

FARAGHER V. CITY OF BOCA RATON:
A PERSONAL ACCOUNT OF A
SEXUAL DISCRIMINATION PLAINTIFF

*Beth Ann Faragher**

INTRODUCTION

\$1.00! That was the monetary award in dispute when the United States Supreme Court heard my case.

My case, *Faragher v. City of Boca Raton*¹, was heard at the United States Supreme Court on March 25, 1998.² The monetary issue was whether or not I should be awarded \$1.00 under Title VII of the Civil Rights Act of 1964.³ The case, however, was about much more than \$1.00. It was about dignity, fairness and treating people with respect.

My parents, William and Beverly Faragher, instilled in their children the values of honesty, integrity, and fairness. They encouraged me to fight for these values. My interest in pursuing a legal education was motivated, in part, by a desire to address and relieve social injustice.

Ironically, as an ocean lifeguard for the City of Boca Raton, Florida, I experienced first hand the type of harassment that countless employees face every day in this country. At first I saw myself as nothing more than a victim, but then I realized that it was my opportunity to address a pervasive wrong that exists in our society.

I never set out to make a name for myself through my case. Initially, my goal was to right a wrong which existed in my ocean lifeguard

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1. 524 U.S. 775 (1998).

2. This article will describe my personal experience as a plaintiff in a sexually harassing work environment and court case that eventually was heard by the United States Supreme Court. While it will briefly discuss the opinions from the trial court, appellate court and Supreme Court, it is not meant to be a legal analysis.

3. 42 U.S.C. § 2000e-2 (a)(1) (2000).

community. It exceeded my greatest expectations and became a national issue of human dignity and civil rights.

THE FACTS

Background

I was born and raised just outside of Cleveland, Ohio as the middle child of five. During the summers, with five children under foot at home, my mother excelled at motivating us to play outside and participate in sports. Our choices during the summer months were to attend swim team practice every morning, or stay home and help with chores. Needless to say, my siblings and I swam daily during the summers. The competition was friendly, and the exercise was a great way to tire out the five of us so we did not drive Mom totally crazy.

At sixteen, the natural progression in my swimming career was lifeguarding. During high school I lifeguarded at local pools and lakes in the Cleveland area. When I moved to Boca Raton, Florida to attend college, lifeguarding helped me pay for college expenses.

Lifeguarding on the ocean was quite different than lifeguarding at a pool or lake. In order to qualify for the open ocean lifeguard position, I passed a rigorous physical test that included a 500 yard ocean swim in fewer than nine minutes, a mile run in fewer than seven minutes, and ocean rescues of drowning "victims." After passing the test in 1985 I started lifeguarding for the City of Boca Raton; I was nineteen years old. At that time there were only two other female lifeguards in a squad of approximately forty-five men due to the rigorous physical testing requirements.

At first ocean lifeguarding seemed like a dream job. The pay was great, at approximately one and one-half times the then current minimum wage. The hours were great; we were paid for an eight-hour day that included a one-hour morning workout and one-hour lunch break. The environment was great; I was working on the beach in beautiful, sunny south Florida . . . who could ask for more?

Boca Raton Marine Safety Division

The hierarchy of the Marine Safety Division (also known as the "beach patrol") of Boca Raton was similar to a military organization. Lieutenants supervised the basic ocean lifeguards. Captains supervised

lieutenants, and the Chief supervised the Captains. When I started at the City of Boca Raton, David Silverman was a Marine Safety Lieutenant and William “Bill” Terry was the Marine Safety Chief.

The typical lifeguard morning routine included clocking in shortly before the hour, completing a thirty to forty minute workout, and showering before the morning meeting that started at a quarter to the hour. Either the Chief or a Captain conducted the morning meetings at Marine Safety Headquarters. Headquarters was a small building consisting of a locker room, a small meeting room where the lifeguard tower assignments were posted, a bathroom with one shower and one toilet, and an office where the assigned captain(s) and/or chief worked. All of the lifeguards shared the same locker room and bathroom.

