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# TWO WRONGS DO NOT MAKE A RIGHT: THE NEED TO REVISIT THE ELLERTH/FARAGHER AFFIRMATIVE DEFENSE

ROBERT R. GRAHAM III*

## I. INTRODUCTION

On June 26, 1998, the United States Supreme Court issued its parallel decisions in *Burlington Industries, Inc. v. Ellerth*[1] and *Faragher v. City of Boca Raton.*[2] Building off of its previous decision in *Meritor Savings Bank v. Vinson*,[3] the Court was tasked with determining whether, and to what extent, employers could be held vicariously liable for instances of "hostile environment" sexual harassment.[4] In an attempt to effectuate "Congress' intention to promote conciliation rather than litigation in the Title VII context,"[5] the Court held that employers are subject to vicarious liability to victimized employees for an "actionable hostile environment."[6] In the absence of any tangible employment action, however, employers could raise a two-part affirmative defense. First, an employer would need to show that it exercised reasonable care to prevent and quickly correct any sexually harassing behavior. Furthermore, the employer would also need to show that the victimized employee unreasonably failed to take advantage of any of the employer's mechanisms for preventing or correcting the harassment.[7]

While these decisions seemingly went a long way toward further articulating Title VII sexual harassment law, several questions surrounded this newly crafted affirmative defense (hereinafter the "*Ellerth/Faragher* defense") that employers had to avail themselves of in order to avoid vicarious liability. Justice Clarence Thomas, wary of the Court's divergence from the negligence standard employed for other instances of discrimination prevented by Title VII, articulated several of these

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1. 524 U.S. 742 (1998).
2. 524 U.S. 775 (1998).
3. 477 U.S. 57 (1986).
4. *Id.* at 65. Although the Court previously determined that sexual harassment constituted discrimination on the basis of sex for purposes of Title VII in *Meritor Savings Bank v. Vinson*, it did not articulate the circumstances that might lead to vicarious liability on the part of the employer for the behavior of its supervisors.
5. *Ellerth*, 524 U.S. at 764.
6. *Id.* at 765.
7. *Id.*

concerns in his dissenting opinion in *Ellerth*: "Although the Court recognizes an affirmative defense—based solely on its divination of Title VII's *gestalt*—it provides shockingly little guidance about how employers can actually avoid vicarious liability. Instead, it issued only Delphic pronouncements and leaves the dirty work to the lower courts."[8]

In the seventeen years since the Court's initial pronouncement, and Justice Thomas' denouncement, of the *Ellerth/Faragher* affirmative defense, a split has materialized among the United States courts of appeals as to how to correctly apply the defense. Namely, as the case law below illustrates, there is disagreement as to whether both prongs of the defense are necessary in cases dealing with a single, severe instance of sexual harassment. While these "single, severe" cases sparked the debate, they also highlighted a larger issue with the structure of the *Ellerth/Faragher* defense that applies equally to cases of pervasive harassment—whether an employer that took proactive measures to prevent and remedy harassing behavior should be held liable nonetheless.

In addressing this issue, I conclude that there are important policy considerations that merit several courts' adoption of a modified version of the *Ellerth/Faragher* defense. To better appreciate these objectives, however, I will begin in Part II by outlining the legislative and judicial background of Title VII and the *Ellerth/Faragher* defense. In Part III, I will profile the resulting circuit split, and in Part IV, I will articulate the various policies that support the Fifth and Eighth Circuits' adoption of a modified version of the defense. Ultimately, recognizing that a dual standard for pervasive and single, severe harassment cases presents more questions than answers, I will use Part V to lay out the basic provisions of a legal alternative that avoids the complications of a dual standard of liability for pervasive and single, severe sexual harassment cases. For purposes of this Note, I will focus on cases that directly address single instance harassment in some capacity, while recognizing that pervasive harassment cases share the same fundamental issues and concerns.

## II. THE LEGISLATIVE AND JUDICIAL BACKGROUND

### A. *Title VII of the Civil Rights Act of 1964*

The foundations of sexual harassment law are rooted in Title VII of the Civil Rights Act of 1964, which states, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge 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."[9]

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8. *Id.* at 773 (Thomas, J., dissenting).

9. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1991). Title VII further states,

> It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or other-

## B. Meritor Savings Bank v. Vinson

At the inception of the Civil Rights Act of 1964, it was not clear whether claims of sexual harassment in the workplace constituted discrimination on the basis of sex for purposes of Title VII. The requirements for an actionable claim, if one existed, were even more opaque.

The Supreme Court took its first step toward clarifying these ambiguities in *Meritor Savings Bank v. Vinson.* In *Meritor,* Mechelle Vinson, a female employee of Meritor Savings, alleged that she participated in a prolonged sexual relationship with her supervisor, Sidney Taylor.[10] She claimed that the relationship, though voluntary, resulted from her fear that failure to comply with Taylor's wishes would cause her to lose her job. During the course of their relationship, which lasted several years, Vinson alleged that Taylor "made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours."[11] In addition to Taylor exposing himself to her and even forcibly raping her on several occasions, Vinson estimated that she had intercourse with him "some 40 or 50 times"[12] during the course of their relationship. Despite all of this, Vinson neither reported the repeated harassment to any of her supervisors nor attempted to use the bank's complaint procedure, and the bank denied any knowledge of the alleged misconduct.[13]

The United States District Court for the District of Columbia held that Vinson was not the victim of sexual harassment or discrimination while employed at Meritor Savings. Even if she had been, the court stated, the bank was not liable because it was without notice. As such, it could not "be held liable for the alleged actions of Taylor."[14]

The Court of Appeals for the District of Columbia reversed the district court's ruling, holding that the "voluntariness" of the relationship did not erase the need for a remand: "Taylor made Vinson's toleration of sexual harassment a condition of her employment."[15] Furthermore, the court stated that the voluntariness of the relationship had no materiality whatsoever.[16] As to the vicarious liability of Meritor Savings for Taylor's actions, the court held that an employer "is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct,"[17] in effect, imposing a strict liability standard on employers for instances of sexual harassment.

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wise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* at § 2000e-2(a)(2).

10. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
11. *Id.* at 60.
12. *Id.*
13. *Id.* at 61.
14. *Id.* at 62.
15. *Id.*
16. *Id.* at 63.
17. *Id.*

In a unanimous decision, the Supreme Court held that Taylor's harassment of Vinson fell within the broader range of sex-based discrimination that Title VII was designed to prevent. As Justice Rehnquist noted, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[18] Furthermore, the Court specifically recognized two instances in which sexual harassment is actionable: (1) "harassment that involves the conditioning of concrete employment benefits," and (2) "harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."[19] As a result of *Meritor* and subsequent case law, these two types of sexual harassment claims have come to be known as "quid pro quo"[20] and "hostile environment" claims, respectively.[21]

"Quid pro quo" sexual harassment claims center around instances in which the victim suffers from a "tangible employment action," usually a demotion, lack of promotion, or termination of employment, for failure to comply with the sexual advances of an employer or supervisor.[22] In instances, such as that in *Meritor*, where the victim does not suffer from some tangible employment action or other economic consequence, he or she may rely alternatively on a "hostile environment" claim. As Justice Rehnquist noted, "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. 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."[23] For a victim to succeed on a hostile environment claim, he or she must illustrate that the sexual harassment experienced was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[24] In *Meritor*, the Court agreed that Vinson's allegations fulfilled this criterion: "Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for 'hostile environment' sexual harassment."[25]

Despite the fact that the Court went into great depth in articulating the factors that lead to liability on the part of the supervisor for workplace sexual harassment claims, it passed on the opportunity to

