

# Labor AND Employment Law

SPRING 2018  
VOLUME 46, NUMBER 3  
Section of Labor and  
Employment Law  
American Bar Association



## Faragher-Ellerth at 20

### How Far Have We Come? And Where Do We Need to Go?

By Lauren Stiller Rikleen

Silence in the workplace is the accelerant that fuels sexual harassment. Equally complicit, however, are reporting systems that offer a protective cover for employers without addressing the root causes of the silence.

Twenty years ago, the U.S. Supreme Court held that employers may be held vicariously liable for a hostile environment created by a supervisor's behavior. If the behavior did not result in a tangible adverse job consequence, such as dismissal or demotion, the employer may assert an affirmative defense that includes two required elements. First, the employer can demonstrate it exercised reasonable care to prevent and promptly correct sexually harassing behaviors. Second, the employer can show that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. Based on the names of the cases, this doctrine is frequently referred to as the *Faragher-Ellerth* Defense.

As employers sought to implement mechanisms that would

demonstrate reasonable care to prevent bad behaviors, sexual harassment training emerged as a key strategy to assert the affirmative defense to a claim of a hostile work environment. Prudent employers required sexual harassment training coupled with a system for reporting harassment to, for example, the Human Resources Department.

One flaw in programs adopted to strengthen the defense against a potential law suit is that policies for reporting sexual harassment are generally underutilized. Based on an analysis of existing data, the U.S. Equal Employment Opportunity Commission (EEOC) stated that: "... approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct." Rather, the EEOC noted, those who experience sex-based harassment are more likely to avoid the harasser, deny or downplay their experience, or try to ignore or endure the behavior.

The failure to report is not unreasonable. Those who report



unwelcome behavior can experience retaliation in two ways: from the workplace itself, such as being denied a promotion or being transferred; and socially from one's peers, which can manifest in such treatment as being blamed, becoming the subject of gossip, or labeled as a troublemaker. For example, *Moussouris v. Microsoft Corp.*, a lawsuit filed against Microsoft for gender discrimination,<sup>1</sup> includes allegations that when complainants reported their concerns about pay disparity and promotion issues to HR,

their circumstances were either ignored or worsened.

If the #MeToo Movement and the revelations over the past 6 months have taught us anything, it is that standard sexual harassment policies and related training programs are woefully inadequate. The outpouring of stories from workplaces around the country demonstrate that a far more comprehensive commitment to a respectful and inclusive workplace culture is essential if meaningful changes are to occur.

*continued on page 10*



# Two Big Changes to the FLSA

By Anna P. Prakash

Congress and the Supreme Court have made unexpected changes to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* Congress amended the FLSA to prohibit employers from keeping their employees' tips. The Supreme Court, in *Encino Motorcars, LLC v. Navarro*, No. 16-1362, --- S.Ct. ---, 2018 WL 1568025 (April 2, 2018), discarded decades of precedent requiring that FLSA exemptions be construed narrowly and, instead, held that exemptions must be given a fair reading.

## Employers Cannot Take Employees' Tips Under New FLSA Amendment

The FLSA has long allowed employers to take a "tip credit" against their tipped employees' wages if certain conditions are met. 29 U.S.C. § 203(m). That is, employers may pay tipped employees less than minimum wage if employees are: (1) given notice; and (2) allowed to retain all tips unless they are participating in a valid "tip pool" (i.e., an arrangement where tips are shared between employees who customarily and regularly receive tips). *Id.* Thus, employers who want to avail themselves of the FLSA's "tip credit" cannot take employees' tips for rea-

sons other than a valid tip pool.

In 2011, the Department of Labor ("DOL") issued regulations that made tips "the property of the employee whether or not the employer has taken a tip credit... [and] prohibited [employers] from using an employee's tips, whether or not it has taken a tip credit, for any reason other than...[a]s a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool." 76 Fed. Reg. 18832-42 (April 5, 2011). Then, with the change of administration in 2017, the DOL reversed course, proposing to rescind portions of the regulations to allow employers who do not claim a "tip credit" to distribute their employees' tips to employees who are not customarily and regularly tipped. 82 Fed. Reg. 57395-413 (Dec. 5, 2017).

In March of 2018, before further action was taken on the 2011 regulations, Congress passed an omnibus spending bill, the Consolidated Appropriations Act. The bill, which has been signed into law, amends the FLSA to explicitly prohibit employers from keeping employees' tips "for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the

employer takes a tip credit." H.R. 1625, title XIII, available online (last accessed April 5, 2018). The FLSA's allowance of valid tip pools remains in place and the bill nullifies the relevant provisions of the 2011 regulations until such time as DOL takes further action. As amended, the FLSA prohibits employers from taking employees' tips irrespective of whether they claim a tip credit.

## FLSA Exemptions Are To Be Given A "Fair Reading"

Although the FLSA generally requires employers to pay overtime when their employees work over forty hours in a work week, certain types of employees are exempt from the FLSA's requirements. 29 U.S.C. § 213. On April 2, 2018, in *Encino Motorcars*, the Supreme Court held that car dealership service advisors are exempt from the FLSA's overtime compensation requirements. 2018 WL 1568025. Employment lawyers have paid particular attention to the portion of the Court's opinion pertaining to how FLSA exemptions are to be construed. Specifically, the Court rejected the longstanding principle that FLSA exemptions are to be "construed narrowly." *Id.* at \*7. The Court, in the majority

opinion written by Justice Thomas, explained that it had "no license to give the exemption anything but a fair reading." *Id.*

The Court did not overturn precedent requiring that exemptions are limited to those circumstances "plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see generally Encino Motorcars*. Nor did the Court shift the burden of proving that an exemption applies away from the employer, *see e.g., Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688, 691-92 (4th Cir. 2009); *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 691, n.4 (6th Cir. 2001), or enunciate something new in requiring courts to give their cases a fair reading. *See generally Encino Motorcars*. Rather, in acknowledging the remedial purpose of the FLSA, the Court held that exemptions are also a part of the FLSA's purpose. *Id.* at \*7. Quite likely, then, whether and to what extent *Encino Motorcars* actually changes how FLSA exemptions are litigated will be borne out in lower court decisions. ■

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## Faragher-Ellerth

*continued from page 1*

This goal is in the full interests of any organization. For years, studies have demonstrated a positive link between financial performance and diverse organizations. A workplace engaged in a culture of respect, civility and inclusion performs better financially and does not need to rely on prescriptive training and failed reporting policies.

To accomplish this goal, however, requires senior leadership willing to invest in data gathering, analysis, training and systems

that can help develop a culture in which intolerance and harassment can neither thrive nor be protected. Data gathering is an essential component because only through a candid internal assessment can an organization truly understand where it needs to focus its efforts and identify the appropriate metrics for measuring success.

The process of data gathering can be accomplished in a myriad of ways, including through a confidential interview process. It is critical, however, that the organization also be committed to addressing challenges identified

in the assessment by, for example, creating a short- and longer-term plan for meaningful progress and change.

Another essential element to foster change is accountability. Individuals must be held responsible for their conduct, including those who ignore or otherwise enable harassing or demeaning behaviors to continue. If the standard is respect and inclusivity, then direct and honest conversations about words and deeds that deviate from those goals may actually become easier once removed from a legally constrained definition of harassment.

Here is what the #MeToo Movement tells us: when employers ignore the disconnect between their training and reporting policies and a respectful and inclusive environment, they may win the battle of legal protection, but they will fail to achieve a workplace that can compete for talent and engage workers in their common goals. ■

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