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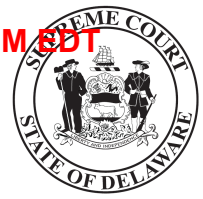

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANA MILLER,	)	
	)	No. 598, 2012
Plaintiff Below	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE	)	
DEPARTMENT OF PUBLIC SAFETY	)	
	)	
Defendants Below	)	
Appellees.	)	

APPEAL FROM AN ADVERSE JURY VERDICT RESULTING FROM IMPROPER JURY INSTRUCTIONS AND FROM AN OPINION AND ORDER ENTERED IN THE SUPERIOR COURT OF THE STATE OF DELAWARE AT C. A. NO. 08C-07-231

APPELLANT DIANA MILLER'S CORRECTED OPENING BRIEF

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I. NATURE OF THE PROCEEDINGS

Plaintiff Diana Miller tried before a jury a *quid pro quo* sexual harassment claim against the State of Delaware, Department of Public Safety. The trial began on July 24, 2012 and was completed on August 2, 2012. The jury returned a verdict for Defendant.

Prior to the court's final instructions to the jury, Plaintiff's counsel objected to the jury charge wherein "adverse tangible employment action" was an element of the claim to be proven by Plaintiff. In addition, Plaintiff's counsel objected to the inclusion of an affirmative defense in the jury charge to the charge of adverse tangible employment action.

Following the defense verdict, Plaintiff moved for and briefed a Motion for New Trial based upon the erroneous charges set forth above. The trial court denied the Motion for New Trial. This appeal is from the erroneous jury charges and the denial of the Motion for New Trial.

This is Plaintiff/Appellant's Opening Brief in support of her request that this matter be remanded to Superior Court for trial with the proper jury instructions.

II. SUMMARY OF ARGUMENT

A. The trial court committed reversible error when it charged the jury with the inclusion of adverse tangible employment action as an element of the *quid pro quo* sexual harassment claim. The court and the parties acknowledged that there was no adverse tangible employment action and the case law supports that a finding of adverse tangible employment action need not be shown or proven for a Plaintiff to prevail on a *quid pro quo* sexual harassment claim.

B. The trial court committed reversible error when its jury charge contained both the *prima facie* element of adverse tangible employment action and the availability of an affirmative defense for Defendant. The United States Supreme Court jurisprudence has consistently held that the availability of an affirmative defense is not permitted when there is a charge of adverse tangible employment action.

III. STATEMENT OF FACTS[1]

Miller's original action included three causes of action: hostile work environment, retaliation and *quid pro quo* sexual harassment. In an earlier opinion, the Court dismissed her hostile work environment claim as time-barred and because she did not meet the elements of a retaliation claim.[2] The case proceeded to trial, therefore, on her remaining claim of *quid pro quo* sexual harassment.

Prior to jury selection, the Court and counsel met to review a number of issues. During the meeting, the Court indicated it would be giving some preliminary instructions on the elements of Miller's claim. Each side had submitted proposals for final instructions and the discussion concerned, in part, which one of the two submissions the Court would give in the opening instructions.

Miller's proposal for her claim was as follows:

> Plaintiff Diana Miller alleges that Troop Commander, Captain John Laird, subjected her to harassment. It is for you to decide whether the DSP is liable to Diana Miller for the actions of Captain John Laird.
>
> To prevail on this claim, Diana Miller must prove all of the following by a preponderance of the evidence:

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[1] The facts set forth herein were taken verbatim from the Procedural and Factual Background section, pages 1 through 12, of the Memorandum Opinion of Judge Jerome O. Herlihy dated October 11, 2012 from which this appeal is taken. The Statement of Facts will be supplemented in bold with citations to the record below to capture any further evidence from the record to support Appellant's appeal.

[2] Miller v. State, 2011 Del. Super. LEXIS 160 (Del. Super. Ct. Apr. 6, 2011)

> First: Diana Miller was subjected to sexual advances toward her by Captain John Laird, because of Diana Miller's sex;
>
> Second: The conduct by Captain John Laird was not welcomed by Diana Miller; whether Diana Miller thereafter submitted to or rebuffed the advances does not (in and of itself) determine whether the advances were welcome.
>
> Third: John Laird's sexual harassment altered the conditions of Ms. Miller's employment of **[*sic*]** adversely affected her status as an employee.[3]

The State did not oppose using her proposal for the opening instructions. The Court also used Miller's proposal regarding the applicable defense available to the defendants.

Before counsel made their opening remarks, the Court followed its normal practice of giving the jury a brief set of instructions on applicable principles, such as witness credibility, and on the elements of Miller's claim using her instruction. The following is a portion of the introductory instructions pertinent to her claim:

> This is a civil case and, in a civil case, we call a person who sues the plaintiff. In this case, that is Diana Miller. We call the person or entity which is sued the defendant. In this case, the defendants are the State of Delaware and the Department of safety and Homeland Security. I will hereafter use the term "Department" when referring to it. I will no longer refer to the State separately. The State police are a division in the department and, when referring to them, I will use the term "State Police."
>
> In this case, the plaintiff, Diana L. Miller, makes a claim under Delaware's Discrimination in Employment statute which prohibits employees who are

[3] P1. 's Proposed Jury Instructions, Docket No. 163, p. 10.

working in a supervisory capacity from sexually harassing subordinates. Plaintiff, Diana L. Miller, claims Troop Commander Captain John Laird, a male, while employed by the State Police, made unwelcome sexual advances toward her and made requests for sexual favors and that Captain Laird's behavior altered the conditions of her employment or adversely affected her status as an employee. The Department has denied the plaintiff's allegation of sexual harassment and contends that any contact between plaintiff, Miss Miller, and Captain Laird, was, instead, welcome. The Department also asserts that it responded reasonably and immediately once plaintiff, Miss Miller, reported a claim of sexual harassment.

Let me turn to the burden of proof on the issues.

The issues are the disputes between the parties, the dispute you must resolve as the jury in this case. Plaintiff, Diana Miller, alleges that the commander, Captain Laird, while a member of the State Police, subjected her to harassment. To prevail on this claim, Diana Miller must prove all of the following by a preponderance of the evidence: First, that she was subjected to sexual advances toward her by Captain John Laird because of her gender; second, the conduct of Captain Laird was not welcomed by Diana Miller. Whether she thereafter submitted to or rebuffed the advances does not, in and of itself, determine whether the advances were welcome. Third, Captain Laird's sexual harassment altered the condition of Miss Miller's employment or adversely affected her status as an employee.

