EMPLOYERS AND EMPLOYEES BEWARE: THE DUTIES IMPOSED BY THE RECENT SUPREME COURT DECISIONS AND THEIR IMPACT ON SEXUAL HARASSMENT LAW

INTRODUCTION

The now infamous case brought by Paula Corbin Jones against President Clinton did more than lead the President down the road to impeachment. The case gave national attention to the problem of sexual harassment for the first time since Anita Hill's allegations of sexual harassment by Justice Clarence Thomas. While the nation watched the unfolding drama of the President's case, the Supreme Court put sexual harassment on its agenda for the 1998 term. The Court decided four very important cases, each dealing with different aspects of this complex body of law.[1] Two cases in particular, *Burlington Industries, Inc. v. Ellerth*[2] and *Faragher v. City of Boca Raton*,[3] sought to resolve the issue of employer liability in cases where alleged sexual harassment is conducted by a supervisor of the employer.

In both *Faragher* and *Burlington Industries*, the Supreme Court affirmed that employers are *per se* liable when a plaintiff suffers a tangible job detriment as a result of harassment committed by a supervisor. At the same time, the Court took a significant step toward eliminating the conflict among the lower courts as to the appropriate standard of liability for "hostile work environment" sexual harassment. The Court's resolution was to hold employers vicariously liable, subject to a limited exception. This exception is satisfied only upon a showing that the employer took reasonable steps to prevent and/or correct any misconduct, as well as a showing that the employee unreasonably failed to fulfill its corresponding obligation to act reasonably when the situation arises.

This Comment will focus on the recent Supreme Court decisions and their impact on sexual harassment both in the courtroom and in the workplace. Part I contains an overview of the law

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[1] *See* Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998) (dealing with employer liability for acts of its supervisors); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (dealing with employer liability for supervisory acts); Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (holding same-sex sexual harassment actionable under Title VII); Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998) (regarding sexual harassment of a student and an implied private right of action pursuant to Title IX).

[2] 118 S. Ct. 2257.

[3] 118 S. Ct. 2275.

of sexual harassment and employer liability prior to the most recent Supreme Court decisions. Part II examines the recent decisions themselves, focusing primarily on the facts and holdings of each case. This part also provides some preliminary (and general) observations on the merits of the dissent, written by Justice Thomas in both cases. Part III assesses the impact these decisions will have on sexual harassment and employment law in the future, paying close attention to the affirmative defense created by the Supreme Court. In conclusion, this Comment asserts that the affirmative defense recently established by the Court properly places an increased burden upon both employers and employees to be proactive in their fight against sexual harassment.

PART I: A BRIEF OVERVIEW

A. *Title VII and the Distinction between Quid Pro Quo and Hostile Work Environment*

Sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.[4] The statute reads, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or 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."[5] Sexual harassment that affects an individual's terms, conditions, or privileges of employment subjects that individual to disparate treatment on the basis of sex and as a result, falls within the purview of this statute.[6] Employees who prevail in a Title VII lawsuit against their employers may be entitled to compensatory and punitive damages,[7] as well as injunctive relief, back pay, and attorney's fees.[8]

Courts distinguish between two types of sexual harassment in Title VII cases: "quid pro quo harassment" and conduct that creates a "hostile work environment."[9] According to the Equal Employment Opportunity Commission ("EEOC") guidelines, quid pro quo harassment occurs when "(1) submission to such conduct is

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4 *See* 42 U.S.C. § 2000e-(2)(a)(1) (1999); *see also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); 29 C.F.R. § 1604.11(a) (1998).

5 42 U.S.C. § 2000e-2(a)(1) (1999).

6 *See* Meritor, 477 U.S. at 57; Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

7 42 U.S.C. § 1981 A (stating that compensatory and punitive damages are subject to a statutory minimum of $50,000 for employers with between 15 to 100 employees to a maximum of $300,000 for workforces that employ more than 501 employees).

8 *See id.*; *see also* 42 U.S.C. § 2000e-5(g).

9 *See generally* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[10] In general, quid pro quo harassment occurs when the victim suffers a tangible employment action as a result of the alleged conduct.[11]

Quid pro quo sexual harassment differs from harassment that creates an abusive or hostile working environment. A hostile work environment is created when the conduct complained of is "sufficiently pervasive"[12] so as to alter the terms or conditions of the victim's employment.[13] The alleged harassment must create both a subjectively and objectively hostile work environment, but need not result in a tangible job detriment to the victim.[14] Courts should look at "the frequency of the 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 to determine whether the alleged conduct creates an environment sufficiently hostile to constitute a violation of Title VII."[15]

The case law on sexual harassment has been shaped, in large part, by the Supreme Court's decision in *Meritor Savings Bank v. Vinson.*[16] In *Meritor,* Mechelle Vinson, a female bank employee, brought a sexual harassment suit against Meritor Savings Bank and her supervisor, Sidney Taylor.[17] In her complaint, Vinson alleged that she had been the victim of repeated sexual advances by her supervisor throughout her four year period of employment with

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10 29 C.F.R. § 1604.11(a)(1)-(2) (1998).

11 *See Henson,* 682 F.2d at 909 (outlining the five elements of proof needed to make a prima facie case of quid pro quo sexual harassment: (1) the employee belongs to a protected group, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based upon sex, (4) the employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment, and (5) *respondeat superior*); *see also* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1562 (11th Cir. 1987).

12 *See Henson* at 682 F.2d at 904.

13 *See id.* at 682 F.2d at 903-905. An employee must satisfy five requirements in order to establish a prima facie case for sexual harassment under a hostile work environment theory: (1) the employee must be a member of a protected class, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based upon sex, (4) the harassment complained of affected a "term, condition, or privilege of employment" and (5) *respondeat superior. Id.*

14 *See* Harris v. Forklift, 510 U.S. 17, 22 (1993).

15 *See id.*

16 477 U.S. 57 (1986).

17 *See id.* at 59.

the company.[18] Vinson claimed that she succumbed to their first sexual encounter because of a "fear of losing her job."[19] Vinson subsequently had intercourse with Taylor between forty and fifty times during this four year period.[20] Vinson also alleged that her supervisor had "exposed himself" to her in the women's bathroom and raped her on several occasions.[21] However, Vinson never alleged that she experienced any tangible job detriment during this time.

Basing its decision, in part, on the language of Title VII[22] and the EEOC guidelines on sexual harassment,[23] the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[24] In particular, the Court held that a claim for sexual harassment still exists absent any economic effect on the victim,[25] and the proper inquiry includes "whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . ."[26] As a result, the Supreme Court held that the district court did not properly consider plaintiff's hostile work environment claim and remanded the case for further proceedings.[27]

Meritor did not, however, determine when an employer is liable for sexual harassment conducted by one of its supervisors. The EEOC, in its amicus curiae brief to the Court, suggested that employer liability should be determined by using traditional agency principles.[28] The EEOC proposed that where a supervisor exer-

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18 *See id.* at 60. Vinson alleged that Taylor's conduct began after her brief probationary period as a teller-trainee. During the probationary period, Taylor treated her "in a fatherly way and made no sexual advances." *Id.*

19 *See id.*

20 *See id.*

21 *See id.*

22 *See id.* at 64. ("The phrase 'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment.") (quoting Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

23 *See id.* at 65 (citing 29 C.F.R. 1604.11(a)(3) (1998)).

