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Employer Liability for Hostile Environment Sexual Harassment Created by Supervisors Under Title VII: Towards a Clearer Standard?

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EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT CREATED BY SUPERVISORS UNDER TITLE VII: TOWARDS A CLEARER STANDARD?

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I. INTRODUCTION

Imagine going to work, turning on your computer, and discovering that, once again, the office manager has sent you pornographic e-mail. This has been occurring every day for about one week. You know that the employer has a sexual harassment policy, and today you decide to follow the proper procedure and file a complaint. After receiving the complaint, the employer

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* To my husband, Greg—because you loved me. This Casenote is also dedicated to my parents, Paula Habib and William Sabino, for their unconditional love and support. I would also like to give special thanks to Professor Betsy Ruff, Professor Rebecca Karl, and Professor Michael Millender, for their inspiration and guidance.

takes prompt and appropriate remedial action. Under this scenario, would the employer be liable in a court of law to the employee for the harm caused by these acts of harassment?

This Casenote explores the changing area of employer liability for supervisor-created hostile environment sexual harassment[1] in the wake of two recent Supreme Court decisions.[2] To this end, Part II explains the conflict that existed prior to the Supreme Court cases. Part III focuses on the reasoning of the lower courts' opinions in the *Faragher* case as a backdrop for highlighting how the recent decisions have changed this area of the law. Part IV sets forth the new controlling principles for employer liability for supervisor-created hostile environment sexual harassment outlined in the *Faragher* and *Burlington Industries* majority opinions. Part V focuses on the dissent in *Burlington Industries*, which was incorporated into the dissent of *Faragher*. Part VI analyzes the current state of employer liability for supervisor-created hostile environment sexual harassment and highlights the ambiguities arising from the Supreme Court's recent decisions. Part VII presents the Conclusion of this Casenote.

II. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BEFORE *FARAGHER* AND *BURLINGTON INDUSTRIES*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to [such individual's] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[3] A violation of Title VII may be predicated on either of two types of sexual harassment: quid pro quo or hostile environment.[4] Before *Faragher* and *Burlington Industries*, quid pro quo sexual harassment "involve[d] the conditioning of concrete employment benefits on sexual favors"[5] (now, quid pro quo harassment only exists when job threats are actually carried out[6]). Hostile environment sexual harassment is harassment so severe or pervasive as "to alter the conditions of [the victim's] employment and create an abusive

1. There are two types of sexual harassment: quid pro quo and hostile environment. Since the law regarding quid pro quo sexual harassment is fairly well settled, *see infra* pp. 563, this Casenote focuses on hostile environment sexual harassment. Additionally, case law divides employer liability for hostile environment sexual harassment into two group of harasses: co-employees and supervisors. Again, since the law involving co-employees is fairly well settled, uniformly applying a negligence standard, this Casenote only explores hostile environment sexual harassment committed by supervisory personnel.

2. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).

3. 42 U.S.C. § 2000e-2(a)(1) (1994).

4. *See Burlington Indus.*, 118 S. Ct at 2264.

5. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 62 (1986).

6. *See Burlington Indus.*, 118 S. Ct. at 2264.

working environment."[7] The Supreme Court case that established hostile environment sexual harassment as a violation of Title VII, regardless of whether the plaintiff suffered an economic or tangible loss, was *Meritor Savings Bank v. Vinson*.[8] However, the Court set no clear guidelines for determining when an employer is liable for the hostile work environment created by its supervisory employees.[9]

In *Meritor*, the Supreme Court directed courts to look to principles of agency law, referring them to the Restatement (Second) of Agency sections 219-237, in determining an employer's liability for actions of its employees.[10] While directing the courts to look to principles of agency law,

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7. *See Meritor*, 477 U.S. at 67 (citing Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

8. 477 U.S. 62 (1986). In *Meritor*, Michelle Vinson was hired to work as a teller by Sidney Taylor, the vice president of the bank branch. *See id.* at 59. Vinson worked at the branch for four years and was promoted several times to become the assistant branch manager. *See id.* After taking an indefinite sick leave, Vinson was discharged. *See id.* at 60. Thereafter, Vinson filed suit claiming that throughout the four years of her employment, she had "constantly been subjected to sexual harassment." *Id.*

Vinson alleged that after working for a short time, Taylor invited her out to dinner and suggested they have sexual relations. *See id.* Fearing for her job, Vinson eventually agreed. *See id.* Vinson testified that during the four years of her employment, she and Taylor had intercourse 40-50 times. *See id.* Taylor also fondled her in front of other employees, exposed himself to her repeatedly, and raped her a few times. *See id.* This behavior apparently ceased when Vinson started dating a boyfriend. *See id.* Vinson never reported the harassment or used the company's complaint procedure because she was afraid of Taylor. *See id.* at 61.

At the district court level, the court denied relief to Vinson on the grounds that if there was a sexual relationship between the parties, the relationship was voluntary and had nothing to do with her employment at the bank. *See id.* The Court of Appeals for the District of Columbia reversed, noting that a claim of sexual harassment can be premised on two types of harassment: quid pro quo and hostile environment. *See id.* at 62. The Court of Appeals believed that Vinson's claim was based on hostile environment sexual harassment, and that the district court had not considered this in deciding the case. *See id.* The Court of Appeals further stated that the voluntariness of the sexual relationship between Taylor and Vinson was irrelevant if her job was conditioned on these sexual favors. *See id.* The Court of Appeals then held the bank strictly liable for this harassment whether it knew or should have known of its existence, relying on EEOC guidelines which referred to "agents" of employers. *See id.* at 63.

The Supreme Court granted certiorari and affirmed for a different reason from the Court of Appeals. *See id.* Here, the Supreme Court established hostile environment sexual harassment as a valid claim, and then attempted to address an employer's liability for this type of harassment. *See id.* at 64. For the Court's discussion of the standards for employer liability, see *supra* text accompanying note 7.