The State Police claim an affirmative defense. To prevail on this defense, the State Police must prove both of the following by a preponderance of the evidence: First, the State Police exercised reasonable care to prevent and correct promptly any sexually harassing behavior by Captain Laird; second, plaintiff, Diana Miller, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the State Police or to avoid harm otherwise.

Prevention and correction are established if the State Police established an explicit policy against harms in the workplace on the basis of sex; and that policy was fully communicated to its employees; and that policy provided a reasonable way for Diana Miller to make a claim of harassment to higher management; and reasonable steps were taken to correct the problem. However, if the State Police knew or should have

> known of the sexual harassment from whatever source and failed to take steps to correct the problem, the first part of the defense has not been established and there is no need to determine whether the second part of the defense has been established. In this scenario, the employer has not established the defense.[4]

Miller claims she presented her case to the jury based on the elements of *quid pro quo* which the Court set forth in the opening instruction of which, of course, she only had about two hours' notice that any instruction would be given. Miller testified she went to work for the Delaware Emergency Management Agency ("DEMA") in 1998. She worked there five to six years before being transferred to Delaware State Police Troop 2 in 2004. She worked in the patrol section at first which was at the back of the troop. In May or June, 2006, there was a reorganization at Troop 2 and she moved from the back of the troop to the front where various captains and lieutenants had their offices. She became Captain John Laird's secretary.

Miller liked working with the road troopers and wanted her desk to remain in the back. Further, she said she did not like Captain John Laird, whom, she claimed, prior to the move, would walk some distance from his office to the back of the troop. Once there, he stared at her. This happened several days a week.

There was a Christmas party in December, 2006, at the Chesapeake Inn, during which Miller testified, Captain Laird "played footsie" with her. Laird denied this. Miller

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[4] Instructions to the Jury, by Herlihy, J., dated Aug. 1, 2012.

had some sort of surgery (never specified) in late February 2007, and was out for a month. While home recuperating, Miller said Captain Laird came to her house in full uniform. She was upstairs in her bedroom because she was, at that moment unable to go up and down stairs. She was informally dressed in pajamas and t-shirt. Miller said at one point, Laird grabbed her breasts and leaned in to kiss her. She told the jury she was startled.

Laird's version of this incident differed. He did go to her house and he was in uniform. She was upstairs, but he said she was dressed in very tight jeans (which she had said earlier she could not put on at that time) and was preparing to go out to eat. He said that Miller initiated the kiss then took off her top then removed her bra as fast as any woman he had ever seen. She approached him with breasts bared and he claimed he raised his left hand to stop her when his hand came in contact with her breast.

Miller testified Laird's conduct was unwelcome. His return visits and several overnight stays to her house over the next several months were also unwelcome, as was the night he stayed and the two had intercourse. He, however, said she initiated it by having oral sex with him. **Miller, however, testified that Laird initiated their sexual encounter.**[5] When she returned from her medical leave, Miller stated she felt unwelcome by others. Whether it was due to the amount of

[5] A-207 @ 20.

time she spent in Laird's office or what, the atmosphere had changed. She felt boxed in because Laird was her boss and was the only one speaking to her.

Sometime after she returned to work, Laird told her she was the subject of internal affairs investigation. The charge arose because she had supposedly had sex with another trooper, a sergeant, in a maintenance closet at Troop 2. **That charge was dismissed as unsubstantiated.**[6] Miller had been seeing this trooper for about a year. Laird told her he would look out for her in the investigation.

Diana Miller testified at trial that her relationship with Laird caused many problems in her workplace. She was told repeatedly that the only friends that she had at Troop 2 were the Lairds[7]**; she was accused of receiving preferential treatment by her coworkers**[8]**; she believed that she had no right to talk with anyone other than the Lairds**[9]**; and after reporting Laird's sexual harassment, she was sent to the Training Academy where she felt ostracized and for years was all alone in a corner.**[10]

Laird's wife, Cissy, came to Troop 2 on a number of occasions. She and Miller became friendly. After a while, Cissy Laird brought up the idea of a "girls" trip to Mexico. Only at the last moment did Miller learn Captain Laird was coming

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[6] A-030 @ 12.
[7] A-230 @ 20.
[8] A-230 @ 6.
[9] A-214 @ 20, A-230 @ 20.
[10] A-256 @ 10.

along. In Mexico in the hotel lobby she said Cissy told her she, Miller, would be registered Mrs. Laird and she, in return, would register as a cousin. There was a king size bed in their room. All slept in the same bed, Miller testified.

She also testified that one day when she was sitting next to Cissy at the pool, she told Miller to go out in the pool and "cuddle" Laird who was in the middle. She went to him and told him what Cissy said. They hugged and came back by Cissy who said to go up to the room and have sex. Miller said Cissy said she, Miller, was not holding up her end of the bargain. Laird and Miller had sex, but Miller claimed it was unwelcomed.

Captain Laird was not asked about the Mexico trip but Cissy Laird was. She denied the three of them slept together in the king size bed in Mexico; that only Miller did. She never consented to her husband having sex with Miller.

Whatever happened in Mexico, the relationship, whatever it really was between Miller and Laird, was essentially over. They returned in late June or early July. They stopped exchanging texts as they had been doing so much of before even while at their respective desks though only feet apart. Miller's position at Troop 2 during all of this did not change. Her salary remained the same. When she was moved from her job with the road troopers to being Laird's secretary she took on new duties, none of which changed while she and Laird were in their "relationship." Her pay was not diminished. She applied for a position in State

Police Headquarters during this period, but: (1) she did not meet the qualifications; (2) only she and Laird knew of their relationship **(this statement was disputed at trial)**[11]; and (3) Laird had no role in the decision to not offer her the position.

On August 1, 2007, Miller appeared before an internal affairs officer in regard to the complaint concerning her and the sergeant. During that interview, she mentioned the affair with Laird. Further investigative action was taken that day and Laird was suspended later in the evening. He resigned several weeks later. She accepted an offer to be transferred to the training academy for the same pay. That location is closer to her home in Dover. Plaintiff testified that she was transferred to the Training Academy and remained there for 4.5 years, all the while being ostracized by DSP personnel.