18. *Id.* at 64.
19. *Id.* at 62.
20. *See generally id.*
21. *Id.*
22. *Id.* at 65.
23. *Id.* at 64. In reaching this determination, the Court placed heavy emphasis on the sexual discrimination guidelines promulgated by the EEOC. Quoting these guidelines, Justice Rehnquist stated "sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" *Id.* at 63–65.
24. *Id.* at 67.
25. *Id.*

determine which instances, if any, could lead to vicarious liability on the part of the employer. The opinion stated only that the Court of Appeals' conclusion that "employers are always automatically liable for sexual harassment by their supervisors" was incorrect.[26] While this issue remained open after *Meritor*, the Supreme Court addressed the question of vicarious employer liability for the harassing actions of supervisors twelve years later in two landmark decisions: *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton.*

### C. Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton

The Supreme Court decided *Ellerth* and *Faragher* in the wake of several decisions by the courts of appeals applying different standards of employer liability for supervisory harassment.[27] In *Ellerth*, the victim employee, Kimberly Ellerth, alleged that she was effectively forced to quit her job due to the ongoing harassment she was subjected to by one of her supervisors, Ted Slowik.[28] During the course of her employment at Burlington, Ellerth claimed that Slowik repeatedly made "boorish and offensive remarks"[29] toward her, some of which could be construed as conditioning career advancement and other employment benefits on her willingness to "loosen up,"[30] among other things. Despite Slowik's remarks, she was never subjected to any tangible employment action; in fact, she was promoted during the time of the alleged harassment. Prior to her decision to leave Burlington, Ellerth did not inform anyone about the repeated harassment, despite knowing that Burlington had a sexual harassment policy in place.[31]

In *Faragher*, the victim employee, Beth Ann Faragher, alleged that she was subjected to inappropriate remarks and touching by two of her supervisors, Bill Terry and David Silverman, during her part-time employment as a lifeguard for the City of Boca Raton. According to her complaint, the two men "created a 'sexually hostile atmosphere' at the beach by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms."[32] Although Faragher did not complain to higher management about the actions of Terry or

26. *Id.* at 72 ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.").

27. Additionally, there were varying views within each circuit as to what the correct standard for employer liability in these situations should be. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 749–50 (1998) (noting that the Court of Appeals for the Seventh Circuit, in reversing the district court's ruling of summary judgment for the defendant employer, "produced eight separate opinions and no consensus for a controlling rationale . . . on . . . the standard for an employer's liability on such a claim").

28. *Id.* at 747–48.

29. *Id.* at 747.

30. *Id.* at 748.

31. *Id.*

32. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998). The alleged assault included disparaging remarks regarding Faragher's weight and body, uninvited touching

Silverman, a fellow lifeguard wrote to the City's Personnel Director regarding the harassment. In response to this note, the City reprimanded both men and required them to choose between being suspended without pay or forfeiting their annual leave.[33] Unlike the defendant employer in *Ellerth*, there was no evidence that the City of Boca Raton disseminated a sexual harassment policy to the Marine Safety Section, the department in which Faragher worked.[34]

The majority's discussion in these two cases began by referencing several potentially applicable principles of agency law,[35] as articulated in the Restatement (Second) of Agency, in order to create "a uniform and predictable standard [for vicarious employer liability under Title VII sexual harassment claims] . . . as a matter of federal law."[36] Eventually, the focus of this discussion turned to section 219(2)(d) of the Restatement, which states that an employer

> is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation (hereinafter the "aided-by-agency-relation principle").[37]

Whereas other agency principles did not fit cleanly into the purposes or framework of Title VII, the majority in both *Ellerth* and *Faragher* felt this was a logical starting point for its discussion of vicarious employer liability for instances of supervisory sexual harassment.[38] The majority noted that the agency relationship between employers and supervisors is what affords supervisors contact with employees and that supervisors "necessarily"[39] rely on their superior position in instances of sexual harassment as it may make employees reluctant to report any harassing behavior or check abusive conduct.[40] Furthermore, the majority

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of her breasts and buttocks, offers for sex, and, generally, "vulgar references to women and sexual matters." *Id.* at 782.

33. *Id.* at 783.

34. *Id.* at 781–82.

35. *Ellerth*, 524 U.S. at 754 ("Congress has directed federal courts to interpret Title VII based on agency principles."); *Faragher*, 524 U.S. at 802 n.3 ("[O]ur obligation here is not to make a pronouncement of agency law in general . . . . Rather, it is to adapt agency concepts to the practical objectives of Title VII.").

36. *Ellerth*, 524 U.S. at 754.

37. *Id.* at 758.

38. *Faragher*, 524 U.S. at 802. The Court noted that:

> in implementing Title VII it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.

*Id.*

39. *Id.* at 803.

40. *Id.* The Court elaborated on the distinction between a victim employee's ability to resolve instances of harassments by supervisors as opposed to those by fellow employees:

> When 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

believed that employers generally were better able than common workers to check the behavior of supervisors through more thorough screening, training, and monitoring processes.[41]

While the majority in both *Ellerth* and *Faragher* agreed that the aided-by-agency-relation principle provided a solid foundation for the determination that employers should be held vicariously liable for instances of supervisory "hostile environment" sexual harassment, it still had to satisfy the ruling in *Meritor* that an employer is not automatically liable for harassment by a supervisor.[42] In resolving this issue, the Court noted that the most fitting alternative to automatic employer liability would be to allow employers 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 like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.[43]

Such a defense, according to the majority in *Faragher*, served the primary purpose of Title VII of avoiding harm, rather than providing redress.[44] In its discussion of the second prong of the affirmative defense, namely the requirement to show that the victim employee failed to avoid or mitigate harm,[45] the majority stated that this requirement reflected the policy that a victim "has a [general] duty 'to use such means as are reasonable under the circumstances to avoid or minimize . . . damages' . . . ."[46]

In summary, Supreme Court sexual harassment jurisprudence in the wake of *Meritor*, *Ellerth*, and *Faragher* articulates the following set of rules regarding sexual harassment claims in the workplace and the potential for vicarious employer liability: An employer is vicariously liable for the sexual misconduct of one of its supervisors if that misconduct results in a tangible employment action against the victim. Alternatively, if no tangible employment action takes place, an employer may still be held vicariously liable in instances of sexual harassment when the supervisor creates a hostile work environment through behavior that is "sufficiently severe or pervasive 'to alter the

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> '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.'

*Id.* (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991)).

41. *Id.* at 803.

42. *Id.* at 804 ("[T]here is obviously some tension between [*Meritor*'s] holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously . . . .").

43. *Id.* at 805.

44. *Id.* at 806.

45. *Id.*

46. *Id.* (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n.15 (1982)).

conditions of [the victim's] employment and create an abusive working environment.'"[47]

In cases where the victim's claim rests on the hostile environment theory, however, the employer may assert an affirmative defense so long as two criteria are met. First, the employer must prove by a preponderance of the evidence that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[48] Second, the employer must prove (also by a preponderance of the evidence) that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[49]

## III. THE RESULTING CIRCUIT SPLIT

Despite the Supreme Court's best attempts at articulating a uniform standard for federal sexual harassment law in the form of the *Ellerth/Faragher* defense, Justice Thomas' fears quickly materialized in the wake of these decisions.[50] While the requirements of the Court's newly constructed affirmative defense were clear, confusion arose amongst the courts of appeals as to how this defense should apply to claims of "hostile environment" sexual harassment based on a different set of facts. Specifically, the courts struggled to reach a consensus as to how both prongs of the defense should be applied to incipient or single, severe instances of "hostile environment" sexual harassment (unlike those in *Ellerth* and *Faragher* that occurred over a prolonged period). In regards to claims involving this set of facts, a split emerged as to whether or not the second prong of the defense, that the victim employee unreasonably failed to make use of the company's preventative or corrective mechanisms, should be applied.

