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THE FIRST BITE IS FREE: EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

Joanna L. Grossman*

INTRODUCTION

The common law extends to a dog the "prestigious distinction" of being entitled to one bite before its owner becomes strictly liable for damages.¹ While this common law privilege for dog owners has been largely abrogated by statute,² the Supreme Court recently adopted a variation of it for employers of supervisors who sexually harass their subordinates.³ That variation, ostensibly grounded in traditional agency principles, generally entails that employers are now liable for the hostile environment created by their supervisors, for the most part, only after being given a chance to react and failing to do so. In other words, for employers of harassing supervisors, as for the dog owners that preceded them, the first bite is free.

Workplace sexual harassment is not a new phenomenon.⁴ Female

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1. See *Turner v. Irvin*, 246 S.E.2d 127, 128 (Ga. App. 1978) ("Dogs alone (maybe cats) have been singled out among domestic animals, even where they are wrongfully in the place (violating leash law) where they do their mischief, as attaining the prestigious distinction of being entitled to the 'first bite.'"); see also *King v. Breen*, 560 So. 2d 186, 188 (Ala. 1990) ("Under the traditional common law concerning injuries inflicted by domestic animals, the plaintiff had to allege and prove that the animal's owner had prior knowledge of the animal's vicious propensities."); *Westberry v. Blackwell*, 577 P.2d 75, 76 (Or. 1977) ("The general rule is that the owner of a dog or other domestic animal is strictly liable for injuries caused by the animal only if the owner knows or has reason to know of the animal's dangerous propensities.").

2. See, e.g., N.J. STAT. ANN. § 4.19-16 (West 1999) ("The owner of any dog which shall bite a person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness."); see also *Holland v. Buckley*, 305 So. 2d 113, 115, 119 (La. 1974) (overruling previous interpretation of Article 2321 of the Civil Code that the "dog gets the first bite free").

3. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

4. This article focuses primarily on sexual harassment in the workplace and the standards for employer liability. But sexual harassment is not confined to the workplace; schools, prisons, housing

slaves were certainly exposed to unwelcome sexual advances and often raped by their masters;⁵ female industrial workers in the early twentieth century faced a barrage of sexual comments, threats, and attacks in the factories where they worked;⁶ and female clerical workers have long been chased around desks by the men in control of their economic destinies.⁷

Despite evolving ideas about sex equality and the advent of legal remedies for harassment, sexual harassment continues to plague many workers—most of them women⁸—and pose an intractable barrier to true workplace equality.⁹ The U.S. Merit Protections Board conducted the ear-

authorities, and other institutions are beginning to grapple with pervasive harassment and uncertain legal remedies. See generally Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817 (1991); Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); Kathleen Butler, *Sexual Harassment in Rental Housing*, 1989 U. ILL. L. REV. 175; Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061; Kathy Lee Collins, *Student-to-Student Sexual Harassment Under Title IX: The Legal and Practical Issues*, 46 DRAKE L. REV. 789 (1998); Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261 (1992); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999); Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987); Robert Brown, Jr. & Marjorie Van Ochten, *Sexual Harassment: A Vulnerable Area for Corrections*, CORRECTIONS TODAY, Aug. 1990, at 62.

5. See KERRY SEGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993*, at 16-17 (1994) (noting that sexual harassment and abuse of female slaves was rampant in America); see also LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 40-44 (1978) (describing sexual exploitation of slave women by their masters).

6. See SEGRAVE, *supra* note 5, at 61-80.

7. See *id.* at 103-22. For historical work on sexual harassment, see generally FARLEY, *supra* note 5; Elvia R. Arriola, *What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law, 1970-85*, 22 COLUM. HUM. RTS. L. REV. 21 (1990); Jill L. Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445 (1981).

8. See, e.g., BARBARA A. GUTER, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS* 47 (1985); J.B. Pryor, *Sexual Harassment Proclivities in Men*, 17 SEX ROLES 269, 269-71 (1987); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 J. AM. PSYCHOLOGIST 497 (1991).

9. Beyond the scope of this article are two ongoing feminist debates concerning why sexual harassment constitutes sex discrimination and how to conceptualize the harm of sexual harassment. For thoughtful and interesting dialogue on these two questions, see generally Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (offering an account of sexual harassment based on systematic efforts—using sexual and non-sexual conduct—to entrench masculine norms in the workplace); Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (conceptualizing sexual harassment as a dignitary harm); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762-70 (1997) (explaining harm of sexual harassment by "technology of sexism" that polices gender roles); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998) (conceptualizing sexual harassment around a theory of workplace competence as "designed to maintain

liest systematic survey of sexual harassment in the workplace and found that four out of ten women reported having experienced sexual harassment within the previous two years.¹⁰ Later surveys and studies have reached similar conclusions.¹¹ Lawsuits have revealed that no industry is immune: rampant sexual harassment has been found in the military,¹² in law firms,¹³ in car manufacturing plants,¹⁴ in pharmaceutical companies,¹⁵ on cruise ships,¹⁶ and in a wide variety of other settings.¹⁷

. . . highly rewarded lines of work as—bastions of masculine competence and authority”). See also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1-23 (1979) (conceptualizing sexual harassment in terms of institutional subordination of women to men in the workplace, motivated by the male impulse to exert sexual dominance over women).

10. See U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 33 (1981); see also Claire Safran, *What Men Do to Women on the Job*, REDBOOK, Nov. 1976, at 217.

11. See, e.g., FARLEY, *supra* note 5, at 18-21 (discussing studies and surveys finding widespread sexual harassment); GUTEK, *supra* note 8, at 42-60; U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE* (1988); Douglas D. Baker et al., *The Influence of Individual Characteristics and Severity of Harassing Behavior on Reactions to Sexual Harassment*, 22 *SEX ROLES* 305, 305-06 (1990); Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, 47 *ARB. J.* 61, 61 (1992) (citing studies which estimate that 50 to 80 percent of female workers have been sexually harassed); Beth E. Schneider, *Consciousness About Sexual Harassment Among Heterosexual and Lesbian Women Workers*, 38 *J. SOC. ISSUES* 75, 83-85 (1982). The EEOC reports that sexual harassment complaints rose from 10,532 in 1992 to 15,222 in 1999, with the total monetary payout to claimants, based on administrative claims as opposed to litigation, rising from \$12.7 million to \$50.3 million during that same period. See U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges EEOC and FEPAs Combined: FY 1992—FY 1999* (visited Feb. 5, 2000) <<http://www.eeoc.gov/stats/harass.html>>.

12. See Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 *MIL. L. REV.* 1 (1993); *Pentagon Forgoes Inquiry of General*, *SUN-SENTINEL* (Ft. Lauderdale, Fla.), Apr. 15, 2000, available in 2000 WL 5653024 (discussing allegation of sexual harassment made by Army's highest-ranking female officer); see also *Specht v. Dalton*, No. 97-56744, 1999 WL 1038255 (9th Cir. 1999).

13. See, e.g., *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 541 (Cal. Ct. App. 1998) (affirming multi-million dollar judgment against law firm for sexual harassment of secretary by partner).

14. See, e.g., *Mitsubishi Harassment Settlement Approved*, *N.Y. TIMES*, June 26, 1998, at D20 (reporting that a district judge approved a payment of \$34 million by Mitsubishi Motors Corporation to settle a sexual harassment case brought on behalf of female factory workers by EEOC, following on the heels of a \$9.5 million payment to settle private sexual harassment lawsuits from other women in the factory).

15. See, e.g., Andrew Stephen, *Fondle a Woman, Pay \$250,000*, *NEW STATESMAN*, June 14, 1999, at 20 (reporting on pharmaceutical giant Astra's payment of \$10 million to settle a sexual harassment suit involving 120 complainants).

16. See, e.g., Douglas Frantz, *Cruise Line Reports 62 Alleged Sex Assaults Since '93*, *N.Y. TIMES*, July 14, 1999, at A14 (reporting that Carnival Cruise Lines, defending against a sexual harassment suit brought by a former employee, revealed 62 incidents of sexual assault on board its cruise ships in the past five years); Patricia King, *Love Just Wasn't In Their Stars*, *NEWSWEEK*, Dec. 21, 1998, at 57 (reporting on lawsuit against Crystal Cruises brought by gift-shop worker against

Changing attitudes and legal structures have not extinguished harassment in the workplace. However, a significant body of law—rooted in Title VII of the Civil Rights Act of 1964—that is designed to protect workers from sexual harassment has emerged. Arguably the most significant recent legal developments concern employer liability, for victims of harassment need to prove not only that they were harassed in violation of federal law, but also that someone should be held liable for the harassment.

In June, 1998, the Supreme Court issued two decisions, *Burlington Industries, Inc. v. Ellerth*¹⁸ and *Faragher v. City of Boca Raton*,¹⁹ that established new standards for employer liability for sexual harassment.²⁰ Although the two cases presented different questions and factual predicates, the Court adopted a unified holding with respect to employer liability for supervisor harassment. An employer is automatically liable for harassment culminating in a tangible employment action against the victim. However, when a harassing supervisor takes no tangible employment action against his victim, the employer's liability is subject to an affirma-

ship captain based on alleged sexual assault): The lawsuits seem to have only scratched the surface of the problem. *See, e.g., Douglas Frantz, On Cruise Ships, Silence Shrouds Crimes*, N.Y. TIMES, Nov. 16, 1998, at A1 (providing a special report finding a pattern of sexual harassment and assault and carefully planned cover-ups on many cruise lines).

17. *See, e.g., Melinda Ligos, Harassment Suits Hit the Dot-Coms*, N.Y. TIMES, Apr. 12, 2000, at G1 (describing proliferation of harassment suits against internet start-up companies, attributable in part to the "anti-corporate" structure and concomitant lack of policies and procedures common in the industry). Studies of particular workforces and institutions have also found the incidence of sexual harassment to be high. *See, e.g., Alice J. Dan et al., Sexual Harassment as an Occupational Hazard in Nursing*, 17 BASIC AND APPLIED SOC. PSYCHOL. 563, 567 (1995) (noting that 88.5% of nurses surveyed reported one or more incidents of harassment by physicians); Louise F. Fitzgerald & Alayne J. Ormerod, *Breaking Silence: The Sexual Harassment of Women in Academia and the Workplace*, in PSYCHOLOGY OF WOMEN: A HANDBOOK OF ISSUES AND THEORIES 553, 559 (Florence L. Denmark & Michelle A. Paludi eds., 1993) (estimating that 50% of female university students will experience sexual harassment at some point); Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 436 (1986) (reporting on higher levels of harassment in traditionally male occupations); Margaret Collinson & David Collinson, *"It's Only Dick": The Sexual Harassment of Women Managers in Insurance Sales*, 10 WORK, EMPLOYMENT & SOC'Y 29, 44 (1996) (reporting, based on qualitative analysis, widespread harassment of women in insurance sales, a non-traditional area of female employment); Ronnie Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1998, at 69 (reporting that 90% of large corporations have received complaints of sexual harassment).

18. 524 U.S. 742 (1998).

19. 524 U.S. 775 (1998).

20. A third decision from the October 1997 term established that same-sex sexual harassment may be actionable under Title VII provided the victim can prove that the conduct occurred "because of sex." *See Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 79 (1998).

tive defense based on the employer's efforts to prevent and correct harassment and the victim's unreasonable failure to take advantage of opportunities to avoid or mitigate harm.²¹ With that holding, the Supreme Court purported to establish a standard of liability more stringent for employers than one of mere negligence.²²

Many commentators interpreted the new standards as a blow to employers based on the perception that employers would now be held accountable for workplace harassment without regard to their culpability.²³ The thesis of this article is that the conventional wisdom with respect to *Faragher* and *Ellerth* is dead wrong. Those decisions, far from imposing additional liability on innocent employers, have instead created a virtual safe harbor that protects employers from liability unless their own conduct is found wanting. This protection for employers comes at a high price, depriving some victims of actionable sexual harassment of legal redress.

Part I of this article outlines the new standards for employer liability for supervisory harassment and their doctrinal underpinnings. The Court in *Faragher* and *Ellerth* noted that negligence provides a minimum standard of liability for harassment by any employee, but concluded that in addition employers can be held vicariously liable for supervisor harass-

21. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

22. There has been an onslaught of academic commentary on these decisions. See generally Francis Achampong, *Employer Liability for Hostile Environment Sexual Harassment by a Supervisor: A Critical Assessment of the Supreme Court's New Vicarious Liability Standard*, 28 SW. U. L. REV. 45 (1998); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999); Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55 (1999); Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517 (1999); B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1 (1999); Isabel M. Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999); Steven M. Warshawsky, *Ellerth and Faragher: Towards Strict Employer Liability Under Title VII for Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMPLOYMENT L. 303 (1999); Susan Webber Wright, *Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11 (1999).

23. See, e.g., Stephen Kent Madsen, *Placing the Blame Where it Does Not Belong: Burlington Industries, Inc. v. Ellerth*, 35 IDAHO L. REV. 311 (1999); Daniel J. Harmelink, Note, *Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment*, 84 IOWA L. REV. 561 (1999); Brian S. Kruse, Note, *Strike One—You're Out! Cautious Employers Lose Under New Sexual Harassment Law: Faragher v. City of Boca Raton*, 78 NEB. L. REV. 444 (1999); David James Schaibley, *See No Evil, Hear No Evil, Be Vicariously Liable*, 22 HAMLINE L. REV. 531 (1999); Angela Scott, *Employers Beware! The United States Supreme Court Opens the Floodgates on Employer Liability Under Title VII*, 24 S. ILL. U. L.J. 157 (1999).

ment based on the agency principle that holds masters liable for the actions of their servants when those servants are aided by the agency relation.²⁴ Because supervisors who harass their subordinates meet that test, agency principles justify holding employers vicariously liable for the harassment. However, the Court fell short of a pure rule of strict vicarious liability by providing employers with an affirmative defense in cases where the supervisor did not take any tangible employment action against the victim (namely, hostile environment cases).²⁵ An employer who can prove the affirmative defense can reduce its damages or escape liability altogether.²⁶

Part II of the article revisits these new standards as applied to a series of hypothetical cases and demonstrates that the standards of liability are far more indulgent to employers than an abstract discussion suggests. The effective standard of employer liability turns primarily on the construction of the affirmative defense. If the affirmative defense affects only the *remedies* available, then the standard adopted more closely approximates strict liability: the employer's after-the-fact efforts to stop the harassment and the victim's failure to complain do not negate liability, but instead mitigate damages. If, however, the affirmative defense negates *liability* even for the prior acts, then the effective standard becomes far more lenient to employers—hence, the first free bite.

The Supreme Court split the difference by dictating that the affirmative defense operates as a bar to liability where the plaintiff had the opportunity to prevent the harm, but only as a bar to damages where the plaintiff could have prevented some but not all of the harm.²⁷ In striking this compromise, the Supreme Court took one step away from the automatic liability standard it purported to adopt. The lower courts have taken an additional step. The distinction between these two categories has been obliterated by trial and appellate courts interpreting the affirmative defense who have held—expressly or impliedly—that it always operates to eliminate liability.²⁸

24. See *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 754.

25. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

26. See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765. Whether the affirmative defense affects damages or liability is examined in Part II, *infra*.

27. See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

28. See, e.g., *Watkins v. Professional Security Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999); *Scrivener v. Socorro Independent School District*, 169 F.3d 969 (5th Cir. 1999); *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999); *Wright v. Anixter, Inc.*, No. 98-17164, 1999 U.S. App. LEXIS 19962 (9th Cir. Aug. 18,

Part III critiques the new standards in theory and practice. The Supreme Court would have the affirmative defense sometimes affect damages and sometimes affect liability, while lower courts would have it only affect liability. However, this part of the article argues that the affirmative defense should never affect liability, but only damages. As applied, the affirmative defense undermines Title VII's goal of compensating victims of discrimination while not serving its deterrence rationale. Moreover, construing the affirmative defense to bar liability in some or all cases is inconsistent with the agency principles that underlie the rule, as well as the doctrine of avoidable consequences that the Court tried to implement. More troubling still, the rule unfairly penalizes women who do not file formal complaints, despite the well-documented reality that most sexual harassment victims do not report such conduct through internal grievance mechanisms. Taken together, these effects severely limit the ability of the *Faragher* and *Ellerth* scheme to ensure that women are compensated for the debilitating effects of sexual harassment or to make any meaningful contribution to women's equality in the workplace.

Finally, Part IV critiques the Court for ignoring the many instances in civil rights law where mitigating factors have not been permitted to affect the threshold finding of liability. This part proposes a legislative correction to the problem created by *Faragher* and *Ellerth*, one which strikes a reasonable compromise between the competing interests of employers and victims while remaining faithful to the underlying goals of Title VII.

I. THE NEW LAW OF SEXUAL HARASSMENT: IN THEORY

In *Meritor Savings Bank, FSB v. Vinson*,²⁹ the Supreme Court recognized that two varieties of sexual harassment—quid pro quo and hostile work environment—are forms of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.³⁰ Only briefly examining the issue

1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998); *Guerra v. Editorial Televisa—USA, Inc.*, No. 97-3670, 1999 U.S. Dist. LEXIS 10082 (S.D. Fla. June 4, 1999); *EEOC v. Barton Protective Svcs.*, 47 F. Supp. 2d 57 (D.D.C. 1999); *Hetreed v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. May 11, 1999); *Neal v. Electronic Data Sys. Corp.*, No. 5:98-CV-521-B4(2), 1999 U.S. Dist. LEXIS 9732 (E.D.N.C. 1999); *Russell v. American Eagle Airlines, Inc.*, 46 F. Supp. 2d 1330 (S.D. Fla. 1999); *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143 (E.D. Cal. 1998); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998).

29. 477 U.S. 57 (1986).

30. See *id.* at 65-66. Title VII of the Civil Rights Act of 1964 provides, in relevant part: [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or

of employer liability, the Court rejected a rule of automatic liability as well as one requiring actual notice.³¹ The Court then directed lower courts to look to agency principles to determine when, on this narrowed continuum, employers should be liable for sexual harassment in the workplace.³²

Armed with the Supreme Court's instructions, lower courts looked to somewhat amorphous "agency principles" to determine whether employers could or should be held liable for sexual harassment under various circumstances. Those courts ventured in multiple directions and reached wildly inconsistent results. Most of the resulting opinions varied as to (1) whether employers could be held liable for harassment about which they had no notice;³³ (2) what significance to give an employer's sexual harassment policy in determining that employer's liability;³⁴ and (3) how to treat plaintiffs who failed to make use of available policies and grievance procedures.³⁵ Those questions, and more, were answered by the Supreme Court in *Faragher* and *Ellerth*. This part will examine the two categories of actionable harassment and discuss the new rules of liability that apply to each.

to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994). The protection against sexual harassment is drawn from the language about discrimination in the terms or conditions of employment. *See, e.g.,* *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998); *Meritor*, 477 U.S. at 64.

31. *See Meritor*, 477 U.S. at 72.

32. *See id.* The Supreme Court interpreted Title VII, which defines the term "employer" to include "agents," to require this analysis. *See id.*; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763-64 (1998).

33. *Compare Sauer v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that an employer can be liable for supervisor harassment without regard to knowledge or recklessness in hostile work environment cases), *with Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (holding that the plaintiff must demonstrate that the employer had knowledge of hostile work environment to be found liable).

34. *Compare Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1450 (10th Cir. 1997) (stressing the importance of an employer's sexual harassment policy when determining liability), *with Kracun v. Iona College*, 119 F.3d 80, 89 (2d Cir. 1997) (noting that the existence of a sexual harassment policy with reasonable complaint procedures does not insulate an employer from liability).

35. *Compare Splunge v. Shoney's Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (suggesting that a plaintiff's failure to complain, notwithstanding the existence of an effective harassment policy, could insulate the employer from liability), *with Tipp v. Amsouth Bank*, 76 F. Supp. 2d 1315, 1329-30 (S.D. Ala. 1998) (finding plaintiff's failure to complain only impacts a jury's consideration of whether she acted reasonably; it does not establish that she did, in fact, act unreasonably).

A. Actionable Sexual Harassment

Since Catharine MacKinnon first coined the terms and the underlying analysis in 1979,³⁶ courts have distinguished between quid pro quo and hostile work environment harassment. Finding conceptual utility in MacKinnon's distinction, courts uniformly identified these two categories in analyzing harassment cases, though they disagreed about the dividing line. Those disagreements became important, ultimately, because courts applied different standards for employer liability depending on the type of harassment.

1. Classic Quid Pro Quo Harassment

Before *Faragher* and *Ellerth*, courts uniformly understood quid pro quo harassment to include the classic case where a supervisor takes an adverse action against a subordinate employee based on the employee's refusal to submit to sexual advances.³⁷ Almost as uniformly, courts agreed that employer liability for such harassment was automatic; that is, an employer would be held liable for quid pro quo harassment regardless of notice, the existence of an anti-harassment policy, or action taken in response to the harassment.³⁸ Courts differed, however, as to the treatment of two variations on the classic case: (1) when a supervisor threat-

36. See *MACKINNON*, *supra* note 9, at 32 (dividing "women's experiences of sexual harassment" into two categories: (1) harassment "in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity;" or (2) sexual harassment that is a "persistent condition of work").

