

**10-D | VARIANCE IN POTENTIAL EMPLOYER LIABILITY BASED ON POSITION OF "HARASSER"**

1. Harassment by high level manager. *Faragher* and *Ellerth* suggest that harassment by an individual "indisputably within that class of an employer organization's officials who may be treated as the organizations proxy" results in automatic liability. Courts have provided little guidance on this "proxy" component.

2. Harassment by a "supervisor." Where there has been no tangible employment action, the employer is presumptively liable, subject to the *Faragher* and *Ellerth* affirmative defense. Generally, supervisors are those whose authority includes the power to hire, fire, demote, promote, transfer or discipline. Absent authority such as this, an employee does not qualify as a "supervisor" for imputing liability to the employer.

3. Harassment by a co-worker. Following *Faragher* and *Ellerth*, the courts have continued to apply a negligence standard to cases where the alleged harasser is a co-worker. The employee must prove the employer "knew or should have known" of the alleged harassment. Courts, in essence, largely consider the two prongs of the *Faragher* and *Ellerth* affirmative defense to determine negligence.

4. Harassment by nonemployees. Courts apply the negligence standard reasoning that the employer ultimately controls the conditions of the work environment. In this instance, "appropriate corrective action" includes consideration of the authority and control the employer has over the nonemployee.

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