Take a Closer Look: An Examination of the *Faragher/Ellerth* Affirmative Defense

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ABSTRACT

Since 1986, workplace sexual harassment has been recognized by the Supreme Court as a form of actionable discrimination under Title VII of the Civil Rights Act to be prevented for its detrimental impacts on an individual's physical and mental health. An employer could be vicariously liable for workplace sexual harassment committed by its supervisors even if no tangible employment actions are taken against the plaintiff-employee. Nonetheless, most workplace harassment claims fail in court because federal law essentially granted immunity to employers through the *Faragher/Ellerth* affirmative defense. In 1998, the Supreme Court established a two-pronged framework in two landmark cases regarding workplace harassment. Although the Supreme Court showed its intention to incentivize employers to prevent and reduce harassing behavior in the workplace by "rewarding" them with an affirmative defense, it built a "safe harbor" within the vicarious liability doctrine and provided a basis for employers to escape liabilities. After almost three decades of development, federal courts' application of *Faragher/Ellerth* defense ultimately forges a pro-employer environment in sexual harassment cases. In addition, empirical studies show neither the training programs nor the grievance procedures help to significantly prevent or reduce workplace harassment. Although over 90 percent of large employers in the United States have some form of sexual harassment training in place, it seems to have little to no impact on the overall number of harassment complaints. Knowing they are likely to prevail, the employers lack incentives to effectively implement anti-harassment policies and conduct deliverable training programs.

This article takes interest in how a jury question turned into a *de facto* matter of law in the subsequent development of the federal case law and led to the creation of a pro-employer environment in workplace sexual harassment litigation. In this article, I contend that to reach the goal that the *Ellerth/Faragher* court tried to achieve, which is incentivizing employers to reduce harassment behavior in the workplace, the affirmative defense needs to be eliminated. Evidence from both the subsequent case law in federal courts and social science studies show apparent flaws of the affirmative defense, which leads to an unfriendly environment for sexual harassment victims. With the inadequacy of many anti-harassment policies and training designs, it is time to find alternative incentives for employers in reducing workplace harassment behaviors.

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INTRODUCTION

In a House report released in April 2024, the House Intelligence Committee found that the Central Intelligence Agency ("CIA") failed to appropriately handle sexual assault and harassment within its workforce.[1] According to the interviews with the whistleblowers, not only were the reporting procedures confusing, but there was also little to no accountability or punishment for the perpetrators of the harassment.[2] In addition, the CIA had fired the victim who stepped forward and cooperated with law enforcement investigations.[3]

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[1] Katie Bo Lillis, *House Intelligence Committee Finds CIA Mishandled Sexual Assault and Harassment Claims*, CNN (Apr. 22, 2024, 11:07 AM), https://www.cnn.com/2024/04/22/politics/house-intelligence-committee-find-cia-mishandled-sexual-assault-and-harassment-claims/index.html.

[2] *Id.*

[3] *Id.*

Although explicitly prohibited under Title VII of the Civil Rights Act of 1964, workplace sexual harassment has not shown a significant decrease.[4] Over the years, scholars have pointed out that sexual harassment law has not been able to live up to its potential, particularly in the employment context.[5] In *#MeToo Has Done What the Law Could Not*, Professor Catherine MacKinnon pointed out that "[i]t is widely thought that when something is legally prohibited, it more or less stops. This may be true for exceptional acts, but it is not true for pervasive practices like sexual harassment, including rape, that are built into structural social hierarchies."[6] Unlike other actionable claims under Title VII, employers are rarely held liable for harassment behaviors that happen in the workplace, especially in hostile work environment cases, where no tangible employment action is taken.[7] Not only is it difficult for plaintiff-employees to establish a prima facie case that will meet the "severe or pervasive" standard, but employers can easily enjoy an affirmative defense that would lead them to limited, if any, liability.[8]

By creating the affirmative defense in two landmark cases, the Supreme Court had the intention to incentivize employers to prevent and reduce harassing behavior in the workplace.[9] The Court thought it would create strong motives for employers by "rewarding" them with an affirmative defense, but instead, it built a "safe harbor" within the vicarious liability doctrine and provided a basis for employers to escape liability.[10] This paper revisits the *Faragher/Ellerth* framework and argues from both doctrinal and sociological standpoints that the defense should be eliminated. Over the years, federal courts have created a pro-employer environment, resulting in a perverse incentive for employers in constructing their anti-harassment practices.[11] Without considering the context around the situation, courts tend to judge employee responses in hindsight, holding victims to a "reasonable" person standard that is unrealistic to meet.[12] This article takes interest in how a jury question developed into a question of law in federal courts over the

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[4] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC DATA HIGHLIGHT: SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES (Apr. 2022).

[5] *See generally* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2005); L. Camille Hébert, *How Sexual Harassment Failed Its Feminist Roots* 1 (Moritz Coll. L., Working Paper No. 567, 2020).

[6] Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html.

[7] Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J. L. REFORM 809, 811 (2002).

[8] *Id.* at 822–24.

[9] *See generally* Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 965–88 (2021); Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 164–67, 187 (2021).

[10] *See* discussion *infra* Part III.

[11] Hébert, *supra* note 5 at 1 ("The courts have turned that promise into a cause of action that seeks to protect the workplace form women who make claims of sexual harassment, rather than a cause of action that seeks to protect women from discriminatory workplaces.").

[12] *Id.* at 26–27.

past decades, and suggests that the elimination of the *Faragher/Ellerth* affirmative defense is a necessary first step to better achieve the principle of Title VII: to incentivize employers and employees to work together to reduce workplace harassment.[13]

Part I of this article will discuss the background of workplace sexual harassment under Title VII and the invention of the *Faragher/Ellerth* framework. Part II will address how the federal courts created a pro-employer environment in the subsequent application of the affirmative defense and essentially turned a jury question of reasonableness in both prongs of the affirmative defense into a matter of law. Part III introduces the empirical evidence to demonstrate that the reasonableness standard applied by the courts is out of touch with reality, resulting in *pro forma* anti-harassment policies and training that are incapable of reducing sexual harassment behavior in the workplace. Part IV addresses some potential alternatives that would incentivize employers to reduce workplace harassment and discuss the importance of reintroducing the right to jury in hostile work environment claims.

I. WORKPLACE SEXUAL HARASSMENT: TWO STEPS FORWARD, ONE STEP BACK

Sexual harassment is considered a form of sex discrimination under Title VII of the Civil Rights Act of 1964 and is prohibited in the workplace. But it was not always the case. Sexual harassment was not an actionable claim when the Civil Rights Act was enacted, and it was practically "invented" by Professor Catharine MacKinnon. In her 1979 book, *Sexual Harassment of Working Women*, Professor MacKinnon demonstrates that sexual harassment meets the definition of sexual discrimination under an inequality approach and, therefore, should be covered by Title VII.[14] She identified two types of harassment. The first type, "quid pro quo," includes situations like a supervisor offering an employee a raise or promotion if they meet his or her sexual demands.[15] The other type of sexual harassment, a which would come to be known as "hostile work environment," is when one person frequently offers unwanted pervasive sexual comments, requests, or advances toward another person, "mak[ing] the work environment unbearable.[16]

The next year, in 1980, the U.S. Equal Employment Opportunity Commission ("EEOC") adopted Professor MacKinnon's argument and updated its guidelines regarding sexual harassment. Under the EEOC

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[13] *Id.*

[14] *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[15] *Id.* at 37.

[16] *Id.* at 40. Professor MacKinnon originally called this form of discrimination a "condition of work," but the situation which she described would come to be known as a "hostile work environment" through cases like *Meritor*. *See id.*; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

definition, workplace sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[17] Since the guidelines were issued, federal courts have uniformly adopted the definition.[18] Six years after the guidelines were issued, in *Meritor Savings Bank v. Vinson*, the Supreme Court followed suit when, for the first time, it recognized sexual harassment as an actionable claim under Title VII.[19]

A. The "Hostile Work Environment" Under Title VII

In the 1986 landmark case, *Meritor Savings Bank v. Vinson*, the Supreme Court first recognized workplace sexual harassment as a form of sex discrimination that violates federal anti-discrimination laws.[20] It was a victory at the time for its recognition of a "hostile or abusive" environment caused by workplace sexual harassment.[21] *Meritor* marks the official recognition that both quid pro quo and hostile work environment claims are actionable under Title VII.[22] However, the Court then went on to implement a stringent standard for employees alleging sexual harassment in the workplace.[23]

First, the Court held that a hostile work environment is only actionable when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[24] This requirement indicates that the misconduct must be extremely serious for a hostile work environment to be actionable, leaving a wide range of sexually derogatory and denigrating conduct out of sanction.[25] Second, the Court found that the lower court erred in holding employers strictly liable when it was unclear whether the employer possessed knowledge of the harassment

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[17] Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (2024).

[18] *See, e.g.*, Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934, 944–45 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984).

[19] *Meritor*, 477 U.S. at 66 ("Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.").

[20] *Id.*

[21] *Id.*

[22] *Id.* at 65.

[23] *Id.* at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." (citation omitted)); *see also* L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L. J. 819 (1997).

[24] *Meritor*, 477 U.S. at 67 (alteration in original).