24 *Id.* at 66.

25 *See id.* at 67-68.

26 *Id.* at 68.

27 *See id.* at 73.

28 *See id.* at 70; *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
The text of the Restatement reads:
(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
(c) the conduct violated a non-delegable duty of the master, or

cises authority delegated to him by his employer by affecting (or threatening to affect) the terms, conditions, or privileges of employment, the employer should be liable.[29] However, when the claim is based on a "hostile work environment" theory, an employer should not be held liable if that employer had an anti-harassment policy in the workplace and the employee failed to use it.[30] In other cases, the EEOC argued, employers should be liable if they had actual knowledge of the situation or if the victim had no reasonable avenue to complain about the harassing conduct.[31]

The Supreme Court neither accepted nor declined the EEOC's proposals.[32] Rather, the Court declined to rule definitively on the subject, stating simply that "[c]ongress wanted courts to look to agency principles for guidance in this area."[33] The Court did, however, hold that Title VII places some limits on employer liability for harassment by its supervisors.[34] Furthermore, the Court concluded that the existence of a company grievance procedure and the employee's failure to use that policy were relevant for purposes of determining employer liability but were not dispositive.[35]

Since *Meritor*, employer liability has turned on whether the alleged conduct was defined as "quid pro quo" or "hostile work environment" sexual harassment.[36] Virtually all courts have held that in cases of "quid pro quo" sexual harassment, the employer is liable for the supervisor's conduct, regardless of whether the employer knew about the supervisor's harassing behavior.[37] Imposition of vicarious liability in this scenario is implicitly supported by the Supreme Court's holding in *Meritor*[38] and consistent with the EEOC guidelines.[39] Some courts have imposed vicarious liability

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(d) the servant purported to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

29 *See Meritor*, 477 U.S. at 70.

30 *See id.* at 71.

31 *See id.*

32 *See id.* at 72.

33 *See id.*

34 *See id.*

35 *See id.*

36 *See* Burlington Industries, Inc. v. Ellerth, 188 S. Ct. 2257, 2264 (1998).

37 *See* Nichols v. Frank, 42 F.3d 503, 513-514 (9th Cir. 1994); Davis v. Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997); Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993) (citing Meritor, 477 U.S. at 76); *see also Burlington Industries*, 118 S. Ct. at 2268. ("Every Court of Appeals . . . has found vicarious liability when a discriminatory act results in a tangible employment action.").

38 *See Meritor*, 477 U.S. at 70-71. ("[T]he 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.").

39 *See* 29 C.F.R. § 1604.11 (1998).

on the grounds that the supervisor is acting within the scope of his employment by making employment decisions that fall within his or her supervisory powers.[40] Other courts have reasoned that vicarious liability is justified because the supervisor is "aided" by the agency relationship that exists between the supervisor and the employee.[41] Vicarious liability has also been imposed on the theory that the supervisor "merges" with the employer when he or she makes decisions affecting the economic status of an employee.[42]

Lower courts have disagreed over the standard of employer liability for harassment where no tangible employment action has been taken and the claim is brought under a "hostile work environment" theory.[43] Like quid pro quo sexual harassment, employers can be liable for conduct that creates a hostile work environment if the supervisor was acting within the scope of his employment, or pursuant to an exception to the "scope of employment" rule.[44] Many courts have held that sexual harassment by a supervisor is

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[40] *See, e.g.*, Schroeder v. Schock, 42 FAIR EMPL. PRAC. CAS (BNA) 1112 (D. Kan. 1986); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer."); *see also* EEOC Policy Guidance on Sexual Harassment, 8 FAIR EMPL. PRAC. CAS (BNA). Manual 405:6699 (March 1990); RESTATEMENT (SECOND) OF AGENCY § 219(1), *supra* note 28; RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

The text of § 228(1) reads:

(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and;
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

But see Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2267 (1998) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.").

[41] *See, e.g., Nichols*, 42 F.3d at 514; *see also* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

[42] *See, e.g., Faragher*, 118 S. Ct. at 2285 (citing Kotcher v. Rosa and Sullivan Appliance Ctr, Inc., 957 F.2d 59, 62 (2d Cir. 1992)); *see also* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989).

[43] *See e.g.*, Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987).

[44] *See* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6695-6699; *see also* Amy Karff Halevy and Ryan J. Maierson, *The Supreme Court Changes the Rules on Employer Liability for Sexual Harassment*, 36 HOUS. LAW. 53, 54 (September/October 1998) ("[a]n employer may be liable if (1) it knew or should have known of the harassment and failed to take immediate and appropriate corrective action; (2) the harasser had actual authority to commit harassment; (3) the harasser had apparent authority to commit harassment; (4) the employer intentionally or carelessly caused an employee mistakenly to believe that the supervisor was acting for the employer; (5) the employer knew of such a misapprehension but failed to correct it; (6) the employer was negligent or reckless in supervising the alleged harasser; (7) the employer entrusted an employee to provide others with a harassment-free workplace but the employee breached that duty; or (8) the harassing supervisor was aided in accomplishing the tort by the existence of the agency relation.").

conduct that falls outside the scope of employment.[45] However, courts have held an employer liable if it was found to be "negligent or reckless" with respect to the supervisor's sexually harassing behavior.[46] An employer is "negligent" if it knew or should have known about the harassment and failed to take immediate corrective action.[47] An employer has actual knowledge if it actually witnessed the alleged harassment, or if a complaint was filed, either with the EEOC or through the company's internal complaint procedures.[48] Constructive knowledge can be imputed to the employer if the conduct was pervasive or openly practiced in the workplace.[49] This analysis is consistent with the EEOC guidelines on employer liability for sexual harassment by a co-worker.[50]

An employer could also be directly liable for the harassment of its supervisors if the supervisor "[p]urported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."[51] In situations where the employer does not promulgate an antiharassment policy, employees could believe that the company implicitly supports the supervisor's behavior.[52] Furthermore, apparent authority is rooted in the supervisor's power over the employee and the supervisor may rely on this authority to force the employee to remain silent about the harassment for fear of retaliation.[53] Alternatively, the supervisor is "aided in accomplishing the tort by the existence of the agency relation"

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45 *See* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6697 (citing Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1412-1422 (7th Cir. 1986); Burlington Industries, Inc. v. Ellerth, 188 S. Ct. 2257, 2267 (1998)).

46 *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b); EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6698-6699.

47 *See* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6699 (citing Fields v. Horizon House, Inc., No. 86-4343 (E.D. Pa. 1987)).

48 *See id.* at 6695-6696.

49 *See id.* at 6696.

50 *See* 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer [or its agents or supervisory employees] knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

51 RESTATEMENT (SECOND) OF AGENCY § 219(2)(d); *see generally* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6699; *see also* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1560 (11th Cir. 1987) (illustrating a supervisor using his supervisory authority to threaten the employee with discharge if she did not comply with his sexual advances); Karibian v. Columbia University, 14 F.3d 773, 780 ("[e]mployer is liable for the discriminatorily abusive work environment created by supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"); 29 C.F.R. § 1604.11(c) (1998) (holding supervisors directly liable for sexual harassment, regardless of whether the employer knew or should have known about the harassing conduct).