### A. *Courts that Dropped the Second Prong of the* Ellerth/Faragher *Defense*

#### 1. *Indest v. Freeman Decorating* (Fifth Circuit, 1999)

The first major case questioning the applicability of the second prong of the *Ellerth/Faragher* defense in instances of incipient or single, severe sexual harassment arose in the Fifth Circuit in *Indest v. Freeman Decorating, Inc.*[51] In *Freeman*, which was decided less than one year after the Supreme Court's rulings in *Ellerth* and *Faragher*, one of Freeman's employees, Constance Chaix Indest, alleged that she was sexually

47. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

48. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

49. *Id.*

50. Recall that Justice Thomas was afraid the Court's "Delphic" pronouncements in *Ellerth* and *Faragher* would leave much of the work to the lower courts in determining the standard for vicarious employer liability; *see also* David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Courts Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 525 (2009) ("Courts continue to muddle through sexual harassment cases, both the prominent and obscure, and to produce decisions only loosely rooted in the Supreme Court's formulations").

51. 164 F.3d 258 (5th Cir. 1999).

harassed by her supervisor, Larry Arnaudet, during the course of a weeklong convention that they worked on together.[52] Indest claimed that Arnaudet made crude sexual comments and gestures toward her on four different occasions, both while she was alone and in the presence of her immediate supervisor and her director, Dawn DiMaggio.[53] She reported all of the incidents to DiMaggio and others, who then investigated the allegations in accordance with the company's sexual harassment policy. As a result of the investigation, Freeman issued a verbal and written reprimand to Arnaudet and asked Indest for further suggestions on how to discipline Arnaudet. When Indest notified Dan Camp, a human resources director, that she was filing a charge with the Equal Employment Opportunity Commission ("EEOC") out of fear that she would be retaliated against, Camp sent a member of his department to reassure Indest that no retaliation would take place. One week later, Camp himself flew out to see Indest and assured her that Arnaudet was going to be suspended and that he would no longer be working on any projects with her. Despite these assurances and several, periodic promotions that she received in the wake of the incidents involving Arnaudet, Indest filed a lawsuit against Freeman under Title VII.

The Fifth Circuit unanimously held that Arnaudet's behavior was neither severe nor pervasive enough to satisfy the criteria of a "hostile environment" sexual harassment claim. Additionally, the court noted that even if the elements of a "hostile environment" claim had been met, Indest could not establish a basis for Freeman's liability as her employer.[54] While strict application of the *Ellerth/Faragher* test would have rendered Freeman vicariously liable for Arnaudet's actions,[55] the Fifth Circuit articulated several reasons why it believed that a modified version of the defense, namely, that Freeman could escape vicarious liability merely by showing that it used reasonable care to prevent or promptly correct any sexually harassing behavior (the first prong of the defense). The court, in an opinion written by Judge Edith Jones, gave several reasons for ignoring the second prong of the defense.

First, the Fifth Circuit distinguished the facts of *Ellerth* and *Faragher* from those of the case at hand:

> The Supreme Court cases both involve complaints of longstanding supervisor misbehavior, and the plaintiffs either never utilized or claimed not to be aware of the company policies. But for purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was

52. *Id.* at 260.

53. *Id.*

54. *Id.* at 264 ("The Supreme Court's decisions in *Ellerth* and *Faragher* articulate and recapitulate some, but not all, standards for employer liability.").

55. Freeman would not have been able to assert the *Ellerth/Faragher* affirmative defense if Arnaudet's actions constituted "hostile environment" harassment because Indest made use of Freeman's sexual harassment policy and reported the incident to her superiors. Therefore, Freeman could not make out the second prong of the defense.

> never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment.[56]

In addition to distinguishing the cases on the basis of their facts, the Fifth Circuit articulated several policy reasons for dropping the second prong of the *Ellerth/Faragher* defense in instances of incipient sexual harassment. Primarily, the court felt that employers who reacted quickly to complaints of sexual harassment logged by their employees should not be unduly punished.[57] Rather, a company's swift response to an employee's complaint should have consequences for its exposure to vicarious liability due to the fact that such a response forestalled any sort of hostile environment from taking shape.[58] Additionally, the court feared that application of the full defense in instances such as the one it faced would come too close to the strict liability that the Supreme Court prohibited in *Meritor*: "Imposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor* but Title VII's deterrent policy."[59]

Ultimately, the Fifth Circuit's decision to distinguish the facts of *Indest* from those of *Ellerth* and *Faragher*, alongside the various policy arguments it highlighted, reflected the court's belief that there was a difference in the level of culpability between employers who lazily allowed for instances of sexual harassment to occur within their workplaces and those who proactively attempted to prevent and remedy those situations. While its use of the term "incipient" seems to walk a vague line between pervasive and single, severe instances of sexual harassment, the Fifth Circuit's recognition that the *Ellerth/Faragher* affirmative defense fell short in regards to employer fairness set an important foundation for future decisions.

### 2. *McCurdy v. Arkansas State Police* (Eighth Circuit, 2004)

Two years after holding that full application of the *Ellerth/Faragher* defense was appropriate in cases of severe and pervasive sexual harassment,[60] the Eighth Circuit issued its decision in *McCurdy v. Arkansas*

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56. *Id.* at 265.

57. *Id.* at 266.

58. *Id.* The court wrote:

> the company's swift response to the plaintiff's complaint should have consequences for its vicarious liability exposure precisely because the company forestalled the creation of a hostile environment. In cases like *Ellerth*, by contrast, the plaintiff's failure or delay in invoking anti-harassment procedures may suggest that a company lacked vigilance or determination to enforce them or that it appeared to turn a blind eye toward sexual harassment.

*Id.*

59. *Id.*

60. *See* Moisant v. Air Midwest, Inc., 291 F.3d 1028 (8th Cir. 2002). In *Moisant*, the victim employee alleged that her supervisor sexually harassed her on three occasions and that she reported the first and third instances to her employer. *Id.* at 1030–31. After each report, Air Midwest took disciplinary action against the supervisor, eventually firing him after the third offense. *Id.* at 1031. Despite its prompt response, the Eighth Circuit ulti-

*State Police*.[61] In *McCurdy*, Jamie McCurdy, an employee of the Arkansas State Police, claimed that she was harassed by one of her supervisors, Sergeant Daryl Hall, during her time as a radio dispatcher in Little Rock.[62] McCurdy's complaint stated that on April 28, 2002, Hall came up to her and touched her breasts and made inappropriate comments regarding her body, in addition to other unwelcome sexual advances.[63] McCurdy decided to report the incident to Sergeant Shawn Garner, and word of Sergeant Hall's behavior quickly reached Captain Carl Kirkland.[64] Kirkland promptly initiated an investigation that resulted in Hall's transfer and demotion.[65] At the conclusion of the investigation, McCurdy sued the Arkansas State Police, but not Sergeant Hall, for sexual harassment.[66]

In its discussion of whether or not the Arkansas State Police Department was vicariously liable for Sergeant Hall's lewd behavior, the Eighth Circuit found that McCurdy's employer undertook substantial measures to ensure that no further harassment ensued once she reported the harassment.[67] As such, noting that full application of the defense would effectively, though not technically, impose strict liability, the Eighth Circuit held that a modified version of the defense was the more equitable option:

> To reach a conclusion that the affirmative defense is unavailable in single incident cases in which the employee takes advantage of preventative or corrective opportunities provided by the employer and the employer thereafter takes swift and effective action to avoid further offensive conduct stands the underlying policy behind the affirmative defense on its head.[68]

This result, the court said, would effectively impose a strict liability standard on employers in instances of single, severe harassment due to the fact that even diligent employers could not escape vicarious liability if the plaintiff promptly reported any harassing behavior. Recognizing that strict application of the defense would leave the Arkansas State Police vicariously liable for Sergeant Hall's behavior, despite the extensive measures it took to remedy the situation, the Eighth Circuit con-

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mately held that Air Midwest was vicariously liable for the conduct of Moisant's supervisor: "Although Air Midwest acted promptly to provide appropriate remedies for the events of which Ms. Moisant complained, that does not immunize them from the vicarious liability that *Faragher* imposes." *Id.*

61. 375 F.3d 762 (8th Cir. 2004).

62. *Id.* at 764.

63. *Id.*

64. *Id.* at 765.

65. *Id.* at 765–66.

66. *Id.* at 767.

