

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 13 (2006-2007)

Issue 3 *William & Mary Journal of Women and  
the Law: 2006 Symposium: Current  
Developments in Gender and the Workplace*

---

Article 3

April 2007

## Theory and Practice: Employer Liability for Sexual Harassment

B. Glenn George

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Labor and Employment Law Commons](#)

---

### Repository Citation

B. Glenn George, *Theory and Practice: Employer Liability for Sexual Harassment*, 13 Wm. & Mary J. Women & L. 727 (2007), <https://scholarship.law.wm.edu/wmjowl/vol13/iss3/3>

Copyright c 2007 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

# THEORY AND PRACTICE: EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

B. GLENN GEORGE\*

## INTRODUCTION

- I. THE *BURLINGTON/FARAGHER* AFFIRMATIVE DEFENSE
- II. THE VOICE OF EXPERIENCE: APPLICATION OF THE *BURLINGTON/FARAGHER* DEFENSE
  - A. *Part One: Prevention and Correction by the Employer*
    - 1. "Reasonable Care to Prevent"
    - 2. "Reasonable Care to . . . Correct"
  - B. *Part Two: Plaintiff's Failure to Take Advantage of Corrective Opportunities*
    - 1. Unreasonable Failure "To Take Advantage of Any Preventive or Corrective Opportunities Provided by the Employer"
    - 2. Unreasonable Failure "To Avoid Harm Otherwise"
  - C. *Distinguishing Liability Standards for Unknown Harassment and Reported Harassment — Does It Matter?*
- III. RISK MANAGEMENT
  - A. *Lessons for the Employer*
    - 1. *Prevention: Drafting and Implementing an Effective Anti-Harassment Policy*
    - 2. *Correction: Responding to Reports of Alleged Harassment*
  - B. *Lessons for the Plaintiff*
  - C. *The Role of Summary Judgment*

## CONCLUSION

## INTRODUCTION

When the Supreme Court recognized hostile environment sexual harassment as a viable claim under Title VII of the Civil Rights Act of 1964,<sup>1</sup> the Court left open the question of when the employer could be held vicariously liable for such conduct. Referencing the applicability of agency standards,<sup>2</sup> the Court assigned to the lower courts

---

\* Professor of Law, Marshall-Wythe School of Law, College of William and Mary. This article is based on a presentation at a symposium sponsored by the William & Mary Journal of Women and the Law on February 25, 2006, Current Development in Gender and the Workplace.

1. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. II 1996).

2. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

the initial struggle of adapting traditional agency law to the sexual harassment context.<sup>3</sup> A decade later, however, the Supreme Court rejected the lower-court approaches and followed its own path in announcing an affirmative defense that could relieve the employer of liability for a supervisor's misconduct.<sup>4</sup>

The Supreme Court's creation of an affirmative defense for hostile environment sexual harassment claims under Title VII was an unexpected and unanticipated development for many commentators.<sup>5</sup> With eight years of experience under our belts, however, the effects and impact of the Court's liability standard are beginning to take shape. Although the availability of this defense was no doubt a welcome surprise for employers from the outset, defendants' success in using the defense has been greater than even the most optimistic observer might have predicted. Using the affirmative defense on liability has proven an effective shield to bypass consideration of the harassment itself and avoid trial altogether. Even with modest evidence of past prevention efforts, employers are often granted summary judgment on the liability issue, thereby mooting any debate on what constitutes sexual harassment within the meaning of the statute.<sup>6</sup>

By reviewing a significant sample of appellate court decisions, this article examines the impact of the liability question and how courts have interpreted the various elements of the affirmative defense. As a result, it is possible to develop a concrete set of recommendations to guide both employers and employees in approaching this issue. This examination also concludes that, notwithstanding the courts' discussions of the various elements of the defense, often a single factor can explain the rulings: the employer's response to the harassment once it has been reported. Although reaching these conclusions sometimes twists the language of the affirmative defense to questionable limits, the results may well satisfy the "spirit" of the Supreme Court's position, if not the literal language.

### I. THE *BURLINGTON/FARAGHER* AFFIRMATIVE DEFENSE

The development of sexual harassment claims under Title VII has been reviewed at length elsewhere and will be summarized only briefly here.<sup>7</sup> Early in the development of sexual harassment law,

---

3. *Id.*

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

5. See Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 65 (1999).

6. *Id.* at 65-67.

7. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-26 (1991); B. Glenn

courts were willing to hear plaintiffs' claims of "quid pro quo" harassment, typically characterized by the supervisor's demand for sexual favors in exchange for an economic benefit, such as a promotion or raise.<sup>8</sup> In that form, sexual harassment closely resembled the more traditional kinds of sex discrimination under Title VII where an applicant or employee claims the loss of a job or employment opportunity based on her sex. The courts were less accepting, however, of a claim for "hostile environment" sexual harassment, where the plaintiff alleges various forms of offensive behavior but is unable to tie that behavior to any economic consequences in her employment.<sup>9</sup>

Hostile environment sexual harassment was first recognized by the Supreme Court as an actionable form of sex discrimination under Title VII in 1986.<sup>10</sup> In *Meritor Savings Bank v. Vinson*, plaintiff Mechelle Vinson claimed that her supervisor had engaged in both sexual touching and rape but made no allegations that this behavior impacted her pay or promotions.<sup>11</sup> The Court agreed that, even absent economic consequences, such harassment could constitute a violation of Title VII when it became "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"<sup>12</sup>

---

George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 8-13 (1993); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 61 (2000).

8. See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211, 212-13 (9th Cir. 1979) (cause of action existed for plaintiff who was allegedly fired for refusing her supervisor's sexual demands); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977) (supervisor demanded sex as a condition of continued employment); see also *infra* note 32.

9. See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F.Supp. 161, 163 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977).

10. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

11. *Id.* at 60, 64.

12. *Id.* at 67 (quoting *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1972)). This discussion will be limited to the issue of liability for hostile environment harassment, as distinguished from "quid pro quo" harassment. Harassment including economic consequences, or a "tangible employment action" in the Court's current terminology involves a different line of analysis. For these claims, also referred to as "quid pro quo" harassment, the employer will be held liable for the supervisor's actions as a consequence of the authority delegated to the supervisor by the employer. *Mikels v. City of Durham*, 183 F.3d 323, 332 (4th Cir. 1999).

Any harassing conduct that culminates in a "tangible employment action" against the victim is necessarily conduct "aided by the agency relation," since it can only be taken by supervisory employees empowered by their employers to take such action. . . . In that circumstance, vicarious liability is absolute, without regard to whether the employer knew, or should have known, or approved of the act, or sought to prevent it or stop it.

*Id.*; see also B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J. L. & FEMINISM 133, 141 (2001).