9. *See, e.g., Faragher*, 118 S. Ct. at 2284 ("While indicating the substantive contours of the hostile environments forbidden by Title VII, our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment . . . ."). One of the few well established rules regarding hostile environment sexual harassment is that such harassment must be objectively and subjectively offensive. *See* Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

10. *See* 477 U.S. at 72 (stating that the court agrees "with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."). The Court also stated that agency

which would require that strict or vicarious liability be imposed when an employee acts within the scope of their employment,[11] the Court in *Meritor* simultaneously rejected the idea of automatic liability.[12] The Court held that Title VII would not make employers "automatically liable for sexual harassment by their supervisors."[13] However, the Court also stated that lack of notice to the employer of the harassing conduct would not necessarily insulate an employer from liability.[14] Additionally, "the mere existence of a grievance procedure and a policy against [sexual harassment], coupled with the [victim's] failure to invoke [the grievance] procedure" would not necessarily insulate an employer from liability.[15]

Directing courts to look to the Restatement (Second) of Agency has caused much confusion among the federal courts of appeals as to the standard to be applied in hostile environment sexual harassment cases.[16] In section 219, the Restatement (Second) of Agency sets forth five distinct standards for liability.[17] Before *Faragher* and *Burlington Industries*, most courts required a plaintiff to satisfy the requirements for direct, rather than strict or vicarious, liability, or some combination thereof.[18] The federal courts of appeals have used the standards set forth in the Restatement

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principles may not be completely transferable to Title VII issues. *See id.*

11. Restatement (Second) of Agency § 219(1) states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958); *see also infra* pp. 565-66.

12. *See Meritor*, 477 U.S. at 72 (stating that the "Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors").

13. *Id.*

14. *See id.*

15. *Id.*

16. *See* David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 131 (1995).

17. The Restatement (Second) of Agency § 219 (1958) states:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

18. *See* Oppenheimer, *supra* note 16, at 70; *see also infra* pp. 563-64.

(Second) of Agency in various and alternative ways, leading to an ad hoc approach to determining employer liability for hostile environment sexual harassment. As to quid pro quo sexual harassment, the circuits have uniformly held that an employer is strictly liable for sexual harassment committed by its supervisory personnel.[19] Nonetheless, the circuits have been extremely reluctant to apply the same standard that is applied in quid pro quo cases to hostile environment cases.[20] The direct liability standard has been used by the First,[21] Second,[22] Third,[23] Fourth,[24] Fifth,[25] Seventh,[26] Eighth,[27] Ninth,[28] Tenth,[29] and Eleventh[30] Circuits. The vicarious liability standard premised on actual or apparent authority has been used by the Second,[31] Third,[32] Tenth,[33] Eleventh,[34] and D.C.[35] Circuits. Finally, respondeat superior has been used by the Fourth,[36] Sixth,[37] Seventh,[38] and Eleventh[39] Circuits. Thus, there has been no clear standard the courts of

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19. *See Faragher*, 118 S. Ct at 2284; 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, 669 (1995).

20. For one possible reason as to the difference in treatment between quid pro quo and hostile environment sexual harassment, see Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 856 (1991) (arguing that courts perceive hostile work environment sexual harassment as less serious than quid pro quo, and thus require a higher standard of proof). *See also Faragher*, 118 S. Ct. at 2287 (acknowledging the disparate treatment); *Burlington*, 118 S. Ct. at 2272 (Thomas, J., dissenting) (comparing hostile environment racial harassment to hostile environment sexual harassment).

21. *See* Lipsett v. University of P.R., 864 F.2d 881, 901 (1st Cir. 1988) (applying the Title VII standard in the Title IX context).

22. *See* Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997).

23. *See generally* Bouton v. BMW of N. Am., Inc., 29 F.3d 103 (3d Cir. 1994) (finding that a harasser, by sexually harassing an employee, acts contrary to the employer's and employee's interests).

24. *See* Andrade v. Mayfair Management Inc., 88 F.3d 258, 261-62 (4th Cir. 1996).

25. *See* Nash v. Electrospace Sys., Inc., 9 F.3d 401, 404 (5th Cir. 1993).

26. *See* Carr v. Allison Gas Turbine Div., Gen. Motors, 32 F.3d 1007, 1012 (7th Cir. 1994).

27. *See* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564-66 (8th Cir. 1992).

28. *See* Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).

29. *See* Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 784 (10th Cir. 1995).

30. *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997) [hereinafter *Faragher I*]; Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989).

31. *See* Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997); Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994).

32. *See* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 109 (3d Cir. 1994).

33. *See* Bolden v. PRC Inc., 43 F.3d 545, 552 (10th Cir. 1994).

34. *See Faragher I*, 111 F.3d at 1535; Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 (11th Cir. 1987).

35. *See* Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995).

36. *See* Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1353 (4th Cir. 1995).

37. *See* Kaufman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir. 1992).

38. *See* Ellerth v. Burlington Indus., 102 F.3d 848, 859-62 (7th Cir. 1996).

39. *See Faragher I*, 111 F.3d at 1536.

appeals have been following, and in fact, some circuits have used several as alternative theories.

Under the direct liability[40] standard, the employer is held directly liable as a result of its own negligence, or recklessness.[41] The two main prongs of this test are: whether the employer knew or should have known of the harassment, and whether the employer failed to take prompt, adequate remedial action. The courts have made a distinction with regard to the applicable standard based on the harasser's status as either a supervisor or a co-employee.[42] Generally, "[i]n cases of co-employee harassment, liability [is] imposed on the employer only when the employer [is] directly liable due to negligent or reckless conduct, when the employer ratifie[s] the harassment after it occur[s]."[43] However, some circuits also have used this standard for cases where the harasser is a supervisor, making little or no distinction.[44]

Some circuits have attempted to hold supervisory personnel to a higher standard than regular employees. One of the vicarious liability standards that the courts have been willing to use is actual or apparent authority.[45] Under this standard, an employer is only liable if the harassing supervisor purported to speak or act on behalf of the employer while engaging in the harassing conduct, or if the harasser was aided in his conduct by the existence of the agency relationship.[46] To some extent, sexual harassment is always aided by the existence of the agency relationship "because [the] responsibilities [of a supervisor] include close proximity to and regular contact with the victim."[47] However, the courts have required a more direct link between the agency relationship and the harassing conduct, construing this standard narrowly.[48]

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40. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958) ("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 . . . .").

41. *See Faragher I*, 111 F.3d at 1535.