[25] *See* Hébert, *supra* note 5, at 57 (describing how sexual harassment in the workplace can have serious repercussions even before reaching the courts' very high standard).

conduct.[26] In its *amicus curiae* brief, the EEOC contended that knowledge should not be a deciding factor when considering employer liability in a hostile work environment claim because agency principles require employers to be strictly liable for the misconduct of its supervisors.[27] Disagreeing with the EEOC on the issue of strict liability, the majority of the Court in *Meritor* indicated that "Congress' decision to define 'employer' to include any 'agent' of an employer" shows an intent to limit employer liabilities.[28] Accordingly, the *Meritor* Court rejected the EEOC and the D.C. Circuit's strict liability rule in hostile work environment claims and refused to issue a definitive ruling on employer liability.[29] Instead, the Court left an opaque instruction for lower courts, suggesting that they should look to "agency principles for guidance" going forward.[30] As a result, this instruction results in "wildly inconsistent results" in lower courts, primarily because they are constantly relying on "somewhat amorphous 'agency principles.'"[31]

Although the *Meritor* Court rejected the employer's position that a company should be shielded from liability by virtue of the "mere existence" of an anti-harassment policy and grievance procedure, the Court suggested that the employer might have a stronger argument "if its procedures were better calculated to encourage victims of harassment to come forward."[32]

B. The Faragher/Ellerth Affirmative Defense Framework

In 1998, the Supreme Court revisited the issue of employer vicarious liability and created a two-pronged affirmative defense in two landmark cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, regarding workplace harassment by supervisors.[33] In *Ellerth*, Kimberly Ellerth resigned from her job after working for Burlington Industries, alleging that she had suffered from repeated vulgar, sexualized comments and inappropriate touch without consent during her employment.[34] Ellerth knew about Burlington Industries' anti-harassment policy, but she did not

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[26] *Meritor*, 477 U.S. at 72 ("We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were 'so pervasive and so long continuing . . . that the employer must have become conscious of [them].'" (alteration in original)).

[27] *Id.* at 70 (describing the EEOC's view that "where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them").

[28] *Id.* at 72.

[29] *Id.*

[30] *Id.*

[31] Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 678 (2000).

[32] *Meritor*, 477 U.S. at 72–73.

[33] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[34] *Ellerth*, 524 U.S. at 747–48.

report her supervisor's harassment conduct through internal procedures.[35] Similarly, in *Faragher*, Beth Ann Faragher remained silent while suffering from two male supervisors' repeated inappropriate touching and offensive comments during her employment as a lifeguard for the City of Boca Raton in Florida.[36] After resigning from her job, Beth Ann Faragher brought the action against the city, asserting that her supervisors' conduct constituted discrimination and thus was in violation of Title VII of the Civil Rights Act.[37] In both cases, the employers had an anti-harassment policy, which the plaintiffs knew about; neither plaintiff utilized the internal reporting procedure and were not subject to tangible employment actions.

With these two cases, the Supreme Court created the well-known *Faragher/Ellerth* defense. The Court first reasoned that an employer may be subject to vicarious liability for a supervisor's sexual misconduct and harassment.[38] This standard of liability is grounded on two main principles: "1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment."[39] The Court somewhat clarified the strict liability confusions raised by *Meritor* by holding that employers are vicariously liable for sexual harassment committed by a supervisor.[40] When a supervisor creates a hostile work environment by committing sexual harassment, the employer is vicariously liable, regardless of whether the supervisor's conduct created a hostile work environment or resulted in a "tangible employment action . . . such as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[41]

So far, the *Ellerth/Faragher* Court's analysis of employer vicarious liability was consistent with the general tort law principle of vicarious liability. However, the Court then decided to differentiate torts committed within and outside the scope of Title VII. Outside of Title VII's scope, when a supervisor causes serious physical injury or death of the employee, courts do not insulate employers from their vicarious liability. For example, in *Anicich v. Home Depot U.S.A., Inc*, the Seventh Circuit reversed the lower court's decision to grant summary judgment for the employers and ruled that the use of supervisory authority to commit a tort outside the scope of employment could be a basis to hold the employer liable for negligent hiring, supervision, and retention.[42]

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[35] *Id.* at 748.

[36] *Faragher*, 524 U.S. at 780–82.

[37] *Id.* at 780.

[38] *Ellerth*, 524 U.S. at 755–57.

[39] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *superseded by* ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (2024).

[40] *Ellerth*, 524 U.S. at 765.

[41] *Id.* at 761.

[42] Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 654 (7th Cir. 2017).

In *Faragher*, the Court recognized the special treatment employers enjoy under Title VII, especially when the employee who commits torts or crimes is not advancing the employer's interests:

> In so doing, the courts have emphasized that harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual harassment to the classic "frolic and detour" for which an employer has no vicarious liability. These cases ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts that were in no sense inspired by any purpose to serve the employer.[43]

Based on its interpretation of Congress' intent, the Court concluded that there was "no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment."[44] Using three examples, Court drew the line between "scope" and "frolic" on the spectrum of possible harassing conducts, stating that cases, like *Faragher*, involves an employee expressing sexual interests and in no way serving any interest of the employer, beyond the scope of employment.[45]

Ultimately, the Court established an affirmative defense scheme when a supervisor creates a hostile work environment but does not take a "tangible employment action" against the employee.[46] Employers can enjoy a defense if the following two prongs are satisfied: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[47]

The two-pronged test shows the Supreme Court's willingness to put faith in employer self-policing. By rewarding employers with an affirmative defense in harassment cases, the Court tried to create incentives for companies to prevent and reduce harassing behavior in the workplace.[48] However, the Court also provided employers with the possibility of limited

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[43] Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).
[44] *Id.* at 798.
[45] *Id.* at 799.
[46] *Id.* at 807.
[47] *Id.*
[48] *Id.* at 806. ("[A] theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.").

or no liability. Legal scholars have pointed out that the Court elevated "symbolic compliance structures" to replace otherwise meritorious sexual harassment claims, and as a result, employers "can limit its potential harassment liability not only probabilistically … but also directly, by instituting and then using symbolic compliance structures to establish a legally efficacious defense to an otherwise actionable claim."[49] These "symbolic compliance structures" were implemented in response to the ambiguity of legal mandates as a tool to establish efficacious defense, and the courts reinforced these structures when they treat them "as evidence of good faith."[50]

By adopting a modified vicarious liability standard, the *Faragher/Ellerth* Court unintentionally carved out wiggle room specifically designed for harassment claims that gives more leniency to employers and puts victims in a disadvantageous position.[51] Although it arose out of sexual harassment context, the affirmative defense was extended to other forms of harassment in practice.[52] Employees alleging racial or religious harassment are facing the hurdle of the *Faragher/Ellerth* as well.[53] If the harassment does not lead to a concrete, tangible employment action, victims of a hostile work environment must first report the harassment to the employer through its internal complaint process or else risk losing later in court.[54]

II. FLAWS OF THE AFFIRMATIVE DEFENSE: EVIDENCE FROM FEDERAL COURTS

The *Ellerth-Faragher* Court provided little to no guidance on how employers could actually avoid vicarious liability. Instead, it seems to leave the heavy-lifting work to the lower courts by stating that the "proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law"[55] but refraining from further instructions. Instead of letting the jury decide whether employers have exercised reasonable care and whether the plaintiff-

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[49] Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 172 (2001).

[50] Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1546 (1992) (discussing how organizations respond to legal changes using symbolic compliance structures).

[51] *Id.* at 1540 (discussing weak Title VII enforcement mechanisms and Supreme Court decisions that limit aggrieved employees to pursue legal channels). *See also* sources cited *supra* note 9.

[52] *See* Jones v. Delta Towing L.L.C., 512 F. Supp. 2d 479, 489–90 (E.D. La. 2007) (articulating *Faragher-Ellerth* affirmative defense to vicarious liability for workplace harassment is available in context of a hostile work environment claim grounded in racial discrimination). *See also* Garrett v. Tyco Fire Products, LP, 301 F. Supp. 3d 1099, 1106 (2018) (allowing *Faragher-Ellerth* in racial harassment case); Edrisse v. Marriott Int'l, Inc., 757 F. Supp. 2d 381, 384 (S.D.N.Y. 2010) (finding employer satisfied elements of *Faragher-Ellerth* affirmative defense to vicarious liability for supervisor's frequent mocking and harassment of a black Arab-Muslim employee). *See generally* Hébert, *supra* note 5.

[53] *Edrisse*, 757 F. Supp. 2d at 384, 387*; Garrett*, 301 F. Supp. 3d at 1121–23.

[54] Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998).

[55] *Id.* at 807.

employees have unreasonably failed to utilize the grievance procedures, most lower courts have treated this question as a matter of law.[56] In some early cases, the federal courts took the evaluation of the two-pronged test very literally and created precedents for future rulings that allow employers to get away with only minimum efforts of the anti-harassment practice. Under the circumstances where the defendant-employer files a renewed motion for judgment as a matter of law after the jury issued their verdicts, courts frequently find for the employer, despite the jury's opposite view regarding the "reasonableness" evaluation.[57] Moreover, the appellate courts might be unwilling to review the question of jury trial during the appeal,[58] resulting in the propensity of courts to treat the reasonableness question as a matter of law rather than for the jury.