Over Miller's objection, the Court's final instruction to the jury on the elements of her of *quid pro quo* was:

> Let me turn to the burden of proof on the claim plaintiff Ms. Miller has and the burden of proof on the defense which the State Police have raised. These are the issues in the case, the disputes of fact that you must resolve.
> Plaintiff Ms. Miller alleges that former Captain John Laird, subjected her to sexual harassment. It is for you to decide whether the State of Delaware is liable to the plaintiff for the actions of former Captain Laird while he was a police officer. To prevail on a [sic] this claim, the plaintiff Ms. Miller must prove all of the following by a preponderance of the evidence:

[11] A-215 @ 21.

First, that she was subjected to having to engage in sexual contact and/or sexual intercourse by Mr. Laird because of her sex; and

Second, Captain Laird was her supervisor at the time of the alleged harassment. It is irrelevant that during the time of Captain Laird's alleged conduct, Ms. Miller was under the immediate supervision of Lieutenant Hukill. That is because Lieutenant Hukill was under the supervision of Captain Laird.

A supervisor is one who had the power to hire, fire, demote, transfer, or discipline the plaintiff, to set work schedules and pay rates, or to make other decisions that would affect terms and conditions of plaintiff's employment, whether exercised alone or in connection with others. Under Delaware law, the Director of Public Safety is the only person authorized, however to remove employees of the Department and fix their compensation; and

Third, Captain Laird's conduct was not welcomed by Ms. Miller; and

Fourth, Ms. Miller's submission to Captain Laird's conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment; and

Fifth, Ms. Miller was subjected to an adverse "tangible employment action"; 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 significant change in benefits; and

Sixth, Ms. Miller's rejection of, failure to submit to, or submission to Captain Laird's conduct was a motivating factor in his decision to take the alleged tangible employment action against her.

If any of the above elements have not been proved by the preponderance of the evidence, your verdict must be for the defendants and you need not proceed further in considering this claim.

The State police have raised an affirmative defense. That is a defense they must prove. To prove it they have to prove all of the following elements by a preponderance of the evidence.

First, they exercised reasonable care to prevent and correct promptly any sexually harassing behavior. This first element is proven if:

1. The State Police had established an explicit policy against harassment in the workplace on the basis of sex.

2. That policy was fully communicated to its employees, including Ms. Miller.

3. That policy provided a reasonable way for Ms. Miller to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by Ms. Miller.
   Second, Ms. Miller unreasonably failed to take advantage of any preventative or corrective opportunities provided by the State Police or to avoid harm otherwise.

On the other hand, proof that Ms. Miller did not follow a reasonable complaint procedure provided by the defendant will ordinarily be enough to establish that she unreasonably failed to take advantage of a corrective opportunity.

As I said, the burden of proof in this case is by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true. The side upon which you find the greatest strength and the greatest weight of the evidence is the side upon which the preponderance of the evidence exists. Preponderance of the evidence does not mean the greater number of witnesses or exhibits as opposed to the lesser number of witnesses or exhibits.

In order for a party to have sustained her or its burden of proof, the evidence must do more than merely balance the scale; it must tip the

> scale to some extent at least in that party's favor. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who or which has the burden of proving it.
>
> Evidence is the testimony of witnesses and any exhibits that may be introduced during the trial. You will have the exhibits in the jury room during your deliberations. You should consider all of the evidence bearing upon a [sic] every issue regardless of who produced it. While it is very important that you listen to and consider what the lawyers say during their remarks to you, what they say is not evidence. Further, even though you must follow what I say or have said about the law, what I say is not evidence. If at any time the lawyers or I say anything about the evidence which differs from your recollection of the evidence, disregard what we may say and go by own your [sic] recollection.[12]

The substantive part of this instruction is modeled after the Third Circuit's pattern instruction on such a claim.[13] The Third Circuit's instruction and the Court's

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[12] Instructions to the Jury, by Herlihy, J., dated Aug. 1, 2012

[13] 5.1.3 Elements of a Title VII Claim - Harassment - Quid Pro Quo Model

Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him, her] to harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of [supervisor].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe activity] by [supervisor], because of [plaintiffs] [sex] [race] [national origin];

Second: [Supervisor's] conduct was not welcomed by [plaintiff];

Third: [Plaintiff's] submissions to [supervisor's] conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment;

Fourth: [Plaintiff] was subjected to an adverse "tangible employment action"; 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 significant change in benefits; and […]

instruction are premised on the United States Supreme Court's decision in Burlington Indus., Inc. v. Ellerth.[14] In that case, the Court recognized that the general rules of scope of employment and *respondeat superior* are not directly transferable to cases where an employer is to be held liable for an action of one of its employees. The Court's holding states:

> We adopt the following holding in this case and in Faragher v. Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), also decided today. An 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, see Fed. R. Civ. P. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonable **[*sic*]** failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the

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[…]Fifth: [Plaintiff's] [rejection of] [failure to submit to] [supervisor's] conduct was a motivating factor in the decision to [describe alleged tangible employment action].

If any of the above elements has not been proved by the preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim.

[14] Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

> employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[15]

Miller's evidence showed no tangible job action of any kind was taken against her: no wage reduction, no demotion, no discharge or undesirable re-assignment, etc. In that circumstance, therefore, the defenses came into play. The evidence showed the State Police had an anti-sexual harassment policy which had been in effect for several years and of which Miller was aware before all of this business with Laird started. Several years before, she had made a complaint of sexual harassment which proved to be unfounded but it showed she knew how to mention this to higher authorities. And the day she complained about Laird to internal affairs, Laird was suspended.

[15] Burlington Indus., 524 U.S. 742.

IV. ARGUMENT

A: Improper Charge of Adverse Tangible Employment Action

1. Question Presented

Did the Superior Court commit reversible error when it charged that the jury had to find adverse tangible employment action as a *prima facie* element of sexual harassment?

