

Ackel v. National Communications, Inc.
339 F.3d 376 (5th Cir. 2003)

In this sexual harassment/retaliation case, the Fifth Circuit Court of Appeals (which includes Texas) held that the defense is unavailable when the harassing employee is the “proxy” for the employer. In *Ackel*, four female plaintiffs alleged that National’s president engaged in sexually harassing behavior and that the company retaliated against them for engaging in protected conduct.

While accepting National’s argument that the four plaintiffs had not established a tangible job detriment, the Fifth Circuit panel held that an employer may not avail itself of the Faragher/ Ellerth affirmative defense in two distinct circumstances: (1) when a tangible job detriment (e.g., termination, suspension, demotion, transfer) has occurred, **or** (2) when the harassing employee holds a sufficiently high position in the management hierarchy so as to speak for the corporate employer.