In the three decades following *Faragher-Ellerth*, the federal courts created a pro-employer environment by applying a series of factors in deciding the actionability of sexual harassment claims and granted *de facto* safe harbor to employers.[59] The following sections assess how federal courts analyze both prongs of the affirmative defense and essentially provide employers with an easy escape route as long as they can show an anti-harassment compliance policy and plaintiff-employee's failure to immediately utilize employer-proved reporting channels.

A. The "Reasonable" Question

The first prong of the *Faragher-Ellerth* framework pivots on a reasonableness inquiry, yet the Supreme Court left an important question unanswered—to what extent does a company's preventative measures constitute "reasonable care" in reducing and correcting sexual harassment behavior? In its reasoning, the Court merely instructed that "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."[60] As a result, following *Faragher-Ellerth*, the lower courts began to develop their own standards regarding the reasonableness of an employer's preventative and corrective care.[61] Although the Supreme Court did not rule on whether the existence of an anti-harassment policy is sufficient to satisfy the first prong as a matter of law,[62] federal courts routinely find companies

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[56] Grossman, *supra* note 31, at 700.

[57] Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 265 (4th Cir. 2001).

[58] *See* Gentry v. Exp. Packaging Co., 238 F.3d 842, 847 (7th Cir. 2001) ("As an appellate court, our review of the jury trial below is limited in nature.").

[59] Hébert, *supra* note 5, at 3 (discussing courts' elements approach to sexual harassment claims).

[60] *Faragher*, 524 U.S. at 807.

[61] *See* David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461 (2009).

[62] *Faragher*, 524 U.S. at 778. ("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

have exercised reasonable care as long as employers provide a facially valid anti-harassment policy.[63] In the post-*Ellerth/Faragher* era, the precedent gradually started to build about the different sets of facts that had been so found.

In one of the earliest cases following the *Ellerth/Faragher* decision, *Fierro v. Saks Fifth Ave.*, the Southern District of New York interpreted the first prong of the affirmative defense at face value, holding that Saks' anti-harassment policy was an undisputed fact and therefore passed the first prong of the *Ellerth/Faragher* defense.[64] The fact that Saks has an existing antiharassment policy was undisputed, but the court ignored *Faragher* Court's instruction that the promulgation of such policy is not necessarily "reasonable" a matter of law, and failed to assess whether the policy is "suitable to the employment circumstances"[65] before granting summary judgment for the defendant-employer.[66]

In many cases that set precedents for later rulings, courts have indicated that the mere *dissemination* of anti-harassment policy is sufficient to constitute a company's reasonable care in preventing and correcting sexual harassment.[67] In *Barrett v. Applied Radiant Energy Corp.*, the Fourth Circuit noted that the "[d]istribution of anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting sexual harassment."[68] This standard could not be rebutted unless the plaintiff is able to demonstrate that the anti-harassment policy was adopted in bad faith, defective, or dysfunctional.[69] The Fourth Circuit interpreted *Faragher*'s holding as a validation for all anti-harassment policies adopted in good faith.[70] Ruling as a matter of law, the Fourth Circuit held that if a policy was not adopted in bad faith or otherwise defective or dysfunctional, the existence of such a policy militated strongly in favor of the "reasonable care" to prevent harassment.[71] Such a reviewing standard was not laid out nor approved by the *Faragher* court, but an invention by the court while refusing to evaluate whether the policy was suitable to the circumstances. The Fourth Circuit drew the "reasonable" line at anything that is not adopted in bad faith, defective, or dysfunctional at first glance.

Similarly, in *Shaw v. AutoZone*, the Seventh Circuit held that when the employee was provided a handbook that included a sexual harassment policy

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stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

[63] Grossman, *supra* note 31, at 688. *See, e.g.*, Ritchie v. Stamler Corp., No. 98-5750, 2000 WL 84461, at *3 (6th Cir. Jan. 12, 2000); Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999).

[64] Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 491–92 (S.D.N.Y. 1998).

[65] *Faragher*, 524 U.S. at 807.

[66] *See Fierro*, 13 F. Supp. 2d at 491–92.

[67] *See generally* Walsh, *supra* note 61.

[68] Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001).

[69] *Id.*

[70] *Id.*

[71] *Id.*

and signed a form acknowledging the receipt of the policy, the employer satisfied the "reasonable care" prong of *Faragher-Ellerth* defense.[72] Under some circumstances, a written policy is not necessarily required for employers to satisfy the first prong. In a 2010 case, the District Court for the Northern District of Illinois treated the parties' supplemental briefs as cross-motions for summary judgment and held that a *verbal* sexual harassment policy alone could satisfy the first prong of the *Faragher-Ellerth* defense, and therefore denied employee's motion for summary judgment to rule as a matter of law.[73] The employer never had a written policy against sex harassment, and the general manager's knowledge of a sex harassment policy was "common sense."[74] The employer had no knowledge or intention to implement a written sexual harassment policy, but the court nonetheless found it could be deemed as exercising reasonable care because "such a policy is not necessary in every instance as a matter of law to satisfy the first prong of *Ellerth/Faragher* defense."[75]

Some courts applied a heightened scrutiny when examining the first prong of the *Faragher-Ellerth* defense. In *Clark v. UPS*, the Sixth Circuit held that for the employer-defendant to satisfy the first prong, the court must "[look] behind the face of a policy to determine whether the policy was effective in practice in reasonably preventing and correcting any harassing behavior."[76] The court then identified the requirements of a reasonably effective policy, that such policy should "(1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy."[77] Even in one of the most heightened scrutiny standards, the court showed an enormous faith in harassment training and employee education. However, it failed to assess whether the policy had been successfully implemented.

In some cases, courts have refused to apply the first prong when the harassment was a single incident, even when the incident itself was severe or pervasive.[78] Instead of evaluating the employer's response to harassment conduct, some courts suggested that a single incident does not create a hostile work environment, and employers should not be liable for a

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[72] Shaw v. AutoZone, Inc., 180 F.3d 806, 812–13 (7th Cir. 1999).

[73] Turner v. Saloon, Ltd., 715 F. Supp. 2d 830, 836 (N.D. Ill. 2010) (while referring to the deposition record, the court did not specify what constitutes a verbal policy).

[74] *Id.*

[75] *Id.*

[76] Clark v. United Parcel Serv., Inc., 400 F.3d 341, 349 (6th Cir. 2005).

[77] *Id.* at 349–50 (citations omitted).

[78] *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 Charges*, 69 FORDHAM L. REV. 1265, 1295–96 (2001); *see also* Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (suggesting that single incident harassment may no longer be actionable because of the difficulties that employers would experience in avoiding liability).

standalone harassment conduct because the difficulties to avoid vicarious liability.

Accordingly, the disparate ruling on "reasonableness" in different circuits showed the factual intensity of the first prong. Given the circumstances around a sexual harassment claim, it should be very difficult for a judge to rule, as a matter of law, on the establishment of a hostile work environment, the severity or pervasiveness of the conduct, the adequacy of preventative or corrective measures by the employer, and the effectiveness of their implementation. Instead of leaving these determinations to the jury, federal courts kept modifying the *Faragher-Ellerth* defense and approached the first prong as a question of law.

B. The "Unreasonable" Question

Compared to how much leniency was given to employers regarding the first prong of the *Faragher-Ellerth* affirmative defense, federal courts' treatment towards employees in evaluating the second prong of the defense was incomprehensibly harsh. If a victim delays or fails to report through the employer-approved procedures, there is a high likelihood that federal courts are going to dismiss their claims based on the "unreasonable" prong as a matter of law. In many cases, courts reversed jury verdicts around on the key issue of reasonableness. For example, in *Barrett*, the jury originally issued a verdict for the plaintiff-employee, finding that she had not unreasonably failed to report harassment, but the district judge overturned the verdict in a post-trial opinion, granting the defendant-employer's motion for judgment as a matter of law.[79]

Based on the lower courts' interpretation and application of the defense, a plaintiff-employee is often found to be "unreasonable" if there is a failure to report *immediately* or if they report promptly but failed to go through the exact, designated channel employers provide. Yet scholars have found that "only 15% of those who reported did so in what courts consider a timely manner."[80] In *When Rules are Made to be Broken*, Professor Eigen, Professor Sherwyn, and Nicholas Menillo examined the circuit court opinions and concluded that the federal court judges often fail to thoroughly consider the circumstances around the case and dutifully apply the second prong of the affirmative defense as the *Ellerth/Faragher* directed, let alone find for plaintiff-employees.[81] Out of the 213 cases they studied, in only one case, *Moore v. Sam's Club*, the Southern District of New York applied the

[79] Barrett v. Applied Radiant Energy Corp., 70 F. Supp. 2d 644, 645–46 (W.D. Va. 1999); *see also* Lissau v. S. Food Serv., Inc., 159 F.3d. 177, 182 (4th Cir. 1998) (remanding for renewed motion for summary judgment for the defendant).

[80] Matthew D. Venuti, Comment, *Modernizing the Workplace: The Third Circuit Puts the* Faragher-Ellerth *Affirmative Defense in Context*, 64 Vill. L. Rev. 535, 537 (2019).