67. *Id.* at 771. The court explained:

> To conclude the ASP failed promptly to correct Sergeant Hall's harassing behavior would require us to suspend logic and reason. We conclude the ASP did exactly what the Supreme Court's affirmative defense requires [it] to do—maintain an appropriate anti-harassment policy and promptly implement that policy when an employee complains about harassing conduct.

*Id.*

68. *Id.* at 772.

cluded, "We decline the invitation to reach what appears to us to be an absurd result."[69]

### 3. Other Notable Decisions that Dropped the Second Prong of the *Ellerth/Faragher* Defense

Recent decisions by several district courts suggest that the movement behind a modified *Ellerth/Faragher* defense is picking up steam. In *U.S. EEOC v. Asia Pacific Hotels, Inc.*,[70] the United States District Court for the District of the Northern Mariana Islands explicitly endorsed dropping the second prong of the defense in single harassment claims: "If an employer has satisfied Prong One . . . it seems neither fair to that diligent employer nor consistent with the underlying policy of Title VII to have that employer's Title VII liability turn on the alacrity of the complaining employee."[71]

The United States District Court for the Eastern District of New York also rejected the application of the second prong of the defense in cases involving single, severe incidents of harassment in *Cajamarca v. Regal Entertainment Group.*[72] In *Cajamarca*, the court noted how a forced application of the second prong, once it had already been established that the employer acted reasonably to prevent or remedy the harassment, cannot be required in all circumstances in order for an employer to escape vicarious liability: "a close reading of those decisions indicates that the *Faragher/Ellerth* defense was created primarily to address and determine who is to blame for a continued hostile work environment rather than initial instances of harassment."[73] Whereas the *Asia Pacific* and *Cajamarca* courts saw no difficulty in drawing a distinction between single-severe and pervasive sexual harassment cases, the history of case

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69. *Id.*

70. No. 10-00002, 2011 WL 3841601, at *1–6 (D. N. Mar. I. Aug. 26, 2011) (dealing with a single incident of harassment where a member of a band under contract with the The Saipan Grand Hotel woke up to find the hotel's Food and Beverage Manager in her room and inappropriately touching her).

71. *Id.* at *5. Judge Mark Bennett, who wrote the opinion in *Asia Pac. Hotels, Inc.*, went on to address the concerns raised by the United States District Court for the Northern District of Indiana in Alalade v. AWS Assistance Corp., 796 F. Supp. 2d 936 (N.D. Ind. 2011) that the Supreme Court did not carve out an exception for employers in cases of single harassment:

> If anything, I think *Alalade* is too reticent . . . . *Ellerth* and *Faragher* were pervasive sexual harassment cases. As such, I do not think they control single-severe-incident cases . . . . I therefore disagree . . . that it is only for the Supreme Court to modify the EFD for single-severe-incident cases; I have no institutional qualms about jettisoning Prong Two in cases like this one.

*Id.* at *6 (citation omitted).

72. 863 F. Supp. 2d 237 (E.D.N.Y. 2012). In *Cajamarca*, a female employee of a movie theatre chain alleged that her supervisor, Otis Gadsden, insisted that she go out with him multiple times, which eventually culminated in a single instance where he exposed himself to her in the employee break room and assaulted her. Eventually, one of Cajamarca's supervisors noticed that she seemed nervous around Gadsden, at which point Cajamarca reported the harassment. Her supervisor immediately began an investigation which ultimately led to his suspension. *Id.* at 242–45.

73. *Id.* at 252.

law in the wake of *Ellerth* and *Faragher* also shows a strong commitment by some courts to a strict application of the defense.

### B. *Courts that Retained Both Prongs of the* Ellerth/Faragher *Defense*

#### 1. *Harrison v. Eddy Potash, Inc.* (Tenth Circuit, 2001)

In *Harrison v. Eddy Potash, Inc.*,[74] the Tenth Circuit explicitly refused to drop the second prong of the *Ellerth/Faragher* affirmative defense in instances of incipient or single-severe, "hostile environment" claims. In *Harrison*, an employee of a mining company, Jeanne Harrison, alleged that her supervisor, Robert Brown, repeatedly took her to isolated areas in the mines where he made several unwelcome, sexual advances, touched her inappropriately, and even forced her to masturbate him.[75] This harassment persisted for about two months,[76] at which point Harrison complained to one of her managers regarding Brown's behavior. The manager and company acted quickly to remedy the situation, starting an investigation the same day on which the complaint was filed, offering Harrison counseling services and any necessary medical expenses, reassigning her to a division where she would not be in contact with Brown, formally reprimanding Brown, and noting that she would be "made whole" for any work time lost as a result of the matter.[77] Ultimately, Harrison never returned to work and brought suit against her employer, Eddy Potash, Inc., under Title VII.[78]

On appeal, the Tenth Circuit rejected Eddy Potash's contention that the jury should have been instructed to apply the modified version of the *Ellerth/Faragher* defense as adopted by the Fifth Circuit in *Indest v. Freeman Decorating*.[79] Writing for the court, Judge Briscoe stated:

> *Indest* is highly suspect and, in our view, should not be adopted. As outlined in *Indest II*, there is no reason to believe that the "remarkably straightforward" framework outlined in *Faragher* and [*Ellerth*] does not control in all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment.[80]

While the Tenth Circuit went on to distinguish the facts of *Indest* from those of the case before it,[81] as the harassment at hand persisted for a much longer duration—probably to the point of "severe and pervasive"—it left little room for doubt as to its belief that the modified defense was "not an accurate statement of the governing law."[82] As

74. 248 F.3d 1014 (10th Cir. 2001).
75. *Id.* at 1016–18.
76. *Id.* at 1018.
77. *Id.*
78. *Id.* at 1018–19.
79. *Id.* at 1024–25. The offered instruction read as follows: "You are instructed that if you find that Plaintiff Jeanne Harrison promptly complained of Robert L. Brown's harassing conduct and that Eddy Potash promptly responded, disciplined appropriately, and stopped the harassment, then you should find for Eddy Potash." *Id.* at 1024.
80. *Id.* at 1026.
81. *Id.*
82. *Id.*

such, the Tenth Circuit felt the need to articulate its commitment to both prongs of the *Ellerth/Faragher* affirmative defense in the wake of the Fifth Circuit's holding in *Indest.*

2. *Alalade v. AWS Assistance Corp.* (N.D. Indiana, 2011)

Ten years after the Tenth Circuit's decision in *Harrison,* the United States District Court for the Northern District of Indiana explicitly affirmed the application of both prongs of the *Ellerth/Faragher* affirmative defense in cases involving single instances of "hostile environment" sexual harassment in *Alalade v. AWS Assistance Corporation.*[83] In *Alalade,* Annastacia Alalade, an employee at AWS, alleged that her supervisor, Samuel Ntawanda, followed her into a pantry closet at the group home in which they worked and forced himself upon her.[84] The incident involved Ntawanda undressing her, kissing her, and touching her inappropriately.[85] When Alalade reported the incident to AWS, Ntawanda was fired.[86] AWS' motion for summary judgment was denied, however, because it could not satisfy the second prong of the affirmative defense since Alalade reported the harassment.[87]

In response, AWS contended that it was not required to satisfy the second prong of the *Ellerth/Faragher* defense due to the fact that the alleged harassment only involved one isolated incident.[88] In AWS' view, their "prompt and effective response to Alalade's complaint would suffice to avoid liability, notwithstanding [their] inability to meet the second prong."[89]

Unfortunately for AWS, their plea was not well received. Writing for the court, Chief Judge Simon articulated several reasons why it was inappropriate to adopt a modified version of the *Ellerth/Faragher* defense. First, he discredited the Fifth Circuit's ruling in *Indest,* a case upon which AWS relied heavily in its reasoning that the second prong of the defense need not apply in this situation.[90] Chief Judge Simon then went on to discuss the policy implications that an adoption of the modified defense might have if it were to be adopted by the court.[91] Namely, his concern was that such a concession might "swallow" the

83. 796 F. Supp. 2d 936 (N.D. Ind. 2011).

