motion for Summary Judgment, which this Court granted on January 29, 2002.

On January 29, 2002, Defendant filed a Motion for Summary Judgment as to Wilkenson, Jacobson and Liao.

On February 20, 2002, this Court entered an Order Granting Defendant's Motion for Summary Judgment as to Claimants Wilkerson, Jacobson and Liao and Denying as Moot Plaintiff EEOC's Motion for Summary Judgment on Defendant's Fourteenth and Fifteenth Affirmative Defenses.

On April 5, 2002, Defendant filed a Motion for Attorneys' Fees. This Court's Order Granting in Part and Denying in Part Defendant's Motion for Attorneys' Fees was thereafter entered on May 7, 2002.

On May 20, 2002, EEOC filed a Notice of Appeal.

On August 2, 2002, EEOC/Appellant's Filed a Notice of Motion and Motion to Stay Enforcement of Judgment of Attorneys' Fees and Costs Pending Appeal. This Court's Order Staying Enforcement of Judgment of Attorneys' Fees and Costs Pending Appeal was thereafter filed on September 3, 2002.

On June 20, 2003, the Ninth Circuit Court of Appeals reversed and remanded to this Court for further proceedings.

On September 18, 2003, this Court issued a minute order Filing and Spreading Judgment of the Ninth Circuit Court of Appeals wherein this Court set a Status Conference on October 14, 2003.

On October 8, 2003, this Court filed an Order Continuing Status Conference to October 20, 2003, pursuant to a stipulation by both parties. On October 20, 2003, this Court set the following dates during the Status Conference: Discovery Cutoff—December 31, 2003; Pretrial Conference—March 29, 2004 at 1:30pm; Jury Trial—May 11, 2004 at 9:30am.

On October 29, 2003, Plaintiff EEOC filed a Notice of Motion and Motion for Partial Summary Judgment as to Defendant's Affirmative Defenses, Nos. 14 & 15, which is currently before this Court.

***3** On November 24, 2003, Defendant filed a Response to Plaintiff's Supplemental Memorandum of Points and Authorities is Opposition to Plaintiff's Motion for Partial Summary Judgment.

On December 1, 2003, Plaintiff EEOC filed a Supplemental Reply Brief in Support of it Motion for Partial Summary Judgment on Defendant's Affirmative Defenses, Nos. 14 & 15.

II. *Discussion*

A. Standard

Under the Federal Rules of Civil Procedure, summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.;* Fed.R.Civ.P. 56(e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *See Anderson,* 477 U.S. at 250–51, 106 S.Ct. at 2511. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment. *See Harper v. Wallingford,* 877 F.2d 728 (9th Cir.1989); *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir.1987).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence.

Unauthenticated documents cannot be considered on a motion for summary judgment. *See Hal Roach Studios v. Richard Feiner and Co.,* 896 F.2d 1542, 1550 (9th Cir.1990).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. *See* Fed.R.Civ.P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989).

B. Analysis

***4** [1] EEOC brings this Motion for Partial Summary Judgment as to Defendant's Fourteenth and Fifteenth Affirmative Defenses[2] (hereinafter the "*Ellerth* / *Faragher* affirmative defense") .[3] The EEOC brings this Motion on the ground that Robert L. Reeves, by virtue of his position as Defendant Reeves and Associates, a Professional Corporation's founder, chief executive officer, president, director and shareholder, is the Reeves Firm's proxy / alter-ego. As such, EEOC argues that Defendant is not entitled, as a matter of law, from asserting the *Ellerth* / *Faragher* affirmative defense because the alleged harasser, Robert L. Reeves, is the Reeves Firm's proxy / alter ego.