42. *See, e.g., id.*

43. Oppenheimer, *supra* note 16, at 73-74.

44. *See id.* at 132-136 (discussing cases from the Third, Sixth, Ninth, and Eleventh Circuits).

45. *See* Restatement (Second) of Agency § 219(2)(d) (1958).

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

46. *See* Lewis & Henderson, *supra* note 19, at 679.

47. *Faragher I*, 111 F.3d at 1537.

48. *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994) (holding an employer liable where the harasser used the appearance of his authority to sexually harass the victim, that is,

Perhaps the most stringent standard is vicarious liability based on the theory of respondeat superior.[49] Here, the employer is strictly liable for the harasser's conduct if the harasser was a supervisor acting within the scope of employment.[50] However, the federal courts of appeals, except for the Seventh Circuit, have either combined this test with one of the prongs of the direct liability test so that the strictness of this standard is diminished, or have narrowly construed the meanings of "in the scope of employment" or "supervisor."[51] This greatly diminishes the ability of a plaintiff to effectively bring a claim against an employer.

Every circuit, except for the Seventh and the Eleventh, has held that even where harassment occurs by a supervisor within the scope of employment, if the employer takes prompt remedial action, it is not liable to the injured employee.[52] Thus, unless the plaintiff can prove the employer is liable on the basis that the harasser used actual or apparent authority to accomplish the harassment, the plaintiff's claim will fail. This violates the principles of standard agency law that hold an employer absolutely liable for acts of its employees committed in the scope of employment.[53] Under traditional agency law, the employer's response "may absolve it of any direct liability and protect it from punitive damages, but a company's vicarious liabilities for the acts of its agents carried out within the scope of their agency is absolute."[54] This is one of the main contradictions arising out of *Meritor's* directive to look to agency law, and yet, not hold employers strictly liable for the harassing conduct of its agents.

Many federal courts of appeals also have required that the plaintiff show that the employer had either actual or constructive notice of the hostile environment sexual harassment.[55] Requiring the plaintiff to prove

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by firing her on the ground that she "owed him"). This standard is very similar to a pre-*Faragher* and *Burlington Industries* conception of quid pro quo sexual harassment.

49. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

50. *See id.*

51. *See* Nancy L. Abell et al., *Circuit by Circuit Review of Selected Sexual Harassment Issues*, CA01 A.L.I.-A.B.A. 609, 613-23 (1995). Meanwhile, there have been different interpretations as to what constitutes a supervisor. Generally speaking, courts look to whether the supervisor "exercised significant control over the plaintiff's hiring, firing, or conditions of employment." Oppenheimer, *supra* note 16, at 139. Some courts, though, have been reluctant to classify low-level management employees as supervisors where there is a large management hierarchy, even though the harasser was the victim's direct supervisor. *See, e.g.*, Daulo v. Commonwealth Edison, 938 F. Supp. 1388 (N.D. Ill. 1996) (defining supervisor narrowly in the context of a hostile environment racial discrimination case).

52. *See* Abell, *supra* note 51, at 613-23 (looking at case law from each Circuit to answer the question, "If the employer responds immediately and in a meaningful manner, can the employer still be held responsible for the hostile environment variety of sexual harassment claims?").

53. *See* Oppenheimer, *supra* note 16, at 132.

54. *Id.*

55. *See id.* at 133-134 (discussing cases from the Ninth and Eleventh Circuits).

that an employer knew or should have known of the harassment, and failed to take prompt remedial action, is the standard for direct liability, not vicarious liability. This approach fails to treat direct and vicarious liability as alternative theories of recovery.[56]

Additionally, in applying the theory of respondeat superior,[57] the federal courts of appeals have differed in their definition of "scope of employment."[58] Some circuits have held that supervisors are almost never acting within the scope of their employment when they sexually harass an employee and the company has a policy prohibiting sexual harassment.[59] Under such a view, an employer would almost never be held liable since "employers rarely employ workers for the purpose of engaging in wrongful acts."[60] Other courts have held that employees may be acting within the scope of their employment even when engaging in acts prohibited by the employer.[61] These courts generally look to the time and place of the acts of sexual harassment in determining whether they occurred within the scope of the harasser's employment.[62]

Which standard is applied can greatly affect the outcome of a case, hence leading to different results in different circuits. By deciding *Faragher*[63] and *Burlington Industries*,[64] the Supreme Court addressed these conflicting standards and offered guidance to the lower courts.

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56. *See id.* at 73.

> The array of federal court decisions addressing the relationship between agency law and sexual harassment by supervisors reveals an exasperating problem. Federal courts routinely misapply the law of agency. The prevailing line of cases requires employees to prove not only that the harassing supervisor was acting within the scope of his employment (vicarious liability), but also that the employer was reckless or negligent in its supervision (direct liability). Under common-law theories of agency, proof of either (not both) should be sufficient to impose liability on the employer.

Id.

57. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).
58. *See* Oppenheimer, *supra* note 16, at 136-37.
59. *See, e.g.*, *Faragher I*, 111 F.3d at 1535.
60. Oppenheimer, *supra* note 16, at 132.
61. *See, e.g.*, Ellerth v. Burlington Indus., 102 F.3d 848, 859 (7th Cir. 1996).
62. *See id.*
63. 118 S. Ct. 2275 (1998).
64. 118 S. Ct. 2257 (1998).

