

## Testing the Boundaries of the Faragher/Ellerth Defense in Sexual Harassment Cases

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### Working Together

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In 1998, the U.S. Supreme Court created a defense for employers accused of permitting a supervisor to engage in unlawful sexual harassment of an employee. In two seminal cases, the Court held that an employer is not vicariously liable for a supervisor's workplace harassment of a subordinate if the employer can show: (1) that it exercised reasonable care to prevent and promptly correct the sexually harassing behavior **and** (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

This defense, known as the "Faragher/Ellerth defense," is every employer's not so secret weapon. However, the recently decided case of *Kramer v. Wasatch Cnty. Sheriff's Office* (10th Cir. 2014) is a reminder that this defense cannot to be taken for granted.

Kramer worked for the defendant as a jailor, where she was subject to offensive comments about her breasts and frequently overheard graphic sexual conversations between her male colleagues. She complained about the harassment to the Sheriff, who convened a staff meeting and acted out the exact harassing scenarios that Kramer complained about, using her in the role of the victim.

Kramer was later transferred to work as a bailiff, where she was again the target of a campaign of harassment. Her supervisor made her give him foot massages, sexually assaulted her, and frequently followed her home after work. The Sheriff learned that Kramer was again the subject of "sexual misconduct," as he characterized it, and directed a staff member, who had no prior investigation experience and was friendly with the alleged harasser, to conduct an investigation. Rather than get to the bottom of Kramer's allegations, the investigation centered on Kramer's personal sexual encounters, specifically the identity of the father of her unborn child.

Not surprisingly, Kramer brought a sexual harassment suit against the County and also not surprisingly, the County invoked the *Faragher/Ellerth* defense, arguing that (1) it addressed the sexual harassment by investigating Kramer's claim and (2) that Kramer failed to timely report the harassment to the Sheriff. The Tenth Circuit rejected the defense, citing the inadequacy of the investigation and the bias of the investigator.

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This case is a stark reminder that employers who learn of sexual harassment allegations must take great care in their response so as to avail themselves of this defense. That means employers must conduct a targeted and meaningful investigation and employ a neutral investigator, such as an attorney or human resources professional. *Kramer* reminds us that it is not enough to simply go through the motions as the defendants did in that case.

**Tags:** Hostile Work Environment, Sexual Harassment