Because employer liability is an "automatic" consequence of the conclusion that a supervisor's misconduct includes a tangible employment action, the distinction between

Having recognized the viability of a claim for hostile environment, however, the Court turned to the question of employer liability. For "quid pro quo" harassment, the courts consistently held the employer responsible for the supervisor's misuse of his authority.<sup>13</sup> Such cases closely parallel the more traditional claims of Title VII discrimination, such as a termination decision based on race. Thus, in other areas of Title VII, employer liability is an undisputed "given" — employers, acting through supervisors as agents, must answer for the supervisors' misuse of delegated authority to hire, fire, or otherwise control employment terms.<sup>14</sup> Relying on such precedent, the court of appeals

---

a "tangible employment action" and "hostile environment" is frequently litigated. Compare cases defining tangible employment actions broadly in the First, Seventh, Ninth, and Tenth Circuits (*Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (including transfers and negative job evaluations); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (moving to small office, limiting support services, eliminating assignments); *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997) (unfavorable job reference); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (lateral transfer), *cited with approval in Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1033 (10th Cir. 2004) (negative job references may constitute "adverse employment action" as an act that does more than "de minimis harm" to plaintiff's future employment prospects)); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (requiring employee "to go through several hoops in order to obtain her severance benefits")) with cases defining tangible employment action more narrowly in the Fourth, Fifth, and Eighth circuits (*Reinhold v. Virginia*, 151 F.3d 172, 174-75 (4th Cir. 1998) (extra work assignments, "inappropriate" work assignments, and denial of the opportunity to attend a professional conference held not to constitute tangible employment actions); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (only "ultimate employment decisions" qualify as tangible employment actions); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (transfer is not a tangible employment action)). The Supreme Court recently responded to a developing split among the circuit courts of appeal in the case of *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006). Rejecting a more narrow approach, the Court agreed that a reassignment of duties (without a change in pay or status) could constitute a "materially adverse employer action" in the context of a retaliation claim. *Id.* at 2406-07. A full discussion of this issue is beyond the scope of this piece.

13. See, e.g., *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.3d 1311, 1316 (11th Cir. 1989); *Katz v. Dole*, 709 F.2d 251, 256 n.6 (4th Cir. 1983). The Supreme Court affirmed the lower courts' approach. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 760-61 (1998). The circuits were also in agreement in co-worker (non-supervisor) harassment cases, consistently holding the employer liable for the harassment only when the employer had knowledge of the misconduct and failed to respond appropriately. See, e.g., *Blankenship v. Parke Care Ctrs., Inc.* 123 F.3d 868, 872 (6th Cir. 1997); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996).

14. See Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 516-22 (1996) (discussing vicarious liability in employment discrimination law). As noted by the Supreme Court, "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions." *Meritor Sav. Bank*, 477 U.S. at 70-71.

in *Vinson v. Taylor* similarly had imposed on the employer strict liability for the supervisor's acts of sexual harassment.<sup>15</sup> The Supreme Court rejected this approach for hostile environment cases in *Meritor Savings Bank* and left open the question of when an employer would be held liable for such misconduct.<sup>16</sup> In agreement with the Equal Employment Opportunity Commission (EEOC),<sup>17</sup> the Court charged the lower courts to "look to agency principles" for guidance.<sup>18</sup>

Following the limited guidance offered in *Meritor Savings Bank*, the lower courts struggled with the application of agency principles in hostile environment cases with varying results.<sup>19</sup> The Supreme Court's 1998 decisions in the companion cases of *Burlington Industries v. Ellerth*<sup>20</sup> and *Faragher v. City of Boca Raton*<sup>21</sup> sought to settle the conflict. Kimberly Ellerth, a former employee of Burlington Industries, claimed harassment by her second-level supervisor, alleging inappropriate comments and touching.<sup>22</sup> Ms. Ellerth was aware of the corporate sexual harassment policy and complaint process but resigned her position without reporting the behavior.<sup>23</sup> Burlington won the case on summary judgment when the trial court ruled that the employer could not be held responsible for any harassment that may

---

15. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

16. *Meritor Sav. Bank*, 477 U.S. at 69-72.

17. The EEOC is the federal agency charged with the enforcement of Title VII. See 42 U.S.C. § 2000e-4.

18. *Meritor Sav. Bank*, 477 U.S. at 72.

19. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (strict liability); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994) (negligence liability); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992) (negligence liability); *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988) (strict liability). See generally George, *supra* note 7, at 3-8 (reviewing the development of liability standards prior to *Burlington Industries* and *Faragher*); Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 687-730 (offering a circuit-by-circuit review of liability cases in this area). Cf. White, *supra* note 15, at 523-53 (discussing vicarious liability as applied to hostile environment, sexual harassment).

20. 524 U.S. 742 (1998).

21. 524 U.S. 775 (1998).

22. Ms. Ellerth alleged that 1) her supervisor told her to "loosen up" and that he could make her life "very hard or very easy;" 2) the supervisor rubbed her knee and told her she was not "loose enough" during an interview for a promotion, and 3) the supervisor stated that shorter skirts would make Ms. Ellerth's job "a whole heck of a lot easier." One of the central issues of the case was whether Ms. Ellerth had alleged quid pro quo or hostile environment harassment. Hoping to take advantage of the strict liability standard applied by the lower courts for quid pro quo harassment, Ms. Ellerth argued that these "threats," even though never carried out, amounted to quid pro quo harassment. The Supreme Court held that unfulfilled threats could only provide evidence of hostile environment harassment. *Burlington Indus.*, 524 U.S. at 748-55.

23. *Id.* at 748.

have occurred, where the employer had no knowledge of the alleged misconduct.<sup>24</sup> Beth Ann Faragher, a lifeguard for the City of Boca Raton, Florida, also alleged incidents of crude comments and unwelcome touching by two of her supervisors.<sup>25</sup> Although the city had a sexual harassment policy, the policy was never disseminated to the employees in Ms. Faragher's unit;<sup>26</sup> thus, she was unaware of the policy's existence and never filed a complaint.<sup>27</sup> Nonetheless, the Eleventh Circuit agreed with the City that it could not be held liable without knowledge of the harassment.<sup>28</sup>

Both *Burlington Industries* and *Faragher* considered the same issue: when can an employer be held responsible, or vicariously liable, for supervisor harassment that was never reported by the subordinate employee? As articulated by the Court, "We decide whether . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer *without showing the employer is negligent or otherwise at fault* for the supervisor's actions."<sup>29</sup>

The Supreme Court resolved the conflict in the circuits by unexpectedly creating an affirmative defense as a mechanism for an employer to avoid sexual harassment liability that had occurred without the employer's knowledge.<sup>30</sup> The Court thwarted any hope of "automatic" employer liability with its categorical statement that "sexual harassment by a supervisor is not conduct within the scope of employment."<sup>31</sup> Relying on the Restatement (Second) of Agency, the Court distinguished between "direct" liability (based on the employer's own behavior in failing to correct known harassment)<sup>32</sup> and "vicarious" liability (based on the supervisor's conduct that is unknown

---

24. *Id.* at 749.