52 *See* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6697.

53 *See id.*

when he or she is able to continue the harassment by threatening to affect the working conditions of the employee (e.g., threatening to fire the employee).[54] An employer is liable in these situations if the employer knew about the harassment and failed to take any measures to stop it.[55]

PART II: THE RECENT SUPREME COURT DECISIONS: *FARAGHER AND BURLINGTON INDUSTRIES*

A. Facts of *Faragher*

In 1992, Beth Ann Faragher initiated a lawsuit against the City of Boca Raton and two former supervisors for sexual harassment, asserting claims under Title VII, 42 U.S.C. § 1983, and Florida state law.[56] Faragher sought compensation from the city for nominal damages, costs and attorney's fees.[57]

Between 1985 and 1990, Beth Ann Faragher was employed part time and during the summers as a lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton.[58] The lifeguards and the supervisors working with Faragher were stationed at the beach and worked out of the Marine Safety Headquarters.[59] There was a "clear chain of command" among the workers at this station: lifeguards reported to lieutenants and captains who reported to the Chief of the Marine Safety Division.[60]

When Faragher worked for the city, she was supervised by Bill Terry, David Silverman, and Robert Gordon.[61] Bill Terry served as Chief of the Marine Safety Division, "[w]ith authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands, and to make a record of any such discipline."[62] Both David Silverman and Robert Gordon were lieutenants when Faragher began work but were later promoted to training captains.[63] Silverman and Gordon were in

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54 *Id.* at 6699.
55 *Id.* at 6697-6699.
56 *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2280 (1998).
57 *See id.*
58 *See id.*
59 *See id.*
60 *See id.*
61 *See id.*
62 *See id.*
63 *See id.*

charge of formulating the lifeguards' daily assignments, as well as supervising their work and fitness training.[64]

In 1986, the city adopted a sexual harassment policy.[65] This policy was documented by the city manager, in a memorandum, and addressed to all city employees.[66] The policy was subsequently revised and re-issued in 1990.[67] However, the city's anti-harassment policy was not completely disseminated to all city employees.[68] As a result, Terry, Silverman and Gordon, as well as many other lifeguards, were unaware that the policy existed.[69]

Faragher alleges that Bill Terry and David Silverman engaged in numerous instances of sexually harassing conduct, both against her and other female lifeguards at the station.[70] Specifically, Faragher alleges that both Terry and Silverman made several vulgar sexual gestures in her direction, made sexually offensive remarks about her body and women in general, and subjected Faragher to "uninvited and offensive touching."[71] Faragher's complaint contained specific allegations that "Terry once said that he would never promote a woman to the rank of lieutenant."[72] Furthermore, during a job interview with a female lifeguard, Terry had said that the female lifeguards had sex with the males at the station and asked whether she would be willing to do the same.[73] The complaint also alleged that Silverman had once said to Faragher: "Date me or clean the toilets for one year."[74] Silverman also allegedly pantomimed an act of oral sex and tackled Faragher while commenting that, "but for a physical characteristic he found unattractive, he would readily have sexual relations with her."[75] Faragher ultimately resigned in 1990.[76]

Faragher did not complain to higher management about her supervisors' conduct during her tenure with the city, although she did speak to Gordon about the problem.[77] However, Faragher regarded these conversations as informal discussions with a person she "held in high esteem" and not a formal complaint to a supervi-

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64 *See id.*
65 *See id.*
66 *See id.*
67 *See id.*
68 *See id.* at 2280-2281.
69 *See id.*
70 *See id.*
71 *See id.* at 2280.
72 *See id.* at 2280.
73 *Id.* at 2281.
74 *Id.* at 2280.
75 *Id.* at 2281.
76 *See id.*
77 *See id.*

sor.[78] Furthermore, Gordon had heard complaints about Terry and Silverman from other lifeguards and responded to one complainant by saying "the city just [doesn't] care."[79] The city was eventually notified of Terry and Silverman's behavior in 1990 through a complaint by a former lifeguard.[80] This lifeguard alleged that both she and other co-workers had been harassed by Terry and Silverman and sent a letter to the City's Personnel Director.[81] Upon receipt of the complaint, the city launched an investigation and Terry and Silverman were both reprimanded.[82] Faragher initiated the lawsuit two years after she resigned.[83]

The United States District Court for the Southern District of Florida entered judgment in favor of Faragher.[84] After finding that Terry and Silverman's conduct was severe enough to create an abusive working environment, the court justified imputing liability to the city on three grounds.[85] First, the court held that the conduct of the two supervisors was pervasive enough to support an inference of constructive knowledge.[86] The court also held that Terry and Silverman were both acting as agents of their employer and the city was therefore liable pursuant to traditional agency principles.[87] Finally, the court concluded that Gordon's knowledge of the problem and failure to pursue any corrective measures was yet another reason to impose liability on the city.[88]

A Court of Appeals panel for the Eleventh Circuit reversed the district court's holding.[89] While the court agreed that the supervisors' harassment created an abusive working environment, it held that the city was not liable for its conduct.[90] The court reasoned that Terry and Silverman "[w]ere not acting within the scope of their employment when they engaged in the harassment,[91] that they were not aided in their actions by the agency relationship,[92]

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78 *See id.*

79 *Id.*

80 *Id.*

81 *See id.*

82 *See id.*

83 *See id.* at 2280.

84 *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1563-64 (S.D. Fla. 1994).

85 *See Faragher*, 118 S. Ct. 2275, 2281.

86 *See id.*

87 *See id.*

88 *See id.*

89 *See* Faragher v. City of Boca Raton, 76 F.2d 1155, 1166-67 (11th Cir. 1996).

90 *See Faragher*, 118 S. Ct. at 2281.

91 *See* RESTATEMENT (SECOND) OF AGENCY § 219(1).

92 *See id.* § 219(2)(d).

and that the city had no constructive knowledge of the harassment by virtue of its pervasiveness or Gordon's actual knowledge."[93]

The Court of Appeals for the Eleventh Circuit, sitting en banc, affirmed the panel's decision.[94] The court held that: an employer may be indirectly liable for hostile environment sexual harassment by a supervisor if:

> (1) the harassment occurs within the scope of the superior's employment; (2) the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate.[95]

The court agreed that the supervisors were not acting within the scope of their employment while engaging in harassing behavior.[96] It then concluded that Terry and Silverman were not "aided by the agency relationship" because neither Terry nor Silverman threatened to fire or demote Faragher in connection with their offensive conduct.[97] The court also affirmed the panel's finding that the city lacked constructive knowledge of the harassment, finding nothing in the record to suggest that the conduct was pervasive enough to impute knowledge to the employer.[98] Finally, the court rejected the district court's finding that the city acquired knowledge through Faragher's conversation with Gordon.[99]

B. Facts of *Burlington Industries*

In 1994, Kimberly Ellerth filed a lawsuit against Burlington Industries, Inc., alleging that she was sexually harassed by her supervisor during her brief tenure with the company.[100] The complaint alleged that Burlington had engaged in sexual harassment and forced her constructive discharge in violation of Title VII.[101]

Burlington Industries is a large company with more than 22,000 employees stationed at approximately 50 plants around the

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93 *See Faragher*, 118 S. Ct. at 2281.