37. See, e.g., *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 496 (7th Cir. 1997); *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995). Recently, some states have taken steps to criminalize quid pro quo harassment in employment. See, e.g., DEL. CODE ANN. tit. 11, § 763 (Supp. 1998); N.C. GEN. STAT. § 14-395.1 (1993); TEXAS PENAL CODE ANN. § 39.03 (West 1994); see also *Carrie N. Baker, Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. J. 213, 214 (1994) (advocating for treatment of quid pro quo harassment as a crime).

38. See, e.g., *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Kaufmann v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Horn v. Duke Homes*, 755 F.2d 599, 606 (7th Cir. 1985); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); see also *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986) (noting with approval the position taken by the EEOC in its brief before the Court that employers are strictly liable for quid pro quo harassment); EEOC, GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. § 1604.11(c) (1998) (imposing strict liability). *But see Sims v. Brown & Root Indus. Servs.*, 889 F. Supp. 920, 925-27 (W.D. La. 1995) (requiring proof of employer negligence as prerequisite to liability for hostile environment or quid pro quo harassment).

ens adverse job action in order to extort sexual consideration from an employee, but fails to carry out his threats despite the employee's refusal to submit, and (2) when an employee submits to a supervisor's sexual advances to avoid the threatened adverse action or obtain the promised benefit. Federal courts split on whether these "unfulfilled threats" and "submission" cases fit under the quid pro quo umbrella.³⁹

2. "New" Quid Pro Quo

The Court in *Ellerth* redrew the boundaries for quid pro quo harassment. The plaintiff in that case, Kimberly Ellerth, was a salesperson for Burlington Industries.⁴⁰ She was indirectly supervised by Ted Slowik, a mid-level manager with the authority to hire, promote, and fire employees subject to approval by higher-ups.⁴¹ Slowik allegedly subjected Ellerth to repeated unwelcome sexual advances and made several comments indicating that her success at Burlington was contingent on her submission to his advances.⁴² Although Ellerth refused his advances, Slowik never carried through with his threats.⁴³

The Court refused to treat unfulfilled threats as actionable under a quid pro quo theory of harassment, holding that:

[w]hen a plaintiff proves that a *tangible employment action* resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.⁴⁴

Thus under *Ellerth*, a simple threat of adverse action or a promise of benefits is not sufficient to transform a claim of hostile environment into a claim of quid pro quo.⁴⁵ Plaintiffs suing based on unfulfilled

39. Compare *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir. 1994) (holding that the mere threat of adverse action conditioned on sexual submission constitutes a quid pro quo violation of Title VII), and *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1292 (3d Cir. 1997) (same), and *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (same), with *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (only fulfilled threats constitute an actionable quid pro quo).

40. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

41. See *id.*

42. See *id.*

43. See *id.* at 748.

44. *Id.* at 753-54 (emphasis added).

45. See *Ellerth*, 524 U.S. at 754 (classifying Ellerth's claim as hostile environment because she alleged only unfulfilled threats); see also *Grozdanich v. Leisure Hills Health Ctr.*, 25 F. Supp. 2d 953, 968 (D. Minn. 1998) (stating that *Ellerth* "strongly suggests that unwelcome sexual advances,

threats, then, must use the hostile environment rubric and, as explained below, will be subject to a different rule of employer liability.⁴⁶

The principal substantive distinction between harassment resulting in a tangible employment action (*quid pro quo*) and that not so resulting (hostile environment) is that the latter requires a showing that the harassment was severe and pervasive, while the former simply requires evidence that some tangible employment action was taken based on an employee's refusal to submit to a supervisor's sexual advances.⁴⁷ Proof of a single threat that results in a tangible employment action will be sufficient to prove *quid pro quo* harassment in violation of Title VII,⁴⁸ whereas a single *unfulfilled* threat likely will not be sufficiently severe or pervasive to mount a hostile environment claim.⁴⁹

The proper treatment of submission cases after *Ellerth* is less clear. The petition for certiorari limited the question presented to whether the plaintiff stated a claim for *quid pro quo* harassment under Title VII when she "neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects . . . as a consequence of a refusal to submit

which are accompanied by an unfulfilled threat of tangible, adverse employment consequences, should be analyzed only as a form of hostile work environment harassment"); *Gallagher v. Delaney*, 139 F.3d 338, 346-47 (2d Cir. 1998); *Jones v. Clinton*, 990 F. Supp. 657, 669 (E.D. Ark. 1998); *Ponticelli v. Zurich Am. Ins. Group*, 16 F. Supp. 2d 414, 434 (S.D.N.Y. 1998).

46. See *infra* text accompanying notes 62-77.

47. The Court in *Ellerth* strongly cautioned against relying on categories of harassment for purposes of determining employer liability. See *Ellerth*, 524 U.S. at 751. However, the Court simply redefined the categories and then adopted its own "categorical" rule for liability. See *id.* at 753. Using the Court's analysis, the distinction between cases that constitute *per se* discrimination (*quid pro quo*) and those that require a showing of severity and pervasiveness (hostile environment) in order to be actionable is identical to the distinction between cases that merit the pure rule of automatic liability and those in which liability is limited by the affirmative defense. For both the threshold question of discrimination and the secondary question of liability, the line is drawn between cases in which a tangible employment action is taken against the victim employee based on her refusal to submit and cases in which no such action is taken. See *id.* at 753-54 (indicating where tangible employment action is taken, the harassment is actionable without showing it was severe and pervasive); see *id.* at 765 (indicating where tangible employment action is taken, employer is automatically liable, subject to no defenses). This syllogism results from the fact that when a supervisor takes a tangible employment action against an employee who refused his advances, the terms and conditions of her employment have been altered (which satisfies the threshold question of discrimination) and the supervisor has without question been aided by the agency relation in accomplishing the harassment (which satisfies the secondary question of employer liability).

48. See *id.* at 752 (noting that both theories state violations of Title VII but that hostile environment harassment must be severe and pervasive).

49. See *id.* at 754 ("We express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment [under a hostile environment theory].").

to those advances."⁵⁰ The Court limited its consideration to the facts before it in which the plaintiff refused her supervisor's advances, and no consensus on the proper characterization of submission cases has since emerged. The only court faced squarely with such a case refused to treat it as a quid pro quo harassment.⁵¹

The EEOC guidelines on employer liability, revised to reflect the holdings in *Faragher* and *Ellerth*, explicitly adopt the position that an employment benefit received as a result of submission to a supervisor's sexual advances qualifies as a "tangible employment action" for purposes of employer liability.⁵² According to the EEOC, "[t]he Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible."⁵³ Under this interpretation, where a subordinate employee obtains a promised benefit because of her submission, she need not prove the conduct was severe or pervasive.⁵⁴ Even the EEOC's broad interpreta-

50. Brief for Petitioner Burlington Indus., Inc. at i, *Ellerth* (No. 97-569); see also *Ellerth*, 524 U.S. at 761-47 ("We decide whether, under Title VII . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.").

51. See *Hetreed v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. May 12, 1999), at *13 (rejecting argument that submission to supervisor's unwelcome sexual advances constituted tangible job detriment under *Ellerth*). But see *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 133 (3d Cir. 1999) (stating in dicta that plaintiff alleging quid pro quo harassment must show either that she submitted or that tangible employment action was taken based on her refusal to submit); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 775 (W.D. Ky. 1998) (suggesting that quid pro quo category includes submission cases).

52. See EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 21, 1999) <<http://www.eeoc.gov/docs/harassment.html>> at 6

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. [hereinafter *EEOC Revised Policy Guidance*].

Id. The EEOC's revised guidance, issued June 21, 1999, supersedes previous guidance relating to employer liability.

53. *Id.* This interpretation of *Ellerth* is not universally shared. See generally Corporate Educational Services, *EEOC Explains When You're Liable for Supervisors' Sexual, Racial, Other Harassment*, 6 No. 5 Iowa Employment L. Letter 4 (1999) (taking the position that quid pro quo claims do not involve situations where employees submit and benefit from harassment); Janice Goodman, *Significant Development in Discrimination Law*, 591 PLI/Lit 601, 605 (1998) (questioning whether an employer is liable for quid pro quo conduct to which the employee submits and benefits from a supervisor's sexual harassment); see also John D. Canoni, *Sexual Harassment: The New Liability*, 46 RISK MGMT., Jan. 1, 1999, at 12 ("A tangible employment action must first be adverse. This . . . means that employees cannot complain if they receive job benefits from a harassing situation. . . .").

54. See *EEOC Revised Policy Guidance*, *supra* note 52.

tion of *Faragher* and *Ellerth* does not account for cases where the victim submits to avoid harm rather than to obtain a benefit. In such cases, the supervisor does not need to take a tangible employment action—beneficial or detrimental—for his threat has successfully coerced the victim's compliance.

The cornerstone of a new quid pro quo case is "tangible employment action," which the Supreme Court defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁵⁵ While the Court attempted to give content to its newly created category by explaining that a tangible employment action will often inflict direct economic harm,⁵⁶ lower courts are struggling with its precise contours. Certainly an employee who is fired suffers a tangible employment action, as does an employee who is demoted or suffers a reduction in pay or benefits.⁵⁷ But other, less drastic changes in working conditions are more difficult to categorize.⁵⁸ Early cases agree that neither constructive discharge⁵⁹ nor voluntary actions taken by a plaintiff (*e.g.*, requesting transfer to avoid contact with the harasser) will suffice⁶⁰ and suggest that the concept of tangible action is

55. *Ellerth*, 524 U.S. at 761. The plaintiff must also prove a causal link between the tangible employment action and her refusal to comply with the supervisor's sexual demands. *See, e.g.*, *Forshie v. Waterloo Indus., Inc.*, 178 F.3d 527, 530 (8th Cir. 1999) (reviewing, in light of *Ellerth*, evidence of causal connection between plaintiff's termination and her refusal to submit to supervisor's sexual demands); *Guerra v. Editorial Televisa-USA*, No. 97-3670-CIV, 1999 U.S. Dist. LEXIS 10082, at *19-21 (S.D. Fla. June 4, 1999) (rejecting quid pro quo type claim because plaintiff failed to link tangible employment action to rebuff of supervisor's advances).

56. *See Ellerth*, 524 U.S. at 762.

57. *See id.* at 761.

58. *Compare Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 144 (3d Cir. 1999) (stating that the "concept of a tangible adverse employment action is not limited to changes in compensation . . . [it] includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job"), *and id.* at 153 ("the loss of [plaintiff's] office, the dismissal of her secretary, the missing files, and the lapse assignments that led to a fifty percent pay decrease are tangible adverse employment actions under *Ellerth* and *Faragher*"), *with Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (holding, in light of *Ellerth*, that the imposition of additional work was not a tangible employment action because "she does not allege that she experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities"), *and Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (concluding that additional work does not constitute tangible job detriment under *Ellerth*).

59. *See, e.g.*, *Dunegan v. City of Council Grove*, No. 97-4039-RDR, 1999 U.S. Dist. LEXIS 18581, at *14-15 (D. Kan. Nov. 30, 1999); *Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 436 (2d Cir. 1999).

60. *See, e.g.*, *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 268 (5th Cir. 1998) (no tangible employment action where teacher voluntarily withdrew from extracurricular activities to avoid suspected harassment from school principal); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 776 (W.D. Ky.

being construed more narrowly in the wake of *Ellerth* than before.⁶¹

3. *Hostile Work Environment Harassment*

Sexual harassment that does not result in a tangible employment action is actionable, if at all, under a hostile work environment theory.⁶² Hostile environment harassment is based on the notion that unwelcome sexual conduct, if sufficiently severe or pervasive, violates Title VII because it alters the terms and conditions of employment on the basis of sex.⁶³

The Court in *Faragher* reviewed the course of and approved the rules governing hostile environment harassment in examining plaintiff Beth Ann Faragher's claim that she was subjected to a sexually hostile environment at the hands of her immediate supervisors while serving as a lifeguard for the City of Boca Raton.⁶⁴ A hostile work environment may be created by conduct of a sexual or sex-based nature,⁶⁵ whether verbal,

1998) (finding that a voluntary transfer to lower paying job does not constitute tangible employment action).

61. *Compare* *Savino v. C.P. Hall Co.*, 199 F.3d 925, 923 n.8 (7th Cir. 1999) (finding that a victim's transfer to another office is not a tangible employment action under *Ellerth*) with *Bryson v. Chicago State Univ.*, 96 F.3d 912, 917 (7th Cir. 1996) (finding tangible job detriment where university professor was stripped of one title and barred from committee work based on theory that "[d]epriving someone of the building blocks for . . . a promotion . . . is just as serious as depriving her of the job itself"), and *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to the particular situation.") (cited with approval in *Ellerth*, 524 U.S. at 761).

62. *See Ellerth*, 524 U.S. at 754.

63. *See id.* at 752. Harassment that is sex-based, as opposed to sexual, is equally a violation of Title VII. *See, e.g., Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) ("[C]onduct underlying a sexual harassment claim need not be overtly sexual in nature. Any unequal treatment of an employee that would not occur but for the employee's gender may . . . constitute a hostile environment in violation of Title VII."); *see also* *Schultz*, *supra* note 9, at 1769 (urging recognition of nonsexual forms of harassment in addition to or in place of sexual conduct); *cf. Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 79 (1998) (holding that the "because of sex" requirement may be met in cases involving same-sex harassment where conduct is motivated by animus or hostility to one sex).

64. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 810 (1998).

65. The *Faragher/Ellerth* holding has been applied to harassment on any unlawful basis, not just harassment based on sex. Indeed, the Court in *Faragher* commended lower courts for drawing on racial harassment cases in roping the contours of a sexually hostile environment claim. *See*, 524 U.S. at 788. Moreover, the EEOC's revised guidelines, which explicitly apply the standards of *Faragher* and *Ellerth* to all unlawful harassment—based on "race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability,"—are entitled to some deference. *EEOC Revised Policy Guidance*, *supra* note 52 ("[T]he standard of liability set forth in the decisions applies to all forms of unlawful harassment."); *see also Richardson v. New York State*

physical, or visual, that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Though a hostile work environment need not cause psychological, economic, or other tangible injury to be actionable,⁶⁶ it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁶⁷

The "severe or pervasive" standard is easy to articulate but difficult to apply.⁶⁸ Using an intensively fact-laden analysis, courts assess the totality of the circumstances, paying particular attention to the " 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"⁶⁹ Severity and pervasiveness tend to be inversely related.⁷⁰ That is, where the harassment is comprised of one or a few isolated incidents that are quite severe—such as a sexual assault or other offensive touching—a hostile en-

Dep't of Correctional Servs., 180 F.3d 426, 436 (2d Cir. 1999) (*Faragher* and *Ellerth* standards apply to race); *Allen v. Michigan Dep't of Corrections*, 165 F.3d 405, 410 (6th Cir. 1999) (race); *Breeding v. Gallagher*, 164 F.3d 1151, 1158 (8th Cir. 1999) (age); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 687 (8th Cir. 1998) (assuming without deciding that *Faragher* applies to claims brought under the Americans with Disabilities Act); *Guzman v. Abbott Labs.*, 59 F. Supp. 2d 747, 762 (N.D. Ill. 1999) (national origin); *Underwood v. Northport Health Servs.*, 57 F. Supp. 2d 1289, 1303 (M.D. Ala. 1999) (race).

66. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993).

67. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); see also *Harris*, 510 U.S. at 21-22 (stating that a sexually objectionable environment must be both objectively and subjectively offensive); *Faragher*, 524 U.S. at 788 (mandating that the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (stating that Title VII does *not* prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same and of opposite sex"); BARBARA LINDEMANN & DANIEL KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992) (noting that these standards exclude "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing").

68. *Faragher*, 524 U.S. at 786 (citing *Meritor*, 477 U.S. at 67 and *Henson*, 682 F.2d at 904).

69. *Id.* at 787 (quoting *Harris*, 510 U.S. at 23).

70. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) (holding that a plaintiff need not subject herself to lengthy abuse in order to recover for a hostile environment); *EEOC v. A. Sam & Sons Produce, Co.*, 872 F. Supp. 29, 35 (W.D.N.Y. 1994) ("In other words, infrequency, while relevant, is not alone dispositive. Rather, it is inversely related to the severity of the incidents. . . ."); *Canada v. Boyd Group Inc.*, 809 F. Supp. 771, 776 (D. Nev. 1992) ("The required showing of severity of conduct varies inversely with the required showing of frequency of conduct.").

vironment will mature long before the conduct becomes pervasive.⁷¹ The converse is also true: where the harassment manifests as a longstanding pattern of conduct, no individual incident need be particularly severe in order for the environment to be actionable.⁷² Either severe or pervasive

71. The EEOC has long held a single, severe act to be sufficient to create a hostile environment. See EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, 8 F.E.P. Manual 405:6681, 6691 (Mar. 19, 1990) [hereinafter *EEOC Policy Guidance*] ("The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. . . . If an employee's supervisor sexually touches that employee, the Commission normally would find a violation."); see also *Watkins v. Professional Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841, at *11 (4th Cir. Nov. 15, 1999) (finding "little doubt" that rape by a supervisor is sufficient to create an actionable hostile environment); *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 437 (2d Cir. 1999) (quoting *Tomka v. Seller Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995)) ("Our law is clear . . . that 'even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment.'"); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, J., concurring) ("I have no doubt that a single severe act of sexual harassment can amount to a hostile work environment actionable under Title VII. I see nothing in *Ellerth* or *Faragher* to negative this proposition."); *Creamer v. Laidlaw Transit Inc.*, 86 F.3d 167, 170 (10th Cir. 1996) ("[W]e agree, that an employee may prevail . . . if there was only a single incident of harassment which, standing alone, was sufficiently 'severe.'"); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (finding, impliedly, that a single incident where a supervisor picked up plaintiff and forced her face against his crotch created a hostile environment); *Grozdanic v. Leisure Hills Health Ctr.*, 25 F. Supp. 2d 953, 970-71 (D. Minn. 1998) (recognizing that sexual assaults, though few or one in number, may rise to the level of a hostile environment); *Fall v. Ind. Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 879 (N.D. Ind. 1998) (finding that a single assault, involving a groping of intimate areas, may create a hostile environment); *Russell v. Midwest-Werner & Pfeleiderer, Inc.*, 949 F. Supp. 792, 797 (D. Kan. 1996) (quoting *Creamer*, 86 F.3d at 170) ("An employee may prevail in an action for sexual harassment . . . if there was only a single incident of harassment which, standing alone, was sufficiently severe."); *Bedford v. Southeastern Pa. Transit Auth.*, 867 F. Supp. 288, 297 (E.D. Pa. 1994) ("[A] single act of harassment because of sex may be sufficient to sustain a hostile environment claim if . . . it may reasonably be said to characterize the atmosphere in which a plaintiff must work."); *Campbell v. Kan. State Univ.*, 780 F. Supp. 755, 762 (D. Kan. 1991) ("As such, a single isolated incident—while perhaps not pervasive—may nevertheless be so severe as to amount to an actionable violation of Title VII."); see also *Gloria Allred & John S. West, Sexual Harassment*, NAT'L L.J., Oct. 26, 1998, at B12 (arguing that *Harris*, *Meritor*, and *Faragher* "do not support the proposition that a single incident of sexual harassment is insufficient to support a Title VII claim"). But see *Clayton v. White Hall Sch.*, 875 F.2d 676, 680 (8th Cir. 1989) (finding a single incident of racial harassment insufficient, as a matter of law, to create a hostile environment); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983) ("More than a few isolated incidents of harassment must have occurred to establish a violation of Title VII."); *Jones v. Clinton*, 990 F. Supp. 657, 675 (E.D. Ark. 1998) (suggesting that only in an exceptional case, such as a sexual assault, could a single incident comprise an actionable hostile environment). Although one other court has questioned whether a single, severe act could constitute a hostile environment, it did so based solely on its view that an unfair rule of liability would attach based on the characterization. See *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999).

72. Professor Vicki Schultz has pointed out the misguided tendency of courts to disaggregate multiple non-severe incidents in order to find that no hostile environment existed. See *Schultz, supra* note 9, at 1720.

harassment can be actionable using the totality of the circumstances test reaffirmed by the Supreme Court in *Harris v. Forklift Systems* and *Faragher*.⁷³

B. *New Standards for Employer Liability*

Pleading an “actionable” claim of sexual harassment is only half the battle—the other half is determining whether someone can be held liable for the harassment. Because individual harassers can generally not be held liable under Title VII,⁷⁴ this inquiry usually centers on employer liability.