25. *Faragher*, 524 U.S. at 780.

26. *Id.* at 781-82.

27. *Id.* 781-83.

28. *Id.* at 783-85.

29. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 746-47 (1998) (emphasis added).

30. *Id.* at 765.

31. *Id.* at 757.

32. The employer's own negligence is at issue, according to the Court, once the employer becomes aware of the alleged misconduct:

Under subsection (b) [of Section 219(2) of the Restatement], an employer is liable when the tort is attributable to *the employer's own negligence*. § 219(2)(b). Thus, although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. *An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.* . . . [B]ut Ellerth seeks to invoke the more stringent standard of vicarious liability.

*Id.* at 758-59 (emphasis added).

to the employer).<sup>33</sup> In considering liability for hostile environment harassment unknown to the employer (and in the absence of any quid pro quo or “tangible employment action”<sup>34</sup>), the Court turned to Title VII’s “primary objective” — “not to provide redress but to avoid harm.”<sup>35</sup>

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would effect Congress’ intention to promote conciliation rather than litigation in the Title VII context. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation to employer liability in certain circumstances.<sup>36</sup>

Consequently, the Court concluded that an employer will be held vicariously liable for unreported supervisor harassment unless he can establish, “by a preponderance of the evidence,” a two-part affirmative defense:

---

33. *Id.* at 758.

34. *See supra* note 13. The Court abandoned the “quid pro quo” terminology in *Burlington Industries* and now refers to those types of claims as ones involving a “tangible employment action.” *Burlington Indus.*, 524 U.S. at 753-54, 760-61. Where a supervisor’s conduct involves a “tangible employment action” (such as a pay raise or promotion), the Court found clear vicarious liability: it was the agency relationship that provided the supervisor the authority to commit the “tort.” *Id.* at 760.

Under Section 219(2)(d), a master may be responsible for acts outside the scope of employment where “the servant . . . was aided in accomplishing the tort by the existence of the agency relation.” *Id.* at 758. The Court goes on to say:

[W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. . . . Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard. . . . When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. . . . Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.

*Id.* at 760-63.

35. *Fragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

36. *Burlington Indus.*, 524 U.S. at 764 (citations omitted).



The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, *and* (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.<sup>37</sup>

Thus, the employer should not be held responsible for the harassment if the employer had an effective anti-harassment policy in place that the employee failed to use.<sup>38</sup>

## II. THE VOICE OF EXPERIENCE: APPLICATION OF THE *BURLINGTON/FARAGHER* DEFENSE

With far clearer marching orders this time around, employer defendants and the lower courts began to refocus their attention on issues of liability in hostile environment, sexual harassment proceedings. With almost a decade of experience from which to draw, the cases have shown some surprising trends. The bad news for the plaintiff and the good news for the employer is the remarkable level of success employers have achieved in defeating harassment claims on the question of liability. Even better news for the employer is the fact that employers have achieved many of these successful results through summary judgment motions, avoiding trial altogether.

---

37. *Burlington Indus.*, 524 U.S. at 765 (emphasis added) (citations omitted); *Faragher*, 524 U.S. at 807.

38. The affirmative defense is limited to the issue of supervisor harassment. The courts had generally agreed, with approval by the Supreme Court in *Burlington Industries* and *Faragher*, that there could be no vicarious liability for the employer for co-worker harassment. See *Burlington Indus.*, 524 U.S. at 760 (referencing RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1957)). In the case of co-worker harassment, liability is imposed only if the employer knew (or should have known) of the harassment and failed to respond appropriately. See, e.g., *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663 (7th Cir. 2005); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001); *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295 (5th Cir. 2001); *Curry v. District of Columbia*, 195 F.3d 654 (D.C. Cir. 1999).

Focusing on the liability issue thus may bypass the often more difficult question of whether the alleged conduct occurred and, if so, whether the conduct was sufficiently egregious to constitute harassment under the Act. The developing guidance under each prong of the *Burlington/Faragher* defense will be considered in turn, with particular emphasis on the law of the Fourth Circuit.

*A. Part One: Prevention and Correction by the Employer*

The first prong of the *Burlington/Faragher* affirmative defense requires the employer to establish that he took “reasonable care to prevent and correct promptly any sexually harassing behavior.”<sup>39</sup> This prong, as applied by the courts, can itself be divided into the distinct issues of prevention and correction.

*1. “Reasonable Care to Prevent”*

On the issue of prevention, the courts — following the guidance of *Burlington/Faragher* — generally focus on the employer’s anti-harassment policy. Although some variation exists among the circuits, most courts have found that the existence of an anti-harassment policy with a complaint procedure is sufficient to satisfy the first part of the defense. Defeating this conclusion requires the plaintiff to produce significant evidence that would undermine the presumptive good faith of the employer in developing and/or enforcing its policy. Thus, soon after the *Burlington/Faragher* decisions, the Fourth Circuit concluded:

[W]here . . . there is no evidence that an employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional, the existence of such a policy militates strongly in favor of a conclusion that the employer ‘exercised reasonable care to prevent’ and promptly correct sexual harassment.<sup>40</sup>

In even more blunt terms, the Fourth Circuit has declared that “dissemination of ‘an effective anti-harassment policy provides compelling proof’ that an employer has exercised reasonable care to prevent and correct sexual harassment.”<sup>41</sup>

---

39. *Burlington Indus.*, 52 U.S. at 765.

40. *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)).

41. *Matvia v. Bald Head Island Mgmt., Inc.* 259 F.2d 261, 268 (4th Cir. 2001) (quoting

In spite of its sweeping statements, the Fourth Circuit has demonstrated its willingness to look beyond the mere existence of an anti-harassment policy.<sup>42</sup> Both the terms of the policy and the employer's practices under the policy can undermine the claim that the policy alone provides an effective means of prevention. In *Smith v. First Union National Bank*, for example, the plaintiff alleged a variety of gender-based ridicule by her supervisor, including remarks that "the only way for a woman to get ahead at First Union was to spread her legs"<sup>43</sup> and that female employees who were upset must be "menstruating"<sup>44</sup> or "needed a 'good banging.'"<sup>45</sup> On another occasion, the supervisor leaned over the plaintiff's chair and, in reference to the O.J. Simpson trial, stated that "he could 'see why a man would slit a woman's throat.'"<sup>46</sup> The Fourth Circuit reversed summary judgment for the employer on several grounds but explicitly noted that the employer's anti-harassment policy could be considered "defective" and "dysfunctional" by a jury because of policy language suggesting that sexual harassment necessarily involved sexual advances.<sup>47</sup> Thus, the plaintiff might reasonably have concluded that the conduct of her supervisor did not constitute harassment under the policy.<sup>48</sup>

In another unpublished opinion by the Fourth Circuit, the court again reversed a summary judgment granted by the district court because of evidence that the employer's anti-harassment policy had been seriously undermined by the remarks and behavior of senior management.<sup>49</sup> In *Williams v. Spartan Communications*, the plaintiff presented several pieces of evidence to support her contention that the employer had effectively sabotaged its sexual harassment policy and training by the unchecked actions of various management employees.<sup>50</sup> Among other things, senior management made no attempt

---

*Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998)); see also *Barrett Applied Radiant Energy Corp.*, 40 F.3d 262 (4th Cir. 2001) (rejecting plaintiff's argument that dissemination of policy alone was inadequate); *Dowdy v. North Carolina*, 23 Fed. Appx. 121 (4th Cir. 2001); *Silver v. General Motors Corp.*, 225 F.3d 665 (4th Cir. 2000) (unpublished disposition); *Riffle v. The Sports Auth., Inc.*, 210 F.3d 361 (4th Cir. 2000) (unpublished disposition).