The Harassment

The sexual harassment began almost immediately after I started lifeguarding in the fall of 1985.⁴

David Silverman

David Silverman, a big man at approximately six feet two inches and 225 pounds, pounded on the bathroom door when female lifeguards were showering, asking to come in and shower with us. In the beginning the female lifeguards showered alone. When Silverman’s behavior continued, the other female lifeguards and I began showering together for protection. Can you imagine how this made us feel? We were old enough to vote and to join the military, but we were too afraid to shower alone in our place of employment for fear of harassment and possible sexual assault.

Silverman repeatedly propositioned me to shower with him. He stated, “Come on Beth, shower with me.” The answer was always, “NO!”

Silverman owned a pickup truck with a camper on the back covering a bed inside. On rainy days, Silverman asked me to join him in the back of his truck where he spent much of his time instead of sitting at his assigned lifeguard tower. Silverman then predicted that his chances of getting a “blow-job” were the same as the chances of rain, insinuating

4. I will describe some of the very explicit and crude language to which I was exposed, and I apologize if it makes any of my readers feel uncomfortable. Unfortunately my personal experience included being subjected to such language.

that he would receive oral sex from me. These degrading comments were often made in front of other lifeguards. They embarrassed and humiliated me.

On any given day, David Silverman supervised a beach with four to eight lifeguards assigned to it. He counted the number of female lifeguards assigned to his beach by saying he had twice as many "tits." For example, on a day he had three female lifeguards assigned to his beach, he excitedly stated, "I have six tits on my beach today."

Silverman negatively commented to me about the size and firmness of my breasts, as well as approving of my "nice ass" and legs. In my tower, he remarked to me about other women's "tits." His behavior was inappropriate and distracting. While watching the water and beach to protect lives, I was subjected to Lieutenant Silverman's degradation of other women and myself.

At Marine Safety Headquarters in a group of male and female lifeguards, this supervisor pantomimed performing oral sex on a woman by throwing his head back and flicking his tongue in the air. I was absolutely offended.

David Silverman was not only crude and inappropriate with me but with other female lifeguards as well. As a new female lifeguard sat at her assigned tower on her first day of work, Silverman approached her and stated, "I want to lick your clit."

To another female lifeguard, in regard to a beach patron, Silverman stated, "I'd love to eat between her legs." He commented about this female lifeguard's nipples being obvious under her bathing suit when it was cold. Silverman subjected every female lifeguard to this type of behavior and language.

The most egregious and frightening incident I experienced with this supervisor occurred while I did a beach run as a morning workout. Silverman ran up behind me, tackled me, and rolled me in the sand. He said "If you had tits, I'd do you in a minute." Upset and humiliated, I ran crying to a lifeguard captain whom I trusted. While sympathetic, he discouraged reporting the behavior to City Hall, and in fact, he cautioned against it. As a result, I learned to live with the egregious behavior and comments.

At the time of these incidents, I was between nineteen and twenty four years old; Silverman was in his thirties. His behavior was disgusting, intimidating, and wholly offensive. In 1989, while harassing the other female lifeguards and myself, Silverman was promoted to Captain in the City of Boca Raton Marine Safety Division.

William Terry

Bill Terry was Chief of the Marine Safety Division for the City of Boca Raton throughout my employment from 1985 to 1990. He was “god” on the beach patrol and supervised all of the lifeguards, lieutenants, and captains. Since the City of Boca Raton gave him almost unlimited authority over the beach patrol, he knew he could get away with harassing the female lifeguards. Terry was in his late thirties or early forties. He was old enough to be my father, and definitely old enough to know better.

Terry touched, grabbed, and stroked various body parts of myself and the other female lifeguards including our buttocks, breasts, thighs, waists, necks, and shoulders. Just about any body part was fair game to Bill Terry. None of this contact was consensual; none of it was encouraged.