1. The *Ellerth* / *Faragher* Affirmative Defense Is Not Available to Defendant In the Proxy / Alter–Ego Context

EEOC argues that in *Faragher,* the Supreme Court acknowledged the viability of the proxy theory of vicarious liability by noting that standards for binding the employer were not at issue in the seminal harassment case of *Harris v. Forklift Systems,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Plaintiff notes that the Supreme Court in *Faragher* cited with approval its earlier decision in *Harris,* where it held a corporation vicariously liable because the harasser in that case was the president of the company "who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."[4] *Faragher,* 524 U.S. at 789–90. The Supreme Court further suggested that an owner, supervisor holding a "sufficiently high position 'in the management hierarchy," ' proprietor, partner, or corporate officer may also be treated as a corporation's proxy. *Id.; see Burns v. McGregor Electronic Industries, Inc.,* 955 F.2d 559, 564 (C.A.8 1992); Torres v. Pisano, 116 F.3d 625, 634–635, and n. 11 (C.A.2), cert. denied, 522 U.S. 997, 118 S.Ct. 563, 139 L.Ed.2d 404 (1997); Katz v. Dole, 709 F.2d 251, 255 (C.A.4 1983). Similarly in *Ellerth,* Plaintiff notes that the Supreme Court stated that vicarious liability attaches "where the agent's high rank in the company makes him or her the employer's alter ego." *Ellerth,* 524 U.S. at 758.

Defendant claims that the affirmative defense established in *Ellerth* and *Faragher* applies irrespective of the identity of the alleged harasser and that nowhere in the *Faragher* / *Ellhert* formulation is there an exception to the affirmative defense in situations in which the alleged harasser is a "proxy" for the employer. According to Defendant, the Supreme Court "established a single exception to the availability of the affirmative defense: cases in which 'the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." ' (Defendant's Response to Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendant's Response"), p. 2 (citing *Faragher,* 524 U.S. at 808.).) For additional support, Defendant also cites to *Ellerth* stating that "no affirmative defense is available ... when the supervisor's harassment culminates in a tangible employment action." *Ellerth,* 524 U.S. at 765.

***5** Defendant further claims that the EEOC ignores the apparent rationale behind the *Ellerth* / *Faragher* affirmative defense, which, according to Defendant, focus on the "obligation of the employee to try to avoid harm." (Defendant's Response, p. 2.) For support, Defendant states that *Faragher* acknowledged that the "EEOC issued a policy statement enjoining employers to establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor." ' *Faragher,* 524 U.S. at 806 (*quoting* EEOC Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6699 (Mar. 19, 1990) (bracketed language in original). However, Defendant is mistaken as to the rationale and fails to consider that this alleged "obligation" is actually the employer's obligation, as *Faragher* expressly stated that "[i]t would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the *employer's affirmative obligation to prevent violations* and give credit here to employers who make reasonable efforts to discharge their duty." *Faragher,* 524 U.S. at 806 (emphasis added).

This Court further disagrees with Defendant's interpretation that *Ellerth* / *Faragher* established a single exception to the availability of the affirmative defense, namely when tangible employment action is taken. This Court interprets that the absence of tangible employment action is merely a prerequisite for asserting the affirmative defense and not the only exception to its availability. Once it is established that no tangible employment action has been taken, only then may a defending employer raise the affirmative defense, and only if said employer is also not the harasser. The Supreme Court decided *Faragher* and *Ellerth* on the same day and adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

***6** *Ellerth,* 524 U.S. at 762–63; *Faragher,* 524 U.S. at 807–08.

After *Ellerth* and *Faragher,* EEOC asserts that courts which have addressed the issue have recognized that defendants may not invoke the affirmative defense in the proxy-harasser context. In *Johnson v. West,* 218 F.3d 725 (7th Cir.2000), the Seventh Circuit recognized that "[v]icarious liability *automatically applies* when the harassing supervisor is either (1) 'indisputably within that class of an employer organization's officials who may be treated as the organization's proxy' or (2) 'when the supervisor's harassment culminates in a tangible employment action....' " 218 F.3d at 730 (*quoting Faragher,* 524 U.S. at 789, 808)(emphasis added). The court continued, stating that "[a]bsent either of these situations, however, an employer may avoid vicarious liability by showing '(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." ' *Id.* (*quoting Ellhert,* 524 U.S. at 765.) Because the harasser in *Johnson* was not the employer's proxy (he was, in fact, a "rather low-level supervisor"), the circuit court affirmed the district court's finding that the employer was entitled to invoke the *Ellerth* / *Faragher* affirmative defense. *Id.*