42. See, e.g., *Smith v. First Union Bank*, 202 F.3d 234 (4th Cir. 2000).

43. 202 F.3d 234, 239 (4th Cir. 2000).

44. *Id.* at 238.

45. *Id.*

46. *Id.* at 239, 245-46. When the plaintiff finally complained about the behavior, the employer conducted a cursory review of the supervisor's "management style" and instructed him to "smile more." *Id.* at 245-46.

47. *Id.* at 245.

48. *First Union Bank*, 202 F.3d at 245.

49. *Williams v. Sposton Commc'ns*, 210 F.3d 364 (Table), 2000 WL 331605 (4th Cir.) (unpublished opinion).

50. *Id.* at \*2.

to stop lewd conversations and jokes in the workplace, and one manager commented that his secretary was fired because she refused to give him a "blow job."<sup>51</sup> Another manager commented at the conclusion of sexual harassment training, "does this mean we can't fuck the help any more,"<sup>52</sup> and a company vice president commented in reference to a group of female employees, "I've stepped over better than that just to jack off."<sup>53</sup> In addition, the company's policy arguably discouraged reporting by warning that "bad faith" accusations under the policy could subject the accuser to disciplinary action; at the same time, the policy contained no provisions that protected employees from retaliation for reporting under the policy.<sup>54</sup>

Other courts have found employer prevention efforts inadequate or potentially inadequate (leaving the question for trial) when the employer had no written policy explicitly directed at sexual harassment. For example, cases have rejected as ineffective to prevent sexual harassment an employer's general assertion of an "open door" policy for employee complaints,<sup>55</sup> the absence of any policy specifically prohibiting sexual harassment,<sup>56</sup> and oral statements that harassment would not be tolerated, where there was no written policy.<sup>57</sup> Even with a specific sexual harassment policy in place, courts have found policies ineffective when the policy fails to provide a complaint mechanism that bypasses the supervisor<sup>58</sup> or fails to adequately identify individuals to whom complaints should be made under the policy.<sup>59</sup>

In *Gentry v. Export Packaging Company*, for example, the Seventh Circuit considered a policy that stated employees should submit their complaints to "Human Resources Representatives" but failed to identify who those representatives were.<sup>60</sup> The court was

---

51. *Id.*

52. *Id.*

53. *Id.*

54. *Sposton Commc'ns*, 2000 WL 331605, at \*2-3.

55. *Robles v. Cox & Co., Inc.*, 154 F.Supp. 2d 795 (S.D.N.Y. 2001).

56. *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000).

57. *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643 (S.D.N.Y. 2003).

58. *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001); *Thomas v. BET Soundstage Rest.*, 104 F.Supp. 2d 558 (D.Md. 2000).

59. *Gentry v. Export Packaging Company*, 238 F.3d 842, 847-48 (7th Cir. 2001) (reversing summary judgment and leaving for a jury the issue of whether employer effectively implemented its policy when it failed to identify "Human Resources Representatives," who were listed in the policy as individuals to whom sexual harassment could be reported). *But cf. Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272 (11th Cir. 2003) (upholding summary judgment in favor of employer whose policy failed to identify "Organizational Effectiveness" representatives" to take complaints but did make clear that complaints would be handled by human resources department, providing employees adequate guidance for filing complaints).

60. *Gentry*, 238 F.3d at 847.

unwilling to conclude that the policy as written was adequate to establish the employer's reasonable efforts to prevent harassment.<sup>61</sup> Instead the court left to the jury the issue of whether the policy's failure to specifically identify the individuals to whom harassment complaints should be made could render the policy ineffective and thus defeat the employer's attempt to prove the affirmative defense.<sup>62</sup> By contrast, the Eleventh Circuit in *Walton v. Johnson & Johnson Services, Inc.* found it sufficient that the policy made clear complaints were to go to the human resources department, even though the policy failed to specifically identify the "Organizational Effectiveness" representatives referenced.<sup>63</sup>

## 2. "Reasonable Care to . . . Correct"

Under the second part of *Burlington/Faragher's* first prong, the courts are to consider the employer's efforts "to correct" sexual harassment.<sup>64</sup> Here the courts have focused on employer response to actual complaints. When applied in circumstances where the employee never complained of the harassment to the employer, as was the case in both *Burlington Industries* and *Faragher*, the courts have looked to the employer's responses to prior complaints of harassment, if any. In other words, the courts have examined whether the employer has demonstrated the effectiveness of its policy by following through on complaints filed by other employees. For those courts that fail to distinguish between cases involving harassment known to the employer (usually through the employee's complaint) and cases involving harassment unknown to the employer,<sup>65</sup> the cases may also consider the employer's response to the harassment in question in the case at hand.<sup>66</sup>

In considering the defendant's "reasonable care to . . . correct,"<sup>67</sup> the courts examine the efforts of the employer to investigate allegations made. In most cases, a prompt and serious investigation, with some meaningful consequences for any harassment found, is sufficient to satisfy the correction requirement under the *Burlington/Faragher* defense and insulate the employer from liability.<sup>68</sup> The

---

61. *Id.* at 848.

62. *Id.*

63. *Walton*, 347 F.3d at 1287.

64. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

65. *See infra* Part II.C.

66. *See Smith v. First Union Bank*, 202 F.3d 234 (4th Cir. 2000).

67. *Burlington Indus.*, 524 U.S. at 765.