Nancy Ewanchew, another female lifeguard, worked for the City of Boca Raton from 1987 to 1989. After a workout one day, she drank from the water fountain at Marine Safety Headquarters while wearing her city issued bathing suit. Terry came up behind her and rubbed his genitals against her buttocks, simulating sexual movement.

Bill Terry used extremely derogatory language to describe female lifeguards, including “bitch,” “stupid,” “slut,” and “cunt.” His language indicated his absolute lack of respect for women. This was further demonstrated when a female lifeguard expressed her interest in applying for the open lieutenant’s position, a level above the basic ocean lifeguard in the beach hierarchy. Terry stated, “It will be a cold day in hell before I promote a woman to lieutenant.” In the five years I worked on the beach patrol, there were no female lieutenants, much less female captains or chiefs.

Bill Terry and David Silverman both disparaged women by often describing them in terms of their body parts. Bill Terry critiqued my breasts, stating I was “man like” and “didn’t have a chest.” When speaking to another female lifeguard, Terry stated, “When God was handing out tits, you must have been first in line.” While a woman interviewed for an open ocean lifeguard position, Terry asked her, “So, are you going to fuck all the [male lifeguards] like the rest of the girls [female lifeguards]?” This was incredibly insulting because I dated one male lifeguard during my five years with the City of Boca Raton. Besides, it was none of Bill Terry’s business whom the female lifeguards dated.

Personal Effects on Me

When these incidents occurred, I was upset, humiliated, embarrassed, afraid, and angry. The other female lifeguards and myself were treated as objects, less than animals, with absolutely no respect. My self-esteem suffered due to the behavior of these two supervisors.

In an effort to prevent further harassment, I made myself look androgynous. I stopped shaving my legs. I stopped wearing makeup. I hid my body by covering up with towels or old gray t-shirts. By covering up the city issued red swimsuit I hoped the harassment would stop. My efforts failed and the harassment continued.

In another effort to avoid harassment, I avoided Terry and Silverman by staying away from the Marine Safety Headquarters unless absolutely necessary. When my presence was required, I kept track of Silverman and Terry's whereabouts in order to stay out of their reach. During morning meetings, I hid in the corner with my back to the wall to avoid unwanted touching and grabbing.

I vented my anger and frustration by hitting the heavy bag in the garage at headquarters. I believed it was all I could do about the harassment by my two supervisors.

Today, fifteen years after leaving the City of Boca Raton, I am still embarrassed and humiliated and angry about the incidents of harassment I suffered.

Reasons for Not Formally Reporting

Many people wonder why I did not formally report the harassment. There were several reasons. When I reported some of the behavior to a lifeguard captain, he discouraged reporting the incidents to City Hall, and in fact, cautioned against it. The supervisors to whom I reported were the ones harassing me. I feared losing my job. Bill Terry was "god" on the beach patrol and those who crossed him suffered retaliation such as bad schedules, poor tower assignments, or termination.

I was unaware of any sexual harassment policy or reporting mechanism during the time I worked for the City. In 1986 the City of Boca Raton issued a sexual harassment policy, but I never saw it. The policy was never posted anywhere in Marine Safety Headquarters. Hung in the locker room at headquarters, however, was a poster of a semi-nude woman clothed only in a sheer negligee. This showed me how harassers felt about women, and strongly indicated that reporting the harassment would be unwise. Finally, as a woman in a very male oriented

profession, I believed I had to “put up” with the behavior if I did not want to be labeled a “sissy.”

Why I Stayed

Another common question is, “You worked there for five years. Why did you stay?” If these two supervisors had not worked for the City of Boca Raton, I might still be lifeguarding. It was an ideal job. We worked six hours but were paid for eight. The pay was great. The lifeguards were wonderful people except for these two supervisors. Some of my closest friends today are lifeguards I met while working for Boca Raton.