This issue was preserved in Plaintiff's opposition expressed to the court during the jury prayer conference on August 1, 2012 and was further preserved in Plaintiff's Motion for New Trial.[16]

2. Standard of Review

The Supreme Court will review *de novo* questions of law decided by the Court below. Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927, 936 (Del. 1982); Wife (J.F.V) v. Husband (O.W.V., Jr.), 402 A.2d 1202, 1204 (Del. 1979); DuPont v. DuPont, 216 A.2d 674, 680 (Del. 1966); Nardo v. Nardo, 209 A.2d 905, 917 (Del. 1965).

The Court has used this standard specifically with regard to challenged jury instructions. North v. Owens-Corning Fiberglas Corp., 704 A.2d 835, 837 (Del. 2000) as cited in Corbitt v. Tatagari, 804 A.2d 1057 (Del. 2002).

[16] A-444.

3. Merits of Argument

The court substantively and substantially changed Plaintiff's *prima facie* elements of the sexual harassment case that she presented to the jury. The court determined that the jury must find that there was an adverse tangible employment action as to Plaintiff in order for Plaintiff to prevail at trial. Quite surprisingly, however, was the agreement of counsel for both parties as well as the court's finding that there was no "adverse tangible employment action" pled or presented at trial. Indeed, there is no question that Plaintiff never pled that there was an adverse tangible employment action. Defense counsel conceded in oral argument during the prayer conference that, "if it was not pled in the complaint [referring to adverse tangible employment action] then it shouldn't be argued in the case." [17] Moreover, the court, in its response to Plaintiff's Motion for New Trial made a factual determination that, "Miller's evidence showed no tangible job action of any kind was taken against her: no wage reduction, no demotion, no discharge or undesirable re-assignment, etc."[18] Despite the unanimity with regard to the fact that the element of adverse tangible employment action was not pled and was not shown at trial, the court erroneously charged the jury with the necessity of finding

[17] A-419 @ 18.
[18] A-648.

this element (actually in two of the six elements)[19] before Plaintiff could prevail on this charge.

We strongly disagree with the lower court's finding that the initial charge to the jury, wherein the jury was instructed that Ms. Miller must prove that the conditions of her employment were altered or adversely impacted her status as an employee, was the same as adverse tangible employment action.[20] As will be set forth below, adverse tangible employment action involves very significant changes in employment. While the court correctly concluded that there were no adverse tangible employment actions taken against Plaintiff, Plaintiff challenges the court's determination that she established no "detrimental actions involving her job because of the Laird's actions."[21] As was added to the Statement of Facts supplementing the facts summarized by Judge Herlihy, there were several detrimental actions/conditions that occurred to Plaintiff Miller as a result of her relationship with Laird. She could not talk with anyone in her department other than Laird while her coworkers accused her of receiving preferential treatment

[19] A-541.
[20] A-649.
[21] A-649.

from Laird.[22] In addition she was ostracized after reporting what the trial court characterized as, "Laird's **reprehensible conduct**" (emphasis supplied).[23]

The record reflects that there was much confusion and strong disagreement with regard to the final jury charge on the elements of sexual harassment. The court distributed the proposed final jury charge to counsel on July 31, 2012, the day before the charge was to be given to the jury. Plaintiff's counsel wrote to the court on that date objecting to the use of the term "tangible employment action" or "adverse tangible employment action."[24] Plaintiff's counsel cited the Ellerth United States Supreme Court decision and the Third Circuit Model Jury Instructions that clearly state that "tangible employment action" is not a required element for a *quid pro quo* sexual harassment claim.

The defense responded verbally the next day in chambers during the prayer conference. Although acknowledging that tangible employment action (or adverse tangible employment action which will be used interchangeably herein) should not be in the case because it was not pled by Plaintiff, defense counsel argued to the court that the six prong sexual harassment claim charge as submitted to the court by the defense during the pretrial (and, as given to the jury during the final jury

[22] A-211 @ 9.
[23] A-225 @ 20, A-649.
[24] A-557.

instructions)[25] was proper under section 5.1.3 of the Third Circuit Model Jury Instructions.

This section also states specifically that this jury instruction applies only to claims involving "tangible employment actions." Although stated explicitly in the Model Jury Instructions, defense counsel did not acknowledge that a tangible employment action need not be a part of a *quid pro quo* sexual-harassment claim.

The court questioned Plaintiff's counsel as to how Plaintiff's relationship with Laird adversely affected her status as an employee. Plaintiff's counsel responded that Laird's preferential treatment was overt and made Ms. Miller's work environment into a "living hell."[26] The court recognized *sua sponte* that in Faragher there was an alteration of the work environment, but rather than acknowledging that was sufficient for a sexual-harassment claim, the court discussed the affirmative defenses, an issue that will be raised in our second argument in this brief.

Defense counsel countered by arguing that if Plaintiff's only evidence was a detriment in the conditions of her employment, that does not, as a matter of law, state a claim.[27] Plaintiff's counsel cited the case of Lee v. Gecewicz, Civil Action

[25] A-604.
[26] A-428.
[27] A-434.

No. 99-158, 1999 U.S. Dist. LEXIS 7317 (E.D. Pa. May 20, 1999), for the proposition that:

> After Burlington a *quid pro quo* Plaintiff must also demonstrate either that she submitted to the sexual advances of her alleged harasser or suffered a tangible employment action as a result of her refusal to submit to those sexual advances.

The lower court determined that, "alteration just doesn't really fit, that's the problem."[28] The lower court's decision to include tangible employment action in the final jury instruction was erroneous for another reason. The court concluded in its Memorandum Opinion denying Plaintiff's Motion for New Trial as follows:

> Miller's evidence showed no tangible job action of any kind was taken against her: no wage reduction, no demotion, no discharge or undesirable re-assignment, etc.

Indeed, the court went further when it opined that Miller had not even shown any form of detrimental action involving her job because of Laird's actions.[29] Thus, the court charged an element of the cause of action that it knew was not in the case. Although there was further argument with Plaintiff's counsel objecting to the use of tangible employment action, the court decided to leave the charge "as is," referring to the charge that contained the element of tangible employment action.