68. *See, e.g., Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1176-78 (9th Cir. 2003) (summary judgment for defendant where employer responded promptly and reasonably

courts generally will not second-guess the severity of sanctions imposed on the harasser, as long as the employer has acted reasonably to prevent a reoccurrence of the misbehavior.<sup>69</sup>

Where the harassment has been reported to the employer, the liability question often turns on the employer's response to that complaint. The case of *Holly D. v. California Institute of Technology* offers a good example. The plaintiff in that case was employed as a secretary for a professor at the defendant university.<sup>70</sup> She became involved in a sexual relationship with her supervisor, allegedly to protect her job, although there were no explicit threats.<sup>71</sup> Holly D. made no complaint to university officials, and the defendant first learned of the allegations from a charge filed with the EEOC.<sup>72</sup> The university immediately placed the plaintiff on paid leave while it conducted an investigation.<sup>73</sup> The professor in question denied the relationship, and the investigating committee concluded that it did not have sufficient evidence to substantiate the plaintiff's claims.<sup>74</sup> Nonetheless, the committee recommended that the plaintiff be transferred to another position and that the professor be reminded of the university's policy on sexual harassment.<sup>75</sup> During the actual litigation, however, the plaintiff produced a coat that had a stain of semen that was matched to the professor, evidence she had refused to provide during the internal investigation.<sup>76</sup> Once this evidence was available, the university immediately forced the professor to resign his position.<sup>77</sup>

---

in conducting investigation, even though its first investigation found insufficient evidence to support's plaintiff's claim of harassment, which later proved to be true); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (employee never filed complaint but employer conducted investigation and fired supervisor within a week of learning of supervisor's behavior); *Casiano v. AT&T Corp.*, 213 F.3d 278, 286 (5th Cir. 2000) (employer conducted in-depth investigation and suspended supervisor); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999) (summary judgment for defendant where prompt response to complaint with investigation and punishment established reasonable care to correct harassment); *Brown v. Perry*, 1999 WL 504814 (4th Cir. 1999) (summary judgment for defendant; employer acted reasonably when supervisor complied with plaintiff's decision not to report first harassment incident to management); *Murray v. City of Winston-Salem*, 203 F. Supp. 2d 493 (M.D.N.C. 2002) (employer investigated plaintiff complaint and gave supervisor written warning).

69. See, e.g., *Mikels v. City of Durham*, 183 F.3d 323, 330 (4th Cir. 1999) (ruling that reprimand for harasser and transfer of victim to another supervisor were reasonable responses intended to prevent future harassment).

70. *Holly D.*, 339 F.3d at 1162.

71. *Id.*

72. *Id.* at 1164-65.

73. *Id.* at 1165.

74. *Id.*

75. *Id.* at 1165.

76. *Holly D.*, 339 F.3d at 1164, 1165 n.7, 1178.

77. *Id.*

In addition to the employer's efforts to "correct" the alleged harassment in *Holly D.* through its investigation, the university supplied evidence of its "prevention" efforts through the existence of an anti-harassment policy, as well as training efforts and other communications designed to remind the campus community of the policy and its prohibitions.<sup>78</sup> The Ninth Circuit upheld summary judgment for the employer in the *Holly D.* case, based in part on the defendant's prompt response and serious investigation as soon as it learned of the plaintiff's allegations.<sup>79</sup> The fact that the defendant's investigation was later found to be in error was held not to undermine the employer's reasonable efforts to "prevent" and "correct" sexual harassment in the workplace.<sup>80</sup>

Where the employer has ignored an employee's complaint or conducted only a superficial investigation, the issue of liability will be left to the jury.<sup>81</sup> The Fourth Circuit case of *Smith v. First Union National Bank* again proves instructive. When the plaintiff finally complained about her supervisor's behavior, described previously, the employer's investigation focused on the supervisor's "management style."<sup>82</sup> The employer never asked the supervisor to confirm, explain, or deny the various sexual comments he allegedly had made to the plaintiff.<sup>83</sup> At the end of a cursory investigation, the employer only cautioned the supervisor about his management style and told him to "smile more."<sup>84</sup> Although the plaintiff was transferred to a position that no longer reported to the supervisor, her office remained in close physical proximity to the accused.<sup>85</sup>

---

78. *Id.* at 1177.

79. *Id.* at 1177-78.

80. *Id.* at 1177.

81. *See, e.g.,* *Homesley v. Freightliner Corp.*, 61 Fed. Appx. 105 (4th Cir. 2003) (employer ignored plaintiff's complaints and supervisor's behavior); *EEOC v. R&R Ventures*, 244 F.3d 334 (4th Cir. 2001) (jury question on employer's reasonableness in promptly correcting harassment where plaintiff told she was overreacting, complaint by another employee was ignored, and employer failed to investigate or take corrective action when plaintiff's mother complained; summary judgment reversed); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001) (failure to promptly correct where employer did not investigate the complaint or discuss allegations with alleged perpetrator; only response was "spot checks" and telling plaintiff to report any reoccurrences); *Ogden v. Wax Works, Inc.* 214 F.3d 999 (8th Cir. 2000) (employer minimized plaintiff complaints, conducted limited investigation focusing on plaintiff's performance, and forced plaintiff to resign); *White v. New Hampshire Dep't. of Corr.*, 221 F.3d 254 (1st Cir. 2000) (jury question whether investigation handled promptly and defendant allowed conduct to continue); *Cadena v. Pacesetter Corp.*, 20 F.Supp. 2d 1333 (D. Kan. 1998) (evidence supporting jury verdict included employer's failure to talk to plaintiff, alleged harasser or witnesses as part of "investigation" into plaintiff's complaint).

82. *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000).

83. *Id.* at 240, 245.

84. *Id.* at 246.

85. *Id.* at 245-46; *see also* *Clegg v. Falcon Plastics Inc.*, 174 Fed. Appx. 18, 2006 WL

*B. Part Two: Plaintiff's Failure to Take Advantage of Corrective Opportunities*

For those advising the potential plaintiff in a sexual harassment claim, the lessons of *Burlington / Faragher* are unambiguous: report it to your employer. A plaintiff's failure to utilize an employer-provided complaint process generally will doom the plaintiff's claim, regardless of the harassment involved.

*1. Unreasonable Failure "To Take Advantage of Any Preventive or Corrective Opportunities Provided by the Employer"*<sup>86</sup>

The second prong of the *Burlington / Faragher* defense requires the employer to prove that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>87</sup> As a vicarious liability standard for harassment *unknown* to the employer, as was the case in both *Burlington Industries* and *Faragher*,<sup>88</sup> the plaintiff's failure to utilize the internal complaint procedure offered in an "effective" anti-harassment policy generally is adequate to satisfy the employer's burden.<sup>89</sup> Plaintiffs regularly argue that such failures are "reasonable," because of fear of retaliation, embarrassment, or discomfort, but the courts have rarely been sympathetic to such claims if only generalized apprehensions are involved.<sup>90</sup> The courts have reasoned

---

887937, at \*5 (3d Cir. 2006) (jury question of reasonableness where employer presented evidence of prompt response to complaint, but plaintiff claimed she had to request action on multiple occasions and that employer seemed "annoyed" by her complaints).

86. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

87. *Id.*

88. *Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998) (finding plaintiff never complained to upper management about the harassment); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 748 (1998) (noting plaintiff failed to notify her employer despite knowledge of a sexual harassment policy).

89. *Faragher*, 524 U.S. at 807-08; *Burlington Indus.*, 524 U.S. at 765.