The City’s Investigation and the EEOC

Nancy Ewanchew, my co-worker in Boca Raton from 1987 to 1989, started a new lifeguarding job for Palm Beach County in 1989. In the spring of 1990, one year and one day after she started her new position, she wrote to the City of Boca Raton, reporting that the female lifeguards were being harassed by two of their supervisors. She waited to write her letter because of her one-year probationary period at her new job. She feared Bill Terry would make a phone call, and cause her to lose her job if she were still in the probationary period. Ms. Ewanchew also feared Bill Terry would get her blacklisted as a lifeguard in south Florida.

The City of Boca Raton started its investigation, and called the female lifeguards to City Hall one at a time. We were given no notice and thus were unable to have the attorney, with whom we were consulting, present with us. We were scared to death! David Silverman, one of my harassers, came to my tower and told me to report to City Hall. He knew exactly why I was called to City Hall and was afraid I would tell the truth. He stated to me “I guess you’re going to do what you have to do.” It was very intimidating and absolutely inappropriate!

At City Hall, I was questioned in a room with approximately four men I had never met. They wore business suits while I wore my city-issued red bathing suit, a t-shirt and shorts. They asked about the extremely embarrassing and demeaning things that had happened to me. It was awful!

Through the investigation, the city determined that inappropriate behavior had occurred. As a result, Silverman was docked forty hours vacation time, and Terry was docked one hundred and sixty hours vaca-

tion time. I was upset about the “discipline,” believing it was merely a slap on the wrist for very egregious behavior. I was also angry that both of my harassers still worked for the City of Boca Raton, making a very decent living. Disagreeing with the City’s resolution of the matter, I filed my complaint with the Equal Employment Opportunity Commission (“EEOC”) in the winter of 1990.

Around the same time, Nancy Ewanchew and I attended a sexual harassment seminar sponsored by the National Organization for Women. We met William “Bill” Amlong, who became our attorney. He was very caring and sympathetic about our situation, and extremely knowledgeable about sexual harassment law.

After the two-year long EEOC process, I obtained my Right to Sue letter. Bill Amlong filed a complaint in federal district court in Miami in early 1992 on behalf of Nancy Ewanchew and I. The other female lifeguards were invited to join the lawsuit but they all declined. I believe they were scared since most still worked for the City of Boca Raton.

By this time, I had moved back to Cleveland, Ohio and was attending law school at Case Western Reserve University. Due to our lawsuit, I took Employment Law as an elective course. Although I was 1,100 miles away from Boca Raton, the five years of harassment I suffered never left myself. When I thought about it, my emotions varied from depression to anger. I felt depressed because of my helplessness at the time and because of the damage done to so many others and me. I felt angry because the two supervisors had harassed us, gotten away with it, and still worked for the City of Boca Raton, several years after the fact.

THE LEGAL CASE

Trial

Prior to trial, I flew to Florida several times for my deposition and a settlement conference. After graduating from law school in 1993, I moved to Colorado and began working for the Denver municipal public defender’s office.

In June 1994 Nancy (Ewanchew) Oakland and I knew that our sexual harassment case would go to trial soon but we did not have an exact date. One Monday morning, I was working in Denver County Court, preparing to proceed to jury trial with my client. A colleague came and informed me that I must be in Miami the next day at 9:00 a.m. for the start of my federal sexual harassment trial. The case with priority settled

so our trial would start the next morning. Fortunately, my colleagues were able to cover my public defender cases while I caught a flight to Florida, as it would not have been wise to tell the federal court to wait.

The trial lasted four days in the United States District Court for the Southern District of Florida. Our witnesses included five other female lifeguards, the former male lifeguard captain to whom I went crying after I had been tackled, Nancy (Ewanchew) Oakland, and myself. The defense case included testimony from David Silverman and Bill Terry, who were both individual defendants. They took the stand in federal court, swore to tell the truth, and then denied anything had ever happened. The last thing we expected was the truth, and they did not disappoint us!

The defense case suggested that the female lifeguards had made up the entire case. It was ridiculous to think I would have pursued a fictional case for four years, paid for several expensive trips to Florida, and took time off from my new job in Denver. If I had made it up, I would have come up with a much more colorful story.