[81] Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. UNIV. L. REV. 109, 164–65 (2015).

affirmative defense and found for the employee.[82] Specifically, the court held that the defendant-employer failed to raise the affirmative defense because the employer conceded that the employee had "took full advantage of the preventive and corrective opportunities provided."[83]

Another rare pro-employee opinion in the post-*Ellerth/Faragher* era, *Greene v. Dalton*, pointed out that the reasonable question regarding the timing to response in a hostile work environment claim should be resolved by a jury, not through summary judgment.[84] In *Greene*, a former Navy employee suffered from an eleven-day pattern of sexual harassment by her immediate supervisor, including vulgar languages, sexual advances, and a sexual assault incident.[85] After a month of the last incident, the plaintiff reported the situation.[86] The appellate court rejected the Navy's argument that the plaintiff unreasonably failed to utilize the reporting procedure and struck down the Navy's attempt to obtain a full summary judgment.[87] Rather, the court explained that the purpose of the affirmative defense was "not intended to punish the plaintiff merely for being dilatory."[88] The appellate court held that the complete liability avoidance would require the Navy to fulfill a higher burden of proof, where "as a matter of law, a reasonable person in [the plaintiff's] place would have come forward early enough to prevent [the supervisor's] harassment from becoming severe or pervasive."[89] Failing to meet this burden, the Navy was not entitled to summary judgment.[90] As a result, the court decided that it is the jury's job to evaluate whether the plaintiff acted reasonably in the given circumstances.[91]

In the majority of cases where the victims failed to report promptly, things did not turn out well for the employees. In *Shaw*, the Seventh Circuit found that plaintiff's fear of reporting her supervisor's harassment conduct was unreasonable.[92] The court found that the employee has duty to utilize the company's complaint procedure despite experiencing *subjective* fear.[93] In finding such fear is an "inevitable unpleasantness" that is insufficient to justify non-reporting, the court stated: "[W]e conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."[94] Similarly, in *Hetreed v. Allstate Ins. Co.*,

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[82] *Id.* at 165–66.
[83] Moore v. Sam's Club, 55 F. Supp. 2d 177, 193 (S.D.N.Y. 1999) (internal quotation marks omitted).
[84] Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999).
[85] *Id.* at 673.
[86] *Id.*
[87] *Id.* at 675.
[88] *Id.* at 674.
[89] *Id.* at 675 (internal quotation marks omitted).
[90] *Greene*, 164 F.3d at 675.
[91] *Id.*
[92] *See* Shaw v. AutoZone, 180 F.3d 806, 812–13 (7th Cir. 1999).
[93] *Id.* at 813.
[94] *Id.*

the Seventh Circuit found the plaintiff-employee's non-reporting due to fear of retaliation unreasonable.[95] The plaintiff suffered from her supervisor's harassment for over four years, and she reported through the internal system after the supervisor-harasser retired because of fear of retaliation.[96] The court indicated that such fear was "an unfounded suspicion," and the response was unsympathetically straightforward, "if it does occur, [it] can be penalized."[97] The court believed that if the bare possibility of retaliation were enough to explain an employee's non- or delayed- reporting, then the *Ellerth/Faragher* defense "would be a dead letter."[98] However, the *Ellerth/Faragher* court never addressed how a victim's fear of retaliation would impact the timing or manner of reporting. Without considering that a jury might be the best fit to decide whether a person had a legitimate fear of retaliation under the totality of circumstances, the Seventh Circuit found it was just a bare possibility, and therefore, the plaintiff's delayed reporting was unreasonable as a matter of law.

In the Tenth Circuit, non-reporting or delayed reporting due to fear of retaliation is also deemed "unreasonable" as a matter of law. For example, in *Pinkerton v. Colorado Department of Transportation*, the Tenth Circuit stressed that under the objective of Title VII, the victim-employee has a duty to promptly report to prevent workplace harassment.[99] Therefore, the "generalized fear of retaliation" would not explain the delay in reporting harassment conduct.[100] In *Pinkerton*, the employee worked as an administrative assistant for the Colorado Department of Transportation ("CDOT") and was suffered from "inappropriate, sexually oriented remarks" during her employment.[101] Her immediate supervisor vulgarly asked her about her breast size, whether she had sexual urges, and if she masturbated.[102] After enduring these comments for two and a half months, the plaintiff reported these conduct through CDOT's internal reporting procedure and filed a written complaint.[103] Although she stated that the delay was because of fear of retaliation, the Tenth Circuit nonetheless found that it was "unexplained" and thus "unreasonable."[104] The court stressed that the plaintiff should have taken the opportunity to report sooner, knowing the CDOT's anti-harassment policy.[105] The dissenting opinion by Judge Ebel, however, called out the inappropriateness of the majority in assessing the standard for summary judgment.[106] The dissent pointed out that even if

[95] Hetreed v. Allstate Ins. Co., 6 F. App'x 397, 399 (7th Cir. 2001).
[96] *Id.* at 398.
[97] *Id.* at 399.
[98] *Id.*
[99] Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1063 (10th Cir. 2009).
[100] *Id.*
[101] *Id.* at 1057.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1064.
[105] *Pinkerton*, 563 F.3d at 1063.
[106] *Id.* at 1067 (Ebel, J., dissenting).

CDOT is able to satisfy the first prong of the *Ellerth/Faragher* defense, there is still a genuine issue of fact as to the second prong.[107] An employee's response to harassment, according to Judge Ebel, whether it is delayed reporting or failure to file a report, "must be determined by reference to many factors," such as the efficacy of the reporting mechanism implemented by the employer.[108] In addition, an employee's own effort to stop harassment behaviors should not be overlooked.[109] The first vulgar comments started in December 2002 and continued into early January. Ms. Pinkerton's contact with CDOT's internal rights administrator was on February 19, 2003, and the official filing of a formal written complaint was on February 24, 2003.[110] Since a single harassment incident may not be sufficient to establish a hostile work environment, a jury could find that Ms. Pinkerton's reporting reasonable, making the summary judgment inappropriate.[111]

Under some circumstances, courts look for a "credible threat" when plaintiff-employees assert a subjective fear that prevents them from immediate reporting.[112] In *Shields v. Fed. Express Customer Info. Servs.*, the Court of Appeals for the Sixth Circuit held that a reasonable jury would interpret a threat towards employment as "credible threats of retaliation to keep [the plaintiffs] quiet."[113] Agreeing with the Second Circuit's rationale in *Gorzynski v. JetBlue Airways Corp.*,[114] the Six Circuit refused to grant summary judgment for the employer and found that genuine issues of material fact exist in both prongs of the Faragher/Ellerth defense. In *Gorzynski*, the Second Circuit rejected a "brittle reading of the Faragher/Ellerth defense" and held that an employer is not, as a matter of law, entitled to the defense "simply because an employer's sexual harassment policy provides that the plaintiff could have complained to other persons as well as the alleged harasser."[115] Similarly, the Sixth Circuit specified that not only the delayed or non-reporting should be considered based on the facts and circumstances, but an employee is allowed to avoid harassment reporting through the internal procedure if a "credible threat of retaliation" can be demonstrated.[116] The Court found that a jury could interpret a supervisor's threatening comment in response to employees'

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[107] *Id.*

[108] *Id.* at 1068.

[109] *Id.* at 1067.

[110] *Id.* at 1068.

[111] *Pinkerton*, 563 F.3d at 1069.

[112] *See* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (concluding that plaintiff's failure to report harassment for several months was not based on a "credible fear" that her complaint would fall on deaf ears or that she would suffer an adverse employment action as a result of her decision to file a complaint). *See also* Venuti, *supra* note 80, at 537. *See generally* Hébert, *supra* note 5, at 7; Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671 (2021).

[113] Shields v. Fed. Express Customer Info. Servs. Inc., 499 F. App'x 473, 483 (6th Cir. 2012).

[114] Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 96 (2d Cir. 2010).

[115] *Id.* at 104–05.

[116] *Shields*, 499 F. App'x at 482 (citing Thornton v. Fed. Express Corp., 530 F.3d 451, 457 (6th Cir. 2008)).

intention of reporting as a credible threat of retaliation, therefore reversed lower court's summary judgment on the issue.

To the contrary, the Eleventh Circuit refused to find the existence of a "credible fear" even when the harasser pulled out a gun while alone with the victim.[117] The court held that because the harasser did not express threats while showing the gun, the plaintiff-employee merely had an "unsupported subjective fear."[118] Since the supervisor did not indicate that her job was in jeopardy or threatened her with physical harm, a "subjective fear" that "may exist in every case" cannot excuse the employee's delayed reporting.[119] As a result, the Eleven Circuit affirmed that, as a matter of law, even a victim's intimidation caused by the gun could not excuse her from delaying reporting.[120]

Moreover, in evaluating the second prong, courts seem to review the manners of reporting rigidly. Compared to how federal courts evaluate the first prong of the *Ellerth/Faragher* defense, they seem unwilling to provide as much leeway to the employees as they give to the employers. The Eleventh Circuit emphasized the principle that "[o]ne of the primary obligations that the employee has under [the *Faragher-Ellerth* rules] is to take full advantage of the employer's preventative measures."[121] However, the preventative measures are often limited to employers' official reporting procedures.[122] For example, in *DeCesare v. National Railroad Passenger Corp.*, the court found that reporting harassment conduct to a union representative rather than the company's designated personnel defeated the plaintiff's claim. [123] Since the union representative did not take further actions upon knowing the harassment conduct, the court deemed that the employer was not notified until Ms. DeCesare's formal filing of harassment allegations.[124] Eventually, Plaintiff was too scared to return to work and was declared disabled by her doctors because of the stressed caused by the

[117] Venuti, *supra* note 80, at 555; Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1291 n.17 (2003) ("We have no quarrel with that claim, but we are unwilling to say that her subsequent failure to report Mykytiuk, when she was out of his presence, was reasonable due to her subjective fear that Mykytiuk might physically harm her. Indeed, the second prong of the *Faragher* defense would be rendered meaningless if a plaintiff-employee could escape her corresponding obligation to report sexually harassing behavior based on an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser.").

