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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

AUTOZONE, INC., a Nevada corporation,

Defendant.

No. CV 06-926-PHX-SMM

ORDER

At the Final Pre-Trial Conference held on May 26, 2009, the Court provided the attorneys for both sides with a draft of the preliminary jury instructions for the case. Defendant objected to the instruction concerning an employer's vicarious liability for a hostile work environment caused by a supervisor. Defendant claims that a tangible employment action was never pled by Plaintiff, and thus, the portion of the instruction asking the jury to determine whether Plaintiff has proved that Wing suffered a tangible employment action is incorrect. Defendant subsequently filed a Trial Brief regarding this issue (Doc. 178), and Plaintiff filed a responsive Trial Brief (Doc. 196).

After reviewing the Ninth Circuit model instruction, the parties' briefing, and applicable case law, the Court finds that its instruction is proper as it relates to the employer's liability and tangible employment actions. In Burlington Industries Inc. v. Ellerth, 524 U.S. 742 (1988) and also in Faragher v. City of Boca Raton 524 U.S. 775 (1998), the U.S. Supreme Court articulated when an employer is subject to vicarious

liability for a supervisor's sexually harassing conduct. The Supreme Court in those cases held that—

> [a]n 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. 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington, 524 U.S. at 765; Faragher, 524 U.S. at 807. A tangible employment action is defined as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington, 524 U.S. at 761.

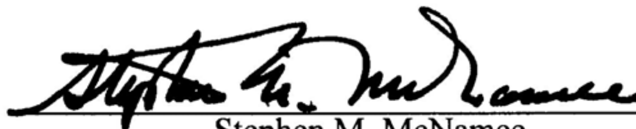
The new rule announced in Burlington and Faragher overturned prior Ninth Circuit precedent as to employer liability for Title VII sexual harassment by a supervisor. See Burrell v. Star Nursery, Inc., 170 F.3d 951, 955-56 (9th Cir. 1999). If the harassment is actionable and the harasser possesses supervisory authority over the alleged victim, an employer is vicariously liable for the harassment. Id. at 956. The presumption of vicarious liability can be overcome only upon a finding that the alleged harassment has not resulted in a tangible employment action and then only if the two-prong affirmative defense is proven by the employer. Id.

The Ninth Circuit model instruction guides the jury through this analysis (Model Instruction 10.2B). The model instruction first asks the jury to determine whether Plaintiff has proved that Ms. Wing suffered a tangible employment action. If such proof is found, then Defendant is vicariously liable for the conduct of supervisor Jose Contreras, and Defendant's affirmative defense is not considered. However, if the jury determines that Plaintiff has not proved that Wing suffered a tangible employment action, it can consider whether Defendant has proved its affirmative defense.

Indeed, in its ruling on Defendant's summary judgment motion, the Court explicitly found that "the alleged reasons for AutoZone's failure to promote Wing, if proven, would constitute a tangible employment action, thereby preventing AutoZone from raising the defense set forth in *Faragher/Ellerth*." (Doc. 115, p.15). The Court also found that questions of material fact existed as to why Wing was not promoted to a Parts Service Manager position. In light of the Court's finding, the Court will leave to the jury the question of fact whether Defendant's alleged failure to promote is a tangible employment action, and if it is not, whether Defendant has proved its affirmative defense.

IT IS HEREBY ORDERED that the Court will give the preliminary jury instruction concerning an employer's vicarious liability for a hostile work environment caused by a supervisor.

DATED this 1st day of June, 2009.



Stephen M. McNamee
United States District Judge