The federal magistrate judge found our witnesses quite credible, Silverman and Terry less than credible and ruled in our favor. By winning we felt vindicated. After pursuing the case for four years, we had proven there was sexual harassment.

Under my Title VII hostile work environment claims, the trial court found the City of Boca Raton had constructive knowledge, and therefore indirect liability, of harassment because of its pervasiveness.⁵ The court further found liability because the supervisors were agents of the City, and based on knowledge by another agent of the City, the lifeguard captain to whom I reported Silverman's behavior.⁶ Since the 1991 amendments to the Civil Rights Act were not applicable, as the conduct occurred between 1985 and 1990, the court awarded me \$1.00 in nominal damages.⁷ This meant the City of Boca Raton would be responsible for paying my attorneys' fees and costs.⁸

5. Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1563 (S.D.Fla. 1994).

6. *Id.* at 1564.

7. *Id.* at 1565.

8. As for our other claims, Nancy (Ewanchew) Oakland was awarded \$35,000 in compensatory damages for her battery claim against Bill Terry and \$2,000 in punitive damages against Bill Terry. *Id.* at 1568. I was awarded \$10,000 in compensatory damages on my 42 U.S.C. § 1983 claim against Silverman and Terry, jointly and severally, and \$500 in punitive damages on my battery claim against Terry. *Id.*

Appeal

Many plaintiffs do not realize that their cases are not always finished after a trial. In many cases, one or both sides appeal. That is what happened in my case. We appealed the trial court's denial of our state law claims, and the City appealed on the trial court's determination of liability under Title VII of the Civil Rights Act. The Eleventh Circuit Court of Appeals originally issued a panel opinion.⁹ However, that was vacated and a rehearing en banc was granted.¹⁰ The first issue on appeal was whether the City of Boca Raton could be held "liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of [me], regardless of its actual or constructive knowledge of that harassment."¹¹ The second issue was "whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of [me]."¹²

The Eleventh Circuit reversed the trial court's decision of my Title VII claim.¹³ It held that the City of Boca Raton had no actual knowledge of the harassment, and therefore was not directly liable under Title VII.¹⁴ The Eleventh Circuit also held that the supervisors were acting outside the scope of their employment and had not been assisted by their agency relationship with the City, and thus were not vicariously liable under Title VII.¹⁵ This meant my \$1.00 award was taken away, and my attorney's fees and costs would not be paid by the City of Boca Raton.

Certiorari and the Media

We filed for certiorari to the United States Supreme Court. As an attorney, I knew the chances of cert being granted were about the same chances of me winning the lottery. One Friday in mid-November 1997, I returned to my office after finishing my public defender docket. My paralegal Neil informed me I had a phone call. I did not recognize the name but that was common due to my large caseload. It was a reporter from a Chicago paper who asked how I felt about the Supreme Court granting certiorari on my case. I was shocked and said, "What are you

9. Faragher v. City of Boca Raton, 76 F.3d 1155 (11th Cir. 1996).

10. Faragher v. City of Boca Raton, 83 F.3d 1346 (11th Cir. 1996).

11. Faragher v. City of Boca Raton, 111 F.3d 1530, 1534 (11th Cir. 1997).

12. *Id.*

13. *Id.* at 1539.

14. *Id.*

15. *Id.*

talking about?" I had not yet received Bill Amlong's messages informing me that cert had been granted. I was thrilled!

The media became overwhelming. I accepted the guidance and expertise of the National Organization for Women to ensure my case received a great deal of public exposure. While it felt like my fifteen minutes of fame, I believed it was a worthwhile cause. Win or lose, I thought disseminating my story would lead to increased knowledge and thus, advancement in the area of sexual harassment prevention. By publicly sharing my embarrassing and degrading experiences, I hoped to encourage others to come forward and report their own harassment situations. This became my mission and an opportunity for me to relieve social injustice.