[118] *Walton*, 347 F.3d at 1291 n.17.

[119] *Id.*

[120] *Id.*

[121] Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1306–07 (11th Cir. 2007).

[122] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1285; Elizabeth Potter, *When Women's Silence Is Reasonable: Reforming the* Faragher/Ellerth *Defense in the #MeToo Era*, 85 BROOK. L. REV. 603 (2020); Jessica K. Fink, *Backdating #MeToo*, 45 CARDOZO L. REV. 899 (2024).

[123] *See* DeCesare v. Nat'l R.R. Passenger Corp., No. CNA 98–3851, 1999 WL 330258, at *5 (E.D. Pa. 1999).

[124] *Id.*

harassment conduct, but the court nonetheless faulted Plaintiff for not filing the report sooner.[125]

As a result, employees who suffer from harassment and try to get help from anyone or anything other than the designated reporting personnel or complaint mechanism will likely be viewed as "unreasonable" and thus found to have failed to take full advantage of the anti-harassment policy.[126] For example, in *Madray v. Publix Supermarkets, Inc.*, the store employees reported the store supervisor's misconduct of improper touching and kissing behavior to three different mid-level managers before filing a formal complaint, and one of the managers testified that he actually witnessed the misconduct.[127] The court concluded that because the plaintiffs did not *adequately* report using formal complaint procedures in Publix's sexual harassment policy, complaining to anyone other than the person designated in the company's anti-harassment policy does not satisfy the reasonable compliant requirement.[128] Even though the plaintiff-employees filed an official complaint four days after their complaint to the other managers, they unreasonably delayed in reporting and failed to take full advantage of the preventative and corrective opportunities.[129] By concluding that the plaintiffs did not reasonably avail themselves of the reporting grievance, the court essentially implicitly faulted the victims themselves for "facilitating" a hostile work environment.[130] The courts often require a plaintiff-employee to provide adequate notice to the employer regarding workplace harassment, while employers' merely promulgating an anti-harassment policy is considered sufficient.[131]

Overall, federal courts often fail to consider any psychological impacts of sexual harassment and the contexts around victims' timing and manner of reporting, thus being unable to achieve Title VII's objective to deter and avoid harm. Instead of letting the jury decide the reasonableness of both *Ellerth/Faragher* defense prongs, federal courts have been trying to draw bright-line rules when evaluating factually-intense questions. Over time, courts have restricted the manners for victims to report harassment conduct and driven the law further away from the initial goal of Title VII.

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[125] *Id.* ("Plaintiff has failed to take reasonable means of providing notice to Defendant. Simply informing her Union representative was not enough in this case. It wasn't until she actually filed a grievance that any action was taken. This Court believes that her filing a grievance served as an appropriate means of notifying Defendant, and this is supported by Nesci's subsequent investigation. However, while filing the grievance was appropriate, Plaintiff should have taken such action much earlier.")

[126] *Id.*

[127] Madray v. Publix Super Mkts., Inc., 30 F. Supp. 2d 1371, 1374 (S.D. Fla. 1998).

[128] *Id.* at 1376.

[129] *Id.*

[130] *Id.*

[131] Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) ("When an employer has taken steps, such as promulgating a considered sexual harassment policy, to prevent sexual harassment in the workplace, an employee must provide adequate notice that the employer's directives have been breached so that the employer has the opportunity to correct the problem.").

III. FLAWS OF THE AFFIRMATIVE DEFENSE: EVIDENCE FROM EMPIRICAL STUDIES

The perspective of the *Ellerth-Faragher* Court was that employers would take steps in a more rigorous manner to reduce workplace sexual harassment. Since the majority deemed harassment to be "outside the scope of the employment" and "misuse of the supervisory authority" under the traditional principle of agency law, it refused to overturn *Meritor's* finding that employers should not be "automatically" liable.[132] Furthermore, the Court envisioned the "temptation to litigate would be hard to resist" unless enacting an affirmative defense to counter such risk and "implement [Title VII] sensibly."[133] The Court believed that both plaintiffs and defendants would be poorly served because it would be hard to tell the difference between the affirmative and "merely implicit uses of power" when considering a supervisor's harassment conduct.[134] Therefore, in order to avoid such temptation, the Court held that an affirmative defense for employers needed to be implemented.[135] In addition, it hoped to create incentives for employers by rewarding those who take steps to prevent harassment in the workplace.[136] However, empirical studies have shown that the current anti-harassment practice has failed to achieve the *Ellerth-Faragher* Court's goal of reducing harassment behavior.[137] Rather, it deviated from the original purpose and became a tool for employers to dodge legal liability.

A. The Inadequacy of Current Anti-Harassment Approaches

As discussed earlier, the treatment the employers receive in the application of the *Faragher-Ellerth* defense shows that the existence of anti-harassment policies and training is often deemed sufficient proof of reasonable care in preventing and reducing workplace harassment.[138] Yet empirical studies provide evidence to the contrary. An EEOC report concluded that most workplace anti-harassment training over the last 30 years has failed as a preventative tool and the traditional forms of training focus on avoiding legal liability rather than reducing workplace

[132] Faragher v. Boca Raton, 524 U.S.774, 804 (1998).
[133] *Id.* at 805.
[134] *Id.*
[135] *Id.* at 780.
[136] *Id.* at 803.
[137] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1294 ("Unfortunately, a standard that provides an incentive for employers to devise a subtle system that satisfies the courts but discourages complaints, does not, we believe, effectively lead to the ultimate goal of eliminating sexual harassment in the workplace."). *See also*, Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 494, 496 (2018).
[138] See discussion *supra* Section II.A.

harassment.[139] In a 2018 study, Professor Elizabeth Tippett analyzed the content of 74 different sexual harassment training curricula and found that most harassment training is outdated—they center around the content developed in the 1980s and 1990s, which focus on the complexity of the sexual harassment law and how to avoid litigation.[140] In addition, most training only puts emphasis on advising victims to invoke an institutional response rather than providing realistic options to help individuals suffering from harassment.[141] The early-stage anti-harassment training included advice and instructions for harassment victims to protect their own legal interests, but researchers found that these instructions disappeared in later training materials.[142] It seems that "[employers] assume that an institutional response is always preferred over other options, which may be true from a liability reduction standpoint."[143] Different from other areas of law, where scholars believe that employers would be self-motivated to adapt quickly to new information and adjust their practices in reducing litigation risk, there has not been much evolution in the content of anti-harassment training.[144] Professor Tippett pointed out that workplace harassment training is operating "like software updates—where the existing substrate is patched and new features are added—but the original code remains intact."[145] This observation might be counterintuitive at first glance because the public's view on both sexuality and harassment have evolved in the past few decades, but it shows employers' confidence—that they are fully aware that there is no necessity to provide a more engaging and meaningful education; that they are sitting comfortably in the legal "safe harbor" as long as they adopt a *pro forma* policy.

The limited studies available suggest that, contrary to what the *Faragher-Ellerth* court envisioned, the training and procedures "may be managerial snake oil."[146] Rather than incentivizing employers to prevent harassment, the affirmative defense incentivizes employers to put in only the bare minimum of preventative efforts.[147] Moreover, the rule might even perversely discourage employers from making complaint procedures easier

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[139] *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/
report.cfm (gathering examples where the company "looked the other way" for years when a valuable employee was the harasser).

[140] Tippett, *supra* note 137, at 485.

[141] *Id.* at 486.

[142] *Id.*

[143] *Id.* at 519.

[144] *Id.* at n.149 (discussing Richard Posner's theory that firms will adapt quickly and adjust their practice in response to risk environment).

[145] *Id.* at 510.

[146] Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT'L ACAD. SCIS. 12255, 12257 (2019).

[147] Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 469 (2002) ("[T]he courts are granting employers summary judgment on the affirmative defense based upon evidence of minimal policies with questionable effectiveness.").

in order for them to raise the possibility of satisfying the second prong of the affirmative defense.[148]

Though research has shown that traditional training can be not only unhelpful but even counterproductive, workplace anti-harassment training continuously carries out outdated content, confusing reporting procedures, and mundane formality. In Professor Frank Dobbin and Professor Alexandra Kalev's study, using advanced statistical models to isolate the effects of harassment training programs, they found that these programs negatively affect the representation of women in management and create a backlash.[149] The data analysis shows that although sexual harassment training for employees can improve knowledge about harassment, it can emphasize gender stereotypes and eventually lead to a reduction in female managers. The mandatory training that focuses on forbidden behaviors and ignores the power dynamics reinforces gender stereotypes and signals that male employees are the problem.[150] Empirical studies have pointed out that such training could lead to more victim-blaming and failed to reform potential harassers.[151]

In some cases, harassment-prevention training could even increase the likelihood of harassment in male employees who are inclined to harass women.[152] The study shows that men who receive high scores on "the Likelihood to Sexually Harass Scale" often shift "toward greater acceptance of sexual harassment" after training programs.[153] In addition, experimental data shows that routinely presented, poorly designed workplace training could discourage male employees from working with women out of fear of harassment charges,[154] although past research has shown there is an extremely low possibility of false accusations in sexual harassment reporting.[155] Even when sexual harassment training is effective at increasing employees' awareness and knowledge about harassment, empirical data has shown that the training does not successfully change employee behaviors.[156] Ultimately, employees who suffer from workplace sexual harassment would become the ones who bear all the cost of ineffective harassment training—

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[148] *See* Sherwyn, Heise & Eigen, *supra* note 78, at 1304.