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

95 *See Faragher*, 118 S. Ct. at 2282 (citing *Faragher*, 111 F.3d at 1534-1535).

96 *See id.* at 2282; *see also* RESTATEMENT (SECOND) OF AGENCY § 219(1).

97 *See Faragher*, 118 S. Ct. at 2282 (according to the Court, traditional agency law requires "[s]omething more than a mere combination of agency relationship and improper conduct by an agent" in order to hold that the agency relationship aided the supervisor in perpetrating the harassment); *see also* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d), *supra* note 28.

98 *See id.*

99 *See id.*

100 *See* Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998).

101 *See id.* at 2259.

country.[102] Ellerth worked in Chicago at one of Burlington's plants from March 1993 until May of 1994.[103] Ted Slowik, a mid-level manager, worked "above" Ellerth in the chain of authority but was not her immediate supervisor.[104] Slowik was a vice-president in one of five business units within one of the 50 divisions.[105] In this position, Slowik had the authority to make hiring and promotion decisions, subject to the approval of his supervisor.[106] Slowik did not, however, occupy an upper-level management position in the company and had no authority to make policy decisions affecting the business.[107]

Ellerth's complaint alleged that Slowik engaged in sexually harassing remarks and gestures throughout her employment with the company.[108] The complaint drew attention to three particular incidents where Slowik's comments could be construed as threats to deny Ellerth tangible job benefits.[109] In the summer of 1993, Slowik invited Ellerth to a hotel lounge and when she arrived, began making comments about Ellerth's breasts.[110] When Ellerth refused to respond encouragingly to these comments, she alleged that Slowik said: "[y]ou know Kim, I could make your life very hard or very easy at Burlington."[111] The second incident occurred in March of 1994, when Ellerth was being considered for a promotion.[112] During her interview with Slowik, he expressed reservations about the promotion, commenting that she was not "loose enough."[113] Although Ellerth ultimately received the promotion, Slowik was recorded as saying "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs."[114] The third set of instances occurred in May of 1994.[115] When Ellerth contacted Slowik regarding a business related issue, Slowik said, "I don't have time for you right now, Kim—unless you want to tell me what you're wearing."[116] A few days

102 *See id.* at 2262.
103 *See id.*
104 *See id.* Ellerth answered to an office colleague in Chicago, who in turn answered to Slowik in New York. *See id.*
105 *See id.*
106 *See id.*
107 *See id.*
108 *See id.*
109 *See id.*
110 *See id.*
111 *Id.*
112 *See id.*
113 *Id.*
114 *Id.*
115 *See id.*
116 *Id.*

later, Ellerth called Slowik again and he asked, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."[117] Shortly after her last incident with Slowik, Ellerth ultimately quit after being questioned about her job performance by her immediate supervisor.[118]

Ellerth did not complain to anyone at Burlington Industries about the problems she was having with Slowik, despite the fact that the company had an anti-harassment policy and Ellerth knew that the policy existed.[119] Ellerth argued that she did not inform her immediate supervisor because it would be his duty as her supervisor to report instances of sexual harassment.[120] However, approximately three weeks after her resignation, Ellerth sent a letter to the company explaining that she quit because of Slowik's conduct.[121]

The United States District Court for the Northern District of Illinois granted summary judgment in favor of Burlington Industries.[122] The district court used a negligence standard to determine employer liability.[123] The court held that while Slowik's conduct created an abusive work environment, Burlington was not liable because it neither knew nor should have known about Slowik's behavior.[124] While it noted the "quid pro quo" component to Ellerth's claims, the court held that the "quid pro quo" harassment merely contributed to the hostile work environment and a negligence standard should apply.[125] Furthermore, the court noted that Ellerth did not pursue any complaint procedures that were open to her through the company's anti-harassment policy.[126]

The district court's opinion was reversed on appeal in a decision that produced eight separate opinions on the basis for employer liability in this case.[127] The members of the court of appeals, sitting en banc, agreed that Ellerth could recover if Slowik's unfulfilled threats were sufficient to impose vicarious lia-

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117 *Id.*

118 *See id.*

119 *See id.*

120 *Id.* at 2262, 2263.

121 *See id.* at 2262.

122 *See* Ellerth v. Burlington Industries, 912 F. Supp. 1101 (N.D. Ill. 1996).

123 *See Burlington Industries,* 118 S. Ct. at 2263.

124 *See id.*

125 *See id.*

126 *See id.*

127 *See* Ellerth v. Burlington Industries, 123 F.3d 490 (7th Cir. 1997), *aff'd,* 524 U.S. 742 (1998).

bility on the employer.[128] Furthermore, a majority of the court also agreed that Ellerth's claim should be classified as one of quid pro quo harassment, contrary to the district court's finding and despite the fact that Ellerth did not suffer any tangible job detriment during her tenure with the company.[129]

The court produced no single theory for employer liability in this case.[130] In particular, the judges disagreed on whether vicarious liability or a negligence standard should apply.[131] A majority of the judges concluded that vicarious liability governed but had different reasons for this conclusion.[132] In contrast, the remaining judges reasoned that Burlington's liability should be analyzed pursuant to a negligence standard and that Ellerth should not recover.[133] Those who favored the application of negligence principles believed, in essence, that unfulfilled threats do not significantly alter the terms, conditions or privileges of employment and as a result, the court should not impose vicarious liability in these situations.[134] These judges concluded that Burlington should not be liable on the grounds that Ellerth did not raise a triable issue of fact as to the company's negligence.[135]

B. Holdings

In deciding both *Faragher* and *Burlington Industries,* the Supreme Court set out to draw a uniform standard establishing the contours of employer liability for sexually harassing conduct by its supervisors[136] and in doing so, attempted to reconcile traditional agency principles with Title VII's objectives of preventing harassment in the workplace.[137] In both decisions, the Court recognized that vicarious liability for sexual harassment by a supervisor may not be imputed to the employer in every situation.[138] Vicarious liability, according to the Court, was justified in situations where a

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128 *See Burlington Industries,* 118 S. Ct. at 2263.

129 *See id.*

130 *See id.*

131 *See id.*

132 *See id.* (reasoning that if a claim involves "quid pro quo" harassment, vicarious liability should automatically apply). Two judges concluded that agency principles impose vicarious liability on employers for supervisory conduct, even in a hostile work environment claim. One judge did not think that Ellerth established a quid pro quo claim but under the law of the controlling state, Burlington would be liable. *See id.*

133 *See id.* (concluding that negligence principles applied in this case).

134 *See id.*

135 *See id.*

136 *See id.* at 2265.

137 *See id.* at 2270; *see also* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2275-2292 (1986).