III. *FARAGHER*: BACKGROUND AND LOWER COURT TREATMENT

A. *Decision in the District Court and Court of Appeals*

Beth Ann Faragher worked as a lifeguard for the City of Boca Raton in the Marine Safety Section intermittently for five years.[65] During this time, one of her supervisors, Bill Terry, subjected Faragher and another lifeguard, Nancy Ewanchew, to uninvited and offensive touching.[66] David Silverman, another supervisor, also made offensive comments and gestures to both Faragher and Ewanchew.[67]

The Marine Safety Section had a clear chain of command, in which both Terry and Silverman were superior to Faragher.[68] Above Terry and Silverman were city officials who worked for the Parks and Recreation Department, and who were located far from the Marine Safety Headquarters at the beach.[69] Lifeguards had little contact with city officials.[70]

Faragher and Ewanchew did not complain about their work environment to the Parks and Recreation Department management during their employment.[71] They did complain to one of their supervisors, Robert Gordon, a Marine Safety Lieutenant and Training Captain.[72] However, both Faragher and Ewanchew, along with most of the female lifeguards, complained to him as a friend and not a superior.[73] Gordon did not report the complaints to any of his superiors.[74]

During Faragher's employment, the city adopted a sexual harassment policy directed to all employees.[75] However, the city failed to effectively disseminate its policy among employees of the Marine Safety Section.[76]

After Ewanchew resigned, she wrote a letter to the City's Director of Personnel complaining about the sexually harassing conduct of Terry and Silverman towards her and other female lifeguards.[77] This was the first time the City received actual notice of Terry's and Silverman's conduct.[78]

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65. *See Faragher I*, 111 F.3d at 1533
66. *See id.*
67. *See id.*
68. *See id.*
69. *See id.*
70. *See id.* at 1533.
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.* at 1564.
76. *See id.*
77. *See id.* at 1533.
78. *See id.*

The City investigated the complaint, reprimanded Terry and Silverman, and disciplined them.[79]

The district court concluded that Terry and Silverman created a sufficiently abusive working environment to alter the conditions of Faragher's employment.[80] The district court then held the city liable for the harassment by its supervisory employees based on three theories: the city was negligent in that it should have known of the hostile environment given the pervasiveness of the situation;[81] the city was negligent via Gordon, who as an agent of the city had knowledge and took no action;[82] and the city was liable because Terry and Silverman were acting as agents of the city.[83]

On appeal to the Court of Appeals for the Eleventh Circuit, the district court was reversed.[84] The Eleventh Circuit agreed that Terry's and Silverman's conduct was severe enough to create a hostile working environment, but did not agree that the city was liable.[85] The Eleventh Circuit acknowledged two bases for liability: direct and indirect.[86] Under direct liability an employer is liable if it knew or should have known of the harassment, and failed to take immediate appropriate remedial action.[87] Relying on the *Meritor* directive to look to agency law and the Restatement, the Eleventh Circuit held that an employer may be indirectly liable, regardless of whether it knew or should have known of a superior's hostile environment sexual harassment: "(1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass the subordinate."[88]

While the court articulated that one of the three standards for indirect vicarious liability is when a harasser is acting within the scope of employment (respondeat superior), it is clear from the court's discussion that it would rarely find a supervisor's acts of harassment to be within the scope of his or her employment.[89] The Eleventh Circuit chose the narrowest construction, effectively removing respondeat superior as a

79. *See id.*
80. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1562-63 (S.D. Fla. 1994).
81. *See id.* at 1563.
82. *See id.* at 1564.
83. *See id.*
84. *See Faragher I*, 111 F.3d at 1539.
85. *See id.* at 1538-39.
86. *See id.* at 1535.
87. *See id.*
88. *Id.* at 1535 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1), 2(c), 2(d)).
89. *See id.* at 1536 n. 6.

possible basis for liability. The court stated, "This Circuit has concluded that in a pure hostile environment case, a supervisor's harassing conduct is typically outside the scope of his employment."[90] The court noted from a previous case that a supervisor who harasses is not acting as the company, nor in the company's interests.[91] Hence, the court viewed respondeat superior as a strict liability standard and stated that "[s]trict liability is illogical in a pure hostile environment setting" because no quid pro quo is involved and the harassing supervisor is thus not acting as the employer.[92] For these reasons, the court concluded that Faragher's claim would fail because Terry and Silverman acted in pursuit of their own personal interests and therefore were not acting within the scope of their employment.[93]

The court also held that Faragher's claim failed with regard to harassment that was aided by the existence of the agency relationship.[94] The court acknowledged that in one sense harassment is always aided by the existence of an agency relationship due to responsibilities which require close and regular contact with the victim.[95] However, the court reasoned that "aided" was not to be used that broadly.[96] Rather, for harassment to be "aided" by the agency relationship, the harassment must be "accomplished by an instrumentality of the agency or through conduct associated with the agency status."[97] An example of such use would be a supervisor literally threatening to fire the victim.[98] Since neither Terry nor Silverman threatened Faragher, and they did not base employment decisions on her responses to their advances, Terry and Silverman were not "aided" by the existence of their agency relationship.

The Eleventh Circuit also held that the city was not directly liable for Terry's and Silverman's harassing conduct overturning the district court's finding that the city had constructive notice due to the pervasiveness of the harassment.[99] The court concluded that the intermittent acts of harassment

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90. *Id.* at 1534.

91. *See id.* at 1536.

92. *Id.* Even though the court accepted respondeat superior as a legitimate theory, in practice, it appears the court finds it an inapplicable standard for the facts of most hostile environment cases.

93. *See id.* at 1536. Looking to the commentary accompanying the Restatement (Second) of Agency §§ 235 and 236, the court makes it clear that for acts to be within the scope of employment, those acts must be in some way intended to benefit the employer. *See id.* at n. 7. However, acts of harassment are rarely, if ever, "intended" to benefit the employer. *See id.* at 1537.

94. *See id.* at 1536.

95. *See id.* 1537.

96. *See id.*

97. *Id.*

98. *See id.* Again, this standard is very similar to a pre-*Faragher* and *Burlington Industries* conception of quid pro quo. *See supra* note 48.

99. *See Faragher I*, 111 F.3d at 1538-39.

committed over a long period of time weighed against the pervasiveness of the harassment.[100]

B. *The Eleventh Circuit Court of Appeals Dissent*

Judge Barkett, in dissent, opined that the majority misapplied the law to the case.[101] Her dissent disagreed with the majority, first, because the majority limited liability to a "knew or should have known" standard and failed to appropriately apply traditional agency law concepts of an employer's responsibility for acts of its agents, and second, because the majority, in applying the law to the facts, effectively required more than mere constructive knowledge, again ignoring traditional agency principles.[102]

Addressing direct liability first, she argued that the majority required more than mere constructive knowledge.[103] Although the majority concluded that the existence of pervasiveness of harassment does not equal constructive knowledge, she reasoned that the pervasiveness of harassment can support an inference of constructive knowledge.[104] Furthermore, constructive knowledge does not require the head of the company to be the one with knowledge, and rarely will that person have such knowledge.[105] An employer should not be able to avoid liability by merely secluding its employees at a remote location and putting a low level supervisor in charge.[106]

Addressing indirect liability, she thought the majority erred in "effectively confining liability to instances where an employer has actual or constructive knowledge."[107] She noted that the purpose of agency law is to establish an employer's liability where it has no knowledge.[108] She

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100. *See id.* at 1538.