As *Meritor* dictated, courts developed standards for employer liability based on “agency principles.”⁷⁵ Most began—and often finished—their analysis with the Second Restatement of Agency, said to embody the common law of agency. Section 219 of the Restatement, which in this context has engendered great confusion, provides in relevant part:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or
 - ...
 - (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation.⁷⁶

Armed with section 219, courts began to develop rules of employer liability for sexual harassment. Although some common threads emerged, the rules of employer liability varied circuit by circuit. In some circuits, employers could be held automatically liable for all supervisor harass-

73. See *Faragher*, 524 U.S. at 787 (listing frequency and severity as two factors to consider in evaluating whether a hostile environment is actionable); *Harris*, 510 U.S. at 23 (suggesting that frequency is one factor that may be considered under *Meritor's* totality of the circumstances test).

74. See *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Haynes v. Williams*, 88 F.3d 898, 899 (10th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995). *But see* *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982) (holding an executive director liable in his official capacity under Title VII).

75. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

76. RESTATEMENT (SECOND) OF AGENCY § 219 (1957); see also *id.* § 219 cmt. 3c (enumerating the situations in which a master may be held liable for the torts of his servants acting outside the scope of employment).

ment;⁷⁷ in others, they could only be liable for supervisor harassment of which they had notice.⁷⁸ In some circuits, employers could be insulated from liability simply by enacting an anti-harassment policy;⁷⁹ in others, a policy had little or no impact on liability.⁸⁰ Even where courts agreed on the ultimate rules of liability, their reasoning was often at odds.⁸¹

After abstaining for more than a decade, the Supreme Court finally took on the issue of employer liability in *Faragher* and *Ellerth*. In *Ellerth*, the Court addressed the standard of liability for a subordinate employee subjected to unfulfilled threats.⁸² In *Faragher*, the Court examined the standard of liability for a supervisor-created hostile environment.⁸³ With those decisions, the Court resolved the bulk of the lower court conflicts and provided some bright line rules of liability, rooted in the Second Restatement of Agency and adapted to the Title VII context.⁸⁴ In the course of deciding the cases before it, the Court reviewed the entire body of law related to employer liability for sexual harassment, noting with approval those rules it viewed as having "continuing vitality."⁸⁵

The remainder of this section outlines the circumstances under which employers can now be held directly or vicariously liable for sexual harassment by supervisors or co-workers, considering the rules explicitly established by the Court's recent decisions, as well as preexisting ones it left intact.

77. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (holding that an employer is strictly liable for a supervisor's work environment harassment if the supervisor was "aided in accomplishing the harassment by the existence of the agency relationship," whether it be with actual or apparent authority); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that an employer will be liable for supervisor harassment without regard to knowledge or recklessness in hostile work environment cases).

78. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (finding employer liability for supervisor work environment harassment where the employer had or should have had notice of such harassment); *Pfau v. Reed*, 125 F.3d 927, 936-37 (5th Cir. 1997); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *Callanan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

79. See, e.g., *Gary v. Long*, 59 F.3d 1391, 1400 (D.C. Cir. 1995) (refusing to hold employer liable based on existence of anti-harassment policy and grievance procedure).

80. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (holding employers automatically liable regardless of the existence of an anti-harassment policy).

81. Compare *id.* (grounding liability in 219(2)(d)), with *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (holding employers liable for supervisor harassment based on scope of employment analysis).

82. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

83. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998).

84. See *Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 762-63.

85. *Faragher*, 524 U.S. at 790-91.

1. Direct Liability

a. "The master intended the conduct or the consequences"

Under section 219(2)(a) of the Restatement, an employer may be held liable for sexual harassment where the individual charged with creating the hostile environment holds a sufficiently high position in the management of the organization to be treated as the employer's proxy or alter ego, such as the president or owner of a company.⁸⁶ The Court in *Faragher* noted this rule with approval.⁸⁷ But as with the scope of employment theory, discussed below, this theory of liability applies as a practical matter in very few cases.

b. "The master was negligent or reckless"

Before *Faragher* and *Ellerth*, all courts agreed that employers could fairly be held liable for workplace sexual harassment under a negligence theory.⁸⁸ Section 219(2)(b) of the Restatement, which permits liability when the "master was negligent or reckless," supports this approach.⁸⁹ This theory of liability can be used where the hostile work environment is created by coworkers, clients, customers, and other third parties as well as supervisors. *Meritor* firmly established that employers have a duty to maintain a nondiscriminatory environment, and that liability at-

86. See *id.* at 801-02; see also *Serapion v. Martinez*, 119 F.3d 982, 991-92 (1st Cir. 1997) (holding that an individual with an ownership interest in the organization who receives compensation based on profits and participates in organization management would qualify as an "owner" for purposes of alter ego liability); *Torres v. Pisano*, 116 F.3d 625, 634-35 and n.11 (2d Cir. 1997) (holding that the actions of a "sufficiently" high level supervisor may be imputed automatically to the employer); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992) (finding an employer-company liable where harassment was perpetrated by its owner); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (requiring that an employee "demonstrate the propriety" of employer liability "[e]xcept in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior.")

87. See *Faragher*, 524 U.S. at 789 ("Nor was it exceptional that standards for binding the employer were not in issue in [*Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993)]. In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer, . . . who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."); see also *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1376 (10th Cir. 1998) (quoting *Ellerth*, 524 U.S. at 758) ("[T]he Supreme Court in [*Ellerth*] acknowledged an employer can be held vicariously liable under Title VII if the harassing employee's 'high rank in the company makes him or her the employer's alter ego.'").

88. See *Faragher*, 524 U.S. at 799 (noting that lower courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"); see also 29 C.F.R. § 1604.11(d) (1997); *EEOC Policy Guidance*, *supra* note 71.

89. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

taches when that duty is breached.⁹⁰ Breach in this context translates to notice and a concomitant failure to act. Employers with actual or constructive notice of a sexually hostile environment can thus be held directly liable unless they take prompt and effective remedial action.⁹¹

Employers most commonly acquire actual knowledge through direct observation, or a victim's internal complaint or protest.⁹² Employers will also be directly liable for failing to take action to remedy a sexually hostile environment about which they should have known.⁹³ While the standard for constructive notice is hard to pin down, employers will certainly be charged with knowledge of anything that is commonly known among employees or that occurs pervasively in public work space.⁹⁴ It is at least arguable that the failure to have a reasonable harassment policy may suffice as proof of constructive notice of all harassment in the workplace.⁹⁵

90. See *id.* at 63-68.

91. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("[A]n employer can be held liable . . . where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."); see also *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1348 (10th Cir. 1990) (finding liability where defendant "permitted known sex maniac to run amok in the workplace").

92. See, e.g., *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp. 381, 385-86 (D. Minn. 1980) (finding actual notice of racial harassment where supervisory personnel saw derogatory notice placed on bulletin board and racial slurs placed on equipment). Where complaints are made to a supervisor or individual with sufficient authority, courts are likely to impute that knowledge to the company generally. See *Williams v. City of Houston*, 148 F.3d 462, 467 (5th Cir. 1998) (finding notice sufficient where complaint made to "first-line supervisor" rather than "upper management"); *Torres v. Pisano*, 116 F.3d 625, 637 (2d Cir. 1997) ("[W]here the person who gained notice of the harassment was the supervisor of the harasser . . . knowledge will be imputed to the employer."); *Bayard v. Riccitelli*, 952 F. Supp. 977, 986 (E.D.N.Y. 1997) (finding notice where plaintiff complained to immediate supervisor); *Wimberly v. Shoney's, Inc.*, 39 F.E.P. Cases 444, 453 (S.D. Ga. 1985) (finding actual notice based on complaint to area manager and area training supervisor). *But see Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 802 (8th Cir. 1998) (finding notice insufficient where complaint made to head of maintenance because individual was not part of the employer's management).

93. See *Ellerth*, 524 U.S. at 765.

94. See *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996) (charging an employer with constructive notice and triggering its duty to take corrective action where harassment was sufficiently pervasive); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016, 1018 (8th Cir. 1988) (charging employer with constructive notice where incidents were "so numerous" that the employer would have had to know of them"); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 882 (N.D. Ind. 1998) (finding that an employer had constructive knowledge where harassment by supervisors "was so broad in scope, and so permeated the workplace, that it must have come to the attention of someone authorized to do something about it"); *Smith v. Sheahan*, No. 95-C7230, 1997 U.S. Dist. LEXIS 20753, at *27 (N.D. Ill.) (finding that knowledge of employer can be inferred where harassment is "particularly pervasive").

95. See, e.g., *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997) (quoting *Karibian v. Columbia Univ.*, 14 F.3d 777, 780 (2d Cir. 1994)) ("When harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that 'the employer either

In short, the Court confirmed in *Ellerth* and *Faragher* that actual or constructive knowledge of past or ongoing harassment triggers an employer's duty to investigate, take action to remedy the harassment, and prevent its reoccurrence. Failure to take such steps may give rise to liability under Title VII for the harassment.⁹⁶ But negligence simply sets a "minimum standard for employer liability."⁹⁷ An employer without actual or constructive notice of sexual harassment is not immune from suit; it may still be held liable under a theory of vicarious liability.

2. Vicarious Liability

a. Scope of Employment

Without question, employers are vicariously liable for any action taken by an employee within the scope of employment regardless of notice. This principle comes without modification from section 219(1) of the Second Restatement.⁹⁸ Not all conduct that occurs during employment, however, is within the scope of employment. For an employee's conduct to fall within his "scope of employment" it must be "actuated, at least in part, by a purpose to serve the [employer]."⁹⁹ Behavior constituting sexual harassment seldom meets that test; to the contrary, the "harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."¹⁰⁰ Thus, the Supreme Court in *Ellerth* took note of a "general rule . . . that sexual harassment by a supervisor is not conduct within the scope of

provided no reasonable avenue for complaint or knew of the harassment but did nothing about it"), cited in *Faragher*, 524 U.S. at 799; see also *EEOC Policy Guidance*, *supra* note 71 (The EEOC will generally "find an employer liable . . . when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem").

96. See *Ellerth*, 524 U.S. at 759; see also *Faragher*, 524 U.S. at 789 ("[T]he combined knowledge and inaction [of employers] may be seen as demonstrable negligence.").

97. *Ellerth*, 524 U.S. at 759.

98. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). The "scope of employment" theory, if applicable, is the only basis upon which to hold an employer vicariously liable for harassment committed by a non-supervisor, or by a supervisor over a non-subordinate employee. See *Faragher*, 524 U.S. at 804. But most liability for co-worker harassment is premised on a theory of direct liability—liability for the employer's own negligence. See *id.* (collecting cases).

99. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957).

100. *Ellerth*, 524 U.S. at 757; see also *Faragher*, 524 U.S. at 793 ("Courts of Appeals have typically held, or assumed, that conduct similar to the subject of this complaint falls outside the scope of employment.").

employment."¹⁰¹

b. Outside the Scope of Employment: "[T]he servant . . . was aided . . . by the existence of the agency relation"

Employers are not immune from liability simply because their supervisory employees harass subordinate employees outside the scope of employment. Section 219(2) of the Restatement of Agency provides several additional bases for holding employers liable for harassment by supervisors even when they are acting *outside the scope of employment*.¹⁰² Ultimately, the Supreme Court in both *Ellerth* and *Faragher* focused on subsection 219(2)(d),¹⁰³ which permits master liability when the servant is aided by the agency relation.¹⁰⁴ In the Title VII context, the crucial part of the inquiry is determining when a supervisor is "aided" in his harassing conduct by the "agency relation."¹⁰⁵ This question had caused much dissension among lower courts and commentators, and the Court's analysis provided some much needed clarification.

(1) Harassment Resulting in Tangible Employment Action

In tangible employment action cases, assessing employer liability under section 219(d) is relatively simple: the employer is automatically liable when its supervisor actually exercises authority to fire or otherwise tangibly harm a subordinate employee who fails to submit to the supervisor's sexual advances. In this "class of cases . . . more than the mere existence of the employment relation aids in commission of the harassment. . . ." ¹⁰⁶ For Title VII purposes, a "supervisor" is anyone with the actual or apparent authority¹⁰⁷ to affect the hiring, firing, demotion, eval-

101. 524 U.S. at 757; *see also Faragher*, 524 U.S. at 801. There are, as the Court in *Ellerth* noted, unusual circumstances where a supervisor's harassing behavior may actually be motivated by or in furtherance of an employer's policy. *See* 524 U.S. at 757 (citing *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052, 1075 (M.D. Ala. 1990) (finding supervisor's harassment to be in furtherance of employer's policy of discouraging women from seeking advancement)). Vicarious liability is clearly valid in such a situation.

102. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957).

103. *See Faragher*, 524 U.S. at 801-02; *Ellerth*, 524 U.S. at 757-64.

104. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957).

105. *See Faragher*, 524 U.S. at 802.

106. *Ellerth*, 524 U.S. at 760.

107. The Court in *Ellerth* considered and dismissed the principle of apparent authority as largely irrelevant in the context of sexual harassment. *See Ellerth*, 524 U.S. at 759. It would be applicable, the Court said, only if an employee reasonably misperceived an harassing employee to have supervisory authority. *See id.* ("If, in the unusual case, it is alleged that there is a false impression that the actor was a supervisor, when in fact he was not, the victim's mistaken conclusion must be a

uation, or daily working conditions of another employee.¹⁰⁸ The supervisor who actually exercises that authority to the detriment of a subordinate employee is clearly aided by the agency relation in accomplishing his harassment, as he could not fulfill the threat without the benefit of that relationship. Thus, the Court in *Ellerth* concluded,

[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability. . . .¹⁰⁹

Based on this reasoning, the Court adopted a rule of automatic liability, further described below, when supervisor harassment results in a tangible employment action¹¹⁰ against the subordinate employee.¹¹¹

reasonable one.”); see also *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) (“Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee’s action.”). But because an employee with apparent but no actual authority could not take any tangible employment action against another employee, this rule is only applicable in the context of hostile environment harassment. See *infra* text accompanying notes 117-25.

108. For varying definitions of supervisor, see, for example, *Grozdanich v. Leisure Hills Health Center*, 25 F. Supp. 2d 953, 972-73 (D. Minn. 1998) (“[I]t is evident that the Supreme Court views the term ‘supervisor’ as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion.” It also includes an employee whose “authority extended only to the management of his subordinates’ daily activities and . . . routines.”); see also *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (“[T]he essence of supervisory status is the authority to . . . hire, fire, demote, promote, transfer, or discipline an employee.”); *Kent v. Henderson*, No. 99-1585, 1999 U.S. Dist. LEXIS 18609, at *9-10 (E.D. Pa. Nov. 30, 1999) (discussing varying definitions of supervisor for sexual harassment purposes); *Simon v. City of Naperville*, No. 98CS263, 2000 WL 283107, at *3 (N.D. Ill. Mar. 8, 2000) (“[A] person assigned to train new recruits and make recommendations that affect their future employment status obviously has authority that affects terms and conditions of employment.”); *Jackson v. T & N Servs.*, No. CIVA-99-1267, 200 WL 264131, at *4-5 (E.D. Pa. Mar. 9, 2000) (“[T]he limited liability of employees to direct the work of crews or other small groups of workers does not equate to a supervisory position for purposes of imputing liability to the employer.”).

109. *Ellerth*, 524 U.S. at 762-63. This position was foreshadowed by *Meritor*, in which the Court noted the following EEOC argument with approval: “where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986) (“Courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor’s actions.”).

110. As with the threshold question of discrimination, the question of whether favorable employment actions based on an employee’s submission to sexual advances should be treated like tangible job detriment cases for liability purposes is an open question. The EEOC’s position is that ful-

(2) *Harassment Not Resulting in Tangible Employment Action*

This leaves the question of what happens when the harassment does not culminate in a tangible employment action. When is a supervisor who does not take tangible employment action against an employee sufficiently "aided by the agency relation" to justify vicarious liability for the employer? This question was explored in *Faragher* when the Court examined the means by which a supervisor who creates a hostile environment is typically aided by agency relation.¹¹² The supervisor-subordinate employment relationship affords the supervisor contact with the harassed employee, creates a captive audience for the harasser, makes conduct more threatening, makes the employee more reluctant to resist or complain, prevents the employee from dealing with abuse in same way as with co-worker, and supports an implicit threat of sanctions for complaining.¹¹³

The Court then considered the possible rules for dealing with supervisor harassment that does not culminate in a tangible employment action.¹¹⁴ One possibility is to hold that supervisors are always aided by the agency relation and apply the same rule of automatic liability applicable to cases involving a tangible employment action.¹¹⁵ A significant obstacle to that rule, however, is that under its own interpretation of *Meritor*, the Court could not adopt a pure rule of automatic liability without overruling it.¹¹⁶ At the other end of the spectrum would be a rule requiring each

filled threat and submission cases are indistinguishable in this context also:

It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis.

EEOC Revised Policy Guidance, *supra* note 53.

111. See *Faragher*, 524 U.S. at 790. The court in *Faragher* acknowledged the consensus on automatic liability in this situation, noting that "there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown." *Id.* The court also excluded quid pro quo cases from its general rule allowing employers to avoid liability by mounting the affirmative defense discussed below. See *id.* at 808 ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.").

112. See *id.* at 802.

113. See *id.* at 803.

114. See *id.* at 793-810.

115. See *id.* at 802.

116. See *id.* at 792, 804 (noting the holding in *Meritor* that "Title VII does not make employ-

individual plaintiff to prove that the supervisor was in fact aided by the agency relation in accomplishing the sexual harassment at issue.¹¹⁷ But such a rule, the Court wisely concluded, would result in unnecessary uncertainty and costly litigation for both plaintiffs and defendants.¹¹⁸

Rather than landing at either end of this spectrum, the Court staked out a middle ground by adopting a rule of automatic liability that is subject to an affirmative defense.¹¹⁹ As a general matter, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor that has authority over the employee. However,

[w]hen 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. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.¹²⁰

ers always automatically liable for sexual harassment by supervisors") (citations omitted).

117. See *id.* at 804 ("There is certainly some authority for requiring active or affirmative, as distinct from passive or implicit, misuse of supervisory authority before liability may be imputed.").

118. See *id.* at 805.

119. See *id.* at 807. Ironically, Justice Thomas dissented from the Court's opinion in both *Faragher* and *Ellerth*, largely because he believes that this standard is more stringent than the standard for comparable racial harassment. See *Faragher*, 524 U.S. at 766-67; *Ellerth*, 524 U.S. at 810. The analysis in his dissent is insupportable, however. The cases cited therein follow a negligence standard of liability for racial harassment because they involve co-workers rather than supervisors. See, e.g., *Dennis v. County of Fairfax*, 55 F.3d 151, 155 (4th Cir. 1995) (applying negligence standard to claim of racial harassment by co-worker); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988) ("In order to hold the employer liable for the conduct of the victim's co-workers, the plaintiff must establish that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action.") (emphasis added); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986) (adopting standard articulated in *DeGrace*); *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980) ("[A]n employer who has taken reasonable steps under the circumstances to correct and/or prevent racial harassment by its nonsupervisory personnel has not violated Title VII.") (emphasis added). The same rule applies for sexual harassment by co-workers: an employer is liable for a hostile environment created by co-workers only if it knew or should have known of the harassment. See *supra* notes 88-93 and accompanying text. The Court's decisions in *Faragher* and *Ellerth*, which address the question when a supervisor is aided by the agency relation in accomplishing harassment, have no bearing on the standard of liability for co-worker harassment. See *Ellerth*, 524 U.S. at 762. Indeed, every court considering the standard of liability for other forms of unlawful harassment in the wake of *Faragher* and *Ellerth* has adopted the standard without modification. See *supra* note 67.

120. *Faragher*, 524 U.S. at 807 (citation omitted); *Ellerth*, 524 U.S. at 765 (citation omitted).

This compromise position of adding an affirmative defense is perhaps the most significant aspect of the Court's decisions, one that merits careful analysis.

C. *Understanding the Affirmative Defense*

The affirmative defense is only available in hostile environment cases.¹²¹ To use it successfully, an employer bears the burden of proving both prongs of a two-part defense.

1. *The First Prong*

The first prong is within the employer's exclusive control and requires the employer to take reasonable care both to *prevent* and *correct* sexual harassment.¹²²

a. *"To prevent . . . any sexually harassing behavior"*¹²³

"Reasonable care" in the context of prevention requires an employer to enact, distribute, and enforce an anti-harassment policy that is calculated to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints.¹²⁴ Substantively, a reasonable policy will communicate the employer's desire to maintain a harassment-free working environment, inform employ-

121. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

122. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. An employer who takes the steps necessary to guarantee success on the first prong of the affirmative defense is rewarded not only by avoiding liability in some cases, but also by avoiding punitive damages in all cases. The Supreme Court's recent decision in *Kolstad v. American Dental Association* clarified when employers may be forced to pay punitive damages for intentional discrimination. 119 S. Ct. 2118 (1999). In *Kolstad*, the Court determined that punitive damages may not be imposed where liability is vicarious based on the acts of a supervisor or agent whose conduct is contrary to the employer's efforts to comply with Title VII. See *id.* at 2129. Thus, although an employer who enacts an anti-harassment policy, trains its employees, and maintains an effective grievance procedure may still face liability for a supervisor's harassment if the victim complains (thereby depriving the employer of the affirmative defense), that same employer would likely be immune from a punitive damages award.

123. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

124. See *Faragher*, 524 U.S. at 807 (noting that "a stated policy suitable to the employment circumstances" will often be important to litigation over the first prong of the defense). Cf. *Meritor*, 477 U.S. at 73 (noting that defendant's contention that policy could insulate employer from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward"); 29 C.F.R. 1604.11(f) (1998) (encouraging employers to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned").

ees about their rights, define prohibited conduct, promise confidentiality to the extent practicable, sternly prohibit retaliation against any employee who makes a complaint under the policy, and provide a viable mechanism for reporting and resolving complaints of sexual harassment.¹²⁵

Adequate dissemination of a sexual harassment policy is as important as its content for purposes of the affirmative defense. That is, to be an effective tool of prevention, a sexual harassment policy must be widely circulated and well-known among employees. Lack of dissemination was critical to the Court's decision to impose liability against the city in *Faragher*.¹²⁶ Although the city had a sexual harassment policy, it had never been distributed to the employees in the Marine Safety Section in which Faragher and her harassing supervisors worked.¹²⁷ Reasonable care to prevent harassment may also require employers to offer employees training sessions about the new policy and procedures or about sexual harassment in general.¹²⁸

125. See, e.g., *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026 (N.D. Iowa 2000) (finding policy inadequate in part because it failed to expressly prohibit retaliation); *Collins v. Village of Woodridge*, No. 95C6097, 2000 WL 294071, at *5 (N.D. Ill. Mar. 17, 2000) (discussing the importance of a confidentiality clause in a harassment policy and the employer's adherence to that clause); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir. 2000) (finding sexual harassment policy inadequate in part because it did not address discrimination on the basis of gender); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (finding policy inadequate in part because it permitted employees to bypass the harassing supervisor by complaining to the director of personnel services, who was inaccessible to employees). *But see Ritchie v. Stamler Corp.*, No. 98-5750, 2000 WL 84461, at *3 (6th Cir. Jan. 12, 2000) (finding summary judgment in favor of employer proper where employer's policy required all complaints to be submitted in writing to the president of the corporation).

126. See *Faragher*, 524 U.S. at 808.

127. See *id.* The Court observed:

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. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees. . . .

Id.; see also *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 118 (3d Cir. 1999) (rejecting employer's claim to affirmative defense based, in part, on its failure to disseminate or enforce its anti-harassment policy); *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1377 (10th Cir. 1998) (reversing summary judgment for employer based on failure to establish that plaintiff had been made aware of harassment policy); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747 (M.D. Tenn. 1998) (denying employer's motion for summary judgment based on the affirmative defense partially because there was a lack of proof that a policy had ever been distributed); *Miller*, 80 F. Supp. 2d at 1030 (holding that prevention was inadequate in part because supervisors were not made aware of employer's anti-harassment policy).

128. See, e.g., *Shaw v. Autozone Inc.*, 180 F.3d 806, 812-13 (7th Cir. 1999) (counting training of managers as one factor supporting summary judgment for employer based on affirmative defense).

b. "To . . . correct any sexually harassing behavior"¹²⁹

The first prong also requires that the employer take appropriate corrective action. An analysis of what constitutes "reasonable care to . . . correct any sexually harassing behavior" focuses primarily on available complaint mechanisms and employer response to complaints.¹³⁰

Where the employer has notice of harassment, reasonable care requires that it takes adequate steps to remedy it.¹³¹ Because of this duty to respond, employers cannot distinguish between informal and formal complaints; they cannot agree—even at the victim's request to—look the other way.¹³² To discharge its duty, an employer must investigate allegations of harassment and "take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring."¹³³ A response that is either procedurally or substantively inadequate will deprive the employer of the opportunity to rely on the affirmative defense. Indispensable to a legally adequate response is a prompt¹³⁴ and thorough investigation, coupled with

129. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

130. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

131. See *Miller*, 80 F. Supp. 2d at 1031-32; *EEOC Revised Policy Guidance*, *supra* note 52, at E-32.

132. See, e.g., *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (finding complaint process deficient because it only requires supervisors to report formal complaints); *EEOC Revised Policy Guidance*, *supra* note 52, at E-32 (suggesting that the prudent employer will not honor a victim's request not to investigate); see also *Varner v. National Super Mkt., Inc.*, 94 F.3d 1209, 1213-14 (8th Cir. 1996) (finding complaint procedure ineffective where supervisor was not required to report known harassment to individuals with power to address it). *But see Torres v. Pisano*, 116 F.3d 625, 639 (2d Cir. 1997) (suggesting that employer may be able to honor victim's request that no action be taken unless conduct alleged is particularly severe).

133. *EEOC Policy Guidance*, *supra* note 71.

134. For cases assessing whether an employer responded with sufficient promptness, see, for example, *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (finding responses sufficiently prompt where investigation commenced on the day the complaint was made and punitive action was taken against the harasser within ten days); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (finding response inadequate despite firing of harasser where investigation was not taken seriously nor action taken until victim filed complaint with the NERC); *Saxton v. AT&T Bell Lab.*, 10 F.3d 526, 535 (7th Cir. 1993) (finding employer response adequate where investigation begun one day after complaint and detailed report was issued within two weeks); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (finding completion of the investigation within one week sufficiently prompt); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 319 (7th Cir. 1992) (finding that an adequate investigation was completed within four days); *Moland v. Bil-Mar Foods*, 994 F. Supp. 1061, 1074 (N.D. Iowa 1998) (finding a genuine issue of fact whether employer responded promptly where remedial actions were taken only after repeated complaints); *Bayard v. Riccitelli*, 952 F. Supp. 977, 986 (E.D.N.Y. 1997) (finding a genuine issue of material fact as to the adequacy of an employer response when there is a two month delay between

remedial action calculated to stop the harassment without punishing the victim.¹³⁵ The failure to stop the harassment, however, is not necessarily fatal to an employer's defense.¹³⁶

Where the employer does not have notice of a particular incident, the measuring stick for reasonable care to correct harassment will necessarily be backward-looking. For example, if an employer has failed to investigate harassment complaints, act on findings of harassment, or, worse still, retaliated against complainants, future victims will have a strong argument that the policy and grievance procedure did not provide a "reasonable avenue" for their complaints. Additionally, a policy may itself be unreasonable if it requires an employee to report any harassment to an immediate supervisor, without providing any alternative in case that supervisor is causing or complicit in the harassment.¹³⁷ The fact that the employer's policy "did not include any assurance that the harassing supervisors could be bypassed in registering complaints" was relevant to the Court's decision in *Faragher* that the employer could not succeed in proving the first prong of the affirmative defense.¹³⁸

investigation and remedial measures).

135. For cases evaluating the substantive adequacy of an employer's remedial measures, see generally *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (finding employer response inadequate where employer twice changed victim's shift to avoid contact with supervisor rather than alter his working conditions); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective *per se.*") (emphasis added); see also *Jackson v. Quanex Corp.*, 191 F.3d 647, 665-67 (6th Cir. 1999) (finding simple reprimand of harasser insufficient to permit proof of the affirmative defense); *EEOC Policy Guidance*, *supra* note 71, at E-31 ("Remedial measures should not adversely affect the complainant. . . . [I]f it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise)."). For a general discussion of the interaction between discipline taken under Title VII and employees' rights under collective bargaining agreements, see Stephen Buehrer, *Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 AM. U. J. GENDER & L. 265 (1998), and Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517 (1999).

136. See, e.g., *Savino v. C.P. Hall Co.*, No. 98-4257, 1999 U.S. App. LEXIS 32476, at *17 (7th Cir. Dec. 14, 1999).

137. See, e.g., *Fowler v. Sunrise Carpet Indus.*, 911 F. Supp. 1560, 1582 (N.D. Ga. 1996) (finding complaint process deficient where plaintiff required to report to harasser); cf. *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (finding complaint process deficient because it permitted employees to bypass the harassing supervisor by complaining to director of personnel services, but the director was inaccessible due to hours of duty and location in a separate facility). *But cf.* *Ritchie v. Stamlor Corp.*, No. 98-5750, 2000 WL 84461, at *3 (6th Cir. Jan. 12, 2000) (affirming summary judgment to employer despite the fact that harassment policy required complaints to be reported in writing to company president, regardless of harasser's identity).

138. *Faragher*, 524 U.S. at 808.

2. *The Second Prong*

The second prong of the affirmative defense focuses on the conduct of the victim. To prevail, an employer must prove that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."¹³⁹ This prong calls for two questions to be answered: (1) whether the plaintiff failed to complain or otherwise mitigate harm and, if so, (2) whether her failure to do so was unreasonable.¹⁴⁰

How and when must a victim of a hostile work environment react to harassment in order to preclude an employer's success on this prong of the affirmative defense? Utilizing the employer's internal grievance procedure is the most common, though not the sole way for a plaintiff to satisfy this prong of the affirmative defense.¹⁴¹ Rarely, if ever, will courts excuse a plaintiff from filing an internal complaint due to fear of retaliation or the perception that such complaints are futile. Courts have taken a hard line on such allegations; one has held, as a matter of law, that "generalized fears [of retaliation] can never constitute reasonable grounds for an employee's failure to complain to his or her employer."¹⁴²

139. *Id.* at 807; *Ellerth*, 524 U.S. at 765.

140. An employer's control over this prong is limited to ensuring that its policies, procedures, and employment culture are such that it would always be "unreasonable" for a plaintiff to bypass the internal grievance procedures. However, this component of employer behavior is already accounted for in the first prong, which evaluates the employer's policies, procedures, and penchant for (or against) retaliation. For example, an employer would not be able to prevail on this second prong if its policy required the plaintiff to report unwelcome conduct to the very supervisor perpetrating the harassment, for it would be entirely reasonable for the plaintiff to refuse to use the employer's internal grievance mechanism and head straight for the courthouse. But that flaw in the policy would have already precluded the employer from utilizing the affirmative defense under the preventative aspect of the first prong. Consequently, the proper analysis of the second prong turns exclusively on the plaintiff's conduct.

141. *See, e.g.,* *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (finding that plaintiff made sufficient effort "to avoid harm otherwise" where she filed a union grievance instead of utilizing the employer's harassment complaint process).

142. *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998); *see also* *Watkins v. Professional Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841, at 19-20 (4th Cir. Nov. 15, 1999) (holding evidence of plaintiff's failure to report harassment due to "embarrassment and fear of reprisal" insufficient as a matter of law to justify inaction); *Cardidad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (reluctance of a victim to report harassing conduct "must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers"); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) ("[A]n employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."); *Barrett v. Applied Radiant Energy Corp.*, 70 F. Supp. 2d 644, 653 (W.D. Va. 1999) (neither subjective and generalized fears of retaliation nor *speculative* concerns about management inaction justify plaintiff's failure to complain); *Franklin v. Consolidated Edison, Inc.*, No. 98 Civ. 2286 (WHP), 1999 WL 796170, *8 (S.D.N.Y.

Though the boundaries vary from case to case, courts have been quick to hold that a *delay* in complaining can be just as fatal to a plaintiff's case as a total failure to complain. Courts have found delays as short as three months to be unreasonable,¹⁴³ although the reasonableness of the response time may vary with the type of harassment. For example, with non-physical harassment, a reasonable employee may not immediately complain, but may only do so after a series of unwelcome comments, advances, or gestures have occurred.¹⁴⁴

Sept. 30, 1999) (an employee is unreasonable when she merely asserts that she did not take advantage of her employer's policy because she subjectively believed "there was no one to whom she could complain"); *Hylton v. Norrell Health Care*, 53 F. Supp. 2d 613, 618 (S.D.N.Y. 1999) ("Generalized fears such as 'I was afraid of repercussions' related to informing an employer of harassment in the workplace do not constitute reasonable grounds for an employee's failure to raise a complaint of harassment with his or her employer."); *Hetreed v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. 1999) (plaintiff's fear of retaliation, "even if credited, is not a valid reason for not reporting the harassment for it prevents the defendant company from taking corrective action"); *Madray v. Publix Super Mkts., Inc.*, 30 F. Supp. 2d 1371, 1375 (S.D. Fla. 1998) ("An employee's generalized fear of repercussions cannot form the basis for an employee's failure to complain to his or her employer."); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (a fear of repercussion justification for failure to complain was insufficient to withstand a motion for summary judgment); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998) (employer may prove affirmative defense where "[p]laintiff has offered no evidence to support her apparent belief that the policy would not be honored"); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998) ("[A] threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection.").

143. *See, e.g.*, *Savino v. C.P. Hall Co.*, No. 98-4257, 1999 WL 1172892, *5 (7th Cir. Dec. 14, 1999) (finding that the employee failed to take advantage of opportunities to prevent or correct harassment when she did not complain about the harassment for four months and when she did report it, she did not tell her employer about incidents of harassment that previously occurred); *Phillips*, 83 F. Supp. 2d at 1034 (finding three month delay unreasonable under second prong of the affirmative defense); *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999) (holding that the employer satisfied the second prong of the affirmative defense where the employee was aware of the employer's policy prohibiting sexual harassment but did not complain until almost two years after the alleged harassment began); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1150 (D. Nev. 1999) (holding that a minor female employee (fifteen years old) working at a fast food restaurant behaved unreasonably, despite her age and "relative unfamiliarity with the adult workplace," by not notifying her employer of sexual harassment until "some weeks" after she quit); *Mirakhorli v. DFW Management Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344, at *24 and *24 n.16 (N.D. Tex. May 24, 1999) (finding that employee unreasonably failed to take advantage of her employer's antiharassment policy where her EEOC charge indicated the harassment commenced in August but she did not inform her employer of the harassing conduct until October); *Kohler v. Inter-Tel Tech.*, No. C98-0378 (MJJ), 1999 WL 226208, at *5 (N.D. Cal. April 13, 1999) (holding that the "plaintiff acted unreasonably by never reporting any harassment" until after she retained an attorney, quit her position and found alternative employment, and further refused to cooperate in the investigation once the employer became aware of the inappropriate conduct).

144. *See, e.g.*, *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp. 2d 601, 606 (W.D. Va. 1998) ("Though unwanted sexual remarks have no place in the work environment, it is far from uncommon for those subjected to such remarks to ignore them when they are first made.")

In one decision, *Marsicano v. American Society of Safety Engineers*,¹⁴⁵ the district court found a plaintiff's behavior unreasonable even though she complained within two weeks of the onset of harassment.¹⁴⁶ The plaintiff in *Marsicano* suffered harassment from her direct supervisor, Hatter, beginning on her first day of employment and continuing to her last—eight working days later.¹⁴⁷ On her last day of employment, a high-level manager, Neel, stopped by plaintiff's office and asked how plaintiff was settling in.¹⁴⁸ Plaintiff did not raise any of her concerns about the harassing supervisor during that conversation.¹⁴⁹ That afternoon plaintiff was subjected to further harassment.¹⁵⁰ The next day, however, she called and said she was unable to come to work and would not return to the company at all due to the harassment by her supervisor.¹⁵¹ The company offered her a different position where she would have less, but still some contact with the harassing supervisor. Plaintiff refused and sued.¹⁵²

Although the plaintiff properly availed herself of the complaint procedures outlined in the employee handbook, the district court held that she had nonetheless behaved unreasonably for not mentioning Hatter's conduct to her supervisor when asked how she was settling in.¹⁵³ "By remaining silent in these circumstances, Marsicano unreasonably failed to take advantage of a corrective and, more importantly, preventive opportunity provided by her employer."¹⁵⁴ Although this case is extreme, other courts have also measured victim reasonableness under the second prong of the affirmative defense quite harshly.

II. THE NEW LAW OF SEXUAL HARASSMENT: AS APPLIED

As is often true when the high court speaks on matters affecting Americans' daily lives—and their pocketbooks—public reaction to the decisions on employer liability have been mixed. Some employer-friendly commentators praised the new rules for providing clear requirements¹⁵⁵

145. No. 97-C7819, 1998 WL 603128 (N.D. Ill. Sept. 4, 1998).

146. *See id.* at *2, 8.

147. *See id.* at *2-3.

148. *See id.* at *3.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.* at *4.

153. *See id.* at *8.

154. *Id.* at *7.

155. *See, e.g.,* Michael Barrier, *Sexual Harassment*, *NATION'S BUS.*, Dec. 1998 ("On the upside, the court clearly explained for the first time how employers can insulate themselves from many

and rewarding diligent employers.¹⁵⁶ But most observers characterized the *Faragher/Ellerth* scheme as a loss for employers because it failed to explicitly ratify the employer-urged rule permitting liability only for negligence (i.e. where the employer knew or should have known about the harassment and failed to stop it).¹⁵⁷ As one commentator noted, “[i]n the past, there was no ruling in place that required employers to be accountable for misconduct if they did not know that such misconduct was taking place.”¹⁵⁸

But a closer analysis of the new scheme and its application in the two years since *Faragher* and *Ellerth* were decided reveals that, as a practical matter, the employers won. The abstract review of standards of liability in Part II might lead one to conclude that the Supreme Court firmly embraced vicarious liability—liability that is unrelated to the employer’s conduct—for hostile environment harassment created by supervisors. But most abstractions lose their purity and attractiveness when they

if not all harassment suits.”); David Rubenstein, *Harassment Prevention is Now a Must for U.S. Companies*, CORP. LEGAL TIMES, Aug. 1999, at 31 (citing employment law expert’s view that *Faragher* and *Ellerth* “provided a blueprint for avoiding those avenues [of liability]”); Jerome R. Stockfisch, *Court Forcing Firms to Halt Harassment*, TAMPA TRIB., Jan. 1, 1999, Bus. & Fin., at 1 (indicating that although the court action admittedly “puts a much stronger burden on companies to ensure their workplace is free of harassment,” lawyers in the defense bar are not “complaining too loudly” as the court provided some “good guidance on exactly what employers must do”).

156. See Canoni, *supra* note 53 (reporting that under the new scheme, “[e]mployers who have an effective, well-publicized sexual harassment complaint procedure in place and properly implemented have a good chance of escaping liability and damages.”).

157. See, e.g., Barrier, *supra* note 155, at 15 (describing the adoption of a rule of virtually automatic liability as the “downside” for employers of *Faragher* and *Ellerth*); Canoni, *supra* note 53 (noting that “[e]mployer groups urged the Court to adopt a negligence standard); see also Brief Amicus Curiae for Respondent the City of Boca Raton at 15-17, *Faragher* (No. 97-282); Brief Amici Curiae of the Equal Employment Advisory Council at 18-19, *Faragher* (No. 97-282); Brief Amicus Curiae of the National Association of Manufacturers and Manufacturers Alliance for Productivity and Innovation in Support of Respondent at 15-30, *Faragher* (No. 97-282); Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Respondent at 3-4, 16-21, *Faragher* (No. 97-282); Brief for Petitioner Burlington Industries, Inc. at 10-15, 24-26, *Ellerth* (1998) (No. 97-569); Reply Brief for Petitioner Burlington Industries, Inc. at 4-11, 19-20, *Ellerth* (No. 97-569); Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioner at 14-20, *Ellerth* (No. 97-569).

158. Lynna Goch, 1998: *The Year in Review*, BEST’S REV.-PROP. & CASUALTY INS. EDITION, Jan. 1, 1999, 99 BREVPC (available in WL 10020425) (“A pair of Supreme Court rulings handed down in June exposed employers to more sexual harassment lawsuits than ever before and took away a potential defense. . . .); see also Kruse, *supra* note 23, at 456-63 (arguing that the new framework unfairly penalizes employers for harassment they had no ability to control); Joyelle K. Werner, Note, *Burlington Industries, Inc. v. Ellerth: An Affirmative Defense Against Employer Liability for Supervisory Harassment*, 50 MERCER L. REV. 1121, 1131 (1999) (criticizing standard because it does not allow employer to escape liability by claiming it had no actual or constructive notice of harassment).

confront reality, and this case is no different. To be sure, the principle that employers can be held vicariously liable for harassment committed by their supervisors—even if they themselves did nothing wrong—was theoretically embraced by the Supreme Court.¹⁵⁹ Yet the affirmative defense, particularly as interpreted by many trial and appellate courts has effectively eliminated any vicarious liability for employers, making them liable, instead, only when their own conduct is found wanting.¹⁶⁰

A. *The Supreme Court and the Affirmative Defense*

Understanding the effect of the affirmative defense is a necessary first step in analyzing the true standard of liability imposed by *Faragher* and *Ellerth*. To prevail on the affirmative defense, the employer has the burden of proving that it took all reasonable measures to prevent and correct any harassment *and* that the plaintiff unreasonably failed to complain or otherwise avoid harm.¹⁶¹ In most cases of supervisor harassment, liability will turn on whether the employer can successfully prove the affirmative defense. What happens when an employer is able to prove both prongs of the affirmative defense by a preponderance of the evidence? The crucial question is whether the employer will be excused from liability entirely or only from any damages that could have been prevented had the plaintiff promptly complained.