The trial court wrongly instructed the jury on the Model Jury Instructions as proposed by the Third Circuit that contain two references to the tangible

[28] A-438.
[29] A-648.

employment action. Tangible employment action is defined therein and was identically defined in this jury charge as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decision causing significant changes in benefits."[30]

As defense counsel noted, this was never pled by Plaintiff because there is no factual basis for finding any of the indicia of tangible employment action. Any jury sworn to follow the law as erroneously charged would not find sexual harassment in the case at bar. Yet, it was undisputed and acknowledged by then Capt. Laird that he had sexual relations with his subordinate secretary, Plaintiff Diana Miller. The law allows for a sexual harassment claim involving a superior wherein the subordinate submits to the sexual demands of her superior.[31] That evidence was acknowledged by Judge Herlihy in his recitation of the facts that we incorporated into our Statement of Facts in this brief. Although the liability was evident from the facts, the jury was unable to enter a verdict for Plaintiff based upon the court's clearly erroneous instruction requiring a tangible employment action be shown to prove this *quid pro quo* sexual harassment claim.

[30] A-479, A-605
[31] Lee, 1999 U.S. Dist. LEXIS 7317 (1999).

B: Improper Charge of Affirmative Defense with Charge of Adverse Tangible Employment Action.

1. Question Presented

Did the Superior Court commit reversible error when it charged the Ellerth/Faragher affirmative defense after charging that Plaintiff must establish an adverse tangible employment action in order to prove her sexual harassment claim? This issue was preserved in Plaintiff's arguments at the August 1, 2012 prayer conference and Plaintiff's Motion for New Trial.[32]

2. Standard of Review

The Supreme Court will review *de novo* questions of law decided by the Court below. Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927, 936 (Del. 1982); Wife (J.F.V) v. Husband (O.W.V., Jr.), 402 A.2d 1202, 1204 (Del. 1979); DuPont v. DuPont, 216 A.2d 674, 680 (Del. 1966); Nardo v. Nardo, 209 A.2d 905, 917 (Del. 1965).

The Court has used this standard specifically with regard to challenged jury instructions. North v. Owens-Corning Fiberglas Corp., 704 A.2d 835, 837 (Del. 2000) as cited in Corbitt v. Tatagari, 804 A.2d 1057 (Del. 2002).

[32] A-444.

3. **Merits of Argument**

The United States Supreme Court spoke clearly in both Ellerth and Faragher with regard to the availability of the employer's affirmative defense. The Court ruled that the affirmative defense is available only when there is no tangible employment action. This ruling has been followed and cited by courts without exception or distinguishing this rule. The rationale appears to be plain: if the employer, whether through the harasser or other management, effects an adverse tangible employment action upon the harassee, there is no defense by way of the employer having a known sexual harassment policy and the harassee's failure to reasonably follow same. In other words, it is enough that a tangible adverse employment action occurred wherein the victim's employment status is significantly impacted by way of termination, demotion or involuntary transfer. Such action nullifies the availability of an affirmative defense.

The Supreme Court has made it abundantly clear, however, that a sexual harassment action may lie without the imposition of an adverse tangible employment action.[33] Such is our case where no adverse tangible employment action occurred and was never pled. Only in this circumstance of a sexual harassment claim that is pled without an adverse tangible employment action can the affirmative defense be charged to the jury. There is no question following

[33] Ellerth and Faragher.

Ellerth/Faragher and their progeny that a jury cannot be charged with both an adverse tangible employment action and the availability of the employer's affirmative defense. Appellant respectfully submits that the inclusion of both of these in the jury charge was reversible error. Although the jury verdict sheet reflects that the jury found that there was no proof of sexual harassment, the jury was charged, as can be seen in the jury instructions in the Appendix, with the affirmative defense. Thus, the jury knew or had reason to believe that the state had a full defense if it met the affirmative defense even though the jury was also charged with the element of adverse tangible employment action.

Plaintiff's counsel, upon his initial review of the jury instructions that were provided to counsel on July 31, wrote to the court and, in pertinent part, objected to the prospective charge that contained both the element of adverse tangible employment action as well as the affirmative defense.[34] During the prayer conference the next day, Plaintiff's counsel again argued that it was erroneous to include in the final both the element of adverse tangible employment action and the affirmative defense.[35]

When this issue of charging both the element of adverse tangible employment action and the affirmative defense was brought to the court's attention

[34] A-558.
[35] A-422.

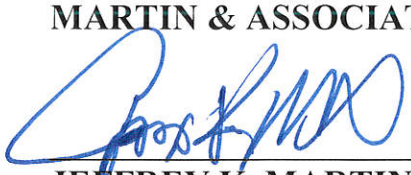
again in Plaintiff's Motion for New Trial, the court summarily dismissed this concern by noting both that there was no evidence of any "tangible job action of any kind" and then thereby justifying the use of the affirmative defense. The error in the instructions which we submit was very prejudicial to Plaintiff was that both the element and the defense were charged and the jury thereby had the false impression that any finding of a tangible employment action could have been nullified by this affirmative defense. Rather than the court finding that the jury had not found an adverse tangible employment action in its Memorandum Opinion, it instead found on its own that there was not a scintilla of evidence of detriment to Plaintiff.

V. CONCLUSION

The lower court erroneously instructed the jury that Plaintiff needed to prove an adverse tangible employment action. This element is not necessary for a finding of sexual harassment and was not pled by Plaintiff. Also, erroneously, the court charged that Defendant had an affirmative defense that could not be charged conterminously with the prima facie element of adverse tangible employment action. For the foregoing reasons, Plaintiff respectfully requests that this case be remanded to Superior Court for a jury trial.

Respectfully submitted,

MARTIN & ASSOCIATES, P.A.



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CERTIFICATE OF SERVICE

I, Jeffrey K. Martin, counsel for Appellant in the above-stated matter, hereby certify that two true and correct copies of the foregoing ***Appellant Diana Miller's Opening Brief*** were served electronically on June 25, 2013 and copies provided thereby (and also served via regular U.S. Mail and electronic mail) to the following:

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Case No. 08C-07-231 JOH

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DIANA L. MILLER	)	
	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	08C-07-231-JOH
	)	
v.	)	
	)	
STATE OF DELAWARE, DEPARTMENT OF SAFETY AND HOMELAND SECURITY	)	
	)	
Defendants	)	

Submitted: August 17, 2012
Decided: October 11, 2012

MEMORANDUM OPINION

*Upon Motion of Plaintiff for New Trial - **DENIED***

Appearances:

Jeffrey K. Martin, Esquire, of Martin Associates, P.A., Wilmington, Delaware, Attorney for the Plaintiff

Michael F. McTaggart, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the Defendant

HERLIHY, J.