101. *See id.* at 1539 (Barkett, J., dissenting). The dissent relies heavily on the principles announced in *Meritor*. *See id.* (Barkett, J., dissenting).

102. *See id.* (Barkett, J., dissenting).

103. *See id.* at 1540 (Barkett, J., dissenting).

104. *See id.* (Barkett, J., dissenting). "Just as the determination of whether conduct is sufficiently 'severe and pervasive' to constitute actionable harassment requires evaluation of the totality of the circumstances, the fact finder [in determining constructive knowledge] must examine the evidence in the same manner. Again, the egregiousness, as well as the number of the incidents, is plainly relevant." *Id.* (Barkett, J., dissenting) (citation omitted). The pervasiveness argument as meeting the requirements of constructive knowledge has been accepted by many courts. *See, e.g.*, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988).

105. *See Faragher I*, 111 F.3d at 1541.

106. *See id.*

107. *Id.* (Barkett, J., dissenting).

108. *See id.* (Barkett, J., dissenting). Referring to Justice Joseph Story, Judge Barkett explained the purpose of agency law:

concluded that the city should be liable on either of two bases: first, that Terry and Silverman were agents of the city acting within the scope of their employment under Restatement section 219(1) and second, that Terry and Silverman were aided in accomplishing the harassment by the existence of an agency relationship under section 219(2)(d) of the Restatement.[109]

Judge Barkett also attacked the majority for concluding that harassment is never within a harasser's scope of employment.[110] Relying on the Restatement she argued that "the proper inquiry in determining" whether an act is "within the scope of employment" is "whether the conduct is of the same general nature" as authorized conduct, or incidental to authorized conduct.[111] In analyzing the conduct, courts should consider when and where the action took place, "whether it was foreseeable, the purpose of the action, whether it served the principal, and the extent of the departure from normal methods or results."[112] She reiterated a commonly held view that one would hope that sexual harassment was never authorized, but a "supervisor is clearly charged with maintaining a productive, safe work environment."[113]

Judge Barkett emphasized the necessity of closely scrutinizing the power structure "within a workplace to determine the extent to which the particular agency relationship has empowered the supervisor to use or abuse his position to accomplish the harassment" in order to correctly apply the principles of the Restatement.[114] The power structure at the Marine Safety Section granted the supervisors "virtually unchecked

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> [A] principal "is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. . . ." This rule of holding a principle liable for the acts of its agent is based on "the consideration that it is the principle who makes it possible for the agent to inflict the injury."

Id. (Barkett, J., dissenting) (citations omitted).

109. *See id.* (Barkett, J., dissenting).

110. *See id.* at 1542 (Barkett, J., dissenting). ("The Restatement [§ 230] clearly states that 'an act, although forbidden, or done in a forbidden manner, may be within the scope of employment.'").

111. *Id.* at 1542 (Barkett, J., dissenting) (referring to the Restatement (Second) of Agency § 299).

112. *Id.* (Barkett, J., dissenting); *see* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184 (6th Cir. 1992); Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987).

113. *See Faragher*, 111 F.3d at 1542 (Barkett, J., dissenting).

114. *Id.* at 1544 (Barkett, J., dissenting) (citing Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1515 (11th Cir. 1989) and Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559 (11th Cir. 1987)).

authority over the work environment."[115] Terry, in particular, gave out work assignments, was in charge of disciplinary actions, and "interviewed and selected new lifeguards subject to approval."[116] As such, it was Terry's duty to provide a safe and productive working environment.[117] The city's power structure isolated Faragher from city management and placed Terry and Silverman in direct control of Faragher's daily work environment, providing Faragher with "no effective avenue for redress."[118]

IV. THE RECENT SUPREME COURT DECISIONS

A. Faragher: *The Supreme Court Majority Opinion*

After reviewing the history of development of sexual harassment law,[119] the Supreme Court analyzed the court of appeals decision in *Faragher.* Turning first to the theory of respondeat superior, the Court acknowledged that most federal courts of appeals have held that hostile environment sexual harassment is outside the harasser's scope of employment based on similar reasoning to that of the Eleventh Circuit.[120] Acts of harassment which create a hostile environment are considered to be motivated by the supervisor's own personal desires, unrelated in any way to the employer or employment relationship.[121] The Court is quick to point out that in contexts other than sexual harassment, courts have taken a much broader view of what actions are within the scope of employment.[122] The Court did not try to reconcile this contradiction noting that "it is enough to recognize that their disparate results do not necessarily reflect varying terms of the particular employment contracts involved, but represent differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior."[123]

Given this, the Court analyzed the different reasons both in favor of, and against, classifying harassing behavior as within the scope of employment, and therefore placing the risk of liability on employers.[124] The fact that supervisors are in charge of maintaining the atmosphere of the

115. *Id.* (Barkett, J., dissenting).

116. *Id.* (Barkett, J., dissenting).

117. *See id.* (Barkett, J., dissenting).

118. *Id.* (Barkett, J., dissenting). Remember, the district court had already concluded that the city failed to effectively disseminate its sexual harassment policy. *See id.* (Barkett, J., dissenting).

119. *See Faragher*, 118 U.S. at 2282-86.

120. *See id.* at 2286 (citations omitted); *but cf.* Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1351-52 (4th Cir. 1995); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184 (6th Cir. 1992)).

121. *See Faragher*, 118 U.S. at 2286-87.

122. *See id.*

123. *Id.* at 2287.