[149] Dobbin & Kalev, *supra* note 146, at 12258. *See also* Justine Tinkler, Skylar Gremillion & Kira Arthurs, *Perceptions of Legitimacy: The Sex of the Legal Messenger and Reactions to Sexual Harassment Training*, 40 L. & SOC. INQUIRY 152, 153 (2015).

[150] Dobbin & Kalev, *supra* note 146, at 12258.

[151] *Id.*

[152] Lori A. Robb & Dennis Doverspike, *Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training*, 88 PSYCH. REP. 85, 85 (2001).

[153] *Id.* at 87.

[154] Tinkler, Gremillion & Arthurs, *supra* note 149.

[155] David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1319 (2010).

[156] Vicki J. Magley, Louise F. Fitzgerald, Jan Salisbury, Fritz Drasgow & Michael J. Zickar, *Changing Sexual Harassment Within Organizations via Training Interventions: Suggestions and Empirical Data*, in THE FULFILLING WORKPLACE: THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH, 225, 227, 229–230, 241 (Ronald J. Burke & Cary L. Cooper eds., 2013).

they pay with their career growth, their physical and mental well-being, and their opportunities to prevail in court.[157]

B. Why Employees Do Not Report

As to the second prong of the *Ellerth/Faragher* affirmative defense, empirical studies show that the majority of the victims do not act how federal court judges expect in their reasonable person standard. A 2016 EEOC report found that up to 85% of women had experienced sexual harassment in the workplace, depending on whether harassment behavior was defined as more than one action or a specific action.[158] Conducted by the EEOC Select Task Force on the Study of Workplace Harassment, the report found that many victims don't report harassment—in fact, "[t]he least common response of either men or women to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint."[159] Based on the data, approximately 30% of victims report harassment at all, and only as many as 13% of employees who suffered from harassment filed a formal complaint.[160] The most common response is different forms of avoidance, such as downplaying the situation and attempting to endure or ignore it.[161]

In fact, the failure of reporting is a result of complicated reasons—fear of both social and professional retaliation, distrust of the grievance procedure, lack of bystander reporting training, or disbelieving that the employers will take disciplinary actions against the harassers, and natural psychological responses to the harassment such as shame, self-blame, and denial.[162] The EEOC acknowledged such social and psychological complications and suggested that employees' failure to report harassment is understandable in such a highly traumatic yet delicate situation. In its Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors,[163] the EEOC points out that failure to immediately report after the first or even several harassment behaviors should not be deemed as unreasonable: "[a]n employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. . . . An employee might reasonably ignore a small number of incidents, hoping that the

[157] *Id.*
[158] *See* Feldblum & Lipnic, *supra* note 139.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* ("Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.").
[163] U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), *superseded by* ENFORCEMENT GUIDANCE ON HARASSMENT IN THE Workplace (2024).

harassment will stop without resort to the complaint process."[164] Moreover, the guideline stressed that an employee who suffer from harassment behavior might hesitate to turn the workplace to a "battleground" and try stopping the harassment behavior on their own before filing a formal complaint.[165]

In addition, studies have shown that employees do not make the reporting decision lightly. The culture of an organization also significantly affects employees' response to harassment training.[166] Employees are more likely to have a cynical belief towards the training and grievance procedure and are less likely to report harassment when their workplace has a gender-homogenous and high-stressed organizational climate where harassment behaviors are more tolerated.[167]

Overall, the empirical studies have demonstrated that the current anti-harassment practice, including training program and internal grievance procedures, has failed to effectively deter harassers from misconduct. In addition, they have dissuaded victims from reporting and deviated from the original goal of avoiding harm under Title VII that the *Ellerth-Faragher* Court was hoping to achieve.

IV. COMPLEX PROBLEMS CAN HAVE SIMPLE SOLUTIONS

While the assumption that the *Ellerth-Faragher* Court relied on has been largely defeated by the subsequent case law and judicial interpretation of the affirmative defense, it is not too late to explore alternative options. The following sections discusses some potential solutions that would incentivize employers to effectively prevent and respond to sexual harassment behavior in the workplace.

A. Statutory Elimination of the Faragher/Ellerth Defense

Despite some concerns about over-monitoring and arbitrarily discharging the accused employee under a strict liability regime,[168] the elimination of the *Faragher/Ellerth* defense is a necessary step towards a

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[164] Feldblum & Lipnic, *supra* note 139.

[165] *Id.*

[166] Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 466 (2020).

[167] Louise F. Fitzgerald, Fritz Drasgow, Charles L. Hulin, Michele J. Gelfand & Vicki J. Magley, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCH. 578, 584 (1997).

[168] *See* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 456–57 (1997) ("Subjecting employers to strict liability when they have clearly attempted to eradicate workplace harassment and taken remedial measures once notified of specific instances of supervisor harassment may deter them from even attempting to prevent or remedy the harassment.").

more effective legal rule for combating workplace harassment.[169] As the New York legislature did in reforming the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), Congress should act to eliminate the *Faragher/Ellerth* defense and hold employer strictly liable in hostile work environment claims.[170]

Section 8-107(13) of the NYCHRL specified that employers are held strictly liable for acts of their supervisor-employees but "can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken."[171] In *Zakrzewska v. New School*, a diversity suit in 2008, the Second Circuit certified the New York Court of Appeals to answer the question of whether the affirmative defense applies under the NYCHRL.[172] The Court of Appeals concluded that the *Faragher/Ellerth* defense is not available under the NYCHRL.[173] The Court of Appeals took legislative intent into consideration and held that "the plain language of the NYCHRL precludes the *Faragher/Ellerth* defense," asserting that to hold otherwise would contradict the specific intention of Section 8-107(13) of the NYCHRL.[174]

Similarly, a new provision added to NYSHRL in 2019 clarified that an employer's liability would not depend on effective reporting by the victims. The provision specifically provides that "[t]he fact that [an] individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable."[175] Although the courts have not yet come to a determination of whether the new NYSHRL provision effectively eliminated the *Faragher/Ellerth* defense the same way as the NYCHRL does,[176] this amendment has shown the determination of the legislature to hold employers to a heightened standard in hostile work environment claims.

From a law and economics standpoint, holding employers strictly liable will also signal litigation uncertainty for employers and thus incentivize

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[169] Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989) ("The most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable.").

[170] N.Y. Exec. Law § 296 (Consol. 2025); *see also* Phillips & Associates, *New York Legislature Passes Bill Eliminating* Faragher/Ellerth *Defense in State Law Harassment Cases*, PHILLIPS & ASSOCS. BLOG (Aug. 2, 2019), https://www.newyorkcitydiscriminationlawyer.com/blog/2019/august/new-york-legislature-passes-bill-eliminating-far/.

[171] N.Y. COMP. CODES R. & REGS. tit. 13, § 8-107 (2006).

[172] Zakrzewska v. New School, 928 N.E.2d 1035, 1036 (N.Y. 2010).

[173] *Id.*

[174] *Id.* at 1039.

[175] N.Y. COMP. CODES R. & REGS. tit. 13, § 8-107 (2006).

[176] Green v. N.Y.C. Transit Auth., No. 15-cv-8204, 2020 WL 5632743, at *9–10 (S.D.N.Y. Sept. 21, 2020).

them to put more effort into reducing harassing behavior.[177] With the current protection of the affirmative defense, employers have an overall chance of 70%–89% or greater in prevailing at pretrial, summary judgment dispositions.[178] This phenomenon provides yet further evidence to support the economic argument "that there are not strong enough incentives to push companies to eliminate or mitigate the risk of workplace sexual harassment."[179] With a lack of regulation, society can only rely on social movements like *#MeToo* to put companies in the "court of social opinion" and spur corporate change.[180] When companies calculate the cost and benefit and decide that the risk of their current practice would eventually affect its reputational and shareholder value, they are more motivated to revamp their anti-harassment practices.[181] The most compelling example is the recent trend in expanding uncompensated termination provisions to include sex-based misconduct in CEO contracts.[182] In the wake of the *#MeToo* movement, corporate boards started to endure public scrutiny on workplace culture, especially when it involves sexual misconduct by high-level executives.[183] This effort includes expanding the definitions of "cause" in CEO contracts that permit uncompensated termination in situations involving harassment, discrimination, or violations of company policy.[184] Prior to #MeToo, the CEO contracts were fairly narrow in defining the situations that would allow terminations without severance package—and shockingly enough, sex-based misconduct is often not part of the traditional language.[185] In many cases, CEOs and high-level executives who are directly involved in sex-based misconduct could comfortably exist with severance packages and the protection of confidential settlements.[186]

Thus, by increasing the uncertainty in the litigation process, a statutory elimination of the *Faragher/Ellerth* defense has the potential to motivate

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[177] *See* Kaushik Basu, *Sexual Harassment in the Workplace: An Economic Analysis with Implications for Worker Rights and Labor Standards Policy* 8 (Mass. Inst. of Tech. Dep't of Econ., Working Paper No. 02-11, 2002).