138 *See Burlington Industries,* 118 S. Ct. at 2270; *Faragher,* 118 S. Ct. at 2285 (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 69-70 (1986)).

tangible employment action was taken.[139] However, the Court also found substantial justifications for imposing vicarious liability on an employer when the supervisor's actions created an abusive working environment.[140]

Viewing the alternative theories on a more practical level, the Court reasoned that when a supervisor engages in sexually harassing conduct, the supervisor's power within the company adds a certain threatening element to his behavior.[141] Therefore, in a sense, a supervisor is always "aided" by the agency relationship.[142] This authority over the employee also distinguishes sexual harassment by a supervisor from harassment by a co-worker.[143] As stated by the Court:

> [W]hen a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose 'power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.'[144]

The Court set out to reconcile by imposing vicarious liability with *Meritor's* holding that employers are not always absolutely liable for harassment by its supervisors.[145] The court in *Faragher* considered two alternatives to limit employer liability in circumstances where no tangible employment action had been taken.[146] One alternative the Court contemplated was to require an "active or affirmative" misuse of supervisory authority before imputing absolute liability to the employer.[147] However, the Court ultimately rejected this alternative, reasoning that it would be difficult to distinguish between active and passive use of supervisory authority and, would, therefore, likely spark an onslaught of litigation.[148] The second alternative raised by the court was to impose some duty on employers

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139 *See Burlington Industries, Inc.*, 118 S. Ct. at 2268-2270 (defining tangible employment action 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"); *Faragher*, 118 S. Ct. at 2284-2285.

140 *See Burlington Industries*, 118 S. Ct. at 2269; *Faragher*, 118 S. Ct. at 2290-2291.

141 *See Burlington Industries*, 118 S. Ct. at 2269.

142 *See id.*; *see also Faragher*, 118 S. Ct. at 2290.

143 *See Faragher*, 118 S. Ct. at 2290-2291; *see also Burlington Industries*, 118 S. Ct. at 2269.

144 *Faragher*, 118 S. Ct. at 2291 (citing Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)).

145 *See id.*

146 *See id.*

147 *See id.*

148 *See id.* at 2291-2292.

to prevent and correct sexually harassing behavior, while at the same time, placing the burden on employees to mitigate harm by, for example, utilizing complaint procedures set up by the company.[149] The Court noted that such obligations are consistent with the idea that both employers and employees should take affirmative steps to eradicate the problem altogether or deal with the harassment promptly when it does occur.[150] In sum, the Court in both *Faragher* and *Burlington Industries* adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. 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 by the employer or to avoid harm otherwise . . . [n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[151]

Having ushered in the new era of the "affirmative defense," the Court then proceeded to apply it to the cases before it. With regard to *Faragher*, the Court concluded that the city was liable for its supervisor's conduct and reversed the court of appeals.[152] The Court also held, as a matter of law, that the city failed to exercise reasonable care to prevent Terry and Silverman's harassing conduct.[153] In particular, the Court concluded that the city's anti-harassment policy was ineffectively communicated to all the employees and as a result, would fail to satisfy the first prong of the affirmative defense.[154] In *Burlington Industries*, the Court held that Ellerth should have another chance to state her claim in light of the new decisions.[155] However, since Ellerth has not alleged that she suf-

149 *See id.* at 2292.
150 *See id.*
151 *See id.*; *Burlington Industries*, 118 S. Ct. at 2270.
152 *See Faragher*, 118 S. Ct. at 2293.
153 *See id.*
154 *See id.*
155 *See Burlington Industries*, 118 S. Ct. at 2271 (noting that Ellerth had focused all her attention in the Court of Appeals on establishing her claim as "quid pro quo" sexual harassment and should now have a chance to fashion her case according to the new standard set by the Court).

fered a tangible employment action as a result of her supervisor's harassment, Burlington Industries should still have a chance to raise an affirmative defense to Ellerth's claims.[156]

C. *The Dissent*

Justice Thomas, joined by Justice Scalia, wrote a strong dissenting opinion in both *Faragher* and *Burlington Industries*.[157] To begin, Justice Thomas argued that employer liability for a hostile work environment in a sexual harassment suit should be based on the same standard used to determine employer liability for a hostile work environment created by racial discrimination.[158] The dissent noted that a hostile work environment claim in race discrimination cases requires the plaintiff to prove that his or her work environment "was so pervaded by racial [or sexual] harassment as to alter the terms and conditions of his employment."[159] However, in race discrimination cases, employer liability in a hostile work environment is decided pursuant to negligence principles.[160] In particular, the employer is liable only if it knew or should have known about the harassment and failed to take prompt remedial action.[161] This standard, according to Justice Thomas, is consistent with traditional agency principles, and should be the basis for employer liability when the discrimination is based upon sex.[162]

The dissent also criticized the majority opinion's construction of the affirmative defense.[163] According to Justice Thomas, the Court fashioned an affirmative defense, providing "shockingly little guidance about how employers can actually avoid vicarious liability."[164] Furthermore, an employer will now be automatically liable even if it promulgated an effective anti-harassment policy, so long as the employee fulfills her responsibility to take "reasonable care to avoid harm."[165] As a result, employers will be subject to vicarious liability even though their liability can technically be mitigated by the affirmative defense.[166] In sum, the lower courts are left with

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156 *See id.*

157 *See Burlington Industries*, 118 S. Ct. at 2271-2275; *Faragher*, 118 S. Ct. at 2294.

158 *See Burlington Industries*, 118 S. Ct. at 2271-2273.

159 *See Burlington Industries*, 118 S. Ct. at 2272 (citing Snell v. Suffolk Cty., 782 F.2d 1094, 1103 (2d Cir. 1986)); *see also*, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

160 *See Burlington Industries*, 118 S. Ct. at 2271-2273.

161 *See id.*

162 *See id.*

163 *See id.* at 2273-2275.

164 *Id.* at 2274.

165 *Id.*

166 *See id.*

many unanswered questions which, according to Thomas, will inevitably lead to more litigation in an already confusing area of law.[167]

PART III: SEXUAL HARASSMENT LAW: THE EFFECTS OF *FARAGHER* AND *BURLINGTON INDUSTRIES*

The recent pronouncements by the Supreme Court will have an impact on sexual harassment law both in the courtroom and in the workplace. However, as Justice Thomas noted, the decisions contain some unanswered questions which need to be addressed by the lower courts.

The Supreme Court has now affirmatively declared that employers are subject to vicarious liability if the employee suffered a "tangible employment action" as a result of the harassment.[168] However, employers are only liable for those actions that "negatively affect the employees work conditions."[169] Furthermore, unfulfilled threats to affect the terms, conditions, or privileges of employment do not fall within the definition of "tangible employment action."[170]

Since employers are deprived of raising an affirmative defense in cases where a tangible employment action has been taken, employees have an incentive to prove that they suffered some type of adverse employment action during their tenure with the company.[171] As a result, lower courts are left to determine what type of conduct falls within the definition of "tangible employment action."[172] The Supreme Court offers some guidance in this area, defining "tangible employment action" 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."[173] This list, however, is not exhaustive and determining whether the employee suffered a tangible employment action will often involve a fact specific inquiry into the circumstances of each individual case.

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167 *See id.* at 2274.

168 *Id.* at 2269.

169 *See* Halevy & Maierson, *supra* note 44, at 56.

170 *See Burlington Industries Inc.*, 118 S. Ct. at 2271.

171 *See* Halevy & Maierson, *supra* note 44, at 56.