According to EEOC, a few Tenth Circuit cases are also instructive in the determination that defendant may not invoke the affirmative defense in the proxy-harasser context. One such case is *Mallinson–Montague v. Pocrnick,* 224 F.3d 1224 (10th Cir.2000), where the Tenth Circuit upheld a jury instruction on alter ego liability[5] in a sexual harassment case where the alleged harasser was employed by defendant bank as Senior Vice President of Consumer Lending.[6]

EEOC also cites a New York State court of appeal case where the appellate court affirmed the trial court's ruling that an employer was not entitled to assert the *Ellerth* / *Faragher* affirmative defense where the accused harasser was the defendant's proxy. *See Randall v. Tod–Nik Audiology, Inc.,* 270 A.D.2d 38, 704 N.Y.S.2d 228 (S.Ct., App.Div. 1st, 2000). There, the alleged harasser was the president and treasurer of the corporation, he owned 50% of the corporation and his wife owned the other 50%, they jointly operated the business, and "[i]f employees had issues or concerns, they would raise them directly with [the alleged harasser or his wife]...." *Id.* at 39, 704 N.Y.S.2d at 229. The Court, assuming without deciding that the *Ellerth* / *Faragher* affirmative defense applied generally to the State anti-harassment statute, wrote:

> [D]efendant's motion [to dismiss] was properly denied. The *Ellerth* / *Faragher* defense may be relied on only where the alleged harassers are not sufficiently elevated within the corporate hierarchy to be viewed as corporate proxies.... [W]e cannot say that defendants established as a matter of law that [the harasser] was not, in fact, a proxy for the employer corporation and accordingly conclude that

> defendant failed to establish any right to relief under the *Ellerth* / *Faragher* doctrine.

***7** *Id.*

Most recently, the Fifth Circuit joined the other circuits in recognizing that the affirmative defense is not available in the proxy-harasser context. In *Ackel v. National Communications, Inc.,* the Fifth Circuit rejected the precise argument that Defendant is making here, namely that an employer is entitled to invoke the *Ellerth* / *Faragher* affirmative defense in every case of supervisory harassment not involving a tangible employment action, including cases of upper echelon / proxy harassers. *Ackel v. National Communications, Inc.,* 339 F.3d 376, at 383 (5th Cir.2003) ("The district court and [defendant] ask us to read [*Ellerth* / *Faragher*] opinions to allow an employer to raise the *Ellerth* / *Faragher* affirmative defense in every case not involving a tangible employment action. We decline to read the opinion so narrowly."). *Ackel* reached the Fifth Circuit on appeal from the district court's grant of summary judgment in favor of the defendant on the *Ellerth* / *Faragher* affirmative defense. The Fifth Circuit reversed, holding that the district court had erred in finding that, as a matter of law, the alleged harasser was not defendant's proxy.[7] *Id.* at 384. Because "[t]he record at least create[d] a question of fact" as to whether the alleged harasser was the organization's proxy "such that his actions are imputable to [defendant] and the *Faragher* / *Ellerth* affirmative defense is unavailable," the Fifth Circuit held that the district court had erred in granting summary judgment. *Id.*

Integral to the Fifth Circuit's holding was its rejection of defendant's argument (the same argument that Defendant is making here), that the *Ellerth* / *Faragher* affirmative defense is available in every case of supervisory harassment not involving a tangible employment action. *Id.* at 383. To the contrary, the Fifth Circuit wrote that "[t]he issue of whether [the alleged harasser] was [defendant's] proxy is central to the resolution of this case because an employer is *automatically liable* for its proxies' harassment of employees." *Id.* at 382 (emphasis added).

The Fifth Circuit in *Ackel* aligned itself with the Seventh Circuit when it read the Supreme Court's opinions in *Faragher* and *Ellhert* as the Seventh Circuit did in *Johnson v. West,* such that defendants are barred from invoking the affirmative defense when the harasser is the defendant's proxy. The *Ackel* court specifically stated that "the employer is vicariously liable for its employees activities in two types of situations: (1) there is a tangible employment action or (2) the harassing employee is a proxy for the employer." *Id.* at 383.

