

Third Circuit Expands Harassment Liability to Company Proxies and Alter Egos

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The United States Court of Appeals for the Third Circuit, which has authority over Pennsylvania, Delaware and New Jersey, recently recognized a "proxy theory" of liability under Title VII of the Civil Rights Act which in effect has the ability to impute automatic liability on employers based on who the alleged harasser is.

What is the proxy theory of liability?

The proxy theory of liability involves claims of harassment against those who are so integrated with the employer that they themselves are tantamount to the entity. Traditionally, hostile work environment/harassment claims involve alleged harassment by either supervisors or mere coworkers. Proxy theory, however, goes one step above that by looping in employees with "exceptional authority and control within an organization."

For context, there are differing legal standards for employer liability in a hostile work environment/harassment claim which are entirely dependent upon who the alleged harasser is.

For other alleged harassers that are mere co-workers, employer liability exists only if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. It looks at whether the employer was negligent.

For alleged harassing supervisors, employers can avoid liability by establishing (1) that they exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities that were provided (such as internal reporting channels described through company policy). This is known as the Faragher- Ellerth affirmative defense and allows employers to argue against liability even if in fact the alleged harassment occurred.

The entire premise behind the Third Circuit's recent *O'Brien v. The Middle East Forum* opinion instituting proxy liability is how to address claims by employees against those who are above mere coworkers and supervisors. The Third Circuit held that when an employee claims the alleged harasser is him or herself the de facto employer, the Faragher- Ellerth defense does not apply. The employer cannot assert the affirmative defense to avoid liability even if the alleged harassment occurred. If the alleged harassment occurred to state an actionable hostile work environment claim, then liability attaches regardless of whether the alleged victim exercised the reporting measures.

The *O'Brien* case involved an employer's Chief Operating Officer. The plaintiff alleged that while she served as the employer's human resources director, the chief operating officer, who was second in command at the

organization, engaged in actionable harassment based on her sex. As the Third Circuit reasoned in *O'Brien*, the Faragher-Ellerth defense does not apply when the status of the harasser is as a proxy of the employer; the proxy is the employer.

Defining proxies and alter egos

The court made clear that only employees with "exceptional authority and control" meet the standard; it is a fact-by-fact determination. Merely having some amount of control falls short. While the employer in *O'Brien* Middle East Forum was not ultimately found liable, the Third Circuit focused on the following facts of the alleged harasser's role in the business:

- He was responsible for day-to-day management and operations;
- He represented the employer in media appearances;
- He created and enforced company policies;
- He served on the organization's board of directors;
- He was second-in-command and reported directly to the president.

The Third Circuit found these factors were sufficient to show the alleged harasser was a proxy; however, it also found the alleged victim did not suffer unlawful harassment on other facts.

It is not a one-size-fits-all test, but the factors suggest that only a few employees could qualify as an employer's proxy or alter ego. However, given the automatic liability imputed on the organization, proxy liability must become a doctrine of focus.

Employers may consider re-evaluating their internal efforts to prevent and monitor harassment. High-level employees should receive the same training, if not more, than all other employees and supervisors. Employers may consider training board members.

If you have any questions regarding the proxy liability or employment-related inquiries at large, please contact [Jennifer Craighead Carey](#), [Caleb P. Setlock](#), or any member of the [Barley Snyder Employment Practice Group](#).

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WRITTEN BY:



Caleb P. Setlock

Associate

Tel: (717) 399-1567

Email: csetlock@barley.com



Jennifer Craighead Carey

Managing Partner

Tel: (717) 399-1523

Email: jcraighead@barley.com