172 *See id.*; *see also* Butler v. Ysleta Independent School District, 161 F.3d 263 (5th Cir. 1998). The teachers reassignment to a different grade level does not constitute "tangible employment action"; Stephens v. Rheem Manufacturing Company, 162 F.3d 1013 (8th Cir. 1998) (remanding to determine whether plaintiff suffered a "tangible employment action" as a result of the alleged harassment); Burrell v. Star Nursery, Inc., 170 F.3d 951 (9th Cir. 1999) (denying summary judgment motion where an issue of fact exists as to whether supervisor's conduct resulted in a "tangible employment action").

173 *See Burlington Industries*, 118 S. Ct. at 2268.

Since *Faragher* and *Burlington Industries*, employers are now subject to a greater risk of liability for supervisory harassment than for harassment by a coworker.[174] Therefore, who constitutes a "supervisor" within each company will take on added significance.[175] In *Burlington Industries*, Slowik held supervisory status because he had authority to make hiring and firing decisions, subject to approval of his supervisor.[176] Similarly, Terry and Silverman held supervisory authority over Faragher in that they were able to issue oral reprimands and dictate Faragher's work assignments.[177] However, neither *Faragher* nor *Burlington Industries* set out to define the scope of supervisory powers and, thus, this issue will continue to be a highly matter litigated in the lower courts.

The Affirmative Defense

In defining the scope of employer liability for hostile work environment harassment by a supervisor, the Court fashioned a two part affirmative defense: (1) the employer must use reasonable care to prevent or correct promptly any sexually harassing behavior and (2) the employee must unreasonably fail to use the company's corrective measures or avoid harm otherwise.[178] The Court, however, offered little guidance as to how employers can satisfy this defense and avoid liability.[179] On this subject, the Court simply stated:

> While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is

174 *See Faragher*, 118 S. Ct. at 2275; *Burlington Industries*, 118 S. Ct. at 2257 (holding employers vicariously liable for harassment by supervisory employees while negligence standards govern employer liability for harassment by coworkers); *see also* Halevy & Maierson, *supra* note 44, at 56 (September/October 1998).

175 *See* Halevy & Maierson, *supra* note 44, at 56; *see also* Pfau v. Reed, 167 F.3d 228 (5th Cir. 1999) (remanding to district court and requiring it to consider the issue of whether harasser was employee's supervisor and if so, whether the defendant has met the affirmative defense necessary to avoid vicarious liability); Fortney-Brunnmeier v. Mare-Bear, Inc., 173 F.3d 860 (9th Cir. 1999) (remanding the case, in part, to determine whether three individuals accused of sexual harassment were plaintiff's supervisors); Todd v. Ortho Biotech, Inc., 175 F.3d 595 (8th Cir. 1999) (asserting that the district court must first determine whether the individual involved was the plaintiff's supervisor before deciding whether to apply the standard set out in *Ellerth* and *Faragher*).

176 *See Burlington Industries*, 118 S. Ct. at 2262.

177 *See Faragher*, 118 S. Ct. at 2280.

178 *See Burlington Industries*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

179 *See id.*

> not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[180]

The Court did not, however, define phrases like "reasonable care," "unreasonable failure," "correct promptly" and "avoid harm otherwise," leaving questions open for the lower courts and making it difficult for employers to know exactly how to protect themselves.[181]

A. Employer's Duty to Exercise Reasonable Care: Developing an Effective Antiharassment Policy in the Workplace

In meeting the first part of the affirmative defense, the Supreme Court has placed a substantial burden on employers to develop a comprehensive antiharassment policy with a complaint procedure in the workplace.[182] The new decisions do not offer guidance as to what these policies must include in order to satisfy the "reasonable care" requirement imposed by the Court.[183] However, it is clear that employers will not avoid liability if their policy does not meet certain minimum criteria (e.g., if the policy is not disseminated to all employees in the company).[184]

Requiring employers to implement a policy against sexual harassment has been an important, but not a necessary component in the development of sexual harassment law prior to this year.[185] The Supreme Court, in various decisions has noted that the primary objective of Title VII "is not to provide redress but to avoid harm."[186] This objective is realized when employers take affirmative steps to create an environment in which sexual harassment is not tolerated.[187]

The EEOC guidelines have also encouraged employers to "take all steps necessary to prevent sexual harassment"[188] and suggest an antiharassment policy as an effective preventive measure.[189] This policy, according to the EEOC, should be "clearly and regu-

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180 *Id.*

181 *See Burlington Industries*, 118 S. Ct. at 2273; *see also* Beverly Garofalo, *Recent Decisions on Harassment Leave Many Questions Unanswered*, 13 No. 2 CORP. COUNS. 1 (July 1998).

182 *See Burlington Industries*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

183 *See id.*

184 *See Faragher*, 118 S. Ct. at 2293-2294.

185 *See* Meritor Savings Bank v. Vinson, 44 U.S. 57, 72 (1986).

186 *See id.* at 2292.

187 *See id.*

188 *See* EEOC Policy Guidance on Sexual Harassment, *supra* note 40, at 6699.

189 *See id.*

larly communicated to employees and effectively implemented."[190] Furthermore, the employer should discuss sexual harassment with all employees, expressing its disapproval and warning that such behavior will be punished.[191] Finally, the EEOC suggests that any policy designed by an employer should encourage victims of sexual harassment to come forward and complain.[192] This is made possible by ensuring confidentiality,[193] protecting against retaliation,[194] and "should not require a victim to complain first to the offending supervisor."[195]

Lower courts since *Faragher* and *Burlington Industries* have placed a particular emphasis on an employer's duty to promulgate an antiharassment policy with an effective complaint procedure.[196] In the absence of a formal antiharassment policy, a reasonable juror could find that the employer failed to exercise "reasonable care" to both prevent and correct sexually harassing behavior.[197] However, the mere existence of a sexual harassment policy in the workplace has not always been sufficient to satisfy the first element of the new affirmative defense.[198]

At a minimum, most courts look favorably upon a policy that is formally documented and disseminated among the company's employees.[199] However, in *Ponticelli v. Zurich American Insurance Company*,[200] the District Court for the Southern District of New York denied defendant's motion for summary judgment, in part, on material issues of fact that arose with regard to the employer's an-

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190 *See id.*

191 *See id.*

192 *See id.*

193 *See id.*

194 *See id.*

195 *See id.* (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 71 (1986)).

196 *See* Sconce v. Tandy Corp., 1998 F. Supp. 2d 773 (W.D. Ky. 1998); Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185 (D.P.R. 1998).

197 *See* Pyne v. Procacci Brothers Sales Corp. and Garden State Farms, Inc., 1998 U.S. Dist. Lexis 11745 (E.D. Pa.) (denying defendant's motion for summary judgment where defendant did not promulgate an antiharassment policy or otherwise use reasonable care to avoid harm).