Neither *Faragher* nor *Ellerth* provides a definitive answer to that question. In *Faragher*, the Court held that the employer could not prevail on the affirmative defense given its failure to take reasonable preventive measures and thus concluded that the employer was automatically liable for the sexually hostile environment.¹⁶² In *Ellerth*, the Court remanded

159. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

160. See, e.g., *Watkins v. Professional Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999); *Scrivener v. Socorro Independent Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999); *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999); *Wright v. Anixter, Inc.*, No. 98-17164, 1999 U.S. App. LEXIS 19962 (9th Cir. Aug. 18, 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998); *Guerra v. Editorial Televisa—USA, Inc.*, No. 97-3670, 1999 U.S. Dist. LEXIS 10082 (S.D. Fla. June 4, 1999); *EEOC v. Barton Protective Svcs.*, 47 F. Supp. 2d 57 (D.D.C. 1999); *Hetred v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. May 11, 1999); *Neal v. Electronic Data Sys. Corp.*, No. 5:98-CV-521-B4(2), 1999 U.S. Dist. LEXIS 9732 (E.D.N.C. 1999); *Russell v. American Eagle Airlines, Inc.*, 46 F. Supp. 2d 1330 (S.D. Fla. 1999); *Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773 (W.D. Ky. 1998); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143 (E.D. Cal. 1998); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998).

161. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

162. See *Faragher*, 524 U.S. at 808 (“we hold as a matter of law that the City could not be

the case for consideration of whether the employer would be able to mount an affirmative defense, without giving any guidance as to its likely success.¹⁶³

Both *Faragher* and *Ellerth* are ambiguous about the effect of the affirmative defense they establish. There is some language in both opinions to suggest that an employer who proves the defense benefits in terms of the remedy to which the plaintiff is entitled, but remains liable for any harm until the time at which a reasonable plaintiff would have resorted to the employer's internal grievance process. For example, in the unified holding, the Court states that "a defending employer may raise an affirmative defense to liability or damages."¹⁶⁴

But other clues suggest that the affirmative defense insulates the employer from liability altogether. The Court, remember, was not working from a blank slate—it had provided some preliminary guidance about employer liability for hostile environment harassment twelve years earlier in *Meritor*. *Meritor* issued somewhat inconsistent proclamations, as it at once endorsed the use of agency principles to hold employers vicariously liable for harassment, but rejected strict liability for employers.¹⁶⁵ These two mandates proved difficult for litigants and courts to reconcile, as a pure application of agency principles dictates a rule of strict liability for supervisor harassment. But the Court in *Faragher* and *Ellerth* read *Meritor* as an undeniable rejection of strict liability.¹⁶⁶ And the effect of construing the affirmative defense to affect only damages, not liability, would be to impose a rule of automatic liability for all forms of supervisor harassment—both quid pro quo, as reformulated, and hostile environment. This result would be flatly inconsistent with the spectrum of em-

found to have exercised reasonable care to prevent the supervisors' harassing conduct").

163. See *Ellerth*, 524 U.S. at 765. Although *Ellerth* has not yet been resolved on remand, the plaintiff is unlikely to prevail because, in spite of the fact that the employer had a policy against sexual harassment that had been distributed to all employees, the plaintiff made no attempt to complain or otherwise make use of the company's internal grievance procedures. See *id.* Only after quitting the company did Ellerth write a letter to the management explaining that her departure resulted from her supervisor's harassing conduct. See *id.* Thus, unless the plaintiff can prove it was reasonable to forego such avenues of relief, the employer is likely to prevail on the affirmative defense. See, e.g., *EEOC to Issue New Sexual Harassment Policy*, *Federal EEO Advisor* (Jan. 1999) (describing *Ellerth* as a "difficult sexual harassment case" for the plaintiff because of the lack of notice to the employer and her failure to complain).

164. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

165. *Meritor*, 477 U.S. at 72 (Title VII does not make employers "always automatically liable for sexual harassment by their supervisors").

166. See *Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 763.

ployer liability delineated in *Meritor*, under the Court's interpretation of that case.

In fact, the Court in *Faragher* and *Ellerth* not only acknowledged *Meritor's* rejection of strict liability,¹⁶⁷ but solidified it by applying enhanced stare decisis to the holding.¹⁶⁸ Important to the Court's analysis was the fact that Congress amended Title VII in 1991, leaving *Meritor* intact. A Supreme Court holding combined with the tacit approval of Congress justified, in the Court's eyes, invoking "enhanced stare decisis" and strictly adhering to *Meritor's* purported limitations on liability.

To adhere to the holding in *Meritor*, the Court explained, it would have to graft some limitation onto the general rule of automatic liability for hostile environment harassment.¹⁶⁹ The Court considered two alternatives to accomplish that result: (1) requiring "proof of some affirmative invocation of that authority by the harassing supervisor," or (2) recognizing "an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment."¹⁷⁰ Both alternatives, the Court reasoned, would safely guard *Meritor's* rejection of automatic liability by carving out certain situations where an employer will avoid liability even where its supervisor actionably harassed a subordinate employee.¹⁷¹ Adopting the latter approach, the Court again referred to the limitation on liability:

The other basic alternative to automatic liability would avoid this particular temptation to litigate [about the actual invocation of supervisory authority], but allow an

167. See *Ellerth*, 524 U.S. at 763 ("Meritor's statement of the law is the foundation on which we build today. Neither party before us has urged us to depart from our customary adherence to stare decisis in statutory interpretation."); *Faragher*, 524 U.S. at 792 ("We are not entitled to recognize this theory under Title VII unless we can square it with Meritor's holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination."); *id.* at 804 (the Court is "bound by [its] holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment.").

168. See *Faragher*, 524 U.S. at 792 ("[T]he force of precedent here is enhanced by Congress's [1991] amendment to the liability provisions of Title VII since the *Meritor* decision, without any modification of the our holding."); *id.* at 804 n.4 (The Court is "bound to honor" *Meritor* because Congress amended Title VII without disturbing the holding, thus implicitly adopting the standard set therein.); *Ellerth*, 524 U.S. at 763-64 (noting Congressional silence in analysis of stare decisis). For a compelling argument that enhanced stare decisis was not justified in this case given the lack of a clear signal to Congress that a particular rule of liability had been established, see *The Supreme Court 1997 Term*, 112 HARV. L. REV. 1, 313-326 (1998) (criticizing the *Faragher* and *Ellerth* decisions for invoking enhanced stare decisis to adopt an ill-advised, weak rule of employer liability).

169. See *Faragher*, 524 U.S. at 804.

170. *Id.*

171. See *id.*

employer to show as *an affirmative defense to liability* that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with the like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided. This composite defense would, we think, implement the statute sensibly, for reasons that are not hard to fathom.¹⁷²

But after adopting this "affirmative defense to liability," the Court retreated to language about mitigating harm and avoiding unnecessary damages, again suggesting that the defense it crafted might spare the employer only in terms of remedy rather than liability.¹⁷³

In the end, the best reading of these opinions with respect to the affirmative defense is that in some cases the defense should avoid liability and in some it should reduce damages. The Court in *Faragher* ultimately described the rule's application as follows:

If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.¹⁷⁴

Drawing a distinction between the former situation the Court describes (where the plaintiff could have avoided some but not all of the harm) and the latter (where the plaintiff could have avoided harm altogether) is no easy task. The circumstances under which a victim could have completely "avoided harm" turn, of course, on the definition of harm. If "harm" is inflicted on the recipient of any unwanted sexual advance, comment, or gesture, regardless of the severity or pervasiveness, there is no situation where a victim employee could avoid *all* harm; for there is nothing to complain about until the harm occurs and no way, in a typical case, to anticipate its infliction. This notion of harm would render the Court's distinction between a defense to liability and damages meaningless, for in every case it would affect only the latter. Harm, then, must refer in this context to something that can be avoided.

172. *Id.* at 805 (emphasis added).

173. *Id.* at 806 ("The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982))).

174. *Id.* at 806-07.

Alternatively, and perhaps more true to the Supreme Court's intent, harm could be construed in legal terms; that is, the "harm" attaches when an actionable hostile environment matures, regardless of the subjective experience of harm preceding that point. If harm is inflicted only when an environment becomes actionable, there are situations where a plaintiff could avoid "harm" entirely. The opportunity to avoid harm would arise only where the hostile environment develops gradually. In that situation, the plaintiff might have the opportunity to complain before any legally recognizable harm is done. The plaintiff who fails to do so would have no cause of action against the employer for any harm that subsequently ensued. However, where the hostile environment develops quickly—if not instantaneously—the plaintiff would not have such an opportunity. In theory, that plaintiff would be able to hold the employer liable for the initial act of harassment, which even a timely complaint could not have forestalled, though not for any subsequent harassment that could have been prevented. It is this interpretation that the EEOC seems to adopt in its revised guidelines, suggesting in one example that the affirmative defense would affect damages but not liability where a plaintiff failed to complain about a supervisor's use of frequent, egregious racial epithets "that caused emotional harm virtually from the outset"¹⁷⁵ A prompt complaint by such an employee would, according to the EEOC, have "reduced, but not eliminated, the actionable harm."¹⁷⁶

B. Lower Courts and the Affirmative Defense

Applied correctly, the *Faragher* and *Ellerth* rule should result in vicarious liability for the employer under some circumstances (a single, severe act of harassment) regardless of the fact that the employer may have responded adequately to stop the harassment and prevent further occurrences. Many lower courts have, however, significantly curtailed the scope of *Faragher* and *Ellerth* using two techniques: (1) by construing the affirmative defense to completely absolve the employer of liability regardless of the type of harassment; or (2) by refusing to apply a rule of vicarious liability where the employer responds appropriately to the plaintiff's complaint.

175. EEOC Policy Guidance, *supra* note 71, at E-27.

176. *Id.*

1. *An Affirmative Defense to Liability*

The first technique for providing employers with a negligence-based safe harbor is to treat the affirmative defense as a defense to liability, regardless of whether the hostile environment matures before the plaintiff has an opportunity to complain. The effect of this approach is to give the employer one free bite, as an adequate response to known harassment will absolve the employer of liability for the harassment from its outset.

The Fifth Circuit endorsed this approach in *Scrivener v. Socorro Independent School District*.¹⁷⁷ In that case, the court affirmed a grant of summary judgment to the employer based on the affirmative defense, rejecting the plaintiff's argument that her failure to complain should reduce her damages but not insulate the employer from liability.¹⁷⁸ The court explained: "[a]lthough Scrivener argues that the *Ellerth/Faragher* affirmative defense goes to damages, the Supreme Court itself characterized the defense as a limit to liability."¹⁷⁹ Thus, under *Scrivener*, an employer can cure the problem—from a liability standpoint—simply by making sure it does not happen again.

Trial courts have effectively reached the same result as the Fifth Circuit in *Scrivener*. Although there are no published trial court opinions that specifically address the proper construction of the affirmative defense, the issue is foreclosed by the analytic approach taken by most courts. The distinction between liability and damages can be drawn, if at all, only by understanding the nature of the harassment at issue and the

177. 169 F.3d 969 (5th Cir. 1999). Two other circuits have briefly considered this issue and avoided *Scrivener's* mistake by recognizing that the affirmative defense may affect liability or damages depending on the circumstances. In *Greene v. Dalton*, the D.C. Circuit reversed the district court's grant of summary judgment based on its failure to consider whether the affirmative defense was a defense to liability or damages under the circumstances. 164 F.3d 671 (D.C. Cir. 1999). Plaintiff Luria Greene averred that her supervisor engaged in a pattern of unwelcome sexual discussions and amorous advances that culminated in rape ten days after she began work. See *id.* at 673. Greene did not file a complaint or report the harassment until more than a month after the rape, when her supervisor again propositioned her. See *id.* Whether the employer could avoid all liability, the court held, would turn on whether "a reasonable person in Greene's place would have come forward early enough to prevent Clause's harassment from becoming 'severe or pervasive.'" *Id.* at 675. That is, would a reasonable person have complained within the first ten days and thus prevented the rape, which rendered the environment hostile as a matter of law. The court of appeals remanded the case because "too little is known about Clause's behavior in the first ten days of Greene's employment." *Id.* The Seventh Circuit in *Savino v. C.P. Hall Co.* rejected the plaintiff's suggestion that the affirmative defense could affect only damages, not liability. 199 F.3d 925 (7th Cir. 1999). The Court concluded that, in the context of sexual harassment, "unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability." *Id.* at 935.

178. See *Scrivener*, 169 F.3d at 970-73.

179. *Id.* at 972 (citing *Ellerth*, 524 U.S. 742, 767 (1998)).

timing of any complaint. Specifically, to honor the Supreme Court's intent, courts must distinguish between harassment that could have been halted had the plaintiff complained before it became actionable and harassment that could have been stopped only after becoming actionable.

Rather than permitting the factual development necessary to make that distinction, however, many trial courts simply assume that an actionable hostile environment exists for the sake of argument and ask whether the employer has offered sufficient evidence to succeed on the affirmative defense. A finding that the affirmative defense is viable is followed, without further analysis, by a grant of summary judgment to the employer.¹⁸⁰ In *Fierro v. Saks Fifth Avenue*,¹⁸¹ for example, the district court entered summary judgment for the employer based solely on proof of the affirmative defense.¹⁸² Likewise, the district court in *Sconce v. Tandy Corp.*¹⁸³ dismissed the plaintiff's complaint with prejudice after the employer satisfied its burden of proof on the affirmative defense.¹⁸⁴ Other cases have entered similar dispositions.¹⁸⁵ This practice gives the court no

180. There is an emerging literature questioning the appropriateness of summary judgment in this context for a host of reasons apart from any misapplication of the affirmative defense. See generally Beiner, *supra* note 22, at 71 (criticizing lower courts for overuse of summary judgment based on "severe and pervasive" element of hostile environment claims and attributing overuse in part to lack of diversity on the federal bench, misunderstanding of the nature of sexual harassment claims, and pressure to clear dockets); Medina, *supra* note 22, at 311 (criticizing an apparent trend toward increased use of summary judgment in sexual harassment cases based on idea that jury should decide fact-intensive questions such as those involved in hostile environment harassment); Note, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1994 (1999) (suggesting that judgments about reasonableness embodied in the affirmative defense "are better suited to jury determination than to summary judgment"). But see Buchanan & Wiswall, *supra* note 22 (predicting that affirmative defense may decrease availability of summary judgment to employers); Jonathan W. Dion, Note, *Putting Employers on the Defense: The Supreme Court Develops a Consistent Standard Regarding an Employer's Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 34 WAKE FOREST L. REV. 199 (1999) (positing that the affirmative defense places a new burden on employers that will "severely hamper" their ability to obtain grants of summary judgment).

181. 13 F. Supp.2d 481 (S.D.N.Y. 1998).

182. See *id.* at 487-95.

183. 9 F. Supp.2d 773 (W.D. Ky. 1998).

184. See *id.* at 775-78.

185. See, e.g., *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999) (affirming summary judgment for employer on affirmative defense without consideration of whether actionable hostile environment existed); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999) (granting employer summary judgment on affirmative defense despite concession that actionable hostile environment existed); *Wright v. Anixter, Inc.*, No. 98-17164, 1999 U.S. App. LEXIS 19962 (9th Cir. Aug. 18, 1999) (affirming summary judgment based on affirmative defense without inquiring into threshold claim of harassment); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998) (granting summary judgment to the employer upon proof of the affirmative defense); *Guerra v. Editorial Televisa—USA, Inc.*, No. 97-3670, 1999 U.S. Dist. LEXIS 10082 (S.D. Fla. June 4, 1999) (same); *EEOC v. Barton Protective Svcs.*, 47

opportunity to consider whether a prompt complaint would have prevented only some or all of the harm suffered by the plaintiff. The result is to deprive the plaintiff of her cause of action based solely on the affirmative defense, regardless of the type of harassment or timing of any complaint. The shortcut taken by these courts is tantamount to adopting the view that the affirmative defense *completely* immunizes an employer from liability.

Thus, whether directly, as in *Scrivener*, or indirectly, as in *Fierro*, many courts have embraced the principle that an employer who has taken reasonable preventative and corrective measures should be completely absolved of liability, even if a legally hostile environment existed before any action was taken.

2. *The Refusal to Apply Faragher and Ellerth*

Three federal courts of appeals have given credence to the "first bite" principle with even more flagrant disregard for the Supreme Court's mandate. In *Indest v. Freeman Decorating, Inc.*,¹⁸⁶ the Fifth Circuit crafted an entirely new basis for relieving the employer of liability for harassment that gives the employer a means to escape liability entirely and effectively eliminates the second prong of the affirmative defense. In that case, plaintiff Constance Indest, an exhibit representative, sued Freeman Decorating based on a series of unwelcome sexual advances, comments, and gestures committed by her supervisor, Larry Arnaudet, during an out-of-town trade show.¹⁸⁷ Upon return to her home office, Indest reported all of the incidents to the branch manager.¹⁸⁸ By any standard, the employer took sufficient corrective measures, including conducting a thorough investigation, issuing a written reprimand to the supervisor, suspending the supervisor upon learning of possible plans to retaliate, and guaranteeing Indest that she would never again have to

F. Supp. 2d 57 (D.D.C. 1999) (assuming existence of hostile environment and granting summary judgment to the employer based on affirmative defense); *Hetreed v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. May 11, 1999) (granting summary judgment for employer based on affirmative defense); *Neal v. Electronic Data Sys. Corp.*, No. 5:98-CV-521-B4(2), 1999 U.S. Dist. LEXIS 9732 (E.D.N.C.) (same); *Russell v. American Eagle Airlines, Inc.*, 46 F. Supp. 2d 1330 (S.D. Fla.) (granting summary judgment based on affirmative defense despite proof of "deplorable harassment"); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998) (granting summary judgment based on affirmative defense based on proof of well-enforced anti-harassment policy).

186. 164 F.3d 258 (5th Cir. 1999).

187. *See id.* at 260.

188. *See id.*

work with the supervisor.¹⁸⁹ Those corrective measures proved successful as, according to Indest, the harassment ceased.¹⁹⁰ The district court, ruling without the benefit of *Faragher* and *Ellerth*, granted summary judgment to the employer, concluding that "Freeman's actions were sufficiently swift and effective to preclude corporate vicarious liability for Arnaudet's conduct."¹⁹¹ On appeal, the Fifth Circuit considered the propriety of that ruling in light of *Faragher* and *Ellerth*.

While the court of appeals questioned whether Arnaudet's conduct was sufficiently severe or pervasive to create an actionable hostile environment, it declined to rule on that threshold issue, resolving the case instead on the basis of employer liability.¹⁹² The court of appeals began by correctly acknowledging that the employer could not utilize the affirmative defense because the plaintiff promptly complained and thus did not unreasonably fail to take advantage of opportunities to avoid or mitigate harm.¹⁹³ Thus, a straightforward application of *Faragher* and *Ellerth* would clearly dictate automatic liability for the employer provided the plaintiff could prove she had suffered an actionable hostile environment before she had the opportunity to complain.¹⁹⁴

Rejecting the straightforward approach out of hand, the court instead held that the company was completely absolved of liability, regardless of whether the conduct prior to Indest's complaint qualified as an actionable hostile environment.¹⁹⁵ To reach this conclusion, the court tossed the entire *Faragher/Ellerth* framework aside, holding that where an employer responds quickly and appropriately to a victim's complaint of sexual harassment, the new standards prescribed by the Supreme Court do not apply.¹⁹⁶ As a practical matter, the *Indest* court eliminated the second prong of the affirmative defense by granting the employer a complete defense to liability when it responds appropriately to a plaintiff's complaint of sexual harassment. Thus, in the Fifth Circuit, such an employer cannot be

189. *See id.* at 260-61.

190. *See id.* at 261.

191. *Id.* at 263.

192. *See id.* at 264 ("Whether Indest was subjected to a sexually hostile working environment might be a close question on this summary judgment record, but it is a question that we do not need to address, because there is another basis on which Indest's claim falls short. Indest cannot establish a basis for Freeman's liability as her employer.").

193. *See id.* at 265.

194. *See id.*

195. *See id.* at 267.

196. *See id.* at 265.

held liable, regardless of whether the plaintiff fulfilled her duty to complain.