124. *See id.* at 2288.

work environment which can inure to the benefit or detriment of the employer argues in favor of placing the burden on employers.[125] Arguably, sexual harassment should just be another one of the foreseeable risks of doing business, the burden of which should fall on the employer and not the victim.[126]

However, the Court concluded otherwise. The Court found it more reasonable to consider sexual harassment to be beyond the scope of employment because it usually serves no interest of the employer.[127] Another reason the Court decided that harassing conduct should fall outside a supervisor's scope of employment is that negligence is the standard uniformly used for co-employee harassment, which implicitly states that harassment is not in the scope of employment for regular employees.[128] Any difference in the standard applied to a supervisor would be based on the conferment of particular authority through the agency relationship and would therefore be irrelevant to a scope of employment analysis, and better analyzed under other vicarious liability standards.[129]

In analyzing vicarious liability under section 219(2)(d) of the Restatement (Second) of Agency, the Court distinguished two separate standards of liability: "the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority;"[130] and the servant "was aided in accomplishing the tort by the existence of the agency relation."[131] This distinction lies in the difference between circumstances where harassment occurs because of a victim's reliance on apparent authority, and where harassment occurs because the agency relationship "aided" harassment or enabled harassment to occur.[132] It is a very narrow line to draw.

It makes sense for an employer to be liable for some tortious conduct made possible by abuse of supervisory authority.[133] Thus, the Court concluded that the appropriate starting point for determining employer liability is with the second part of section 219(2)(d) of the Restatement, analyzing the "aided by the agency relationship" standard.[134] It is only the starting point because the Court sees its role as an attempt to "adapt agency concepts to the practical objectives of Title VII."[135]

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125. *See id.* at 2288 (referring to Judge Barkett's dissent in *Faragher I*).
126. *See id.*
127. *See id.*
128. *See id.* at 2289.
129. *See id.*
130. *Id.* at 2290 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)).
131. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)).
132. *See id.*
133. *See id.*
134. *See id.*
135. *Id.* at 2290 n.3.

The Court acknowledged that in one sense a supervisor is always aided by the agency relationship.[136] The supervisor's position of power over the employee may allow for abuses that would not be present in a co-employee situation.[137] The Court also acknowledged that employers have a greater opportunity to prevent misconduct on the supervisory level through selection, training, and monitoring.[138]

Despite the good reasons in favor of the vicarious liability standard based on harassment aided by the existence of an agency relationship, the Court stated that the *Meritor* directive of not imposing automatic liability on an employer must also be satisfied.[139] Noting that the risk of automatic liability is high where unspoken threats of authority are used to create harassing situations, the court chose to create an affirmative defense an employer may invoke to safeguard against automatic liability.[140] The affirmative defense would allow an employer to show that it "had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided."[141]

Thus, the Court held that an employer is vicariously liable for sexual harassment created by supervisors (either immediate or successively higher) with authority over the victim.[142] When no tangible employment action is taken (hostile environment), an employer may raise an affirmative defense comprised of two 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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[143]

The Court stated that Title VII's primary objective is to avoid harm;

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136. *See id.* at 2291.

137. *See id.*

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

Id. (citing Estrich, *supra* note 20, at 854)).

138. *See id.*

139. *See id.*

140. *See id.*

141. *Id.* at 2292.

142. *See id.* 2293.

143. *Id.*

thus requiring both employers and employees to pro-actively avoid harm.[144] For employers, this means that they should provide a reasonable sexual harassment policy.[145] If employees fail to use the policy, and thus mitigate their own damages, the employer should not be liable for the resulting harm that the victim could have prevented.[146]

The Court further stated that proof that an employer has an anti-harassment policy, and has promulgated it among employees "is not necessary in every instance as a matter of law."[147] Whether or not a stated policy is required may be addressed during litigation.[148] Furthermore, an employee's failure to use the employer's complaint procedure will normally be sufficient to establish that the employee unreasonably failed to avoid harm.[149] Other proof may also be submitted to establish the second element of the affirmative defense.[150]

The Court concluded by finding it unnecessary to address negligence as an alternative theory to vicarious liability, and held the city liable for the hostile work environment of Faragher.[151] The Court held that the city did not exercise reasonable care in preventing sexual harassment due in part, among other reasons, to the city's failure to disseminate its sexual harassment policy to the employees in the Marine Safety Section.[152]

B. Burlington Industries: *The Majority Decision in the Companion Case to* Faragher

In *Burlington Industries*, Kimberly Ellerth alleged that she was harassed by her supervisor at Burlington Industries, Ted Slowik.[153] Burlington Industries is a large national company with an extended hierarchy, of which Slowik was a mid-level manager.[154] As a vice president of one of Burlington's business units, Slowik had the authority to make hiring and firing decisions subject to the cursory approval of his supervisor.[155] However, Slowik was not Ellerth's immediate supervisor.[156]

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144. *See id.* at 2292.
145. *See id.*
146. *See id.*
147. *Id.* at 2293.
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.* at 2294.
152. *See id.* at 2293.
153. *See Burlington Indus.*, 118 S. Ct. at 2262. Procedurally, *Burlington Industries* was on appeal from a decision granting summary judgment in favor of the employer; therefore, the Supreme Court took the facts as alleged by Ellerth to be true. *See id.*
154. *See id.* Burlington Industries had over 50 plants throughout the United States which employed over 22,000 people. *See id.*
155. *See id.* Even though Slowik was a vice president, Burlington Industries argued that his

Ellerth worked out of Chicago and her immediate supervisor reported to Slowik in New York.[157] Throughout Ellerth's employment, Slowik repeatedly made offensive comments and gestures.[158] Ellerth argued that three incidents in particular could be construed as threats to deny tangible job benefits classifying the harassment as quid pro quo, and thus vicarious liability should be applied.[159]

A short time after the last of these incidents occurred, Ellerth quit in response to a warning by her immediate supervisor of the need to return customers calls promptly.[160] At first Ellerth provided reasons for her resignation that were unrelated to the harassment.[161] A few weeks later Ellerth sent a letter explaining that she really quit because of Slowik's behavior.[162] Prior to this letter, Ellerth did not inform anyone of Slowik's harassing behavior, despite her awareness of Burlington's policy against sexual harassment.[163]