198 *See* Fierro v. Saks Fifth Avenue, 13 F. Supp.2d 481 (S.D.N.Y. 1998). The first part of the affirmative defense is satisfied where defendant promulgated an antiharassment policy with adequate complaint procedures. *See id.* at 491-92; Kendrick v. Country Club Hills Board of Education, 1998 U.S. Dist. Lexis 11618 (N.D. Ill. 1998). The defendant's motion for summary judgment was granted where defendant had an adequate sexual harassment policy and promptly investigated allegations. *See id.*

199 *See id.*; *see also* Booker v. Budget Rent-a-Car Systems, 17 F. Supp.2d 735 (M.D. Tenn. 1998). The defendant, in a hostile work environment based on race, failed to meet affirmative defense, in part, because it failed to show that its antiharassment policy was distributed to employees within the company or that management received training about the company policy. *Id.*

200 16 F. Supp.2d 414 (S.D.N.Y. 1998).

tiharassment policy.[201] While the company had promulgated a policy in the workplace, the policy itself only designated one avenue for the employee to complain and the complaint procedure would have forced the employee to complain to her harassing supervisor.[202] Furthermore, the Court held that there was an issue of fact as to whether the employee's complaint was investigated promptly and correctly.[203] Accordingly, a jury could find that the employer failed to exercise "reasonable care" to both prevent and correct sexually harassing behavior in the workplace.[204]

Courts also look to the type of corrective measures employed by the company.[205] For example, one court has held that the employer satisfied the first element of the affirmative defense by promptly offering the plaintiff a transfer within the company that would minimize her contact with the supervisor.[206] The Eleventh Circuit also found defendant's actions reasonable where, after receiving a complaint about an employee's harassment by a plant buyer, the company immediately suspended the employee without pay, pending an investigation, and the employee resigned that day.[207]

A comprehensive antiharassment policy must contain more than a statement by the employer that the company does not tolerate sexual harassment.[208] In order to serve as a preventive measure, it must, at a minimum, define the conduct to be prohibited,[209] state that such behavior will be punished, "up to and including immediate termination,"[210] and give practical examples of behavior that might constitute sexual harassment.[211] Further-

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201 *See id.* at 431.

202 *See id.*

203 *See id.*

204 *See id.*

205 *See* Phillips v. Taco Bell Corp., 156 F.3d 884 (8th Cir. 1998) (remanding for District Court to determine whether Taco Bell took "prompt and appropriate remedial action reasonably calculated to end the harassment"); Dees v. Johnson Controls World Services, Inc., 168 F.3d 417 (11th Cir. 1999). A jury could reasonably infer that the employer knew that supervisors were engaging in sexually harassing conduct before a complaint was filed, yet failed to take any corrective action.

206 *See* Marsicano v. American Society of Safety Engineers, 1998 U.S. Dist. Lexis (N.D. Ill. 1998).

207 *See* Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999).

208 *See* Beverly Garafalo, *Practical Guidelines for Employers*, CORP. COUNS. (July 1998); Jason L. Gunter & Tammie L. Rattray, *Recent Developments in Employer Liability for Sexual Harassment—Ellerth and Faragher*, FLA. BAR J. (October 1998).

209 *See* Susan W. Brecher & Shelley M. Greenwald, *Training Managers and Employees About Company Policies*, HR ADVISOR (May/June 1998) (asserting that employers should define sexual harassment as well as the difference between quid pro quo and hostile work environment).

210 *See* Garafalo, *supra* note 208.

211 *See id.* For example, unwelcome sexual advances, sexual posters, suggestive or offensive jokes, unwanted kisses or hugs. *See id.*

more, the policy must lay out an effective complaint procedure designating at least two avenues for complaint within the company, and insuring as much confidentiality to the individual as possible without impeding the investigation process.[212] Those chosen to receive complaints must be taught how to conduct an investigation and resolve the complaints in an efficient manner.[213] The company policy should also reassure employees that any complaints will be investigated promptly and thoroughly.[214] It is also imperative for employees who complain about sexually harassing conduct to know that they will not be subject to any retaliatory action by either the company or the harassing supervisor.[215] Any policy prohibiting sexual harassment should also prohibit discrimination of any kind, including race, national origin, and same-sex sexual harassment.[216] This policy must be disseminated to all employees and explained so that everyone in the company both understands and takes it seriously.[217]

A company should consider using an outside investigator to conduct some part of the investigation once a complaint has been filed. On the one hand, there are advantages to keeping the investigation within the company. An outside investigator is often unaware of small intricacies within the company, such as how coworkers interact, how supervisors interact with their subordinates, and the overall atmosphere of the workplace.[218] Therefore,

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212 *See id.*; *see also* Ocheltree v. Scollon Productions, Inc., 161 F.3d 3 (4th Cir. 1998) (asserting that the open door policy set up by defendants did not seem to be effective where both the president and vice-president of the company did not make themselves available to plaintiff when she wanted to speak to them. Furthermore, plaintiff was prevented from making a complaint about the supervisor responsible for the alleged harassment).

213 *See* Susan W. Brecher & Shelly M. Greenwald, *Training HR Professionals on Resolving Employee Complaints or Problems, I, II, and III*, HR ADVISOR (1998).

214 *See Garafalo, supra* note 208; *see also* Halevy & Maierson, *supra* note 44 at 57.

215 *See id.*; *see also* Brecher & Greenwald, *supra* note 209, at 8. It is a good idea to explain that the company policy prohibits any type of retaliatory action by managers or employees in training sessions because many employees may not understand the term. *See id.*

216 *See* Gunter & Rattray, *supra* note 208, at 97 (suggesting that companies should develop a policy for reviewing supervisory actions and require supervisors to consult with upper management before taking any adverse employment action against an employee. Furthermore, the article suggests that employers conduct background checks to avoid hiring supervisors who may engage in sexually harassing behavior).

217 *See id.* This can be accomplished by placing policy in letters, handbooks and postings throughout the workplace as well as seminars and training for supervisors at least on an annual basis. *See id.* at 97; *see also* Brecher & Greenwald, *supra* note 209, at 5 ("[T]here are those policies that an employer would like to ensure have been read and understood by managers or all employees, e.g., their organization's Equal Employment Opportunity Policy which should prohibit any illegal discrimination and harassment.").

218 Interview with Susan W. Brecher, Director of Equal Employment Opportunity Studies, School of Labor Relations, Cornell University (advising against hiring independent investigators unless absolutely necessary).

someone within the company might be more equipped to handle the complaint more efficiently.[219] However, there are also advantages to employ an outside investigator in certain situations. Hiring someone from outside the company to assist in any investigation would encourage women who fear retaliation by their employer to come forward and report any unwanted sexual behavior. Very often, women are harassed by the CEO, vice president, or some other high official within the company and feel that complaining to someone in the Human Resource Department is futile.[220] An outside investigator can assure the victims that an impartial investigation will take place because those designated to handle the complaint have no relationship with the harassing supervisor.[221]

An outside investigator can also be hired to perform various functions.[222] For example, a company may want to hire a private investigator to conduct the fact-finding portion of the investigation while someone within the company will decide what type of disciplinary action is appropriate.[223] Furthermore, an outside investigator may benefit from working along side someone within the company so that the investigator has a better understanding of how each individual company operates.[224]

B. Plaintiff's Duty to Prevent and Avoid Sexually Harassing Behavior: The Duty to Report

As *Faragher* and *Burlington Industries* indicate, employers cannot avoid liability simply by proving that it exercised reasonable care to prevent and respond to allegations of sexual harassment.[225] The employer must also prove that the plaintiff unreasonably failed to take advantage of any corrective measures implemented by the company or to avoid harm otherwise.[226] Although the court declined to define "unreasonable failure" or "avoid harm otherwise," it did send a message to employees that they have an obligation to report any sexually harassing conduct to the company.