84. *See* Natalie S. Neals, *Flirting with the Law: An Analysis of the* Ellerth/Faragher *Circuit Split and a Prediction of the Seventh Circuit's Stance,* 97 MARQ. L. REV. 167, 169 (2013) (detailing the circumstances of Alalade's alleged harassment as described by Alalade in deposition tapes).

85. *Id.*

86. Alalade v. AWS Assistance Corp., No. 3:09-CV-338-PPS, 2011 WL 1884339, at*1 (N.D. Ind. May 18, 2011).

87. *Alalade,* 796 F. Supp. at 938.

88. *Id.*

89. *Id.*

90. *Id.* at 942–43 (noting that *Indest* was not binding precedent, even in the Fifth Circuit, and the EEOC had expressly rejected the reasoning in *Indest*).

91. *See id.* at 944–46 (noting that the language in *Ellerth/Faragher* is incredibly straightforward and does not cut out an exception for single instances of sexual harassment, that the existence of the defense itself precludes any problems relating to strict liability, and that the existence of the second prong helps encourage employees to report harassing behavior).

defense as a whole, as AWS' logic could apply equally to responsible employers in cases of pervasive harassment.[92] All policy arguments aside, however, Chief Judge Simon noted that the Supreme Court's failure to carve out any exception for employers in single harassment cases precluded him from adopting AWS' proposed modification to the affirmative defense.[93]

## IV. POLICIES IN SUPPORT OF THE USE OF THE MODIFIED *ELLERTH/FARAGHER* DEFENSE

As the foregoing case law illustrates, it is vital that courts and lawmakers ensure that the victims of workplace sexual harassment receive adequate redress for the harm they suffered at the hands of their supervisors. This redress, however, should not come at the expense of an employer that took proactive measures to prevent and remedy any harassing behavior in line with its obligations under Title VII. While the social climate at the time of the Supreme Court's decisions in *Ellerth* and *Faragher* may have warranted the standard as laid out by the affirmative defense in its entirety, developments both inside and outside of the courtroom suggest that the modified version of the defense—as applied by the Fifth and Eighth Circuits—more appropriately assigns culpability.

### A. *Courts' Examination of the Reasonableness of Employers' Sexual Harassment Policies*

First, the need to apply both prongs of the *Ellerth/Faragher* defense is lessened by the fact that courts have demonstrated the ability to adequately scrutinize the effectiveness of employer sexual harassment policies in the first prong of the defense (i.e., that the employer used reasonable care to prevent or promptly correct any sexually harassing behavior). Proponents of maintaining both prongs believe that the addition of the second prong is necessary in order to keep employers from being held vicariously liable for simply paying "lip service" to anti-harassment policies. By removing the second prong from the inquiry, these commentators argue, employers are not incentivized to do any-

92. *Id.* at 944. Chief Judge Simon remarked:

> there are also pervasive pattern cases where the employer's anti-harassment policy and prompt, effective response satisfies *Ellerth/Faragher*'s first prong, yet the plaintiff's quick action prevents the employer from satisfying *Ellerth/Faragher*'s second prong, depriving it of an affirmative defense . . . . The employer defendants in these "pattern of harassment" cases arguably have done everything that Title VII and *Ellerth/Faragher* are meant to encourage. They had anti-harassment policies in place and responded promptly and effectively to reports of sexual harassment. So by the logic urged by AWS, those employers ought to also avoid liability, based solely on their satisfaction of *Ellerth/Faragher*'s first prong.

*Id.* (citations omitted).

93. *Id.* at 946.

thing more than make sure that they have some sort of policy "on the books."[94]

While this is a valid concern,[95] court opinions from across the country reflect an increase in judicial skepticism as to whether or not an employer's "policy" is truly effective or enforced.[96] Merely having a policy "on the books" is not the foolproof defense to liability that it may have been originally, as "most courts have also made it clear that a reasonable antiharassment [sic] policy will not absolve an employer of vicarious liability under Title VII if the employer fails to promptly and thoroughly investigate an employee's harassment complaint."[97] In *Cadena v. Pacesetter Corporation*, for example, the Tenth Circuit upheld an award for maximum punitive damages after it determined that the defendant employer, despite having a strong anti-harassment policy and training program in place, did not effectively enforce that policy.[98] Other courts have followed the Tenth Circuit's lead in this regard, scrutinizing not only the practicality of the terms of an employer's sexual

94. *See* Charles W. Garrison, *Once is Enough: The Need to Apply the Full* Ellerth/Faragher *Affirmative Defense in Single Incident and Incipient Hostile Work Environment Sexual Harassment Claims*, 61 CATH. U. L. REV. 1131, 1153 (2012) (quoting Walsh, *supra* note 50, at 472–73) ("[C]ourts 'are unduly impressed' by a company that has a sexual harassment policy in place, finding that the existence of a policy alone satisfies the first prong of the test. Thus, if the court were to modify the *Ellerth/Faragher* affirmative defense to only the first element, an employer could entirely shield itself from liability by having a policy in place, regardless of the effectiveness or level of implementation of the policy."); *see also* Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 216–22 (2004); Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817 (2005).

95. An early empirical study in the wake of the *Ellerth* and *Faragher* decisions suggested that courts were merely satisfied by an employer's distribution of a sexual harassment policy. However, the direction that sexual harassment case law has taken in the past decade suggests a much more active approach on the part of the judiciary. *See* David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment*, 69 FORDHAM L. REV. 1265, 1290 (2001) ("[T]he law is relatively clear: a so-called 'good policy' constitutes 'reasonable care.'"); *but see* Walsh, *supra* note 50, at 513 (noting that the courts he examined in the course of his empirical study were more likely to focus on "the remedy provided and to note that the employer had taken 'strong action' against the harasser" than by the mere presence of an anti-harassment policy).

96. *See* Walsh, *supra* note 50, at 513. Walsh notes that, of the few cases in his study that involved a resolution of the *Ellerth/Faragher* defense on the basis of the first prong only, over eighty-three percent of the verdicts were returned in favor of the plaintiff employee. *Id.*

97. Heather R. Boshak & Robert A. Epstein, *The Affirmative Defense to a Vicarious Liability Sexual Harassment Claim*, N.J. L.J., Apr. 4, 2008, http://www.njlawjournal.com/id=900005507790/The-Affirmative-Defense-to-a-Vicarious-Liability-Sexual-Harassment-Claim. The authors further noted that:

> Some of the deficiencies noted by courts have been the failure to investigate a complaint, the timeliness of the investigation, the thoroughness of the investigation—including the failure to interview the alleged harasser and appropriate supervisors, the qualifications of the investigator, and the actions (or lack thereof) taken as a result of the investigation.

*Id.*

98. *See* 224 F.3d 1203 (10th Cir. 2000).

harassment policy,[99] but also whether or not these terms were enforced in the face of a potentially hostile environment.[100] In *Williams v. Spartan Communications*, the Fourth Circuit noted that:

> any anti-harassment policy offered to satisfy the first prong of the *FaragherEllerth* defense must be 'both reasonably designed and reasonably effectual.' Moreover, a prompt response to complaints of harassment made pursuant to a policy banning harassment does not . . . necessarily establish the first prong of the affirmative defense.[101]

This increase in judicial activism has given rise to a new segment of literature within the larger realm of sexual harassment law. Throughout the past decade, several practitioners have relied on the language in court opinions to publish guides to assist employers in crafting and implementing effective anti-harassment policies.[102] Recognizing that solely having some form of a policy on file is unlikely to satisfy the first prong of the *Ellerth/Faragher* defense, these guides stress the establishment of an enforcement mechanism to ensure that the protocols of an anti-harassment policy are carried out in the event of a violation.[103] Specifically, practitioners suggest that the following provisions are necessary for an employer to show that it has established an effective anti-harassment policy: having a clear anti-harassment policy with several channels for reporting instances of alleged harassment[104] (including at least one anonymous method),[105] prompt training and annual re-train-

99. *See* Madray v. Publix Supermarkets, 208 F.3d 1290 (11th Cir. 2000).