Judge Wiener concurred in the court's judgment based on his conclusion that the plaintiff had not proven that the harassment had risen to the level of an actionable hostile environment, but strongly disputed the majority's refusal to apply the rule of automatic liability.¹⁹⁷ A fair interpretation of *Faragher* and *Ellerth* does not permit the panel's exemption for cases where the employer takes prompt action. In most cases, Judge Wiener correctly observed, the employer will not face liability where it responded promptly and effectively because its actions will stymie the maturation of the hostile environment. It is, of course, theoretically possible, Judge Wiener reasoned,

for a supervisor to engage in sufficiently severe conduct (e.g., raping, 'flashing,' or forcibly groping or disrobing the subordinate employee) in such a short period of time that, even though (1) the employee reports the conduct immediately, (2) the employer takes swift and decisive remedial action, and (3) no tangible employment action ensues, the employer could still be held liable under the *Ellerth/Faragher* "severe or pervasive" test.¹⁹⁸

But like the courts that treat the affirmative defense as a complete defense to liability, the *Indest* majority deprives plaintiffs of a claim based on a negligence principle—the adequacy of the employer's response to known harassment.

The Eighth Circuit in *Todd v. Ortho Biotech, Inc.*,¹⁹⁹ like the Fifth Circuit in *Indest*, discarded the rule of *Faragher* and *Ellerth* and created an exception to liability for employers who respond adequately to the harassment, but nonetheless cannot prevail on the affirmative defense because the plaintiff reports the harassment. Plaintiff Lori Todd, a sales representative for a biotechnology company, was sexually assaulted at a national sales meeting by an employee with supervisory authority.²⁰⁰ Although a jury found the employer liable under Title VII, the court of appeals vacated the judgment of the court of appeals and ordered reconsideration in light of *Faragher/Ellerth*.²⁰¹

Deferring to the district court to apply *Faragher* and *Ellerth* in the first instance, the court of appeals remanded the case with only some

197. See *Indest v. Freeman Decorating, Inc.*, 168 F.2d 795, 796-97 (5th Cir. 1999) (Wiener, J., concurring).

198. *Id.* at 804 n.52.

199. 175 F.3d 595 (8th Cir. 1999).

200. See *id.* at 597.

201. See *id.* at 597-99.

vague dicta for guidance. The majority correctly recognized that the employer would be subject to automatic liability for the assault because the plaintiff's prompt complaint would deprive it of the affirmative defense. The court worried, however, that such an outcome would needlessly contort the Supreme Court's holding in *Faragher* and *Ellerth* which, in its view, "was adopted to avoid 'automatic' employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment."²⁰² The affirmative defense, the court of appeals cautioned, was

adopted in cases that involved ongoing sexual harassment in a workplace, and may not protect an employer from automatic liability in cases of single, severe, unanticipated sexual harassment unless, for example, the harassment does not ripen into an actionable hostile work environment claim until the employer learns that the harassment has occurred and fails to take proper remedial action.²⁰³

To protect the employer from liability for harassment that matured before the employer had the opportunity to respond, the *Todd* majority suggested that a single, severe act of harassment could never constitute an actionable hostile environment.²⁰⁴ Such an approach prevents a plaintiff from recovering for any initial act of harassment as long as the employer subsequently responds. Thus, as with the approach taken under *Indest*, *Todd* interprets *Faragher* and *Ellerth* to hold employers liable only based on their own misconduct or inaction, absolving them of liability for the first bite.

Finally, the Fourth Circuit in *Watkins v. Professional Security Bureau, Ltd.*,²⁰⁵ followed suit in dicta. In *Watkins*, the court granted judgment as a matter of law to the employer based on the affirmative defense.²⁰⁶ The employer had a policy against harassment and the victim had not complained to the employer, thus enabling the employer to prevail on the both prongs of the defense.²⁰⁷ However, the court made clear that the plaintiff's failure to complain was essentially irrelevant under its interpretation of *Faragher* and *Ellerth*.

202. *Id.* at 598 (emphasis added).

203. *Id.*

204. *See id.* Although he concurred in the result, Judge Arnold took issue with the majority's view, expressing "no doubt that a single severe act of sexual harassment can amount to a hostile work environment actionable under Title VII." *Id.* at 599. Judge Arnold, though not joining issue with the majority, drew a distinction between cases in which the affirmative defense eliminates liability and those in which it reduces damages. *See id.* at 599-600.

205. No. 98-2555, 1999 U.S. App. LEXIS 29841 (4th Cir. Nov. 15, 1999).

206. *See id.* at *23.

207. *See id.* at *3-4.

Even if [the plaintiff's] disclosure of the harassment to [a low-level supervisor] were adequate to establish that she took advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. . . . Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation.²⁰⁸

Thus, the Fourth Circuit too, has rejected the plain meaning of *Faragher* and *Ellerth* in favor of its own, narrower view of when employers should be held liable for supervisor harassment.

C. *The Impact of the Affirmative Defense*

With these rules in mind, the best way to understand *Faragher* and *Ellerth* is to examine different scenarios involving hostile work environment harassment and their projected outcomes compared to the outcomes dictated by a negligence rule of liability.

1. *Employer Takes Inadequate Preventative Measures*

Under *Faragher* and *Ellerth*, an employer who fails to take adequate measures to prevent harassment in the first instance will not be able to prove the first prong of the affirmative defense and thus will be held liable for all subsequent harassment. For example, an employer who does not maintain a formal anti-harassment policy or otherwise warn employees that harassment is prohibited²⁰⁹ can fairly be held liable for all harassment under the new scheme, regardless of how it responds to complaints of harassment. The employer in this situation is punished, in

208. *Id.* at *21 n.16 (citations omitted).

209. In most cases, the harassment policy must be a written, formal policy. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (noting that "proof that an employer had promulgated an anti harassment policy" will usually be necessary). But smaller employers may be able to get by with an informal policy, as long as the idea that harassment will not be tolerated is adequately communicated to employees. *See id.* (a small workforce "might expect that sufficient care to prevent tortuous behavior could be exercised informally"); EEOC, *Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors* (visited May 2, 2000), <<http://www.eeoc.gov/docs/harassment-facts.html>> at 2 ("Small businesses may be able to discharge their ability to prevent and correct harassment through less formal means."); *cf. Pacheco v. New Life Bakery, Inc.*, 187 F.2d 1055 (9th Cir. 1999), *withdrawn*, 187 F.3d 1063 (9th Cir. 1999) (even if employer qualified as small workforce, preventative measures insufficient where it had "no sexual harassment policy nor complaint procedure in place, either formal or informal").

essence, for his own negligence in failing to take measures to prevent harassment.

Under a rule of simple negligence, an employer who does not act to prevent harassment may also be found liable, but only if it also fails to correct the harassment. An employer is negligent where it has actual or constructive notice of a hostile environment and fails to respond. An employer that fails to maintain an effective policy may be charged with constructive notice of all harassment.²¹⁰ Thus the difference between *Faragher* and *Ellerth* and a negligence rule comes when an employer fails to take steps to prevent harassment but subsequently corrects the problem. In that situation, *Faragher* and *Ellerth* dictate automatic liability whereas a negligence framework finds none. Thus, the penalty for failing to enact and maintain an effective harassment policy is more severe under *Faragher* and *Ellerth* than under a rule of simple negligence in that it dictates liability for the employer regardless of how it responds after the fact.²¹¹

2. *Employer Takes Adequate Preventative Measures*

When an employer takes adequate measures to prevent harassment, its liability turns on three additional variables: (1) the victim's response, (2) the employer's response, and (3) the type of harassment. First, the victim may either complain or fail to complain. Second, the employer may take or fail to take adequate corrective measures. Third, these varied employer and victim responses may be taken in response to two types of hostile work environment harassment. The first, which I will term pervasive, non-severe harassment ("Type A"), occurs when a supervisor subjects a subordinate employee to periodic unwelcome sexual advances, comments, and gestures. The second, which I will term severe, non-pervasive harassment ("Type B"), occurs when a supervisor subjects a subordinate employee to a single act, such as sexual assault, sufficiently severe to create an actionable hostile environment. The interplay of these three elements—victim response, employer response, and type of harassment—controls employer liability in cases where the employer takes adequate preventative measures.

210. See *EEOC Policy Guidance*, *supra* note 71, at 6697 (the EEOC will generally "find an employer liable . . . when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem").

211. Even the cases softening the impact of *Faragher* and *Ellerth* would impose liability in this scenario.

a. *Employer Takes Inadequate Corrective Measures*

Where the employer fails to take adequate measures to remedy a known hostile environment, it is always liable, regardless of the type of harassment. Under a negligence theory, it is directly liable for breaching its affirmative duty to correct a known hostile environment; under *Faragher* and *Ellerth*, it is vicariously liable because it is not able to satisfy the first prong of the affirmative defense.²¹² Although the theory is different, the liability in both cases is premised on the employer's own conduct—in this case its inaction in the face of a known hostile environment.

b. *Employer Takes Adequate Corrective Measures*

(1) *Type A Harassment: Plaintiff Complains*

Under a negligence theory, the employer would avoid liability for non-severe harassment based on its adequate response. Under *Faragher* and *Ellerth*, if the plaintiff takes advantage of the employer's complaint mechanism within a reasonable period of time, the employer will not be able to prevail on the second prong of the affirmative defense. Without the benefit of the affirmative defense, the employer is strictly liable for any actionable sexual harassment.²¹³ The key word here, though, is "actionable." Under existing case law, the employer will rarely face liability with this type of harassment when the employer corrects or stops the conduct in a timely manner because the reasonable period of time within which the plaintiff must complain will lapse long before the hostile environment matures.²¹⁴ The employer, in other words, usually has a chance to nip the harassment in the bud before it blossoms into pervasive, and hence actionable, harassment. Thus, although the plaintiff promptly reports the supervisor, she will likely not have a viable claim unless the employer responds inappropriately or with inaction. However, if the hos-

212. See *Faragher*, 524 U.S. at 807.

213. See *id.*

214. See, e.g., *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999) ("When a plaintiff promptly complains about a supervisor's inappropriate sexual actions, she can thwart the creation of a hostile work environment. To the extent redress is sought, is justified, and is adequately provided by the company, the complained-of incidents will not likely have become severe or pervasive enough to create an actionable Title VII claim."); *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 803 (5th Cir. 1999) (Wiener, J., concurring) ("[A]s a practical matter, inappropriate sexual conduct will virtually never rise to the level of actionability when an employer takes the kind of prompt remedial action that [was taken in this case].").

tile environment accrues before the plaintiff has an opportunity to complain, the employer would be liable. The construction of the affirmative defense in *Todd*, *Indest*, and *Watkins*, however, would change this result and mimic a negligence rule. In those circuits, even if the hostile environment matures before the plaintiff has an opportunity to complain, an employer who responds promptly and appropriately can never be held liable for the harassment.²¹⁵

(2) *Type B Harassment: Plaintiff Complains*

If the plaintiff reports severe, non-pervasive harassment, the employer will not be able to succeed on the second prong of the affirmative defense. The employer would then be subject to strict liability for any harm caused by the initial assault under *Faragher* and *Ellerth*. This result differs from that under a negligence rule, which would not hold an employer liable because it did not (indeed—could not) know of the harassment in time to stop it. For this reason, of course, employers held only to a negligence standard would never be held liable for the single, severe acts of their supervisors. *Todd*, *Indest*, and *Watkins* effectuate the same result, an employer to escape liability for a sexual assault as long as it responds promptly and effectively to a plaintiff's complaint.²¹⁶

(3) *Type A Harassment: Plaintiff Fails to Complain*

Under *Faragher* and *Ellerth*, if the plaintiff does not complain about non-severe harassment, the employer will be able to satisfy both prongs of the affirmative defense.²¹⁷ The employer will avoid liability entirely regardless of whether the affirmative defense is construed as a limit on liability or damages. Even if *Faragher* and *Ellerth* permit a court to reduce damages rather than liability where the plaintiff could have avoided some but not all of the harm, these facts do not fall into that category. Rather, the harm is the actionable hostile environment and, as above, a reasonable person, as courts have construed that concept, would complain about that harm long before the environment became actionable.²¹⁸ Con-

215. See, e.g., *Indest*, 164 F.3d at 265-66.

216. See *id.*

217. See *Faragher*, 524 U.S. 775.

218. See, e.g., *Equal Employment Opportunity Commission v. Barton Protective Svcs.*, 47 F. Supp. 2d 57, 61 (D.D.C. 1999) (applying affirmative defense based on plaintiff's eleven-month delay in complaining about daily harassment because "a reasonable person in [her] place would have come forward early enough to prevent [her supervisor's] harassment from becoming 'severe or pervasive'").

sequently, the employer is thus entitled to escape liability where a prompt complaint would have prevented any legal harm. Negligence theory produces the same result using a different analysis: the employer would be excused from liability based on lack of notice due to the plaintiff's failure to complain of the harassment.

(4) *Type B Harassment: Plaintiff Fails to Complain*

If the plaintiff fails to complain about severe harassment, the employer can successfully prove the affirmative defense. Here, however, different constructions of the affirmative defense produce different results. If the defense goes to liability, the plaintiff will be deprived of a cause of action for the assault as well as any subsequent harassment. Negligence theory would produce the same result, rejecting the employer's liability based on lack of notice. If the defense merely goes to damages, however, the plaintiff should be able to recover for the assault (which she could not have prevented), but not for any harassment subsequent to the time at which a reasonable person would have complained (which arguably she could have prevented).²¹⁹ This approach, seemingly mandated by *Faragher* and *Ellerth* but ignored by several circuits, would impose a higher standard of liability than negligence by holding the employer liable despite its lack of notice.

As the above discussion illustrates, the differences in outcomes between direct and vicarious liability are limited even if the rules of *Faragher* and *Ellerth* are correctly applied. *Faragher* and *Ellerth* impose a greater penalty for the failure to maintain an anti-harassment policy and impose liability for an initial severe act of harassment despite the plaintiff's subsequent failure to complain. In every other scenario, both a negligence theory and *Faragher* and *Ellerth* hold an employer liable only where it fails to respond to known harassment. These differences are further diluted by lower court interpretations of the rules of vicarious liability, which refuse to find liability in the latter situation.

III. A CRITIQUE OF THE NEW STANDARDS: LEGAL, THEORETICAL, AND PRACTICAL PROBLEMS

Despite being ostensibly premised on a theory of vicarious liability, *Faragher* and *Ellerth* have given birth to a framework that hesitates to

219. This same reasoning would apply where the hostile environment is not the result of a single, severe act, but develops at a rate or in a context in which a reasonable plaintiff would not have complained until after the environment became actionable.

impose liability against an employer where it was not at fault and had no opportunity to prevent the harassment. These cases explicitly authorize the absolution of liability where a plaintiff does not complain and a prompt complaint might have given the employer the opportunity to prevent an incipient hostile environment from becoming actionable.²²⁰ Lower courts have given an even broader sweep to the "first bite" principle that employers should be given notice and an opportunity to respond before being held liable for supervisor harassment. Some courts have permitted employers to avoid all liability—regardless of the type of harassment—simply by reacting appropriately to complaints;²²¹ other courts have used a plaintiff's failure to complain promptly about severe harassment to rob her not only of damages for subsequent harassment that could have been prevented, but also of liability for the harassment that could not.²²²

While granting employers a safe harbor for harassment they had no opportunity to prevent may have some intuitive appeal, such lenience contorts relevant legal principles and undermines important policy goals. This part of the article, therefore, critiques the affirmative defense—as intended and as applied—on legal and policy grounds.

A. *Undermining Twin Goals of Title VII*

Before issuing its pronouncements in *Faragher* and *Ellerth*, the Supreme Court had repeatedly recognized that Title VII has two separate, yet equally important goals: compensation²²³ and deterrence.²²⁴ In fact, a

220. See *Faragher*, 524 U.S. at 807 (explaining affirmative defense adopted in both cases).

221. See, e.g., *Watkins v. Professional Security Bureau, Ltd.*, 1999 U.S. App. LEXIS 29841 (4th Cir. 1999); *Indest*, 164 F.3d at 258; *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999).

222. See, e.g., *Scrivener v. Socorro Indep. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999) (affirmative defense goes to liability not damages).

223. See, e.g., *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995) ("Compensation for injuries caused by the prohibited discrimination is [one goal of Title VII and the ADEA]"); *Landgraf v. USI Film Products*, 511 U.S. 244, 282 (1994) (the Civil Rights Act of 1991 "reflects Congress' desire to afford victims of discrimination more complete redress for violations of [Title VII]"); *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 102 (1990) (Stevens, J., concurring in part and dissenting in part) (advocating for a particular rule because it is "consistent with our previous admonitions that Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect"); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1472 (11th Cir. 1985) (citing Title VII's "make whole" rationale); see also *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2129 (1999) (recognizing Title VII's goal of remediation).

224. See, e.g., *McKennon*, 513 U.S. at 358 (fashioning rule to serve Title VII's deterrent purpose); *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) (urging Court to apply particular rule to situations where "deterrent purpose of Title VII is most clearly implicated"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (describing Title VII's primary goal as "prophylactic").

motivating force behind the Civil Rights Act of 1991, which amended Title VII, was to make damages available to victims of employment discrimination.²²⁵ But in *Faragher* and *Ellerth*, the Supreme Court elevated deterrence to the "primary" goal and left compensation by the wayside.²²⁶ The Court's reconstructionist history paved the way for a framework designed primarily to prevent harassment from occurring, at the cost of undercompensating victims when prevention fails.

The goal of compensation is clearly undermined by the affirmative defense. As explained above, the affirmative defense operates to ensure that some harms of sexual harassment are not compensable. By limiting an employer's *liability* based on the victim's failure to complain, as many courts do, the rule deprives the victim not only of damages for any harm that could have been prevented, but also of any damages resulting from the first, unpreventable incident and of any declaratory or injunctive relief. There is every reason to compensate the victim for whatever harm flows from the initial act of harassment. The Supreme Court has specifically recognized that psychological injury and emotional distress are cognizable harms of sexual harassment, and the Civil Rights Act of 1991 provides a monetary remedy for those harms. The narrow construction of the affirmative defense not only punishes the victim to the extent that she could have prevented the harm, but also deprives her entirely of a cause of action.

Moreover, the Court's framework does not further the deterrence goal it purports to embrace. The new framework does nothing to increase an employer's incentives to try to prevent harassment nor a victim's incentives to minimize harm. An employer already has the incentive to try to eliminate *all* sexual harassment due to the rule of automatic liability

225. See, e.g., *Landgraf*, 511 U.S. at 282; see also 132 CONG. REC. S15472-01, S15489 (daily ed. Oct. 20, 1991) (statement of Sen. Leahy) ("[W]ithout the improvements of the Civil Rights Act of 1991, there would be no . . . adequate compensation for the victim."); *id.* (noting that the lack of meaningful recovery for reputational and emotional harm reduces the incentive for victims of harassment to speak out); *id.* ("This bill goes a long way toward setting this priority straight and recognizing the importance of protecting all Americans from discrimination by providing a meaningful legal remedy."); 137 CONG. REC. H9505-01, H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) ("Compensatory damages are necessary to make discrimination victims whole from the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity, and for consequential harms.").

226. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (the statute aims primarily "not to provide redress but to avoid harm"); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (choosing rule that will "serve Title VII's deterrent purpose"); see also *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118, 2129 (1999) (Title VII's "'primary objective' is a 'prophylactic one'" (citing *Albermarle Paper Co.*, 422 U.S. at 417)).

when (i) the harassment results in a tangible employment action; (ii) the employer has no policy regarding sexual harassment; or (iii) the victim complains. Granting the employer a windfall where the victim does not complain adds no additional incentive. Likewise, a rule that limits damages based on the failure to mitigate harm would provide sufficient incentive for a sexual harassment victim to report any harassment; depriving her of liability provides no further incentive. Thus, neither of Title VII's goals are served by this framework.

B. *Inconsistency with Victim Response*

The affirmative defense, which conditions an employee's right to recover on her prompt filing of a complaint, unfairly punishes victims who respond perfectly rationally to sexual harassment. The framework established in *Faragher* and *Ellerth* relies on the basic premise that the ability of employers to satisfactorily resolve claims of harassment using internal grievance mechanisms depends on notice. As a theoretical matter, notice is ensured by the affirmative defense, which requires employers to design policies that are calculated to make victims come forward and gives victims a strong incentive to resist and report harassment at the earliest opportunity. In theory, then, the new regime should result in earlier notification to the employer of harassing conduct. Armed with early notice, employers can then step in to bring the objectionable conduct to a halt. In some instances, harassers need only be told that their conduct is unwelcome or impermissible in order to desist, and early notice would thus serve the goal of prevention in those circumstances.²²⁷ In others, the employer can take swift punitive action calculated to achieve the same result. In either case, the prompt notice has at least theoretically improved the employer's ability to respond to ongoing sexual harassment.