In further support of its opinion, the Fifth Circuit quoted from and cited with approval the Ninth Circuit's *Passantino* opinion. *Passantino v. Johnson & Johnson Consumer Products, Inc.,* 212 F.3d 493 (9th Cir.2000). Although *Passantino* deals with the issue of whether a defendant may invoke the *Kolstad* "good faith" defense to an award of punitive damages where the discriminator is the defendant employer's proxy or alter-ego, the Fifth Circuit found the *Passantino* rationale equally applicable to the issue of the applicability of the *Ellerth* / *Faragher* affirmative defense.

> ***8** [T]he Ninth Circuit has cited *Faragher's* discussion of *Harris* for the proposition that 'an individual sufficiently senior in the corporation must be treated as the corporation's proxy for the purposes of liability,' which 'constitutes a bar to the successful invocation of the [*Ellerth* / *Faragher*] defense....'

Id. at 384 (*quoting Passantino,* 212 F.3d at 516) (bracketed language in original). Accordingly, EEOC asserts that since the overwhelming weight of the case law favors their position, this Court should grant their Motion for partial summary judgment on Defendant's *Ellerth* / *Faragher* affirmative defense.

Defendant argues that the cases cited by EEOC, such as *Ackel* and *Johnson,* do not support denial of the defense. Moreover, Defendant argues that not a single one of EEOC's cases demonstrates that the Supreme Court established a "proxy" exception to the *Ellerth* / *Faragher* defense. Defendant relies on Judge Garza's concurring opinion in *Ackel* to demonstrate that the majority opinion in that case inappropriately adopted the *Johnson* juxtaposition of the *Faragher* discussion of "proxy" liablity. In that opinion, Judge Garza explained why neither *Faragher* or *Ellerth* support the "proxy" exception:

> It would be easy to follow the majority in accepting uncritically the Seventh Circuit's cursory reading of *Faragher* in *Johnson v. West, ...* and simply hold that National Communications may not assert the affirmative defense because Gary Hardesty, as the president of National Communications, is the corporation's proxy. To be certain, Hardesty's conduct was deplorable, and National Communications was delinquent in failing to take action earlier. Nothing in *Faragher* or *Ellerth,* however, indicates that the Supreme Court intended to bar an employer from asserting the affirmative defense when the harassing supervisor happens to be of sufficiently high rank to qualify as the employer's proxy. Accordingly, we are bound, absent a tangible employment action, to apply the defense to the sexual

> harassment claims....”

339 F.3d at 386 (Garza, J., concurring).

Judge Garza further pointed out that *Faragher* discussed the fact that an employer can be automatically liable for harassment by a “proxy” in summarizing pre-existing Title VII law such as *Harris v. Forklift Systems, Inc.*. He noted that in establishing the *Faragher* / *Ellerth* defense, the Supreme Court made no mention at all of the differential treatment of allegations of harassment by a “proxy.” Judge Garza concluded by stating that “under *Faragher* and *Ellerth,* the presence or absence of a tangible employment action is the only relevant factor when determining whether the affirmative defense is available.” *Id.* at 388.

Accordingly, Defendant argues that the same lack of rigorous analysis plagues the other cases cited by EEOC. In short, Defendant claims that the cases upon which EEOC purports to rely in support of its Motion for partial summary judgment barring the assertion of the *Ellerth* / *Faragher* affirmative defense either do not stand for the propositions for which they are offered by the EEOC, or the cases themselves misconstrue *Ellerth* and *Faragher*.

***9** This Court disagrees with Defendant and finds that as a matter of law, the *Ellerth* / *Faragher* affirmative defense is not available to a defendant whose proxy / alter ego engaged in harassment. As briefly mentioned above, the *Ellerth* and *Faragher* Court developed the affirmative defense to further Title VII’s statutory policy establishing the employer’s affirmative obligation to prevent violations and “give credit ... to employers who make reasonable efforts to discharge their duty,” but whose best efforts are frustrated by rogue supervisors. The affirmative defense has no place where the company proxy perpetrates the harassment, because the employer cannot be said to be entitled to any “credit” for having taken reasonable steps to eradicate harassment in the workplace. This Court is of the opinion that this result should prevail regardless of whether a tangible employment action occurs.