Numerous reporters asked if I would travel to Washington, D.C. to hear the oral arguments on my case. After considering it, I decided to attend as it was a once in a lifetime opportunity. How many attorneys get to watch their cases argued before the United States Supreme Court? Bill Amlong suggested I get sworn in to practice before the United States Supreme Court on the same day. I completed my paperwork, paid one hundred dollars, and sat right up front with the other inductees.

Supreme Court

My sister and best friend, Kit, traveled to Washington, D.C. with me. We stayed with our friend Doug Clancy, an attorney who was also sworn into the United States Supreme Court. On March 25, 1998, Kit, Doug and I arrived at the Supreme Court and walked around looking for the inductee entrance. As we passed the front of the building, a gentleman with students saw me and said, "There she is. There's Beth Ann Faragher. Good luck Ms. Faragher." I felt famous! Kit and Doug were incredulous at a stranger recognizing me.

In the courtroom, many of the reporters, whom I had met at earlier press conferences, recognized me; they whispered and waved. As we were sworn in and my name was called, Justice O'Connor recognized it and leaned over to whisper to Justice Stevens. She knew my case would be heard in just a few moments. I was elated; my feet did not touch the ground!

Listening to the arguments felt like an out of body experience. Nine of the most powerful people in the nation, if not the world, were talking about what had happened to me. The Justices were proper when discussing the incidents of harassment, and did not use graphic details. Instead, Justice Ginsburg described the acts of my harassers as "the

deeds.” The focus of the Justices was not my case, but what should be done to prevent others from suffering through the type of harassment that I had endured.

The Holding

The United States Supreme Court held that under Title VII “[a]n 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.”¹⁶ When there is no tangible employment action, such as discharge, demotion, or undesirable reassignment, taken against the employee, an employer can raise a two part affirmative defense to liability or damages, requiring proof of both elements by a preponderance of the evidence.¹⁷ The employer must prove it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and “that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁸ When a tangible employment action has occurred, the affirmative defense is not available to the employer so as to subject it to vicarious liability.¹⁹

Since no tangible employment action was taken against me, the City of Boca Raton had, in theory, the possibility of raising the affirmative defense. In this vein, the Supreme Court stated: “While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed.”²⁰ The City of Boca Raton failed to disseminate its sexual harassment policy to the Marine Safety employees, failed to oversee Marine Safety supervisors’ conduct, and failed to provide a mechanism for bypassing harassing supervisors in the complaint process in its sexual harassment policy.²¹ As a matter of law, the Supreme Court held “the City [of Boca Raton] could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct.”²² In addressing the second part of the affirmative defense, the Supreme Court held there was no reason to remand to determine my ef-

16. 524 U.S. 775, 807 (1998).

17. *Id.*

18. *Id.*

19. *Id.* at 808.

20. *Id.*

21. *Id.*

22. *Id.*

forts to mitigate damages since I had only been awarded nominal damages of \$1.00.²³ The decision of the District Court awarding me \$1.00 under Title VII of the Civil Rights Act was reinstated.²⁴

Present Effects

I believe the Supreme Court's ruling in my case is helping to prevent sexual harassment by requiring employers to take affirmative preventative steps, such as implementing formal policies and sensible complaint procedures.

My law practice includes representing individuals in employment cases. These cases are special to me as I was once a plaintiff in their shoes and understand what they have lived through. Representing others who have suffered discrimination allows me to help alleviate social injustice.

As of the time of this writing, I have still not received my dollar from the City of Boca Raton. If and when I do receive my \$1.00, I will frame it on my office wall as a reminder that we can make a difference.

THE CHALLENGE

Every person is provided an opportunity to make a positive difference in this world. Many times, the opportunity comes in an unexpected manner, time, or place, and is difficult to identify. The key is to summon up the courage to follow what we believe in and to protect human dignity and rights.

Attorneys have the ability to assist others through the law, to better individual lives, and therefore, the lives of us all. We need to recognize these opportunities for ourselves, and to support others presented with these opportunities, and the hardships involved. I could not have done this alone and know that others cannot. We all need to help where we can.

23. *Id.* at 809.

24. *Id.* at 810.