100. *See* Jathan W. Janove, *The* Faragher/ Ellerth *Decision Tree: Lower Courts Put New Growth on Five-Year-Old Branches*, HR MAG. (Sept. 1, 2003), http://www.shrm.org/publications/hrmagazine/editorialcontent/pages/0903janove.aspx ("*Faragher* and *Ellerth* and their progeny teach employers not only to have good anti-harassment procedures in place and conduct training, they require swift and effective remedial action once the employer has knowledge of a problem.").

101. Williams v. Spartan Commc'ns, No. 99-1566, 2000 WL 331605, at *3 (4th Cir. Mar. 30, 2000); *see also* Lancaster v. Sheffler Enters., No. 02-3007, 2003 WL 549036, at *1 (8th Cir. Feb. 27, 2003) (holding that distributing an anti-harassment policy and forcing employees to sign it was not enough; rather, there needed to be evidence that the employer took reasonable steps to enforce the policy and correct any violations of it).

102. *See* Janove, *supra* note 100 ("[T]hese decisions have increased employer understanding of the importance of preventative measures. They have contributed to the development of sound anti-harassment policies, procedures and training and to employers taking proactive steps to eliminate offensive workplace misconduct."). *See also* Kathleen A. Lieder & Christopher P. Mazzoli, Ellerth *and* Faragher*: Applying the Supreme Court's "Delphic Pronouncement" on Employers' Vicarious Liability for Sexual Harassment*, 78 MICH. B.J. 432 (1999).

103. *See* Lieder & Mazzoli, *supra* note 102, at 435–36 ("Simply distributing the policy is probably not enough and the employer should provide supervisors and managers with sexual harassment training or, at the very least, train them regarding the employer's policy. If there is a complaint, an employer should investigate and take prompt remedial action to end the alleged harassment.").

104. *See* Janove, *supra* note 100.

105. *Id.*; *see also* Gary D. Knopf, *Recent Federal Court Decisions May Help Employers Defending Against Harassment Claims*, TROUTMAN SANDERS LLP (Dec. 13, 2012), http://www.troutmansanders.com/recent-federal-court-decision-may-help-employers-defending-against-harassment-claims-12-12-2012/.

ing of supervisors by someone with proper credentials,[106] and mechanisms that allow for immediate investigation[107] and effective remedial action,[108] including disciplinary action against the harasser.[109]

These suggestions reflect the increasing tendency of courts to analyze critically the various components of employers' anti-harassment policies. This judicial trend of holding employers to a higher standard[110] when evaluating the effectiveness of their policies has even led some commentators to suggest a "chipping away" of the affirmative defense in its entirety.[111] Furthermore, the willingness of courts to assess the reasonableness of anti-harassment policies in light of the needs of an employer's specific workplace, rather than in a vacuum, decreases the risk that any sort of "cookie cutter" approach will work to satisfy the first prong of the defense for lazy and inattentive employers.[112]

As Justice Thomas wrote in his dissenting opinion in *Ellerth*, totally preventing instances of sexual harassment in the workplace is a tall task for employers: "sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society."[113] It is, without a doubt, in the best interest of employers, as socially responsible and cost-minimizing institutions, to take every step

106. *See* Janove, *supra* note 100.

107. *See* Blair T. Jackson & Kunal Bhatheja, *Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors*, 62 DRAKE L. REV. 653, 672–73 (2014) (citing several cases where a "gap" of as few as ten days between the reporting of harassing behavior and the start of the investigation was enough for courts to question the promptness of employers' responses to harassment).

108. *Id.* (noting that the most effective remedial mechanisms do not rely overly on forms (as they can prolong the process of the investigation), but instead they go to great lengths to interview the complaining employee, the alleged harasser, and anyone else with knowledge of the situation, and neither promise nor disclaim confidentiality).

109. *Id.* at 674 (noting that courts have found anti-harassment policies to be insufficient in cases where little disciplinary action was taken against the harasser, despite the fact that the matter may have been promptly investigated and that steps were taken to compensate the victim).

110. *See* Janove, *supra* note 100 (noting that case law in the wake of *Ellerth* and *Faragher* suggests that companies are better off by instituting an anti-harassment policy that does not merely parrot EEOC guidelines, but instead "raises the bar higher than the legal standard and focuses instead on company values of respect and professionalism.").

111. *See* Boshak & Epstein, *supra* note 97 ("While 10 years of post-*Faragher/Ellerth* case law have provided a foundation upon which employers can construct and implement antiharassment policies, which will serve to protect against liability for supervisory conduct, many courts are nonetheless holding employers to a high standard and are willing to chip away at the application of the defense.").

112. *See* Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2d Cir. 1998) (noting that the reasonableness of an employer's response to harassing behavior must be assessed in light of the totality of the circumstances, including the nature of the work environment). *See also* Boshak & Epstein, *supra* note 97 (noting that this has caused courts to raise their standard of review in certain cases); Jackson & Bhatheja, *supra* note 107, at 673 ("[T]he inquiry into whether the harassment was promptly corrected is very fact specific.").

113. Burlington Indus, Inc. v. Ellerth, 524 U.S. 742, 770 (1998) ("The most that employers can be charged with, therefore, is a duty to act reasonably under the circumstances.").

possible to create a safe work environment for all employees. As the facts in *Freeman* and *McCurdy* illustrate, however, even the most diligent employer cannot implement a policy that will safeguard against all instances of harassment.[114] What these employers can do, however, is make sure that they have the mechanisms in place to prevent harassment from occurring and to quickly remedy any harassing behavior as it comes to their attention. This is especially true in cases of single harassment, where employers have little, if any, opportunity to remedy the situation until the wrong has already transpired. Therefore, it seems more appropriate that the potential culpability of an employer should be assessed with respect to the steps it took to prevent the harassment from occurring in the first place, and the measures it took to remedy the situation in the unfortunate event that harassment still occurs.

### B. *Costs to Innocent Employers and the Pressure to Settle*

Sexual harassment is an expensive proposition for employers. Whether through lost productivity or low morale, instances of sexual harassment can have a profound effect on an employer's work force, quickly leading to an inferior bottom line.[115] Claims of sexual harassment also entail tremendous social costs for employers. The stigma of being accused of or being found liable for sexual harassment brings with it the potential for not only negative publicity, but also losses in sales and clients.[116] As such, every employer has a great stake, aside from the wellbeing of its employees, in making sure that it establishes a safe working environment with the appropriate measures to quash and remedy any harassing behavior promptly.

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114. *See* Clair Kerner, *Settling Sex Harassment Cases Is an Expensive "Proposition"*, SYNTRIO (June 10, 2014), http://www.syntrio.com/sex-harassment-cases/. Kerner makes note of the fact that many business owners are confident not only in their own business acumen, but also in the screening and training measures in place to avoid hiring supervisors prone to committing acts of sexual harassment. "Unfortunately," she continues, "it is impossible to truly know everything about a manager, and it is even harder to keep tabs on changes in the manager's personality as time passes." *Id.*

115. *See generally To Be 'Employer of Choice,' Need Harassment-Free Workplace* [Letter No. 641] Emp. Prac. Guide (CCH) Issue No. 1104 (May 4, 2000) [hereinafter *Employer of Choice*] ("Employers can no longer afford to avoid taking proactive measures to prevent and eliminate workplace sexual harassment . . . ."). *See also Encyclopedia for Business, 2nd ed.*, REFERENCE FOR BUSINESS, http://www.referenceforbusiness.com/encyclopedia/ (last visited Mar. 28, 2016); Elizabeth Larson, *The Economic Costs of Sexual Harassment*, FOUND. FOR ECON. EDUC. (Aug. 1, 1996), http://fee.org/freeman/detail/the-economic-costs-of-sexual-harassment (highlighting that U.S. businesses suffer approximately $6.7 million [in 1996 dollars] annually due to "absenteeism, employee turnover, and low morale" that results from sexual harassment claims); Beth Braverman, *The High Cost of Sexual Harassment*, FISCAL TIMES (Aug. 22 2013), http://www.thefiscaltimes.com/Articles/2013/08/22/The-High-Cost-of-Sexual-Harassment.