At the district court level, the trial judge granted summary judgment to the employer.[164] While the court found that the work environment was severe and pervasive enough to be hostile, the court also held that "Burlington neither knew nor should have known" of the harassment.[165] The court noted that "there was a quid pro quo 'component' to the hostile environment," but found that this was only a contributing factor to the

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position was not considered upper level management. *See id.* This argument presumably was made in an attempt to classify the harassment as more in line with co-worker harassment where the standard of negligence applies.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.* The first of these incidents occurred on a business trip. *See id.* Ellerth felt compelled to accept an invitation to meet Slowik in the hotel lounge where they were staying. *See id.* After making comments about Ellerth's breasts, Slowik warned that he could make her work life hard or easy, and that she should loosen up. *See id.*

The second incident occurred when Ellerth was interested in a promotion. *See id.* In speaking with Slowik about the promotion, he expressed concerns that Ellerth was not "loose enough" while rubbing her knee. *See id.* Ellerth received the promotion, and Slowik commented that her promotion would require her to be around factory workers who like to look at legs. *See id.*

The third incident occurred when Ellerth called Slowik to get permission to do something for a customer. *See id.* Slowik informed Ellerth that he didn't have any time for her, "unless [she] wanted to tell [him] what [she was] wearing." *Id.* When Ellerth called Slowik again a few days later, he asked whether she had started wearing shorter skirts yet, because that would make her job easier. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.* at 2263.

165. *Id.*

harassment.[166] Recognizing that the state of the law at the time applied vicarious liability to quid pro quo cases and negligence to hostile environment cases, the district court chose to apply the latter.[167]

The Supreme Court framed the issue as follows: whether an employee who is threatened, "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."[168] In the Court of Appeals for the Seventh Circuit the judges disagreed as to which standard should be applied to the case.[169] If the harassing conduct was deemed quid pro quo, then a vicarious liability standard would apply.[170] But if the harassment was labeled hostile environment, the Seventh Circuit was divided as to whether a negligence or vicarious liability standard should apply.[171] The Seventh Circuit was further divided as to whether quid pro quo threats alone, with no tangible action, were sufficient to qualify for application of a vicarious liability standard.[172] The Supreme Court cleared up this confusion by holding that quid pro quo harassment occurs when threats are actually carried out; otherwise it is hostile environment.[173] The Court commented that beyond this initial demarcation, these labels "are of limited utility."[174]

Because no threats were carried out in *Burlington Industries*,[175] the Court continued its analysis as if the case was based on a hostile environment claim.[176] Like the *Faragher* Court, the *Burlington Industries* Court discussed section 219(1) [scope of employment] of the Restatement and concluded that this section is not applicable to sexual harassment cases.[177] However, the Court continued to discuss section 219(2), addressing its sub-parts that were not mentioned in *Faragher*.[178] The Court indicated that the other standards of liability present in section 219(2) were still viable, although not applicable to the instant case.[179] Importantly,

166. *Id.*
167. *See id.*
168. *Id.* at 2262.
169. *See id.* at 2263.
170. *See id.*
171. *See id.*
172. *See id.*
173. *See id.* at 2264.
174. *Id.*
175. An important fact to the Supreme Court was that although Ellerth's job benefits were threatened, no tangible action was ever taken. *See id.* at 2262. In fact, Ellerth was promoted once during her employment with Burlington Industries. *See id.*
176. *See id.* at 2265.
177. *See id.* at 2267.
178. *See id.*
179. *See id.* Other than negligence, the remaining bases of liability are direct liability where the employer acts with bad intentions under section 219(2)(a) and where a non-delegable duty is

although negligence was not discussed at all in *Faragher*, *Burlington Industries* stated that "[n]egligence sets a minimum standard for employer liability under Title VII."[180] This suggests that negligence is a lesser standard available to plaintiffs should the more stringent vicarious standard, combined with the employer's affirmative defense, fail.

V. THE DISSENT IN *FARAGHER* AND *BURLINGTON INDUSTRIES*

The dissent in *Faragher*, written by Justice Thomas, aside from indicating a remand for further proceedings relating to negligence, simply referred to the more detailed dissent he wrote in *Burlington Industries*.[181] The *Burlington Industries* dissent began by comparing Title VII sexual harassment cases to Title VII racial discrimination cases.[182] Both were previously treated similarly with regard to standards to be applied, but now are treated differently when the claim involves hostile environment.[183] For hostile environment racial discrimination a negligence standard is applied, and vicarious liability is not available as an alternative theory of liability.[184] The dissent argued that, like racial discrimination cases, negligence should also be the only standard applied to hostile environment sexual harassment cases by stating, "An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur."[185] Thus, liability is only imposed "if the employer is blameworthy in some way."[186]

Using the same reasoning the majority used to set aside strict liability under a theory of respondeat superior, the dissent argued that supervisors' creation of a hostile work environment is outside the scope of their employment.[187] These acts are not in service of the employer.[188] Therefore, the employer should only be liable if it knew, "or in the exercise of reasonable care should have known, about the hostile work environment and failed to take remedial action."[189] The dissent emphasized that hostile environment acts are specifically of the type that are extraordinarily difficult to monitor, or protect against.[190] Reasonable care is all that can be

involved under section 219(2)(c). *See id.*

180. *Id.*
181. *See Faragher*, 118 S. Ct. at 2294 (Thomas, J., dissenting).
182. *See Burlington Indus.*, 118 S. Ct. 2271-72 (Thomas, J., dissenting).
183. *See id.* at 2272 (Thomas, J., dissenting).
184. *See id.* (Thomas, J., dissenting).
185. *Id.* at 2271 (Thomas, J., dissenting).
186. *Id.* at 2272 (Thomas, J., dissenting).
187. *See id.* (Thomas, J., dissenting).
188. *See id.* (Thomas, J., dissenting).
189. *Id.* at 2273 (Thomas, J., dissenting).
190. *See id.* (Thomas, J., dissenting).

required.[191]

However, having set forth a vicarious liability standard subject to an affirmative defense, which "is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based,"[192] the dissent argued this error is made worse by lack of clear explanation or guidelines, which will only lead to further litigation and confusion in this area of law.[193] The dissent argued that there is no basis in agency law to justify the court's holding.[194] The dissent interpreted section 219(2)(d) as dependent upon the plaintiff's belief that the harasser is acting within the scope of their authority.[195] Given society today, this is something the dissent found unlikely.[196] Finally, the dissent stated that under the Court's standard "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm. In practice, therefore, employer liability very well may be the rule."[197]

VI. ANALYSIS OF THE CURRENT STATE OF EMPLOYER LIABILITY FOR SUPERVISOR-CREATED HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Very few cases have been decided using the analysis set forth in *Faragher* and *Burlington Industries*. Yet it is already clear that application and interpretation of these opinions will be divergent, and not as straightforward as the majority may have hoped. As mentioned above, *Burlington Industries* indicates that negligence is still a valid standard to be used, and one court has already used that approach.[198] Another court treated the

191. *See id.* (Thomas, J., dissenting).