90. *See, e.g., Howard v. City of Robertsedale*, 168 Fed. Appx. 883, 888 (11th Cir. 2006) ("conclusory allegations of feared repercussions are insufficient to overcome an employer's showing of unreasonableness"); *Williams v. Mo. Dept. of Mental Health*, 407 F.3d 972, 977 (8th Cir. 2005) (holding that alleged "shame, shock and humiliation" did not justify failure to report); *Harper v. City of Jackson Mun. Sch. Dist.*, 149 Fed. Appx. 295,301-02 (5th Cir. 2005) (finding claim of intimidation inadequate and unsubstantiated); *An v. Regents of the Univ. of Cal.*, 94 Fed. Appx. 667, 675 (9th Cir. 2004) (fear of losing family and job); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 n. 24 (9th Cir. 2003); *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003) ("more than ordinary fear or embarrassment is needed"); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (finding "nebulous fear" of retaliation inadequate); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (holding that embarrassment and fear of retaliation did not justify



that most victims in these circumstances will be uncomfortable filing a complaint;<sup>91</sup> to excuse the reporting requirement based on these common concerns would effectively nullify this element of the affirmative defense and undermine the Supreme Court's goal of effectuating Title VII's "deterrent purpose"<sup>92</sup> and the statute's goal of "promot[ing] conciliation rather than litigation."<sup>93</sup>

To succeed in establishing the reasonableness of a failure to use available complaint procedures, a plaintiff must produce concrete evidence beyond her generalized fears, such as the employer's failure to respond to prior claims of sexual harassment<sup>94</sup> or prior incidents of retaliation against prior complainants.<sup>95</sup> In *EEOC v. R&R Ventures*, for example, the plaintiff presented evidence that three different managers ignored her or told her she was "overreacting" when she complained about the supervisor's behavior,<sup>96</sup> that the defendant also ignored a harassment complaint of another employee,<sup>97</sup> and that the employer took no corrective action when the plaintiff's mother complained on her behalf.<sup>98</sup> The Fourth Circuit concluded that the evidence was sufficient to go to the jury on the question of whether the employer had acted promptly or reasonably to "correct" issues of harassment under the *Burlington/Faragher* affirmative defense.<sup>99</sup>

The courts have also demonstrated some sympathy for particularly vulnerable victims of harassment in excusing the reporting requirement.<sup>100</sup> In a case involving especially egregious circumstances, the First Circuit in *Reed v. MBNA Marketing Systems, Inc.* agreed that the "reasonableness" of the plaintiff's failure to complain to the defendant was a question for the jury.<sup>101</sup> Evidence included that the

---

failure to report), cited with approval by *Watkins v. Prof'l Sec. Bureau, Ltd.*, 1999 U.S. App. LEXIS 29842, at \*28 (4th Cir. 1999) (unpublished opinion)).

91. See *Reed*, 333 F.3d at 35; *Shaw*, 180 F.3d at 813.

92. *Burlington Indus.*, 524 U.S. at 764.

93. *Id.*

94. See, e.g., *E.E.O.C. v. R&R Ventures*, 244 F.3d 334, 337-38 (4th Cir. 2001) (plaintiff complained without recourse and was told she was overreacting).

95. *Id.* at 338 (finding plaintiff was verbally assaulted by her harasser for reporting his conduct and was later forced to quit due to drastically decreased work hours).

96. *Id.* at 337.

97. *Id.* at 337-38.

98. *Id.* at 337.

99. *Id.* at 341. The trial court had granted summary judgment on the grounds that the conduct in question "was not sufficiently severe or pervasive to create a hostile work environment." *Id.* at 338.

100. See *Reed v. M.B.N.A. Marketing*, 333 F.3d 27, 30 (1st Cir. 2003) (noting plaintiff was only seventeen at the time of the incident and was threatened with termination); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2nd Cir. 1998) (finding plaintiff was functionally literate).

101. *Reed*, 333 F.3d at 37.

victim was only seventeen years old<sup>102</sup> and that her supervisor forced her to perform oral sex, threatened her with termination if she reported the incident, and told her that his family was closely tied with the company management.<sup>103</sup> Similarly, in *Distasio v. Perkin Elmer Corp.*, the Second Circuit concluded that the jury had sufficient evidence to find the plaintiff's failure to report was reasonable where the plaintiff was a functionally illiterate immigrant and had been threatened.<sup>104</sup>

Plaintiffs have sometimes created a bind for the employer by reporting the harassment but then requesting that no action be taken.<sup>105</sup> When the plaintiff later sues, she may argue that the employer's failure to investigate and remedy the situation bars the employer from asserting the *Burlington/Faragher* defense.<sup>106</sup> The employer, in turn, may respond that the plaintiff has unreasonably failed to utilize the employer's complaint process.<sup>107</sup> Although some employers have proceeded to investigate known harassment even without a complaint or cooperation from the alleged victim,<sup>108</sup> the courts generally have not faulted the employer for honoring the plaintiff's explicit request not to pursue an investigation.<sup>109</sup> In *Hardage v. CBS Broadcasting Inc.*,<sup>110</sup> for example, the plaintiff told a company manager about the harassment but explicitly stated that he wanted to handle the situation by himself.<sup>111</sup> When the manager spoke to the plaintiff a second time to follow up, the plaintiff again insisted that he did not want the manager involved.<sup>112</sup> "By specifically requesting the company not make use of its remedial and preventative procedures, Hardage unreasonably failed to make use of CBS's anti-harassment policies and procedures."<sup>113</sup>

---

102. *Id.* at 30.

103. *Id.* at 30, 37.

104. *Distasio*, 157 F.3d at 64-65.

105. See *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999); *Hardage v. C.B.S. Broadcasting*, 427 F.3d 1177, 1182 (9th Cir. 2005).

106. *Hardage*, 427 F.3d at 1186 (plaintiff argued that defendant did not attempt to remedy the harassment suffered by plaintiff by failing to investigate his complaint even after plaintiff opted to handle the situation alone).

107. *Id.* at 1188.

108. See, e.g., *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1165 (9th Cir. 2003) (noting the university's investigation after receipt of a letter from the E.E.O.C. but prior to the Title VII claim).

109. *Hardage*, 427 F.3d at 1186 (noting plaintiff's desire to handle the situation alone would normally negate the need for CBS to correct the situation).

110. *Id.* at 1177.

111. *Id.* at 1182.

112. *Id.*

113. *Id.* at 1188; see also *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (employer cannot be faulted for failing to investigate and take corrective action at plaintiff's request).