116. *See* Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269 (1996). Roberts and Mann note that the damage to a company's image that results from sexual harassment claims is often ignored when calculating the true costs of these cases. Furthermore, they identify the bad press that accompanies these cases as especially harmful given its capacity to cost businesses their customers and revenues.

The question of cost allocation, as the Tenth Circuit noted in *McCurdy*, is central to the issue of whether or not a modified version of the *Ellerth/Faragher* defense is appropriate in cases of single, severe sexual harassment.[117] While the costs of sexual harassment to employers have been well noted,[118] the application of the second prong in harassment cases under Title VII is unique in how greatly it affects an employer's posture in litigation. Because the presence of the second prong inherently undercuts the ability of a diligent employer to fight off liability—so long as the victim employee reported the harassment in question—employers often feel compelled to settle pending claims quickly in order to avoid both the stigma and negative publicity that would accompany a negative verdict and the potential for substantial damage awards.[119] These pressures, therefore, undercut the maximum

117. McCurdy v. Ark. State Police, 375 F.3d 762, 772 (8th Cir. 2004). The court noted that:

> It is a fair question to ask who should bear the responsibility for a single incident of supervisor sexual harassment, an innocent employee like McCurdy or an employer like ASP who effectively stops the harassment after it learns about it. One could argue the ASP should bear the risk of supervisor sexual harassment, as opposed to the innocent McCurdy. However, the Court has rejected this theory of vicarious liability.

*Id.*

118. *See Employer of Choice*, *supra* note 115. The various costs that an employer could face in its attempt to combat a claim of vicarious liability include jury awards (including compensatory and punitive damages, litigation costs, and attorney's fees). *See also* Suzanne Lucas, *Why Employers Settle Sexual Harassment Claims*, CBS NEWS (Nov. 3, 2011, 5:04 PM), http://www.cbsnews.com/news/why-employers-settle-sexual-harassment-claims (noting that employers are often deterred from fighting claims of sexual harassment in court due to the high costs—estimated between $50,000 and $250,000—that they will face, even in cases where the "accusing employee was a vengeful liar who purposefully set out to destroy someone's life"); Janet Savage, *Managing the Risks of Sexual Harassment Claims: A Defense Perspective*, DAVIS, GRAHAM & STUBBS LLP (May 4, 1999), http://www.dgslaw.com/publications?&id=768 (estimating that the costs of defending a sexual harassment claim can climb between $100,000 and $200,000, if not higher); *Costs of a Sexual Harassment Case*, AVVO (Dec. 23, 2013), http://www.avvo.com/legal-guides/ugc/costs-of-a-sexual-harassment-case; James W. Hulbert & Bridget A. Neuson, *Sexual Harassment Liability Under Title VII*, SCHIFF & HULBERT (1998), http://www.isacs.org/uploads/file/Monographs/Business%20Operations/Sexual%20Harassment%20Liability%20Under%20Title%20VII.pdf.

119. While Title VII places a cap on compensatory and punitive damages based on the number of people employed by the employer, juries have awarded verdicts in excess of these amounts. *See* Evan M. Tager, *Ninth Circuit to Hear Title VII Punitive Damages Case En Banc*, MAYER BROWN (June 1, 2014), http://www.mondaq.com/unitedstates/x/320454/trials+appeals+Compensation/Ninth+Circuit+To+Hear+Title+VII+Punitive+Damages+Case+En+Banc (referencing a judgment against an employer in Arizona for $868,750 in punitive damages, more than $500,000 over the maximum award available under Title VII). This problem is even more amplified in state courts, several of which have adopted the *Ellerth/Faragher* defense without the corresponding cap in damages. *See* Larson, *supra* note 115 (citing a sexual harassment verdict against Wal-Mart for $50 million in punitive damages for a supervisor's comments about an employee's figure). *See also* Braverman, *supra* note 115 (citing a $10 million judgment against UBS in 2011); Erin Fuchs, *The 8 Largest Sexual Harassment Verdicts in History*, BUS. INSIDER (Sep. 3, 2012), http://www.businessinsider.com/the-9-most-damning-workplace-sexual-harassment-lawsuits-filed-in-america-2012-8?op=1&IR=T; Ruth Mayhew, *Do Companies Try to Settle Harassment Claims Out of Court?*, CHRON, http://smallbusiness.chron.com/companies-try-settle-harassment-claims-out-court-68735.html (last visited Mar. 28, 2016) (noting that employ-

limits that Title VII places on compensatory and punitive damages,[120] as employers feel compelled to settle for higher amounts[121] in order to avoid the negative publicity and loss in reputation that accompanies a sexual harassment lawsuit. With expediency as the main priority, even responsible employers often feel the need to "throw money" at the problem in order to avoid the costs of being found vicariously liable for sexual harassment, despite the fact that they may have acted reasonably in instituting several measures to prevent and remedy the situation.[122]

The expedited nature of these settlements is not only detrimental to diligent employers, however, as it also runs the risk of pressuring victims of harassment into accepting offers before understanding the scope of their legal rights and remedies.[123] In "throwing money" at the situation, employers also take it upon themselves to assess the extent of the harm suffered by the victim and the corresponding amount that will make that victim whole, a dangerous proposition considering the multitude of factors that play into such a determination.[124] While out-of-court conciliation can be seen as a positive in the Title VII context, the focus should be on the mechanisms that employers have in place to make their employees whole, rather than premature settlements that result from an employer's realization that full application of the *Ellerth/Faragher* defense does little to help them.

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ers would often prefer to settle than risk encountering a sympathetic jury). Interestingly, New Jersey just explicitly affirmed the use of the *Ellerth/Faragher* defense in harassment claims brought under state law. *See* Mark A. Saloman, *Boon to New Jersey Employers: State Supreme Court Confirms that Federal* Faragher/Ellerth *"Affirmative Defense" Now Applies to Sexual Harassment Claims Under State Law*, FORD HARRISON (Feb. 11, 2015), http://www.fordharrison.com/boon-to-new-jersey-employers-supreme-court-confirms-that-federal-faragherellerth-affirmative-defense-now-applies-to-sexual-harassment-claims-under-state-law.

120. *See Punitive Damages Under Title VII*, ARCKEY & ASSOCIATES, L.L.C., http://www.arlaw.us/colorado-newsletters/employment-news/punitive-damages-under-title-vii [https://web.archive.org/web/20140129220903/] (last visited Jan. 29, 2014). The Civil Rights Act of 1991 placed caps on the amount of compensatory and punitive damages that a plaintiff could recover in a harassment lawsuit. The caps are determined by the number of people employed by the defendant employer: for employers with 100 or fewer employers, the plaintiff cannot recover more than $50,000 in punitive damages. For employers with more than 500 employees, the cap is $300,000.

121. *See* Mayhew, *supra* note 119 (noting that in 2012, the EEOC recovered more than $82 million in damages through out-of-court settlements on behalf of employees that brought harassment claims).

122. *See* Lucas, *supra* note 118 ("It is often in the company's best interest to provide a settlement to the accuser, regardless of whether the case is valid or not."). *See also Employer of Choice*, *supra* note 115 ("[C]laims of sexual harassment must quickly settle to protect both business and personal reputations."); Kerner, *supra* note 114 (noting that some business owners now see five-figure settlements as the "high cost of doing business").

123. *See Settling Too Soon: A Mistake You Should Avoid*, DUBIN LAW FIRM, http://dubinlaw.com/?p=459 (last visited Mar. 28, 2016).

124. *See* Barbara E. Hadsell, *Maximizing Damages in a Sexual Harassment Case from the Plaintiff's Perspective*, 17 ALI-ABA COURSE MATERIALS J. 7 (2002) (stressing the uniqueness of sexual harassment cases and the need to consult psychologists and other experts to fully understand the harms suffered by a victim of workplace harassment).