Plaintiff, Diana Miller ("Miller") moves for a new trial arguing that this Court erred in its final instruction on her claim of *quid pro quo* sexual harassment. She argues that the Court materially and substantively altered the elements of her claim from its introductory instruction to the jury to its final instruction. The Court finds there was no substantive change and that the jury was given the correct statement of the elements of her claim on both occasions. The motion for new trial is DENIED.

Procedural and Factual Background

Miller's original action included three causes of action: hostile work environment, retaliation and *quid pro quo* sexual harassment. In an earlier opinion, the Court dismissed her hostile work environment claim as time-barred and because she did not meet the elements of a retaliation claim.[1] The case proceeded to trial, therefore, on her remaining claim of *quid pro quo* sexual harassment.

Prior to jury selection, the Court and counsel met to review a number of issues. During the meeting, the Court indicated it would be giving some preliminary instructions on the elements of Miller's claim. Each side had submitted proposals for final instructions and the discussion concerned, in part, which one of the two submissions the Court would give in the opening instructions.

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[1] *Miller v. State, Dept. of Pub. Safety*, 2011 WL 1312286 (Del. Super. Apr. 6, 2011).

Miller's proposal for her claim was as follows:

> Plaintiff Diana Miller alleges that Troop Commander, Captain John Laird, subjected her to harassment. It is for you to decide whether the DSP is liable to Diana Miller for the actions of Captain John Laird.
>
> To prevail on this claim, Diana Miller must prove all of the following by a preponderance of the evidence:
>
> First: Diana Miller was subjected to sexual advances toward her by Captain John Laird, because of Diana Miller's sex;
>
> Second: The conduct by Captain John Laird was not welcomed by Diana Miller; whether Diana Miller thereafter submitted to or rebuffed the advances does not (in and of itself) determine whether the advances were welcome.
>
> Third: John Laird's sexual harassment altered the conditions of Ms. Miller's employment of adversely affected her status as an employee.[2]

The State did not oppose using her proposal for the opening instructions. The Court also used Miller's proposal regarding the applicable defense available to the defendants.

Before counsel made their opening remarks, the Court followed its normal practice of giving the jury a brief set of instructions on applicable principles, such as witness credibility, and on the elements of Miller's claim using her instruction. The following is a portion of the introductory instructions pertinent to her claim:

> This is a civil case and, in a civil case, we call a person who sues the plaintiff. In this case, that is Diana Miller. We call the person or entity which is sued the defendant. In this case, the defendants are the State of Delaware and the Department of safety and Homeland Security. I will hereafter use the term "Department" when referring to it. I will no longer

[2] Pl.'s Proposed Jury Instructions, Docket No. 163, p. 10.

refer to the State separately. The State police are a division in the department and, when referring to them, I will use the term "State Police."

In this case, the plaintiff, Diana L. Miller, makes a claim under Delaware's Discrimination in Employment statute which prohibits employees who are working in a supervisory capacity from sexually harassing subordinates. Plaintiff, Diana L. Miller, claims Troop Commander Captain John Laird, a male, while employed by the State Police, made unwelcome sexual advances toward her and made requests for sexual favors and that Captain Laird's behavior altered the conditions of her employment or adversely affected her status as an employee. The Department has denied the plaintiff's allegation of sexual harassment and contends that any contact between plaintiff, Miss Miller, and Captain Laird, was, instead, welcome. The Department also asserts that it responded reasonably and immediately once plaintiff, Miss Miller, reported a claim of sexual harassment.

* * * * *

Let me turn to the burden of proof on the issues.

The issues are the disputes between the parties, the dispute you must resolve as the jury in this case. Plaintiff, Diana Miller, alleges that the commander, Captain Laird, while a member of the State Police, subjected her to harassment. To prevail on this claim, Diana Miller must prove all of the following by a preponderance of the evidence: First, that she was subjected to sexual advances toward her by Captain John Laird because of her gender; second, the conduct of Captain Laird was not welcomed by Diana Miller. Whether she thereafter submitted to or rebuffed the advances does not, in and of itself, determine whether the advances were welcome. Third, Captain Laird's sexual harassment altered the condition of Miss Miller's employment or adversely affected her status as an employee.

The State Police claim an affirmative defense. To prevail on this defense, the State Police must prove both of the following by a preponderance of the evidence: First, the State Police exercised reasonable care to prevent and correct promptly any sexually harassing behavior by Captain Laird; second, plaintiff, Diana Miller, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the State Police or to avoid harm otherwise.

> Prevention and correction are established if the State Police established an explicit policy against harms in the workplace on the basis of sex; and that policy was fully communicated to its employees; and that policy provided a reasonable way for Diana Miller to make a claim of harassment to higher management; and reasonable steps were taken to correct the problem. However, if the State Police knew or should have known of the sexual harassment from whatever source and failed to take steps to correct the problem, the first part of the defense has not been established and there is no need to determine whether the second part of the defense has been established. In this scenario, the employer has not established the defense.[3]

Miller claims she presented her case to the jury based on the elements of *quid pro quo* which the Court set forth in the opening instruction of which, of course, she only had about two hours notice that any instruction would be given. Miller testified she went to work for the Delaware Emergency Management Agency ("DEMA") in 1998. She worked there five to six years before being transferred to Delaware State Police Troop 2 in 2004. She worked in the patrol section at first which was at the back of the troop. In May or June, 2006, there was a reorganization at Troop 2 and she moved from the back of the troop to the front where various captains and lieutenants had their offices. She became Captain John Laird's secretary.

Miller liked working with the road troopers and wanted her desk to remain in the back. Further, she said she did not like Captain John Laird, whom, she claimed, prior to the move, would walk some distance from his office to the back of the troop. Once there, he stared at her. This happened several days a week.

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[3] Instructions to the Jury, by Herlihy, J., dated Aug. 1, 2012.

There was a Christmas party in December, 2006, at the Chesapeake Inn, during which Miller testified, Captain Laird "played footsie" with her. Laird denied this. Miller had some sort of surgery (never specified) in late February 2007, and was out for a month. While home recuperating, Miller said Captain Laird came to her house in full uniform. She was upstairs in her bedroom because she was, at that moment unable to go up and down stairs. She was informally dressed in pajamas and t-shirt. Miller said at one point, Laird grabbed her breasts and leaned in to kiss her. She told the jury she was startled.