[178] *See* Eigen, Sherwyn & Menillo, *supra* note 81, at 145 (citing Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARV. L. & POL'Y REV. 103, 109–10 (2009)).

[179] *Companies Have Little Incentive to Fight Workplace Sexual Harassment, Vanderbilt Economist Explain*, VANDERBILT RESEARCH NEWS (Mar. 1, 2018, 4:51 PM), https://news.vanderbilt.edu/2018/03/01/companies-have-little-incentive-to-fight-workplace-sexual-harassment-vanderbilt-economist-explains/; *see also* Joni Hersch, *Gender Gaps in Families, Health Care, and Industry: Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV. 630, 634 (2011).

[180] *Companies Have Little Incentive to Fight Workplace Sexual Harassment, Vanderbilt Economist Explain*, *supra* note 179.

[181] *Id.*

[182] Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 IND. L.J. 125, 134–35 (2022).

[183] *Id.* at 160.

[184] *Id.* at 130 n.8 (discussing how Google gave a $90 million exit package to Android-creator Andy Rubin after alleged sexual misconduct).

[185] *Id.* at 130–31.

[186] *Id.*

employers to do more than the bare minimum in reducing harassment behaviors and, therefore, significantly improve the employees' work environment. Although some might argue that the statutory foundation for harassment claims under Title VII is quite lean,[187] Congress is still the best hope in fundamentally improving employee's situation in workplace harassment.

B. A Middle Ground: Avoidable Consequence Doctrine

While employer strict liability might be the ultimate cure, it will take some time to achieve in the foreseeable future. Furthermore, it is anticipated that there will be strong pushbacks from corporations. California state law manages to find a middle ground that holds employers strictly liable for *all* acts of its supervisors while allowing a new defense to harassment claims.[188] Under California's Fair Employment and Housing Act ("FEHA"), employers are not allowed to raise the *Faragher/Ellerth* defense; instead, they can assert a defense under the avoidable consequences doctrine.[189] The defense has three elements: "(1) the employer took reasonable steps to prevent and correct workplace harassment, (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."[190]

In *State Department of Health Services v. Superior Court*, the California Supreme Court explained that different from the *Faragher/Ellerth* defense, the avoidable consequences doctrine only enables employers to limit *damages*, not all liabilities.[191] Deriving from common tort law, the avoidable consequences doctrine established that "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure."[192] In judging the injured party's effort to avoid harm, the court assessed the employee's mitigation conduct "in light of the situation existing at the time and not with the benefit of hindsight,"[193] which was consistent with principle of the avoidable consequences doctrine. The doctrine does not require the injured party to take efforts that are impractical or disproportional, and the reasonableness of the injured party's efforts is evaluated based on the

[187] Hébert, *supra* note 5, at 42 (suggested that sexual harassment law is essentially court-made law, not by Congress).
[188] CAL. GOV'T CODE §12940(k) (West 2023).
[189] *Id.* at §12940(j)(1).
[190] State Dept. of Health Serv. v. Superior Court, 79 P.3d 556, 565 (Cal. 2003).
[191] *Id.* at 564.
[192] *Id.*
[193] *Id.*

situation of the injury.[194] The court stressed that the holding of *Department of Health Services* indicated a different practice from many federal courts in applying the *Faragher/Ellerth* defense: "[T]he holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms."[195] The court explained that the lack of report may be a consequence of employer's lack of an adequate antiharassment policy or procedures, insufficient communication or employee education, and pointed out that "the employee may reasonably fear reprisal by the harassing supervisor or other employees."[196] The opinion also recognized the victim's natural feelings, such as embarrassment or shame, as sufficient excuses for delayed reporting.[197]

By replacing the *Faragher/Ellerth* defense with the avoidable consequences doctrine, employers are no longer able to escape liability entirely in workplace sexual harassment claims. Instead, an employer that has exercised reasonable care in providing trainings and reporting channels remains strictly liable for harm a victim-employee could not have avoided through reasonable care. On the other hand, this doctrine also gives rise to the duty to mitigate damages, which is consistent with the principle of Title VII. The employer would not be liable for any damages caused by harm that the victim-employee could have avoided at the time of injury. However, even if the employee's actions will not be judged "as high as the standard required in other areas of law" under the avoidable consequences doctrine, the particular level of reasonableness remains unclear. The question of reasonableness will be evaluated based on each individual situation, and it is still unclear whether the courts would let it remain a jury question or turn it into a matter of law.

C. Back into the Hands of the Jury

In the three decades following *Faragher/Ellerth*, the majority of courts have deviated from the initial intention of the affirmative defense by holding that certain *pro forma* policies constitute reasonable care as a matter of law. In the wake of the *#MeToo* movement, some courts have started to realize that social expectations have parted ways with sexual harassment law.[198] For both the first and second prong of the *Faragher/Ellerth* defense, the general public has a different standard of "reasonableness" from the

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[194] Green v. Smith261 Cal. App. 392, 396–97 (Cal. Ct. App. 1968) ("The doctrine does not require the injured party to take measures which are unreasonable or impractical . . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . It is sufficient if he acts reasonably and with due diligence, in good faith.").

[195] *State Dept. of Health Serv.*, 79 P.3d at 565.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 560; *see also* Fink, *supra* note 122, at 933.

courts.[199] While employers were frequently shielded from strict liability by adopting a *pro forma* "zero-tolerance" policy in harassment claims, there is a higher social expectation for employer discipline action of the wrongdoers.[200] Meanwhile, with the development of psychological research, social understandings and expectations regarding a "reasonable" person's response to harassment have evolved as well.[201] As research suggests, there has been an increased recognition among the public regarding how workplace culture, fear of retaliation, and bystander reporting may impact how victims respond to workplace harassment.[202] While the majority of the courts have not kept up with the changing normative expectations, some courts have started to consider the context around the reporting situations rather than accepting the mere existence of an employer's anti-harassment policy to be "compelling proof" as a matter of law.[203]

For example, in *Minarsky v. Susquehanna County*, the Third Circuit vacated summary judgment after finding that a jury should decide whether the policy in place was effective and whether the victim of workplace sexual harassment unreasonably failed to report the misconduct because of her fear of retaliation and losing her job.[204] The plaintiff endured years of sexual harassment by her supervisor and never reported through the county's official anti-harassment reporting process.[205] After the plaintiff filed a claim against her employer, the district court granted summary judgment in favor of the county and found that both prongs of the *Faragher/Ellerth* defense were satisfied.[206] So far, the case was just another example of the courts' mechanical application of the affirmative defense framework. On appeal, the Third Circuit reversed the district court's analysis of the *Faragher/Ellerth* test. Deviating from the previous case law, the Third Circuit shed new light on the affirmative defense framework; the opinion held that "reasonableness," as the "cornerstone of the [*Faragher/Ellerth*] analysis," should be left for a jury to decide.[207] The Third Circuit clarified that although a plaintiff's failure to report persistent harassment behavior is often found unreasonable as a matter of law, it is not "*per se* unreasonable" since "[w]orkplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the

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[199] Fink, *supra* note 122, at 918.

[200] *Id.* at 916 ("With the exposure of Harvey Weinstein and others, members of the public quickly came to comprehend not only the number of women who for years had been targeted by this type of behavior but also the power dynamics that likely prevented many of them from coming forward. . . . [T]he public gained a rapid education regarding the psychological trauma that often accompanies harassment, and regarding the credible fears harbored by many victims that they would face retaliation if they came forward." (footnote omitted)).

[201] *Id.*

[202] Venuti, *supra* note 80, at 536, 566.

[203] Venuti, *supra* note 80, at 536, 546–47.

[204] Minarsky v. Susquehanna Cnty., 895 F.3d 303, 314 (3d Cir. 2018).

[205] *Id.*

[206] *Id.* at 309.

[207] *Id.* at 311.

jury." [208] In one of the footnotes, the *Minarsky* court specifically acknowledged that the #MeToo movement has shown why sexual harassment is underreported: victims "anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment."[209]

The Third Circuit took an approach that has not been widely adopted by other circuits within the frame of the *Faragher/Ellerth* defense: putting factual-based questions back into the hands of the jury. Although significantly deviating from the long-established precedent of other circuits, the *Minarsky* court acknowledged the limitation of judges in determining "reasonableness" and showed its willingness to consider social context and psychological effects. While it is still early to conclude whether more circuits will follow the lead of the *Minarsky* court, the uncertainty of a jury trial might also incentivize employers to be more diligent in reducing workplace harassment. If more plaintiff-employees survive motions for summary judgment, employers will be motivated to improve their anti-harassment practices as society redefines the "reasonable person" standard in harassment reporting.