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219 *See id.*

220 Panel Discussion: The American Bar Association of the City of New York, comment by Wayne Outten, Outten & Goldman, LLP.

221 *See id.*

222 *See* Interview with Susan W. Brecher, *supra* note 218.

223 *See id.*

224 *See id.*

225 *See* Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998).

226 *See id.*

As the EEOC indicates, employers must promulgate antiharassment policies designed to encourage victims to complain about sexually harassing behavior.[227] Such policies must include a promise by the company that no retaliatory action will be taken against any employee who files a complaint.[228] Fear of retaliation is one of the most common reasons why victims of sexual harassment choose to remain silent.[229] In fact, many women have suffered from some form of retaliation after coming forward with allegations of harassment,[230] even though retaliation is expressly forbidden by law.[231] Nevertheless, whether a woman's fear of retaliation is sufficient to justify a failure to report was not answered by the Supreme Court, nor is it clear that a failure to report under these circumstances amounts to an unreasonable failure on part of the employee for purposes of the affirmative defense.

Courts after *Faragher* and *Burlington Industries* have held that a generalized fear of retaliation constitutes an unreasonable failure by the employee to take advantage of preventive measures or to avoid harm otherwise.[232] For example, in *Romero v. Caribbean Restaurants, Inc.*,[233] the plaintiff failed to report allegations of sexual harassment by his supervisor, in part, because he feared that the company would not give him his back pay if he complained about

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227 *See* EEOC Policy Guidelines on Sexual Harassment, *supra* note 41, at 6699.

228 *See* Karff & Maierson, *supra* note 44 at 57; Brecher & Greenwald, *supra* note 209 at 8.

229 *See* Petitioner's Brief, Faragher v. City of Boca Raton, 28 (1997) (citing Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues, 117, 122-123 (1995)).

230 *See* Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992). The supervisor docked the plaintiff her pay for the day she spent in her manager's office complaining about the supervisor's alleged harassment. *See id.* at 198.

231 *See* 42 U.S.C. § 2000e-3(a).

The text reads:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by [42 U.S.C. § 2000e], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

See also Booker v. Budget Rent-A-Car Systems, 17 F. Supp.2d 773 (M.D. Tenn. 1998) (citing Johnson v. Department of Health & Human Services, 30 F.3d 45, 47 (6th Cir. 1994)). To establish a prima facie case of retaliation, the plaintiff must prove "(1) that he was engaged in activity protected under Title VII; (2) that he was the subject of an adverse employment action; and (3) a causal link between the protected activity and the adverse employment action existed." *See id.* at 750.

232 *See* Fierro v. Saks Fifth Avenue, 13 F. Supp.2d 481 (S.D.N.Y. 1998); Romero v. Caribbean Restaurants, Inc., 14 F. Supp.2d 185 (D.P.R. 1998); *see also* Sconce v. Tandy Corp., 9 F. Supp.2d 773, 778 ("[a] threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection.").

233 14 F. Supp.2d at 185.

the harassment.[234] The court concluded that without any evidence that the company would pay him less than he was entitled, the plaintiff's failure to report the alleged harassment was unreasonable.[235] Similarly, the court in *Fierro v. Saks Fifth Avenue*[236] held that "[g]eneralized fears of repercussions can never constitute reasonable grounds for failure to complain to his or her employer."[237] The court reasoned that at some point, employees who are victims of sexual harassment must take responsibility and complain to the appropriate supervisors.[238] A failure to do so would be contrary to Title VII's purpose of deterring sexual harassment.[239] Furthermore, an employer cannot take action against the supervisor if it is unaware of any wrongdoings.[240] However, at least one court has held that the employee's failure to report instances of sexual harassment may have been reasonable, in part, because of a fear of retaliation.[241] The discrepancy in the above cases indicate that lower courts disagree as to whether or not a fear of retaliation will be relevant and/or sufficient to justify an employee's failure to report the harassment.

Courts are also looking at how the employee is reacting to any internal investigations or procedures to deal with any harassment in order to judge whether or not the employee is acting reasonably.[242] This includes an analysis of how well the employee cooperates with the investigation process, as well as the employee's willingness to accept reasonable solutions offered by the employer that fall short of termination.[243] Furthermore, courts will look to see whether the employee delayed in reporting instances of alleged harassment and if so, whether that delay was reasonable.[244]

Placing an increased burden on employees to report sexual harassment and then cooperate in the company's investigation process should be encouraged from both a practical and a feminist perspective. If a company has a comprehensive antiharassment policy in the workplace, employees should immediately be put on notice that such behavior is not tolerated by the employer. This

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234 *See id.* at 192.
235 *See id.*
236 13 F. Supp.2d at 481.
237 *See id.* at 492.
238 *See id.*
239 *See id.*
240 *See id.*
241 *See Booker*, 17 F. Supp.2d at 735.
242 *See Marsicano*, 1998 U.S. Dist. Lexis at *23-24.
243 *See id.*
244 *See* Greene v. Dalton, 164 F.3d 671 (Dist. of Columbia 1999); Philips v. Taco Bell Corporation, 156 F.3d 884 (1998).

policy, if it is effective, should serve not only as a deterrent but as a procedure designed to punish harassment if it occurs. Furthermore, if the company policy expressly states that retaliation is prohibited, women's fear of repercussions should not serve as a justification for failing to complain. Pushing women to report instances of sexual harassment should also be encouraged from a feminist standpoint. It is important for women to be proactive against this problem and by speaking out against such behavior, women send a message that such conduct is not and should not be accepted.

CONCLUSION

Prior to 1998, it had been twelve years since the Supreme Court offered any guidance to lower courts on how and when to hold companies responsible for sexual harassment by their employees. Through *Faragher* and *Burlington Industries*, the Court finally offers a coherent standard for imputing liability to an employer for sexual harassment by a supervisor. In light of the alternatives, the majority's resolution was to place a fairly substantial burden on both employers and employees to be proactive about sexual harassment. However, as with most decisions handed down by the Supreme Court, there are unresolved questions left to be reconciled by the lower courts.

For now, the cases make it clear that employers must promulgate an effective antiharassment policy in the workplace. This policy should include both a strong statement that harassment of any kind will not be tolerated and a comprehensive complaint procedure. Employers would benefit from hiring an outside investigator, at least during the factfinding process, who has experience handling sexual harassment claims and is impartial to both the company and the supervisor under investigation. Most importantly, the policy must contain a statement that retaliatory action taken against a victim who files a complaint with the company will be punished.

It is also clear that employees have a higher burden to report any sexually harassing behavior. With an effective sexual harassment policy in the workplace, employees should feel more comfortable taking affirmative steps to deter any unwanted conduct. Furthermore, a fear of retaliation should not excuse an employee from accepting this responsibility. Placing an increased burden upon women to expose sexual harassment helps them to take control of a situation which makes them feel victimized. By forcing

both employers and employees to be proactive about sexual harassment, the Supreme Court has just taken a leap forward in attacking the growing problem of sexual harassment in the workplace.

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