Laird's version of this incident differed. He did go to her house and he was in uniform. She was upstairs, but he said she was dressed in very tight jeans (which she had said earlier she could not put on at that time) and was preparing to go out to eat. He said that Miller initiated the kiss then took off her top then removed her bra as fast as any woman he had ever seen. She approached him with breasts bared and he claimed he raised his left hand to stop her when his hand came in contact with her breast.

Miller testified Laird's conduct was unwelcome. His return visits and several overnight stays to her house over the next several months were also unwelcome, as was the night he stayed and the two had intercourse. He, however, said she initiated it by having oral sex with him. When she returned from her medical leave, Miller stated she felt unwelcome by others. Whether it was due to the amount of time she spent in Laird's office or what, the atmosphere had changed. She felt boxed in because Laird was her boss and was the only one speaking to her.

Sometime after she returned to work, Laird told her she was the subject of internal affairs investigation. The charge arose because she had supposedly had sex with another trooper, a sergeant, in a maintenance closet at Troop 2. Miller had been seeing this trooper for about a year. Laird told her he would look out for her in the investigation.

Laird's wife, Cissy, came to Troop 2 on a number of occasions. She and Miller became friendly. After a while, Cissy Laird brought up the idea of a "girls" trip to Mexico. Only at the last moment did Miller learn Captain Laird was coming along. In Mexico in the hotel lobby she said Cissy told her she, Miller, would be registered Mrs. Laird and she, in return, would register as a cousin. There was a king size bed in their room. All slept in the same bed, Miller testified.

She also testified that one day when she was sitting next to Cissy at the pool, she told Miller to go out in the pool and "cuddle" Laird who was in the middle. She went to him and told him what Cissy said. They hugged and came back by Cissy who said to go up to the room and have sex. Miller said Cissy said she, Miller, was not holding up her end of the bargain. Laird and Miller had sex, but Miller claimed it was unwelcomed.

Captain Laird was not asked about the Mexico trip but Cissy Laird was. She denied the three of them slept together in the king size bed in Mexico; that only Miller did. She never consented to her husband having sex with Miller.

Whatever happened in Mexico, the relationship, whatever it really was between Miller and Laird, was essentially over. They returned in late June or early July. They

stopped exchanging texts as they had been doing so much of before even while at their respective desks though only feet apart. Miller's position at Troop 2 during all of this did not change. Her salary remained the same. When she was moved from her job with the road troopers to being Laird's secretary she took on new duties, none of which changed while she and Laird were in their "relationship." Her pay was not diminished. She applied for a position in State Police Headquarters during this period, but: (1) she did not meet the qualifications; (2) only she and Laird knew of their relationship; and (3) Laird had no role in the decision to not offer her the position.

On August 1, 2007, Miller appeared before an internal affairs officer in regard to the complaint concerning her and the sergeant. During that interview, she mentioned the affair with Laird. Further investigative action was taken that day and Laird was suspended later in the evening. He resigned several weeks later. She accepted an offer to be transferred to the training academy for the same pay. That location is closer to her home in Dover.

Over Miller's objection, the Court's final instruction to the jury on the elements of her of *quid pro quo* was:

> Let me turn to the burden of proof on the claim plaintiff Ms. Miller has and the burden of proof on the defense which the State Police have raised. These are the issues in the case, the disputes of fact that you must resolve.
>
> Plaintiff Ms. Miller alleges that former Captain John Laird, subjected her to sexual harassment. It is for you to decide whether the State of Delaware is liable to the plaintiff for the actions of former Captain Laird while he was a

police officer. To prevail on a [sic] this claim, the plaintiff Ms. Miller must prove all of the following by a preponderance of the evidence:

First, that she was subjected to having to engage in sexual contact and/or sexual intercourse by Mr. Laird because of her sex; and

Second, Captain Laird was her supervisor at the time of the alleged harassment. It is irrelevant that during the time of Captain Laird's alleged conduct, Ms. Miller was under the immediate supervision of Lieutenant Hukill. That is because Lieutenant Hukill was under the supervision of Captain Laird.

A supervisor is one who had the power to hire, fire, demote, transfer, or discipline the plaintiff, to set work schedules and pay rates, or to make other decisions that would affect terms and conditions of plaintiff's employment, whether exercised alone or in connection with others. Under Delaware law, the Director of Public Safety is the only person authorized, however to remove employees of the Department and fix their compensation; and

Third, Captain Laird's conduct was not welcomed by Ms. Miller; and

Fourth, Ms. Miller's submission to Captain Laird's conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment; and

Fifth, Ms. Miller was subjected to an adverse "tangible employment action"; 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 significant change in benefits; and

Sixth, Ms. Miller's rejection of, failure to submit to, or submission to Captain Laird's conduct was a motivating factor in his decision to take the alleged tangible employment action against the her.

If any of the above elements have not been proved by the preponderance of the evidence, your verdict must be for the defendants and you need not proceed further in considering this claim.

The State police have raised an affirmative defense. That is a defense they must prove. To prove it they have to prove all of the following elements by a preponderance of the evidence.

First, they exercised reasonable care to prevent and correct promptly any sexually harassing behavior. This first element is proven if:

1. The State Police had established an explicit policy against harassment in the workplace on the basis of sex.

2. That policy was fully communicated to its employees, including Ms. Miller.

3. That policy provided a reasonable way for Ms. Miller to make a claim of harassment to higher management.

4. Reasonable steps were taken to correct the problem, if raised by Ms. Miller.

Second, Ms. Miller unreasonably failed to take advantage of any preventative or corrective opportunities provided by the State Police or to avoid harm otherwise.

On the other hand, proof that Ms. Miller did not follow a reasonable complaint procedure provided by the defendant will ordinarily be enough to establish that she unreasonably failed to take advantage of a corrective opportunity.

As I said, the burden or proof in this case is by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true. The side upon which you find the greatest strength and the greatest weight of the evidence is the side upon which the preponderance of the evidence exists. Preponderance of the evidence does not mean the greater number of witnesses or exhibits as opposed to the lesser number of witnesses or exhibits.