As noted, many courts apply the *Burlington / Faragher* affirmative defense for all claims of hostile environment harassment, even when the plaintiff reported the harassment.<sup>114</sup> On its face, the plaintiff's report would seem to render the defense unavailable to the defendant, because the plaintiff, by definition has not "failed to report." In spite of this apparent disconnect, the courts overcome this difficulty by focusing on the plaintiff's delay in reporting as the "failure" to report.<sup>115</sup> This allows the court's analysis to shift back to the issue of how the employer responded once the complaint was made as the deciding factor in the employer's argument to avoid liability.<sup>116</sup> In *Howard v. City of Robertsedale*, for example, the plaintiff waited almost three years before reporting the harassment.<sup>117</sup> When she did complain, the employer immediately placed the victim on paid leave and hired an investigator to look into the allegations.<sup>118</sup> Both prongs of the affirmative defense, the court concluded, thus were satisfied.<sup>119</sup>

## 2. Unreasonable Failure "To Avoid Harm Otherwise"<sup>120</sup>

The second part of the Court's test — the plaintiff's obligation "to avoid harm otherwise"<sup>121</sup> — apparently has been litigated with much less frequency. Even the most sympathetic reader may be left scratching her head to understand the behavior of the plaintiff in *Brown v. Perry*.<sup>122</sup> While attending an out-of-town conference, Wendy Jo Brown was the last remaining guest at a party in a hotel suite hosted by one of the company managers, William Boyd.<sup>123</sup> When Ms. Brown later tried to leave the suite, Mr. Boyd allegedly "pushed her against the wall, and kissed her face and neck."<sup>124</sup> Ms. Brown immediately reported the incident to her supervisor.<sup>125</sup> After speaking with

---

114. See, e.g., *Perry*, 184 F.3d at 396-97 (4th Cir. 1999) (finding that although plaintiff reported the harassment, the employer properly invoked the affirmative defense because a proper sexual harassment policy was in place, post-reporting management supported plaintiff, and she failed to avoid the harm).

115. See, e.g., *Montero v. AGNO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999) (two year delay in reporting considered unreasonable); *An v. Regents of the Univ. of Cal.*, 94 Fed. Appx. 667, 675 (9th Cir. 2004) (nine-month delay in reporting).

116. See *Montero*, 192 F.3d at 863 (noting even after two-year delay in reporting, the defendant responded within eleven days by investigating and taking action on plaintiff's complaint).

117. *Howard v. City of Robertsedale*, 168 Fed. Appx. 883, 885 (11th Cir. 2006).

118. *Id.*

119. *Id.* at 888.

120. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

121. *Id.*

122. 184 F.3d 388 (4th Cir. 1999).

123. *Id.* at 390.

124. *Id.*

125. *Id.* at 390-91.

another supervisor, Ms. Brown decided not to file a formal complaint,<sup>126</sup> and Mr. Boyd later apologized for his behavior.<sup>127</sup> Six months later, Ms. Brown attended another conference at the same hotel and again attended a party in Mr. Boyd's hotel suite.<sup>128</sup> Once again, Ms. Brown was the sole remaining guest after others had left.<sup>129</sup> She and Mr. Boyd left the hotel and went to two different bars over the course of the next hour.<sup>130</sup> When they returned to the hotel, Ms. Brown agreed to return to Mr. Boyd's hotel room (after Mr. Boyd promised he would not touch her).<sup>131</sup> Once in the hotel room, however, Mr. Boyd kissed and groped Ms. Brown, but she again managed to free herself and leave the room.<sup>132</sup> This time, Ms. Brown did file a formal complaint under the employer's policy, and the employer ordered Mr. Boyd not to have any further contact with Ms. Brown.<sup>133</sup> At the conclusion of the investigation, Mr. Boyd received a thirty-day suspension.<sup>134</sup>

In upholding summary judgment for the defendant, the Fourth Circuit noted (in addition to the company's investigation and corrective action) that Ms. Brown "utterly failed to 'avoid harm otherwise'".<sup>135</sup>

By her own account, Brown voluntarily decided to remain alone in Boyd's hotel room with him at night during the September conference even though the March incident was fresh in her mind. Brown not only remained alone with Boyd in his room for a second time, she also accepted Boyd's invitation to visit first a pub and then a reggae bar following the party. Finally after the bar-hopping, Brown agreed to return to Boyd's hotel room at midnight. In light of her previous history with Boyd, no reasonable factfinder could reach any conclusion other than that Brown "unreasonably failed . . . to avoid harm."<sup>136</sup>

### *C. Distinguishing Liability Standards for Unknown Harassment and Reported Harassment — Does It Matter?*

As noted, in circumstances where the plaintiff has reported the harassment under the employer's sexual harassment policy, the

---

126. *Id.*

127. *Id.* at 391.

128. *Perry*, 184 F.3d at 391.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 390-92.

134. *Perry*, 184 F.3d at 392.

135. *Id.* at 397.

136. *Id.*

*Burlington/Faragher* affirmative defense would seem to be inapplicable and requires an illogical result if strictly applied. Assume an employee promptly reports sexual harassment by her supervisor, and the employer responds immediately with a thorough investigation and severe sanctions for the perpetrator. A literal application of the *Burlington/Faragher* affirmative defense would make it impossible for the employer to avoid liability because he is unable to establish the second prong of the defense, the plaintiff's unreasonable failure to take advantage of corrective opportunities. The result is counter-intuitive and at odds with the Court's very purpose in creating the affirmative defense as a means to encourage employers to prevent and correct these issues internally. Consistent with the agency principles upon which the Court relied in establishing the scope of employer liability,<sup>137</sup> an examination of the employer's own negligence in responding to the complaint would provide a more direct and logical means of addressing the liability question.<sup>138</sup>

Although the failure of some courts to distinguish between cases of unknown harassment and reported harassment may require some mental gymnastics to "fit" the *Burlington/Faragher* defense, the confusion may not impact the bottom-line results. Where the employer has disseminated an anti-harassment policy with a complaint procedure, and the harassment is unreported — the circumstance in which the affirmative defense was intended to apply — the plaintiff's failure to utilize that policy should prove determinative (absent additional evidence that the employer has discourage reporting under the policy in some way). Where the plaintiff has reported the harassment, arguably removing the claim from the *Burlington/Faragher* defense, the liability question likely will turn on the employer's response to that complaint under either the *Burlington/Faragher* defense or a negligence standard. Under either approach, identical results may be expected for similar fact patterns.<sup>139</sup>

Under the more straightforward "negligence" standard for reported harassment, courts simply will examine the reasonableness of the defendant's investigation and remedy for any harassment.<sup>140</sup>

---

137. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 758-59 (1998).

138. See *id.* at 758 ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, *unless . . .* the master was negligent or reckless . . .") (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957)). For a more complete discussion of the distinction between vicarious liability for harassment unknown to the employer and "direct" liability for the employer's response to reported harassment, see B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 142-50 (2001).

139. See *E.E.O.C. v. R&R Ventures*, 244 F.3d 334, 341 (4th Cir. 2001) (noting plaintiff made multiple complaints and defendant never took corrective action).