Because victims who delay or fail to complain prevent the proverbial dominoes from falling, courts applying *Faragher* and *Ellerth* punish them by depriving them of a cause of action. Courts distinguish between

227. See David E. Terpstra, *The Process and Outcomes of Sexual Harassment Claims*, LAB. L.J. 632, 633 (Oct. 1993) ("In some instances of sexual harassment, simply confronting the harasser or telling the harasser to stop will be effective in curtailing future incidents."); see also A.L. Culbertson et al., *Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-wide Survey*, Report No. 92152-6800 TR-92-11 (1992) (harassment usually stops when harasser is confronted) (cited in Jeannette N. Cleveland & Melinda E. Kerst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, 42 J. OF VOCATIONAL BEHAV. 49, 59 (1993)); Alice J. Dan et al., *Sexual Harassment as an Occupational Hazard in Nursing*, 17 BASIC & APPLIED SOC. PSYCHOL. 563, 576 (1995) ("[A]ppropriate interventions can have positive effects. For example, when a supervisor directly confronted the harasser, the behavior stopped.").

deserving and undeserving plaintiffs under the guise of ascertaining whether an individual victim has behaved "unreasonably" for purposes of the second prong of the affirmative defense.²²⁸ As discussed above, utilizing an employer's internal grievance mechanism promptly to report any objectionable behavior is a necessary, if not always sufficient condition of "reasonableness."²²⁹ The emerging legal definition of reasonableness in this context is at odds, however, with the realities of victim response. Thus any theoretical advantage of requiring victims to file prompt complaints may be practically elusive. Consequently, victims of harassment—who may be acting quite rationally under the circumstances—may be unfairly penalized for failing to complain.

The literature suggests that many victims are reluctant, if not completely unwilling, to report sexual harassment to their employers.²³⁰ Victims of sexual harassment react in myriad ways. Rather than confront the actual or perceived risks of formally complaining about harassment, many victims will respond in less costly ways. Appeasing the perpetrator, rationalizing the perpetrator's actions, blaming themselves for causing the harassment, denying the existence of harassment, and avoiding the perpetrator or the site of harassment are just some of the informal coping mechanisms utilized by harassment victims.²³¹ One researcher has catalogued the varieties of victim response found in a dozen major

228. See *supra* notes 143-54, 174-76 and accompanying text.

229. See *id.*

230. See, e.g., Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. OF VOCATIONAL BEHAV. 152, 162 (1988) (reporting that only three percent of their sample had attempted to report a sexual harassment experience); U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 10, at 71 (reporting similar results from a survey); Jean W. Adams, *Sexual Harassment of University Students*, 24 J.C. STUDENT PERSONNEL 484, 489 (1983) (finding that no student experiencing sexual advances, propositions or extortion reported the incident to university officials); see also Hearings on H.R. 1, The Civil Rights Act of 1991: Hearings Before the House Comm. On Education and Labor, 102d Congress, 1st Sess. 168, 172 (1991) (statement of Dr. Freada Klein) (estimating that more than 90 percent of sexual harassment victims are unwilling to report the conduct); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOCIAL SCIENCE Q. 814 (Dec. 1986) ("For the most part, women employ passive or placating responses—ignoring it or pretending not to notice, walking away, pretending that the harassment has no effect.").

231. See generally Fitzgerald, *infra* note 236, at 119-21 (contrasting internally and externally-focused responses to harassment); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 36 (1993); Vita C. Rabinovitz, *Coping with Sexual Harassment*, in *IVORY POWER: SEXUAL HARASSMENT ON CAMPUS* (Michael A. Paludi ed., 1990); Margaret S. Stockdale, *What We Know and What We Need to Learn about Sexual Harassment*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* (Margaret S. Stockdale ed., 1996) [hereinafter *HARRASSMENT IN THE WORKPLACE*].

surveys.²³² Classifying responses into categories, Gruber found that reporting harassment through internal grievance mechanisms was the least likely victim reaction. Victims instead choose avoidance (which includes passive reactions such as ignoring the harassment), defusion (which includes going along or making a joke of it in order to minimize conflict), or negotiation (which includes efforts to make the harasser stop without involving the employer) in lieu of confrontation (which includes filing an internal complaint).²³³ The percentage of respondents in the surveys studied who opted for confrontation ranged from zero to fifteen.²³⁴ Even among victims willing to complain, they are much more likely to tell a friend or co-worker than a supervisor or other official.²³⁵

The decision by many victims to forego avenues of complaint provided by the employer can fairly be described as rational, for the documented consequences of reporting harassment are quite severe.²³⁶ For many sexual harassment victims, their economic circumstances dictate silence.²³⁷ As Professor Martha Mahoney emphasized in her analysis of sexual harassment victims who stay on the job (written in the wake of the Clarence Thomas-Anita Hill conflict), few workers have the luxury of standing up for their rights either by complaining or quitting.²³⁸ Mahoney draws on women's reactions to other forms of workplace discrimination to challenge the conventional wisdom that exit is the typical response to abusive or discriminatory conditions. As she points out, the fact that young, single women chose sterilization in order to keep their jobs at a local battery manufacturing plant is a powerful antidote to such generalizations.²³⁹

232. See James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 *SOCIOLOGY & SOCIAL RESEARCH* 3 (Oct. 1989).

233. *Id.* at 3-4.

234. *Id.* at 8.

235. James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 *BASIC & APPLIED SOCIAL PSYCHOLOGY* 543, 545 (1995).

236. See Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 *J. SOC. ISSUES* 117, 122-23 (1995) (cataloguing empirical studies of underreporting); Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 *J. VOCATIONAL BEHAV.* 102, 111 (1993) (same).

237. See, e.g., Ben Bursten, *Psychiatric Injury in Women's Workplaces*, 14 *BULL. AM. ACAD. PSYCHIATRY* L. 245, 248 (1986) ("The social fact that women need employment that may not be abundantly available tends to create a willingness to tolerate persistently abusive conditions of work.").

238. See Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 *S. CAL. L. REV.* 1283 (1992).

239. See *id.* at 1289.

Fear of retaliation may also deter sexual harassment victims from reporting the conduct.²⁴⁰ For women in professional careers, such as law, medicine, or academics, silence in the face of harassment may be a calculated measure to avoid losing the sponsorship or mentorship of an older, more established male partner, doctor, or tenured professor.²⁴¹ Studies demonstrate that these fears are often realized when women report sexual harassment.²⁴² Their reticence may also stem from feelings of fault or inadequacy,²⁴³ the desire to avoid "reinforcing stereotypes of women as victims" by "calling attention to offensive behavior,"²⁴⁴ and a belief that reporting the behavior will disrupt a collegial environment.²⁴⁵

Reporting rates may also be suboptimal because the harm of a hostile environment accrues to all employees, not just the targeted em-

240. See, e.g., Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161, 164 (1990) (estimating, based on experience as ombudsperson in sexual harassment cases, that 75 percent of victims express serious concern about retaliatory or adverse consequences for complaining); Teresa L. Butler & Michael Weber, *Retaliation Lawsuits are Increasing Rapidly*, NAT'L L.J., Jan. 11, 1999, at B5 (citing statistic that 22.5% of all EEOC charge-processing is comprised of claims of retaliation). But cf. Natalie Dandekar, *Contrasting Consequences: Bringing Charges of Sexual Harassment Compared with Other Cases of Whistleblowing*, 9 J. BUS. ETHICS 151, 153 (1990) (suggesting that sexual harassment complainants are often perceived favorably by co-workers and suffer far less than other whistleblowers).

241. See Nina Burleigh & Stephanie B. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, A.B.A. J. 46, 51 (Aug. 1989) ("A lot of women won't object to harassment because they're afraid of alienating their mentors.").

242. See, e.g., FARLEY, *supra* note 5, at 25 (discussing surveys by Cornell and the United Nations finding that women who complain about harassment are often punished for doing so); Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO L.J. 649, 655 (1997) (citing study that found "twenty-four percent of victims surveyed were fired because they complained about sexual harassment"); David E. Terpstra & Susan F. Cook, *Complaint Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 PERSONNEL PSYCHOL. 559 (1985) (reporting that a majority of women who filed sexual harassment complaints were ultimately dismissed from their jobs); Jan Salisbury et al., *Counseling Victims of Sexual Harassment*, 23 PSYCHOTHERAPY 316, 319-20 (1986) (reporting that sexual harassment complainants face psychological abuse, lower performance evaluations, shunning of co-workers and withdrawal of social support).

243. See Burleigh & Goldberg, *supra* note 241, at 48 ("In fact, one of the reasons women lawyers don't report harassment is that they feel inadequate for not being able to cope with it on their own. They see it as a character defect rather than a management problem."); Bursten, *supra* note 237, at 248 (women "may not report the harassment because they feel powerless, demeaned, and intimidated").

244. Burleigh & Goldberg, *supra* note 241, at 48.

245. See *id.* at 51 (noting the difficulties of being a "whistle-blower" and trying to remain collegial); see also Mary P. Koss, *Changed Lives: The Psychological Impact of Sexual Harassment*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 73, 81 (Michele A. Paludi ed., 1990); Rowe, *supra* note 240, at 164 (stating that sexual harassment victims worry about disapproval from co-workers and supervisors if they complain).

ployee.²⁴⁶ The typical employee will weigh the consequences of reporting against the benefits that will likely accrue to her personally. Because she has no incentive to internalize the potential benefits to other employees, the level of reporting may be dampened.²⁴⁷ Unless employers can overcome these barriers and increase actual reporting, the benefits of early notification and response cannot be captured. Thus, the affirmative defense not only penalizes victims who rationally “underreport” harassment of compensation they deserve, but also punishes all other employees by removing any incentive to the employer to correct sexual harassment where the victim does not complain.

The incentives given employers by the *Faragher/ Ellerth* framework (to enact and publicize antiharassment policies and train employees about sexual harassment) may nonetheless have a marginal positive effect on the rate of reporting. The “silent reaction to sexual harassment” may be related, in part, to misconceptions and misunderstandings about the definition of sexual harassment;²⁴⁸ greater information, through training or other methods, may stem that reaction. One lesson from relevant studies is that companies “could facilitate more reporting if public policy statements and educational efforts encouraged potential victims to identify and affirm feelings of offensiveness in response to inappropriate sexual behaviors.”²⁴⁹ Strong statements prohibiting retaliation, which a legally effective policy will contain, may also quell fears of adverse consequences associated with reporting harassment.²⁵⁰ Thus, new employer policies may have a modest influence on the reporting rate of sexual harassment.

It would be naïve, however, to conclude that revisions to employee handbooks and occasional training will drastically alter the complex set of economic, psychological, and behavioral forces that keep most victims from complaining about harassment. The likelihood of reporting may also be influenced by the organizational structure of the workplace. Past treat-

246. See generally Charles L. Hulin et al., *Organizational Influences on Sexual Harassment*, in HARASSMENT IN THE WORKPLACE, *supra* note 231, at 127, 145.

247. See Note, *Notice in Hostile Environment Discrimination Law*, *supra* note 180, at 1987-91 (discussing factors beyond the “rational decision” not to report harassment).

248. Linda Brooks & Annette R. Perot, *Reporting Sexual Harassment: Exploring a Predictive Model*, 15 PSYCHOL. OF WOMEN Q. 31, 45 (1991).

249. See *id.*

250. See Gruber & Smith, *supra* note 235, at 548. In a study designed to explore the variables that affect women’s willingness to report harassment, the authors conclude that women are more likely to be assertive and complain where the “employee is controlled by a set of explicit policies and procedures.” *Id.* at 559. Such policies reinforce the primacy of professional roles over sex roles and induce women to complain when boundaries are crossed. See *id.*

ment of complaining victims may be one factor,²⁵¹ as may the gender balance in the workplace.²⁵² Lin Farley, in an early book on sexual harassment, explained the complex congruence of factors that combine to discourage reporting:

Economic need, the structure of the workplace, and female sex-role conditioning are critical factors in the way women respond to sexual harassment. Because assertions of male dominance are socially sanctioned, because men normally hold higher rank at work, because work is a source of income, and because society trains women to be "nice," few women object to male invasiveness unless it is profoundly disturbing.²⁵³

Studies suggest that the reaction to harassment may depend on severity,²⁵⁴ gender,²⁵⁵ and class.²⁵⁶ Some researchers have also suggested that perceived offensiveness predicts reporting, and that both feminist ideol-

251. See Gruber & Smith, *supra* note 235, at 547 (discussing studies that correlate past treatment of complaints with likelihood of reporting); Lach & Gwartney-Gibbs, *supra* note 236, at 371-72.

252. See Lach & Gwartney-Gibbs, *supra* note 236, at 369.

253. FARLEY, *supra* note 5, at 23.

254. See, e.g., Baker et al., *supra* note 11; Gruber & Smith, *supra* note 235, at 546 (discussing studies that relate severity to the likelihood of reporting); M. Sullivan & Deborah I. Bybee, *Female Students and Sexual Harassment: What Factors Predict Reporting Behavior?*, 50(2) J. NAT'L ASS'N WOMEN DEANS AND COUNS. 11 (1987).

255. See Baker et al., *supra* note 11, at 318. The authors of this study also found that women were disproportionately more likely to resist unwelcome physical contact or other physically threatening conduct and to report such incidents. See *id.*; see also, Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 35 (1998) ("men and women often, but not invariably, perceive social-sexual behavior, especially in the workplace, in different ways"); Caroline C. Cochran et al., *Predictors of Responses to Unwanted Sexual Attentions*, 21 PSYCHOL. OF WOMEN Q. 207-26 (1997); Mary A. Gowman & Raymond A. Zimmerman, *Impact of Ethnicity, Gender, and Previous Experiences on Prior Judgments in Sexual Harassment Cases*, 26 J. OF APPLIED PSYCHOL. 596-617 (1996); Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070-76 (1993); BARBARA A. GUTK, SEX AND THE WORKPLACE (1985); Barbara A. Gutek et al., *Interpreting Social-sexual Behavior in a Work Setting*, 22 J. OF VOCATIONAL BEHAV. 30 (1983); ROSEMARIE SKAINE, POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT 178 (1996) (citing studies showing difference between male and female perceptions of harassment). But see Douglas D. Baker et al., *Perceptions of Sexual Harassment: A Re-Examination of Gender Differences*, 124 J. OF PSYCHOL. 409, 410 (1990) (suggesting that "gender differences in perceptions of sexual harassment may be overstated"); Jeremy A. Blumenthal, *supra*, at 46 (concluding that studies consistently found small, but significant gender differences in perceptions of sexual harassment).

256. Willingness to report harassment may vary along class lines. See Eileen Breshnahan, *Putting Your Body on the Line: A Meditation on 'Hostile Environment' Sexual Harassment in Working-Class Perspective*, 9 NAT'L WOMEN'S STUD. ASS'N J. 64 (1997) (exploring, based on her experience with harassment as a letter-sorter with the United States Postal service, the many reasons working class women may not report harassment to management).

ogy and frequency of behavior affect perceived offensiveness.²⁵⁷

Some of the unfairness inflicted on victims by the affirmative defense could be solved if courts would take a more contextualized approach to determining "reasonableness." The law does not require that the concept of reasonableness be developed in a legal vacuum, nor does it normally permit the label "unreasonable" to be applied to actions that are typical, common, or rational under the circumstances.²⁵⁸ To the contrary, the Supreme Court has repeatedly acknowledged the permissibility of, and even the need for, looking at allegations of a hostile environment from the victim's perspective.

Although the Supreme Court has never adopted the once-popular "reasonable woman" standard for evaluating hostile environment claims, it has recognized the relevance of the victim's perspective.²⁵⁹ The "reasonable woman" standard was justified by some courts based on the assumption that there was a vast divergence between male and female perceptions of sexual harassment, making it unfair to punish conduct only if both men and women would find it to be hostile or abusive. Social scientists have questioned that assumption, suggesting that empirical studies support only a mild divergence in perceptions of harassment based on gender. However, the Court in *Oncale v. Sundowner Offshore Services, Inc.*,²⁶⁰ a case addressing whether same-sex harassment could violate Title VII, emphasized the importance of context in evaluating whether an environment is sufficiently hostile, leaving courts free to consider the individual victim's identity and perceptions.²⁶¹ Likewise, in *Harris v. Forklift*

257. See Brooks & Perot, *supra* note 249, at 45; Gruber & Smith, *supra* note 235, at 546 (discussing studies that found a correlation between perceived offensiveness and likelihood of reporting).

258. See generally Stephen R. Perry, Symposium, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 511 (1992) (commenting that "the idealization of agency that tort law has adopted under the label of the reasonable person is presumably meant to suggest that the 'ordinary' or 'average' person could and would have so acted"); David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 389-90 (1994) (discussing the "reasonable person standard").

259. The "reasonable woman" standard was adopted by the Ninth Circuit in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). The plaintiff in *Harris v. Forklift Systems Inc.* unsuccessfully argued for its adoption by the Supreme Court. See generally CAROLINE FOVELL & DONNA MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000) (discussing a proposition that would change law's fundamental paradigm by introducing a "reasonable woman standard" for measuring behavior).

260. 523 U.S. 75 (1998).

261. See *id.* at 81 ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances . . . [which] requires careful consideration of the social context in which particular behavior occurs and is experienced by its target'). The court further noted that juries must look for "conduct which a reasonable person in the plaintiff's position would find severely hostile or

Systems, Inc.,²⁶² the Court clarified that harassment must be evaluated based on the totality of the circumstances, again leaving room for consideration of the context and individual plaintiff's identity.²⁶³ The reasonableness of a victim's response to harassment, then, must be considered, according to the Court's mandate, in context and from the perspective of a reasonable victim. Such contextualization would not permit decisions such as *Marsicano*, discussed above, to stand. However, even without broadening the notion of reasonableness in this context, courts could lessen the penalty for delaying or failing to report harassment by applying the affirmative defense to remedy rather than liability.

C. Theoretical and Doctrinal Inconsistencies

Premising an employer's liability on its response rather than the underlying conduct of the employer's agent is flatly inconsistent with the principle of vicarious liability. There is no need for vicarious liability if employers authorize the harassment or fail to take steps to remedy a known hostile environment because employers in that situation are directly liable for their own intentional or negligent conduct. The ostensible basis for liability under *Faragher* and *Ellerth* is the degree to which an harassing supervisor is aided by the agency relation. Yet victim complaint and employer response, two factors the Court considers in determining liability, have no bearing on whether the harassing supervisor was aided by the agency relationship in accomplishing the harassment. They should, consequently, have no effect on whether the employer is vicariously liable. This theoretical inconsistency could be cured, however, by interpreting the affirmative defense to affect only damages. Such an interpretation would in effect create a rule of strict liability, as agency principles dictate, with damages subject to normal principles of mitigation.

However, the Supreme Court misapplied mitigation principles. In *Faragher* and *Ellerth*, the Court drew on the common law doctrine of avoidable consequences to develop the affirmative defense.²⁶⁴ Whether or not that doctrine has a place in anti-discrimination law is an open question.²⁶⁵ Even if it does, the Court was clumsy in adapting the general

abusive" (emphasis added). *Id.* at 82. At least one court has taken *Oncala* to open the door to a reasonable woman standard. See *Steinberg v. Hoshijo*, 960 P.2d 1218, 1226 (Haw. 1998).

262. 510 U.S. 17 (1993).

263. See *id.* at 23.

264. See *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 764.

265. For a convincing argument that tort law is an inappropriate analog for discrimination law, see generally Tracy E. Higgins, *Limiting Respondeat Superior Liability: A Wolf in Sheep's Clothing?*,

principle that sexual harassment plaintiffs have a duty to mitigate harm. Limiting a victim's *damages* based on the failure to take advantage of available corrective measures has deep common law roots. Both contract and tort law embrace the principle that plaintiffs cannot recover damages for harm they could have prevented. Limiting *liability*, though, finds no similar support in the common law generally or in anti-discrimination law in particular.

In tort law, the relevant analog is the common law doctrine of avoidable consequences. The Restatement of Torts provides that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."²⁶⁶ As explained in the Comments of the Restatement, this limitation on damages is necessitated by public policy which "requires that persons should be discouraged from wasting their resources, both physical or economic."²⁶⁷ Applied in the tort context, these policy considerations do not justify cutting off liability. As further explained in comment a, "[I]t is not true that the injured person has a duty to act, nor that the conduct of the tortfeasor ceases to be a legal cause of the ultimate harm. . . ." ²⁶⁸

In contract law, the corollary to the doctrine of avoidable consequences is the duty to mitigate damages caused by a breach of contract. With respect to an employment contract, this duty means that the "agent cannot recover damages for losses, which, in the exercise of due diligence, he could avoid."²⁶⁹ That is, a terminated employee has a duty to take steps to reduce the harm caused by the breach of employment contract. A variation of this duty is embraced by authoritative commentators on damages as well and applied in cases of damages stemming from

23 FORDHAM URB. L.J. 1181 (1996).

266. RESTATEMENT (SECOND) OF TORTS § 918(1) (1979). The Restatement also provides that [o]ne is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

Id. at § 918(2). The Supreme Court's construction of Title VII embodies this principle as well by holding employers liable for sexual harassment they knew or should have known about regardless of the existence of a policy and grievance procedure.

267. RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (1979).

268. *Id.*

269. RESTATEMENT (SECOND) OF AGENCY § 455 cmt. d (1958) ("[I]f a servant or other agent, employed on a time basis to render personal services, obtains or by diligence could obtain, during the contract period, other suitable employment . . ., his damages are diminished by the amount which he receives or should receive in such employment.").

other legal wrongs.²⁷⁰

Federal employment law utilizes the doctrine of avoidable consequences. For example, the doctrine has been used to limit worker recovery for an employer's unfair labor practices²⁷¹ and civil rights violations.²⁷² According to the Supreme Court, Congress drew on this "ancient principle of law,"²⁷³ in making "Title VII claimants subject to the statutory duty to minimize damages set out in § 706(g)."²⁷⁴

Some features of the doctrine of avoidable consequences dovetail the rules of employer liability for supervisor hostile environment harassment. For example, the doctrine does not operate to reduce a victim's damages where the victim does not know how to mitigate the harm.²⁷⁵ This limitation could square perfectly with *Faragher* and *Ellerth*, which impose a duty to mitigate only where the policy and grievance procedures the employer maintains are widely disseminated and effective such that it would be unreasonable for an employee not to report sexual harassment as soon as it occurs.²⁷⁶ But there is no precedent in tort, contract, or discrimination law for using a principle of mitigation to erase liability,

270. See CHARLES T. MCCORMICK, *LAW OF DAMAGES* 127-58 (1935). The "general rule" is stated as follows:

Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.

Id. at 127.

271. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941). In *Phelps*, the Supreme Court stated:

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.

272. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (the doctrine of avoidable consequences does not force an unemployed or underemployed petitioner to go into another line of work, take a demotion, or acquire an inferior position, but he only forfeits his right to backpay if he refuses a job which was substantially equivalent to the one he was denied).

273. *Id.* at 231.

274. *Id.*; see also 42 U.S.C. § 2000e-5(g)(1) (1994) ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable"); MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 442 (1988) (noting that Title VII "adopts the common law obligation of a nonbreaching party to a contract to mitigate the breaching party's damages") (citing *Parker v. Twentieth Century Fox Film Corp.*, 474 P.2d 689 (Cal. 1970)).

275. See *Marine Transp. Svcs. Sea Barge Group v. Python High Performance Marine Corp.*, 16 F.3d 1133, 1140 (11th Cir. 1994) ("Manifest in this doctrine is the assumption that the injured party knows what reasonable efforts to use to mitigate damages"); *Ford Motor Co. v. Dallas Power & Light Co.*, 499 F.2d 400, 414-15 (5th Cir. 1974).

276. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806, 807 (1998).

and there is no justification for doing so in the sexual harassment context.

The version of avoidable consequences applied to penalize sexual harassment plaintiffs is inconsistent with that applied to other Title VII plaintiffs. A plaintiff alleging disparate treatment under Title VII, for example, has a claim regardless of whether she notified the employer of the discrimination or made any attempt to prevent or correct it. And while a disparate treatment plaintiff does have a duty to mitigate damages (i.e. look for substitute comparable work where discrimination results in discharge), the plaintiff's fulfillment of that duty has no bearing on the underlying discrimination claim or the employer's liability. Disparate treatment cases are a perfect example of how the avoidable consequences doctrine can correctly be intertwined with anti-discrimination law to limit worker recovery to damages actually caused—and unmitigatable—by an employer's misconduct.

D. *Condoning Effective Quid Pro Quo Harassment*

As discussed above, the Supreme Court in *Faragher* and *Ellerth* did not address the proper characterization of submission cases—where a supervisor's threats lead to submission by a subordinate employee—for the purposes of assessing employer liability. At least one lower court has held that the plaintiff in a submission case does not get the benefit of the rule of automatic liability applicable where the harassed employee suffers a tangible employment action.²⁷⁷ An employer in such a case then has the opportunity to prove the affirmative defense. It is, of course, anomalous to refuse to recognize that submission to a supervisor's sexual extortion is itself an alteration in the terms and conditions of employment. It also strains the holding in *Ellerth*, contradicts the principles behind it, and undermines Title VII's goals of deterrence and compensation.

That mistake is compounded by construing the affirmative defense to defeat liability. The employer in a submission case will typically be able to make out both prongs of the affirmative defense and thus defeat liability.²⁷⁸ Toward the first prong, the employer would show that it main-

277. See *Hetreed v. Allstate Ins. Co.*, No. 96-C2021, 1999 U.S. Dist. LEXIS 7219 (N.D. Ill. May 12, 1999), at *13-14 (rejecting argument that submission to supervisor's unwelcome sexual advances constituted tangible job detriment under *Ellerth*).

278. This may not always be true, as in some cases a victim may not have any opportunity to complain before submitting to her supervisor's threats. Cf. *Gary v. Long*, 59 F.2d 1391, 1398 (D.C. Cir. 1995) (plaintiff taken by supervisor off-premises to a warehouse where she was threatened and then forcibly raped). And even where there is a lapse of time between the threat and the submission,

tained an effective policy and grievance procedure and responded swiftly upon learning of the extortion. Toward the second, the employer would show that the employee unreasonably failed to take advantage of the policy when she submitted to the supervisor's threats instead of reporting the threat. Having made out the affirmative defense, the rule of *Scrivener, Indest, Todd, and Watkins* would extinguish the employer's liability despite the supervisor's use of actual authority from the employer to accomplish the harassment.

E. *Misallocating Risk of Harm*

The imposition of true strict liability for supervisor harassment rather than the compromise rule adopted by the Supreme Court serves two economically desirable goals.²⁷⁹ First, it forces employers to exercise the appropriate level of care. Pre-harassment procedures and proactive monitoring may reduce the amount of harassment, but nothing will completely eliminate the misuse of supervisory authority. A rule of automatic vicarious liability encourages an employer to exercise the greatest care possible in screening prospective managers, as well as in training, supervising, and monitoring existing supervisors. As Judge Posner suggested, "[t]he most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable."²⁸⁰ Indeed, recognition of the employer's greater opportunity to prevent harassment by supervisors influenced the Court in *Faragher* to adopt a rule affording vicarious liability in some circumstances:

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and in-

if a victim fears for her physical safety it may be reasonable to submit before making a complaint.

279. For a general economic analysis of law, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 259-333 (2d ed. 1997). For an application of those general principles to the Title VII context, see generally J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273 (1995).

280. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989). Judge Posner retreated somewhat from this position in *Jansen*, the case ultimately captioned *Burlington Industries v. Ellerth* by the Supreme Court. In that case, Judge Posner issued an opinion concurring in part and dissenting in part, in which he argued that strict liability is appropriate only where a supervisor's harassment results in an official company act. See *Jansen v. Packaging Corp. of Am.*, 123 F.2d 490, 506-17 (7th Cir. 1997). Although the Seventh Circuit majority rejected this position, the Supreme Court ultimately adopted it, substituting the phrase "tangible employment action" for "official company act."

centive to screen them, train them, and monitor their performance.²⁸¹

Second, strict liability imports standard tools of insurance and risk spreading into the Title VII context.²⁸² Any perceived unfairness in holding employers liable for unfulfilled threats is outweighed by the unfairness of leaving the victims of those threats without a remedy for the harm done to them.²⁸³ The employer who assumes the risks of doing business is better able than the victim to absorb the losses, insure against them, and distribute them. The Supreme Court's retreat from automatic liability, therefore, shifts the burden to those who can least afford to bear it.

F. *Deprivation of Attorneys' Fees*

By excusing the employer from liability based on the affirmative defense, the new rules deprive plaintiffs, who have suffered proven discrimination under Title VII, of their statutory right to attorneys' fees.²⁸⁴ The effect of this deprivation is much broader than simply reducing the plaintiff's pot of gold at the end of the rainbow. Without the potential to recover fees, plaintiffs will have a reduced incentive and ability to sue their employers and enforcement of the anti-discrimination law will be undermined.²⁸⁵ As the Supreme Court has recognized, the right to seek attorneys' fees under Title VII has "given the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights."²⁸⁶

281. *Faragher*, 524 U.S. at 803.

282. *See, e.g.*, Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1816-17 (1999) ("[S]trict liability provides compensation to victims for the harm caused by harassers, a result that can be justified by corrective justice or on distributional grounds of insurance and risk spreading").

283. *See* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Doctrines*, 101 HARV. L. REV. 563, 607 (1988) (arguing in the name of efficiency that all supervisor harassment should result in strict liability of the employer); *see also* Smith, *supra* note 281, at 1816 (arguing from an economic standpoint for the imposition of strict liability for all workplace harassment, regardless of the type of harassment or rank of the harasser).

284. Congress added a fee-shifting provision to Title VII in 1976. *See* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000).

285. *See* *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) ("Congress authorized fee shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases.").

286. *Id.*; *see also* Amy Holzman, *Denial of Attorneys' Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, A Sword Against Women*, 63 FORDHAM L. REV. 245, 260 (1994) (criticizing court opinions that deny attorneys' fees to sexual har-

This greater access to lawyers and courts for individual victims produces a broader benefit to society: individuals are given the incentive and the means to share the burden of enforcing federal civil rights laws. In an early case interpreting Title II, the public accommodations analog to Title VII, the Supreme Court acknowledged the importance of fee-shifting in facilitating the public-private enforcement scheme for federal civil rights laws:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive power of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable, but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II [of the Civil Rights Act of 1964].²⁸⁷

The threat of attorneys' fees may also serve to encourage employer compliance with civil rights laws.²⁸⁸

The new rules, as intended and applied, deny plaintiffs and society of important benefits. The *Faragher/Ellerth* scheme, by sometimes eliminating liability, and thus access to attorneys fees, even where actionable discrimination has been proven, undermines the civil rights of individual plaintiffs and society at large.

IV. A PROPOSED SOLUTION

As discussed in the previous section, a rule that permits plaintiffs to suffer actionable harassment, yet deprives them of liability based on the failure to complain is inherently unfair and undermines the goals of Title VII. In this Part, I urge Congress to remedy the Supreme Court's interpretation—and lower courts' misinterpretation—of Title VII by amending the statute. Specifically, I argue herein that, instead of being completely absolved of liability, employers who respond diligently upon learning of hostile environment harassment should be rewarded, if at all,²⁸⁹ in terms

assment plaintiffs utilizing informal resolution processes).

287. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam); see also *Evans*, 475 U.S. at 745 (Brennan, J., dissenting) ("Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as private attorneys' general, vindicating the public interest.").

288. See, e.g., *Hensley v. Eckerhardt*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part and dissenting in part); *Cooper v. Singer*, 719 F.2d 1498, 1501 (10th Cir. 1983); *Shadis v. Beal*, 685 F.2d 824, 829 (3d Cir. 1982); *Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980).

289. The bulk of the criticism presented in this article applies with equal force to a much

of remedy. Such an approach would require that the rule of automatic liability established in *Faragher* and *Ellerth* apply regardless of employer response (contrary to *Todd*, *Indest*, and *Watkins*) and that the affirmative defense operate only to reduce or eliminate damages rather than avoid liability (contrary to *Scrivener*).²⁹⁰ The upshot of this approach is that all plaintiffs who are subjected to a legally hostile environment by a supervisor would be entitled to a finding of liability against the employer, but, in some cases, a plaintiff might not be entitled to any damages as a penalty for her own failure to mitigate.

Federal anti-discrimination law has on numerous occasions recognized the value of holding institutions liable for discriminatory acts even where the individual victim, for one reason or another, may not be entitled to monetary compensation. Thus, in the context of mixed-motive discrimination, after-acquired evidence, and school-based sexual harassment, Congress and the Supreme Court have crafted techniques for reaching such a result.

In *Price Waterhouse v. Hopkins*,²⁹¹ the Supreme Court considered an employer's liability when it made an employment decision based partly on a permissible basis and partly on an impermissible, discriminatory basis. Ann Hopkins, a senior manager at a professional accounting firm, brought suit under Title VII after being denied a partnership in the firm.²⁹² A splintered Supreme Court ruled that "once a plaintiff shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play

broader proposition: that there should be no affirmative defense in hostile environment cases, subjecting employers to strict liability for all supervisor harassment.

290. Early on, Professor Susan Estrich urged courts to abandon the requirement that hostile environment harassment be severe or pervasive. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 843-47 (1991) ("[T]he pervasiveness of the harassment should be relevant to the question of what relief is appropriate. . . . But it does not inevitably follow that there is no harm in harassing, so long as it is sporadic"). The quantum and severity of harassment, she argued, should affect the amount of recovery rather than the existence of liability. See *id.* Professor Estrich' reasoning, that even sporadic or incidental harassment can be harmful to female workers, supports the interpretation of employer liability advocated in this article. Professor B. Glenn George has also argued that the concept of an actionable hostile environment should be construed to encompass all harassing behavior, however trivial. B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 21 (1993). By building in a layer of harassment that is not actionable, Professor George argued, the daily working lives of women are unmistakably different—both symbolically and practically—than those of their male counterparts. See *id.*

291. 490 U.S. 228 (1989).

292. See *id.* at 232.

such a role.”²⁹³ The effect of the Court’s decision was to give employers the freedom to discriminate in employment decisions as long as they could provide an additional, independent basis for such decisions.

With the Civil Rights Act of 1991, Congress strongly repudiated the Supreme Court’s interpretation of employer liability in mixed-motive cases.²⁹⁴ Section 107 of the act specified that Title VII makes employers *liable* for any employment decision where discrimination on a prohibited basis was “a motivating factor” for the decision.²⁹⁵ Thus, under the 1991 amendment to Title VII, an employer who allows sex discrimination to influence an employment decision is held liable for that discrimination regardless of whether it did make or could have made the same decision on legitimate bases. However, in order to avoid unjust penalties for an employer with independent legitimate reasons for their employment decisions, Congress limited the available remedies when an employer is able to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor.²⁹⁶

The Supreme Court adopted the same approach in *McKennon v. Nashville Banner Publishing Co.*, a case involving after-acquired evidence.²⁹⁷ There, the Court was presented with the question of whether to hold an employer liable for a discriminatory firing (in that case based on age) where the employer discovered evidence—after the employee has been terminated—that would have led to the employee’s termination on lawful and legitimate grounds.²⁹⁸

In *McKennon*, the plaintiff was allegedly terminated in violation of the Age Discrimination in Employment Act (ADEA), but testified in her deposition that she had copied and removed confidential documents from

293. *Id.* at 244.

294. See Civil Rights Act of 1991, Pub. L. 102-166, Nov. 21, 1991, 105 Stat. 1071, codified as 42 U.S.C. § 2000e-2.

295. Section 107 amends 42 U.S.C. 2000e-2 to provide, in relevant part: “(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” *Id.*

296. Section 107 also amends 42 U.S.C. 2000e-5(g) to provide, in relevant part:

(B) On a claim in which an individual proves a violation under 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief . . . and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment. . . .

Id.

297. 513 U.S. 352 (1994).

298. See *id.* at 354.

the office, thereby violating her employment agreement and providing independent grounds for termination.²⁹⁹ The Court rejected the suggestion that McKennon was deprived of any cause of action under the ADEA by virtue of her supervening misconduct.³⁰⁰ That approach, said the Court, would undermine Congress' efforts to eradicate workplace discrimination. Title VII's twin goals of compensation and deterrence would be better served by encouraging the private litigant to seek a judgment of liability even where damages might be limited.³⁰¹ Each judgment of liability furthers the objectives of the statute and makes it easier to demonstrate a pattern or practice of discrimination.³⁰² For these reasons, the Court rejected the application of any type of unclean hands principle where a private suit serves important public purposes or where Congress authorizes broad equitable relief to serve important national policies. Therefore, the Court concluded that after-acquired evidence of misconduct could only be used to limit damages, consistent with their view that fairness requires courts to take into account the employee's wrongdoing in fashioning "appropriate remedial action."³⁰³ However, the plaintiff's cause of action is preserved in this situation.

Finally, the Supreme Court has created a similar structure for sexual harassment claims under Title IX. Title IX prohibits schools that receive any federal financial assistance from discriminating on the basis of sex.³⁰⁴ Sexual harassment, under Title IX, is proscribed as a form of intentional sex discrimination,³⁰⁵ and any individual who can prove a violation may be entitled to monetary damages as well as equitable relief and attorneys' fees.³⁰⁶

In 1997, the Office for Civil Rights issued a Policy Guidance on sexual harassment, which set forth its guidelines for preventing and correcting sexual harassment and the standards by which it will hold schools liable for violations.³⁰⁷ Pursuant to the Policy Guidance, a school is automatically liable for all quid pro quo harassment and teacher-student hos-

299. *See id.* at 356.

300. *See id.* at 357.

301. *See id.*

302. *See id.* at 358.

303. *See id.* at 362.

304. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1990).

305. *See Franklin v. Gwinnett County Schools*, 503 U.S. 60, 74-75 (1992). The Supreme Court recently clarified that an educational institution may be held liable under Title IX for failing to prevent a hostile environment created by students as well as teachers. *See Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999).

306. *See Franklin*, 503 U.S. at 75-76.

307. *See id.*

tile environment harassment.³⁰⁸ In addition, a school may be held liable for a hostile environment created by students or third parties if it knew or should have known of the harassment and failed to stop it.³⁰⁹

However, two recent Supreme Court decisions severely limited the circumstances under which a school may be forced to pay monetary damages for sexual harassment. In *Gebser v. Lago-Vista Independent School District*,³¹⁰ the Court held that monetary damages are available for teacher-student sexual harassment only where school officials with the capacity to stop the harassment had *actual* notice of the harassment and responded with deliberate indifference.³¹¹ In *Davis v. Monroe County Board of Education*,³¹² the Court applied that same standard to claims involving peer harassment.³¹³ Thus, to the extent that plaintiffs seek money damages from an educational institution, Title IX does not recognize a theory of imputed liability; that is, a school can only be forced to pay damages based on its own negligence—its failure to act in the face of a known situation of harassment.

However, neither *Gebser* nor *Davis* has any effect on a plaintiff's ability to hold a school *liable* for harassment and obtain equitable relief under the standards elucidated in the Policy Guidance.³¹⁴ Thus, a plaintiff who fails to prove actual notice to an appropriate official of sexual harassment will be unable to collect damages, but may nonetheless obtain a finding of liability.

In three important areas of federal anti-discrimination law, therefore, plaintiffs are entitled to a finding of liability—a judgment that the employer discriminated—even where circumstances dictate that damages are inappropriate. The same approach should be taken in the context of supervisor sexual harassment under Title VII. Portions of *Faragher* and *Elderth* should be overruled or Title VII should be directly amended to establish that the affirmative defense can only affect the remedies available to the victim of supervisor sexual harassment. The employer should be

308. *See id.*

309. *See* Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034-01 (1997).

310. 524 U.S. 274 (1998).

311. *See id.* at 290-91.

312. 119 S. Ct. 1661 (1999).

313. *See id.* at 1671-72.

314. In *Gebser's* wake, the Secretary of Education issued a letter indicating his intent to continue enforcing Title IX according to the standards set forth in the Policy Guidance. *See* Letter from Richard Riley, Secretary of Education, to President Clinton re: sexual harassment and Title IX (January 28, 1999) (available at <<http://www.ed.gov/News/Letters/990128.html>>).

held liable based solely on the occurrence of the harassment at the hands of an agent.

CONCLUSION

As this article has demonstrated, the law of sexual harassment has taken two steps forward, but one step back. The standards for liability adopted by the Court provide substantial incentives for employers to prevent harassment. Better grievance procedures may also resolve harassment disputes more satisfactorily than before. But where neither prevention nor internal band-aids are successful, the new rules will often produce unfair results. If the affirmative defense is construed to bar liability in some or all cases, sexual harassment victims who have suffered actionable discrimination are often deprived of compensation for harassment even where agency principles seem to dictate employer liability. This deprivation comes under circumstances where other victims of discrimination would recover and undermines the goals of Title VII. As it has done before in analogous situations, Congress should step in and correct the problem.

Even the change recommended in this article, however, will not be enough to level the playing field for women in the workforce. Until sexual harassment is eliminated, women always work at a disadvantage compared to their male counterparts. A pinch here, and a leer there can undermine the confidence, ability, and success of a female worker. No amount of money can restore those losses, especially where the system is designed to tolerate a moderate level of noncompensable harassment. Understanding the causes of harassment and the ability of legal deterrents to prevent it is an important area for future research.