D. Government Enforcement Actions as Signals for Change

One of the most criticized issues of sexual harassment law is it fails to fundamentally change the culture of a company. [210] Unlike workplace fatalities and job injuries, sexual harassment does not receive the same level of regulations as those that are recognized by the Occupational Safety and Health Administration ("OSHA").[211] Under OSHA, companies could face hefty fines if they fail to meet the standard for workplace safety.[212] Although sexual harassment ranks as one of the working conditions people are most concerned about, companies do not pay much for failing to provide a workplace safe from harassment.[213]

The EEOC may hold the key to incentivizing employers to change workplace culture by utilizing consent decrees. As a court-enforced settlement, a consent decree can be an effective legal tool between the defendant and the EEOC that spells out an improvement plan for policy implementation, education and training, revamped reporting procedure, and the role of an EEOC monitor in overseeing and supervising the employer for a period of time to ensure successful completion of the provisions outlined

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[208] *Id.* at 314.
[209] *Id.* at 314 n.12.
[210] *See* Susan Bisom-Rapp, *The Role of Law and Myth in Creating a Workplace That "Looks Like America."* 43 BERKELEY J. EMP. & LAB. L. 251, 292 (2022).
[211] Hersch, *supra* note 179, at 630.
[212] *Id*.
[213] *Id*. at 633.

in the decree.[214] In other areas of law, consent decrees have been used by the Department of Justice ("DOJ") as an organizational reform tool, such as police reform,[215] violations of voting law,[216] and sexual harassment violations under the Fair Housing Act.[217] In a consent decree, government agencies could specify all the actions and training the employers must implement to raise awareness and facilitate a harassment-free work environment. For example, "[p]articularly regarding Title VII consent decrees, the EEOC has several components . . . the scope of the decree, injunctive relief, monetary relief, anti-discrimination policy and dissemination, mandated EEOC Title VII training, semi/annual reporting requirements to the EEOC, and other miscellaneous actions."[218]

In 2003, the EEOC entered a 2.5-year consent decree with Dial Corporations with appointed monitors to effectuate the decree.[219] Within the first year of the decree, the monitors have reported that "Dial had successfully rewritten its previous policy regarding harassment, revised its complaint procedures, and had taken steps to improve supervisory accountability."[220] They also reported that the improved sexual harassment training program at Dial had implemented exceeded the requirements of the decree.[221] Reflecting on the success in rebuilding workplace culture, the monitor found that the majority of the employees "attributed the improvements to the [EEOC] litigation."[222]

Similarly, in 2022, a U.S. District Court in California approved and entered a three-year consent decree between the EEOC and Activision Blizzard, Inc., a videogame entertainment company.[223] Aside from $18 million in monetary relief and significant injunctive relief, the consent decree laid out detailed provisions that focused on building an effective anti-harassment compliance program and creating a retaliation-free, inclusive

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[214] *Understanding Consent Decrees from Equal Employment Opportunity Commission and EEOC Title VII Training*, COMPLIANCE TRAINING GRP. (Oct. 27, 2021), https://compliancetrainninggroup.com/2021/10/27/eeoc-title-vii-training/.

[215] *See* U.S. DEP'T OF JUST., POLICE REFORM AND ACCOUNTABILITY ACCOMPLISHMENTS; U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (2023); United States v. Baltimore Police Dep't, 249 F. Supp. 3d 816, 820 (D. Md. 2017).

[216] *See e.g.*, United States v. Union Cnty., No. 2:23-cv-02531, at *5 (D.N.J. June 12, 2023); United States v. New Jersey, No. 3:21-cv-14618, at *1 (D.N.J. Sept. 2, 2021).

[217] *See* United States v. Pfeiffer, No. 20-cv-1974, at *2, *7. (D. Minn. Oct. 24, 2021) (specifies that the defendants must also undergo education and training on the FHA, with specific emphasis on discrimination on the basis of sex and sexual harassment.).

[218] *Understanding Consent Decrees from Equal Employment Opportunity Commission and EEOC Title VII Training*, *supra* note 214.

[219] U.S. EQUAL EMP. OPPORTUNITY COMM'N, MONITORS REPORT CONSENT DECREE IN SEXUAL HARASSMENT CASE IS WORKING AT DIAL (May 26, 2004), https://www.eeoc.gov/newsroom/monitors-report-consent-decree-sexual-harassment-case-working-dial; EEOC v. Dial Corp., No. 99-C-3356, at *2, *3, *12 (N.D. Ill. May 9, 2003).

[220] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 219.

[221] *Id.*

[222] *Id.*

[223] EEOC v. Activision Blizzard, Inc., No. 2:21-CV-07682, (C.D. Cal. Mar. 29, 2022).

culture under the monitorship of the EEOC.[224] An equal employment opportunity ("EEO") consultant would oversee all company policies, reporting and grievance procedures, and review content and effectiveness of all trainings during the three-year period.[225] Since all subsidiaries of the Activision Blizzard would be subject to the consent decree, the terms would be implemented in locations across the country.[226] The EEOC reviewed it as an opportunity for the industry to examine their workplace anti-harassment and anti-retaliation practice.[227]

While consent decrees and monitorship may bring remarkable results in reforming employer anti-harassment practices, consent decrees often are the results of a systematic, long-term pattern of workplace sexual harassment. In the case of Dial Corporation, the consent decree was entered after 11 years of a systematic problem of tolerating a sex-based hostile work environment.[228] In addition, there was evidence of multiple former employees that suffered from harassment.[229] More importantly, the district judge denied Dial's motion for summary judgment, finding genuine issues of material fact remained as to multiple issues of the claim, such as the "severe or pervasive conduct" question,[230] Dial's negligence issue in whether it had taken steps "to address the [harassment] problem on a company-wide basis,"[231] and whether Dial satisfied the *Ellerth/Faragher* affirmative defense.[232]

Overall, by utilizing enforcement tools such as consent decrees, government agencies play an important role in signaling their commitment to helping create a harassment-free environment for employees. Knowing that their anti-harassment and anti-retaliation practices could be subject to

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[224] *Id.* at *4, *5, *8.

[225] *Id.* at *14, *15.

[226] *Id.* at *4.

[227] U.S. EQUAL EMP. OPPORTUNITY COMM'N, COURT APPROVES EEOC'S $18 MILLION SETTLEMENT WITH ACTIVISION BLIZZARD (Mar. 30, 2022) ("We recognize Activision Blizzard for agreeing to a substantial injunctive relief that reflects its commitment to being a change agent in an industry that struggles with harassment in the workplace. We encourage others in the industry to examine their practices to ensure a workplace free of harassment and retaliation. The EEOC remains vigilant to remedy issues of harassment and discrimination wherever we find them").

[228] EEOC v. Dial Corp., No. 99-C-3356, at *3 (N.D. Ill. 2003) ("On May 20, 1999, EEOC initiated this action by filing its Complaint against Dial. EEOC's Complaint alleged that Dial violated Title VII of the Civil Rights Act of 1964, as amended, including, but not limited to, amendments authorized by the Civil Rights Act of 1991, 42 U.S.C. §2000e et seq. ('Title VII'), by engaging in a pattern or practice of sexual harassment and sex-based harassment against a class of current and former female employees since at least July, 1988.").

[229] EEOC v. Dial Corp., No. 99-C-3356, at *2 (N.D. Ill. May 9, 2003).

[230] EEOC v. Dial Corp., 156 F. Supp. 2d 926, 953 ("After reviewing the evidence before me, I find that genuine issues of material fact remain as to whether Dial maintained a policy of tolerating co-worker harassment.").

[231] *Id.* at 954–55.

[232] *Id.* at 956. ("After reviewing the evidence, I find that genuine issues of material fact remain as to the issue of whether Dial is shielded from liability by the *Ellerth/Faragher* affirmative defense. As noted above, the first element of this defense requires the employer to demonstrate that it has exercised reasonable care to prevent and correct promptly any sexually harassing behavior. . . . I am not persuaded that Dial's efforts to prevent harassment on a plant-wide basis were reasonable as a matter of law.").

monitorship, employers will have a stronger incentive to examine their workplace culture and create effective procedures to prevent harassment behaviors.

CONCLUSION

The persistent workplace harassment problems and waves of social movements prove that the need to provide employers with the right incentives to create a harassment-free workplace is still urgent.

After nearly three decades of development, both empirical studies and the post-*Ellerth/Faragher* federal case law provide strong evidence that the *Faragher/Ellerth* defense has failed to achieve its original goal: to encourage employers and employees to work together in reducing harassment. Moreover, the lower court's treatment of both prongs as matters of law rather than jury questions has created substantial legal hurdles for victim-employees seeking relief for their injury. Courts often overlook the actual effectiveness of employers' anti-harassment practices and, critically, fail to consider the totality of circumstances around employee reporting. As a result, the current regime allows employers to comfortably sit in a legal "safe harbor" by creating a *pro forma* anti-harassment policy with an inconvenient reporting channel.

Ultimately, it would be beneficial for the Supreme Court to revisit the feasibility of the *Faragher-Ellerth* defense to better achieve goal of Title VII. If the Court refuses to re-evaluate the defense, Congress should move toward a statutory solution. Such a solution should not only be consistent with the legal principle of anti-discrimination and tort law, but it should also incentivize employers to design anti-harassment practices around harm-deterrence rather than liability-avoidance.