What is more unreasonable is that if the *Ellerth* / *Faragher* affirmative defense did apply to the proxy context, victims of harassment would essentially be required to complain to the proxy / harasser. Further, creation of a complaint procedure which allows the employee to complain to another individual and not the alter ego harasser can be of no effect because the individual to whom the complaint is brought cannot implement any kind of discipline against the harasser, hence, making the complaint procedure or policy in place worthless or illusory.

III. *Conclusion*

[2] In sum, this Court concludes that the *Ellerth* / *Faragher* affirmative defense is not applicable to an employer when the individual, who is also the founder, chief executive officer, president, director and major shareholder of the Defendant company, is also the harasser. However, EEOC has failed to demonstrate that no triable issue exists as to whether Robert L. Reeves, who was at all relevant times Defendant Reeves & Associate’s founder, chief executive officer, president, director and major shareholder, was also the primary or sole harasser that may require such an affirmative defense.

In light of the foregoing, this Court grants in part Plaintiff EEOC’s Motion for Partial Summary Judgment on Defendant’s Affirmative Defenses, Nos. 14 & 15 as it pertains specifically to the conduct of Robert L. Reeves and denies in part as it pertains to other members of Defendant firm that may require such an affirmative defense.

IT IS SO ORDERED.

Parallel Citations

84 Empl. Prac. Dec. P 41,560

Footnotes

1 Defendant provides additional “uncontroverted” facts that EEOC objects to and requests to strike in their entirety in that they are completely irrelevant to the issue presented by EEOC’s Motion for Partial Summary Judgment in violation of Fed. Rules Evid. 401. Furthermore, many of these facts are controvorted by EEOC as well. This Court has considered Defendant’s additional “uncontroverted” facts and EEOC’s objections to those facts, and has determined that the additional “uncontroverted” facts need not be addressed because they would not assist or alter the Court’s conclusion in this Order.

[2] Defendant's Fourteenth and Fifteenth Affirmative Defenses actually constitute a single affirmative defense against vicarious liability in sexual harassment actions, as described by the Supreme Court in *Burlington Industries, Inc. V. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The Supreme Court announced that "[t]he defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly and sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *See Ellerth,* 524 U.S. at 765; *accord Faragher,* 524 U.S. at 807.

[3] EEOC originally brought this Motion for Partial Summary Judgment on Defendant's Fourteenth and Fifteenth Affirmative Defenses in January 2002, but at that time, this Court denied EEOC's Motion as Moot. EEOC's Motion may now be addressed by this Court as it is no longer Moot.

[4] Like the harasser in Harris, Reeves was also the President of the Defendant firm at the time of the actionable conduct.

[5] The jury instruction provided was as follows: Defendant is a corporation. A corporation may only act through natural persons as its agents or employees and, in general, any employee of a corporation may bind the corporation by his or her actions done and statements made while acting within the scope of his or her employment. Where an employee such as Mr. Pocrnick serves in a supervisory position and exercises significant control over an employee's hiring, firing or conditions of employment, that individual operates as the alter ego of the employer, and the employer is liable for any unlawful employment practices of the individual even though what the supervisor is said to have done violates company policy. *Mallinson–Montague,* 224 F.3d at 1232.

[6] The alleged harasser had the authority to hire and fire employees in the consumer lending department, was the ultimate supervisor of all employees in the department, and had the ultimate authority to disapprove all consumer loans. He answered only to the bank's president, who in turn answered to the board of directors. Testimony at trial established that the senior level title was "very important" and a "really big deal," and the alleged harasser's status at the bank was heightened by his service on committees exercising policy-making functions. *Mallinson–Montague,* 224 F.3d at 1233.

[7] The alleged harasser was the president and general manager of defendant employer, as well as a stockholder and member of the board of directors. *Ackel,* 339 F.3d at 384. The defendant argued that the harasser was not its proxy because he owned only 2% of the stock, consulted the corporation's outside CPA before awarding raises to employees, and was removed from his position after the allegations of harassment were made. *Id.* The Fifth Circuit rejected these arguments, stating that stock ownership is not a prerequisite for acting as a corporate proxy. *Id.* The court also held that, because corporate officers may be removed by the board of directors, the fact that the alleged harasser had been removed from his position did not bear on the proxy analysis. *Id.*