### C. *The Adequacy of Tort Law as a Means of Redress*

While fairness to employers that have acted reasonably is a compelling reason to drop the second prong of the *Ellerth/Faragher* affirmative defense, it should not come at the unnecessary expense of the victims of sexual harassment in the workplace. Several commentators have suggested as much, claiming that the elimination of the second prong of the defense leaves victims without a remedy outside of tort law.[125] While the modified defense does make it easier for employers who acted responsibly to avoid vicarious liability under Title VII, it should not be assumed that tort law is an inadequate avenue for victims in need of redress.[126]

First, tort law, like Title VII, allows for victim employees to recover from their employers under the premise of dual liability. While victims face a higher standard to make out tort claims against their employers than they do under Title VII, they also benefit from potentially higher damage awards.[127] Furthermore, the higher standards present in tort law help to facilitate the differentiation between inattentive and diligent employers; employers that acted reasonably are less likely to be found liable, and victims can still make out cases against their employers if they were not responsive to the alleged harassment. Employers in tort actions also benefit from a common law right of indemnity against their supervisors.[128]

Tort law also provides victims with an avenue to recover directly from the supervisor that committed the harassment through several different claims.[129] These claims include, but are not limited to, the torts of battery, assault, false imprisonment, outrage, seduction, intentional infliction of emotional distress, invasion of privacy, and negligent infliction of emotional distress.[130]

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125. *See* Garrison, *supra* note 94, at 1152.

126. Several commentators have suggested that tort law is actually preferable to Title VII in this regard. *See* Ellen Frankel Paul, *Sexual Harassment Discrimination as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 335–36 (1990) (asserting that tort law would "place liability for the harm on the responsible party, not on a usually non-blameworthy employer, as 'deep pockets' considerations and Title VII doctrine currently do . . . ."); *see also* Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375 (1998).

127. *See* Fuchs, *supra* note 119.

128. *See* Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO STATE L.J. 1315, 1331 (2014) (citing DAN B. DOBBS, THE LAW OF TORTS §333 (2000)) ("[I]t is important to remember that the employer possess a common law right of indemnity against its employee to recoup the damages paid to the injured party. The employer thus functions mainly as a deep pocket, with the ultimate legal responsibility residing with the party at fault, namely, the employee.").

129. *Id.* ("Unlike the dual liability scheme of tort law—where both the employer and the employee may be sued—Title VII claims may be brought only against the employer. . . . [U]nder Title VII, the employer has no right of indemnity when it pays a judgment based on the discriminatory act on the part of the employee."); *see also id.* (describing Title VII as an "enterprise liability scheme").

130. Ellen Bublick & Jessica Mindlin, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, VIOLENCE AGAINST WOMEN NETWORK (Sept. 2009), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2150 (noting tort law claims, as compared to criminal law, are more fluid and more easily proven).

Finally, modification of the *Ellerth/Faragher* defense will not preclude victims from recovering from their employers when the employee failed to put reasonable preventative and remedial measures in place. As several courts have illustrated by their comprehensive assessments under the first prong of the defense, merely having anti-harassment policies "on the books" is no longer likely to excuse employers from vicarious liability. As such, the removal of the second prong of the defense does not prevent victims from recovering from their employers, it only prohibits them from recovering from employers who proactively sought to prevent and remedy such harassment.

## V. A Proposed Alternative

While the decision of several courts to jettison the second prong of the *Ellerth/Faragher* defense in cases of single, severe sexual harassment provides a needed level of protection for diligent employers in today's legal environment, the use of this modified defense is not without its problems. First, the existence of different standards for pervasive and single, severe sexual harassment claims raises a new question: how long must harassment go on before it is considered pervasive? Can the modified affirmative defense apply only if only one instance of harassment has occurred? Would several instances of harassment in a short period of time, as was the case in *Indest*, preclude an application of the modified defense? These are the types of questions that courts would be forced to answer if this dual standard were allowed to persist, which would make it even harder for employers and employees to understand their rights and liabilities under Title VII.

As such, it is clear that a uniform standard for both pervasive and single severe sexual harassment is preferable to the division that has materialized in the wake of *Ellerth* and *Faragher*. This begs the question of whether the modified defense should be applied across all Title VII sexual harassment claims. While the first prong of the defense is equally effective in both types of cases,[131] the application of the full defense in cases of pervasive harassment works well and serves the honorable purpose of encouraging victimized employees to report potential violations.

An ideal legal standard, therefore, would seemingly need to be uniform across both pervasive and single severe cases, cognizant of the need of diligent employers to effectively defend themselves, and contain some form of incentive to promote employee reports of harassing behavior. I believe one possible legal alterative that satisfies all three of these priorities would be as follows:

131. In pervasive harassment cases, the length of time that harassing behavior was allowed to persist weighs heavily on the determination of the "reasonableness" of an employer's anti-harassment policies. Whereas an employee who reports harassment quickly is a testament to an employer's effective reporting or enforcement mechanisms, prolonged harassment may suggest several flaws in a company's anti-harassment policy or in its workplace more generally.

> An employee's reporting of harassing behavior creates a rebuttable presumption of liability that shifts the burden to the defendant employer to prove that it acted reasonably in its efforts to prevent and remedy the harassment at issue.

First, this alternative standard would relieve employers from the presumption of liability under which they effectively find themselves in the application of the *Ellerth/Faragher* defense. That defense states that an employer is liable for the harassing behavior of its supervisors, subject to its ability to make out the affirmative defense. While this may serve as an incentive for employers to institute the necessary measures to prevent harassment, it is inconsistent with the foundational concept of our justice system: innocent until proven guilty—or in this case, liable.

By allowing an employee's complaint to create a rebuttable presumption of liability, this standard would also provide victims with the incentive to report harassment in the same fashion as the second prong of the *Ellerth/Faragher* defense does. A report of harassment, however, would not destroy an employer's chance at defending itself as it does under the current defense. Rather, it would shift the focus of the question back to where it appropriately belongs—the reasonableness of the employer's conduct. This step of the analysis would effectively mirror the first prong of the current *Ellerth/Faragher* defense, and would center on the preventative and response mechanisms that the employer put in place. While an employee's complaint may be evidence in and of itself that the system itself was reasonably crafted, employers would also need to show that supervisors and employees alike had the requisite training regarding the company's harassment policy and that enforcement of that policy occurred immediately upon notice of any violations. In this regard, merely having a policy on file would not suffice to overcome the rebuttable presumption created by the employee's report of the harassment.

The standard also lends itself to uniform application across cases of pervasive and single, severe harassment in the same way that the first prong of the *Ellerth/Faragher* defense does under the current system. The longer it takes for an employer to receive word of harassment in its workplace, either by a report or through its own preventative measures, the more likely it will appear that there was some deficiency in the system. This deficiency could concern a reporting mechanism or some other preventative feature, but ultimately employers would be incentivized to put measures in place that allow their workers to feel that they can come forward with any relevant information quickly and safely.

## VI. CONCLUSION

While the *Ellerth/Faragher* affirmative defense was crafted with the welfare of both employers and victimized employees in mind, in practice it has proven to affect disproportionately those employers who have taken reasonable measures to prevent and remedy instances of sexual harassment. While the existence of the defense itself may technically

satisfy the ban on employer strict liability articulated in *Meritor*, employers find themselves operating under a presumption of culpability, their defense from which relies entirely on the decision of the victim employee to report or not report the harassment. This puts employers in a very difficult spot, as they are often undone by the very mechanism they put in place to help prevent an instance of harassment from proliferating any further. This leads to unfortunate consequences for both parties, namely premature settlements that rob both sides of potential legal rights. Fortunately for those employers that have taken the steps required of them under Title VII, some courts have realized the importance of distinguishing between the lazy and the diligent employer and their corresponding levels of culpability. While it may not be a perfect solution, the current split has helped employers to worry less about potential settlements and lawsuits and more about how they can promote a culture of professionalism and respect in their workplaces so that their employees feel respected and secure.