140. *Id.* (finding defendant's failure to correct the harassing behavior after repeated

If applying the *Burlington / Faragher* affirmative defense instead, the courts similarly will begin with an examination of the reasonableness of the employer's response to the complaint under the first prong of the defense as part of the obligation to correct issues of harassment.<sup>141</sup> If the prevention and correction prong is satisfied, the courts have often dispensed with the second prong of the affirmative defense by pointing to any delay in the plaintiff's reporting as an unreasonable failure to take advantage of the employer's complaint process.<sup>142</sup> Under either standard, a flawed or inadequate investigation or response will defeat the employer's effort to escape liability, either by establishing the employer's negligence or by establishing the employer's failure to correct under the first prong of *Burlington / Faragher*.<sup>143</sup>

### III. RISK MANAGEMENT

#### A. *Lessons for the Employer*

The lower courts have fleshed out the requirements of an effective anti-harassment policy under the *Burlington / Faragher* affirmative defense in relatively concrete terms. The good news for employers is that this evolution of case law has provided clear guidance for avoiding hostile environment, sexual harassment liability.

##### *1. Prevention: Drafting and Implementing an Effective Anti-Harassment Policy*

In drafting a policy that will maximize its likelihood of successfully using the defense, an employer would be well-advised to include the following elements:

- A specific policy governing sexual harassment or a discrete section discussing and including sexual harassment in a broader anti-harassment or anti-discrimination policy;
- A definition of sexual harassment that includes both romantic/sexual overtures and gender-based behavior that is degrading and/or insulting;

---

complaints failed to establish the defendant exercised reasonable care).

141. *Id.* (assessing response to plaintiff's complaint based on a standard of "reasonable care to promptly correct any sexually harassing behavior").

142. See *Montero v. AGNO Corp.*, 192 F.3d 856 (9th Cir. 1999).

143. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

- A specified complaint process that includes options for complaining to someone other than one's supervisor;
- A prohibition of retaliation for filing a complaint under the policy; and
- Means of regular distribution and access to the policy.<sup>144</sup>

## 2. *Correction: Responding to Reports of Alleged Harassment*

Equally important for the employer's successful affirmative defense is the handling of any reports under the policy's complaint procedure. Delayed or inadequate responses may become evidence both for a claim resulting from the current report, as well as future complaints. Indeed, poor handling of past complaints may justify the failure of employees to report future complaints, thus establishing the second prong of the *Burlington / Faragher* defense and rendering the defense unavailable.

Case law surveyed suggests the following "best practices" to maximize the possibility of avoiding liability for any harassment that does occur:

- The employer should promptly initiate a response and investigation of any formal or informal reports made.
- Pending the conclusion of the investigation (and depending on the severity of the alleged harassment and the circumstances of the parties involved), the employer should consider separating the parties. This may include removing the alleged victim from the supervision of the alleged harasser by means of temporary reassignments or paid leave for one or both parties. If the parties are not separated during the investigation, the alleged harasser should be warned to avoid any unnecessary or unprofessional contact with the complainant.
- The investigation itself should be conducted by an individual or committee who can be objective. At a minimum, the investigation should include interviews or statements from the complainant, the alleged perpetrator, and any witnesses identified by the parties. Even

---

144. Some employers require new employees to sign a statement acknowledging receipt of the company's anti-harassment policy. Although no court has suggested this practice is required, employers may find it useful evidence to establish the employee's knowledge of available policies and complaint procedures. Similarly, evidence of training and regular reminders of the policy's prohibitions is helpful to establish the employer's prevention efforts, but the courts have not demanded such efforts as a prerequisite to establishing the *Burlington / Faragher* defense.

an erroneous finding of no harassment may protect the employer if the investigation has been reasonably serious and thorough.

If the investigation concludes that the harassment occurred, the employer should consider responses that are most likely to prevent any reoccurrence. The severity of the punishment imposed is not determinative, and courts generally will not second-guess this decision if it was a good-faith effort to resolve the problem. For example, a warning to the harasser and permanently transferring the victim to another unit may be adequate in cases of less severe harassment.

If the accused remains in the workforce, the employer should periodically follow-up with the complainant to ensure there have been no further incidents, especially if the two parties remain in close working proximity.

### *B. Lessons for the Plaintiff*

From the victim's perspective, the list of "best practices" is far shorter and much simpler. The message for the employee/victim of sexual harassment is unequivocal: report the misconduct to the employer through whatever means are offered. If the employer responds promptly and reasonably to the report with a serious investigation and significant consequences for the accused, a potential claim has effectively evaporated in most cases. Although the courts have occasionally excused this obligation to report where there have been threats or concrete evidence that retaliation is the likely result of such a report, most justifications for the failure to report have been rejected. A cautious attorney or advisor could rarely be confident in recommending (or condoning) a client's refusal to use the internal complaint mechanism provided. A client determined to bypass her employer and have her "day in court" is likely to be disappointed, regardless of the severity of the harassment in question.

### *C. The Role of Summary Judgment*

A common assumption of civil procedure is the difficulty of obtaining summary judgment on a claim or issue on which the moving party carries the burden of proof.<sup>145</sup> Nonetheless, employers have been

---

145. See, e.g., *Fairbrother v. Morrison*, 412 F.3d 39, 53 (2d Cir. 2005) ("[G]ranting judgment as a matter of law for a party who bears the burden of proof is an extreme step that may be taken only when the evidence favoring the movant is so one-sided that, absent



remarkably successful in hostile environment sexual harassment litigation in obtaining summary judgment on the liability affirmative defense provided by *Burlington/Faragher*.<sup>146</sup> Where the employer is able to present evidence of a policy with complaint procedures and the plaintiff's failure to use that policy, courts routinely have granted summary judgment in the absence of concrete evidence produced by the plaintiff to refute those elements. For the employer, this presents an important strategic option that bypasses serious consideration of the supervisor's misconduct. Once in trial, the employer may well be concerned that all of his good-faith efforts to prevent and correct the harassment will be overshadowed in the jury's minds by the supervisor's offensive conduct. The affirmative defense thus has become an even more powerful vehicle for defeating sexual harassment claims than might have been anticipated.

### CONCLUSION

In creating an affirmative defense in *Burlington Industries* and *Faragher*, the Supreme Court stated its intent to effectuate Title VII's focus on prevention.<sup>147</sup> The lower courts' implementation of the defense has gone a good distance to educate the employer and encourage companies to adopt policies likely to prevent or quickly eliminate sexual harassment in the workplace. While some victims of sexual harassment may be dismayed by the potential inability to "make the employer pay" for his supervisor's misdeeds, others will no doubt be gratified by the incentives for more immediate resolution and the chance to just get back to work.

---

adequate evidentiary response by the nonmovant, it could not be disbelieved by a reasonable jury." (quoting 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 50.05 (2004))) (considering summary judgment for the defendant under *Burlington/Faragher*).

146. See, e.g., *Matvia, Inc.* 259 F.2d 261, 266 (4th Cir. 2001); *Brown v. Perry*, 184 F.3d at 392-93; *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 298 (5th Cir. 2001); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999); *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663, 667 (7th Cir. 2005); *Holly D.*, 339 F.3d 1158, 1165-66 (9th Cir. 2003).

147. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 407 (1975)).