> In order for a party to have sustained her or its burden of proof, the evidence must do more than merely balance the scale; it must tip the scale to some extent at least in that party's favor. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who or which has the burden of proving it.
>
> Evidence is the testimony of witnesses and any exhibits that may be introduced during the trial. You will have the exhibits in the jury room during your deliberations. You should consider all of the evidence bearing upon a [sic] every issue regardless of who produced it. While it is very important that you listen to and consider what the lawyers say during their remarks to you, what they say is not evidence. Further, even though you must follow what I say or have said about the law, what I say is not evidence. If at any time the lawyers or I say anything about the evidence which differs from your recollection of the evidence, disregard what we may say and go by own your [sic] recollection.[4]

The substantive part of this instruction is modeled after the Third Circuit's patten instruction on such a claim.[5] The Third Circuit's instruction and the Court's instruction

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[4] Instructions to the Jury, by Herlihy, J., dated Aug. 1, 2012

[5] **5.1.3 Elements of a Title VII Claim – Harassment – Quid Pro Quo Model**

[Plaintiff] alleges that [his/her] supervisor [name of supervisor], subjected [him, her] to harassment. It is for you to decide whether [employer] is liable to [plaintiff] for the actions of [supervisor].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] was subjected to [describe activity] by [supervisor], because of [plaintiff's] [sex] [race] [national origin];

Second: [Supervisor's] conduct was not welcomed by [plaintiff];

Third: [Plaintiff's] submissions to [supervisor's] conduct was an express or implied condition for receiving a job benefit or avoiding a job detriment;

Fourth: [Plaintiff] was subjected to an adverse "tangible employment action"; a tangible employment action is defined as a significant change in employment status, such

(continued...)

are premised on the United States Supreme Court's decision in *Burlington Indus., Inc. v. Ellerth*.[6] In that case, the Court recognized that the general rules of scope of employment and *respondeat superior* are not directly transferable to cases where an employer is to be held liable for an action of one of its employees. The Court's holding states;

> We adopt the following holding in this case and in *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), also decided today. An 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, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally

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[5](...continued)
as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits; and

Fifth: [Plaintiff's] [rejection of] [failure to submit to] [supervisor's] conduct was a motivating factor in the decision to [describe alleged tangible employment action].

If any of the above elements has not been proved by the preponderance of the evidence, your verdict must be for [defendant] and you need not proceed further in considering this claim.

[6] 524 U.S. 742 (1998).

> suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[7]

Miller's evidence showed no tangible job action of any kind was taken against her: no wage reduction, no demotion, no discharge or undesirable re-assignment, etc. In that circumstance, therefore, the defenses came into play. The evidence showed the State Police had an anti-sexual harassment policy which had been in effect for several years and of which Miller was aware before all of this business with Laird started. Several years before, she had made a complaint of sexual harassment which proved to be unfounded but it showed she knew how to mention this to higher authorities. And the day she complained about Laird to internal affairs, Laird was suspended. There was no evidence that prior to that date any third party in the State Police had any information on what was going on between Laird and Miller.

Somehow Miller continues to overlook two significant matters, which is reflected in her current motion. The first is, to hold the State Police liable or the State of Delaware, it must be shown that there was some detrimental action involving Miller's job because of Laird's actions. The *Burlington* case makes that clear. In short, there must be a *quid* for the *pro quo*. Miller established none. If believed, she may have made out a case of harassment against Laird but that is not enough to make her employer liable. *Burlington*

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[7] *Burlington Indus., Inc.*, 524 U.S. at 764-765.

says to hold the employer liable, there has to be a detrimental employment action, or, if not, the employer is entitled to assert defenses.

What Miller seeks to do is to simply hold the employer - the State - liable "merely" because of Laird's reprehensible conduct. But she ignored the point the United States Supreme Court made in *Burlington*. The action of the harassing employee is not in the scope of employment, or in the best interest of the employer. That is why more is needed to hold the employer liable and that is where the defenses are implicated.

Miller's real complaint is that there is a substantive difference between the opening instruction and the final one. An examination of the pertinent portions of those instructions renders this claim meritless. In the opening instruction, this Court said:

> Third, Captain Laird's sexual harassment altered the conditions of Miss Miller's employment or adversely affected her status as an employee.[8]

In its closing instruction the Court said:

> Fifth, Ms. Miller was subjected to an adverse "tangible employment action"; 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 significant change in benefits.[9]

The Court simply fails to see the difference. Miller has made two further arguments. At the office conference reviewing the draft of the Court's final instructions

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[8] Pl.'s Proposed Jury Instructions, Docket No. 163, p. 10.

[9] Instructions to the Jury, by Herlihy, J., dated Aug. 1, 2012.

she argued that she tried her case based on that opening instruction. The Court finds this not to be credible. First, it was not until the day of jury selection began that she knew: (1) the Court would be giving an instruction; and (2) which one of the two submitted, the Court would give. Second, it is doubtful she changed her whole case after all the time preceding the start of the trial and on an hour or two's notice. Further, that third element in her charge which the Court used merely stated in shorter terms what is in the fifth element in the Court's final instruction. She knew from her own instruction she had to meet that third element, along with the two others, to prevail. She failed to do that.

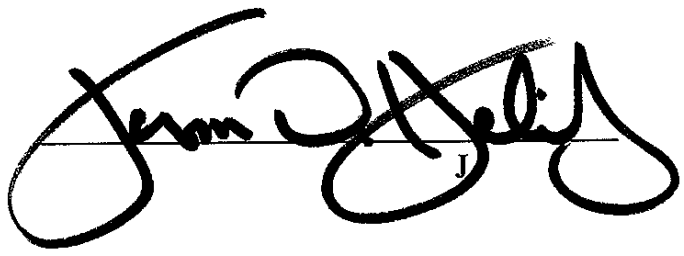
The second and strangest argument she makes is that she did not seek to show her work was affected in any way. Yet her own instruction said she had to. What must be kept in mind is the nature of this claim was not one of a hostile work environment or one of retaliation.

Miller simply did not make her case based even on her own charge of *quid pro quo* sexual harassment.

Conclusion

For the reasons stated herein, plaintiff Diana L. Miller's motion for a new trial is **DENIED**.

IT IS SO ORDERED.



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