192. *Id.* (Thomas, J., dissenting).

193. *See id.* (Thomas, J., dissenting).

194. *See id.* at 2274 (Thomas, J., dissenting).

195. *See id.* (Thomas, J., dissenting).

196. *See id.* (Thomas, J., dissenting).

197. *Id.* (Thomas, J., dissenting).

198. *See* Cadena v. Pacesetter Corp., 18 F. Supp. 2d 1220, 1229 (D. Kan. 1998). Here, Lynn Cadena was employed as a telemarketer for Pacesetter. *See id.* at 1223. Her supervisor, Charles Bauersfeld, began sexually harassing her when he told her that he had a "wet dream" about her. *See id.* She immediately complained to the Vice President who shrugged her off and said that Charlie was like that. *See id.* Bauersfeld continued to regularly harass Cadena. *See id.* Again, Cadena complained to the Vice President after an incident involving Bauersfeld suggesting that Cadena flash her breasts to boost a co-workers morale. *See id.* at 1224. The Vice President told her that Charlie was just having a bad day and got a little crazy. *See id.* It was not until a week later that the employer took some action against the harassment. *See id.* In the meantime, Cadena had submitted a letter of resignation. *See id.*

After Cadena filed suit, Pacesetter filed a motion for summary judgement (the suit and motion were originally filed prior to the recent Supreme Court decisions). *See id.* at 1222, 1229. Acknowledging the new vicarious liability standard set forth in *Faragher* and *Burlington*, the court

affirmative defense as a sort of negligence-plus test by applying a negligence analysis to the first prong, and a contributory negligence analysis to the second prong.[199]

Just exactly how the two prongs of the affirmative defense work together is not entirely clear from the Supreme Court opinions. The conjunction "and" was used to join the two prongs,[200] indicating that both parts must be satisfied for an effective affirmative defense. Therefore, it is not clear how the following scenario might be resolved: an employer has a reasonable effective harassment policy, which the victim reasonably uses to report harassment by the supervisor; the employer takes prompt

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also stated: "[O]ur reading of *Faragher* and *Burlington Industries* suggests that the negligence theory continues to be viable." *Id.* at 1229. Consequently, the court chose to analyze the summary judgment motion by applying a negligence standard to the claim. *See id.*

199. *See* Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 880-84 (N.D. Ind. 1998). Here, Lynn Fall was allegedly sexually harassed by her supervisor Daniel Cohen. *See id.* at 873. Fall alleged that the first occurrence of harassment was when Cohen deceived her into reporting to his office; when Fall tried to leave Cohen's office, he started kissing her and forcing his hand down Fall's blouse. *See id.* After this "attack," Fall felt so ill that she vomited. *See id.* Thereafter, Fall tried to avoid Cohen, but did not complain to anyone. *See id.* Subsequently, there were a few occasions where Fall was voluntarily in Cohen's presence, such as a Christmas party and an art department reception. *See id.* At the art department reception, Fall ran into Cohen, who made a comment that Fall perceived him as a threat to her job. *See id.* at 873-74.

About a month later, Fall first reported the harassment to her immediate supervisor, who said that the harassment needed to be reported to someone in a higher position. *See id.* at 874. Fall's supervisor also indicated that this was not the first time someone had complained about Cohen. *See id.* After Fall notified the Vice-Chancellor of Academic Affairs, Lester Lamon, his first reaction was "Oh no, not again." *Id.* Lamon suggested that Fall inform yet another person of the harassment. *See id.* After a few days she then informed Jack Tharp, the Vice Chancellor of Student Affairs at one of the campus branches. *See id.* Tharp suggested that Fall talk to the University's Affirmative Action Director, Shirley Boardman. *See id.* Fall made repeated attempts to contact Boardman before they were able to meet. *See id.* After hearing of the harassment, Boardman launched an investigation. *See id.* Some disciplinary action was taken against Cohen, but Fall was never informed of this action. *See id.*

On a motion for summary judgment, the court analyzed whether the University could be held liable for the harassment of Fall applying the affirmative defense in *Faragher*. *See id.* at 880. Addressing the first prong of the affirmative defense, the court noted that an employer must also reasonably prevent harassment, in addition to promptly correcting harassment. *See id.* at 881. The court analyzed whether the employer was reasonable in preventing the harassment by applying the "knew or should have known" aspect of the negligence standard. *See id.* And arguably the analysis used to determine whether the employer was reasonable in correcting the harassment would be the second part of the negligence standard. In fact, the court stated: "The first element of the defense . . . is akin to the familiar negligence showing." *Id.* at 880.

Here, based on the facts, the court felt a reasonable person could conclude that the university had prior notice of Cohen's harassment. *See id.* at 882. Thus, it failed to reasonably prevent sexual harassment. *See id.* The court also concluded, as to the second prong of the affirmative defense, that a reasonable person could find Fall's three month delay in reporting the harassment was not unreasonably failing to take advantage of preventative and corrective opportunities. *See id.* at 884.

200. *See Faragher*, 118 U.S. at 2292.

corrective action, yet the victim still sues for any injuries sustained. In this situation, the second prong of the affirmative defense is not satisfied. Did the Supreme Court expect the employer in this situation to be held liable, even though they have done all that they reasonably could have done to deal with the situation both before and after? In fact, this is the very result that Justice Thomas feared in his dissent.

However, this scenario is very unlikely. In the cases that have applied the affirmative defense, the courts seem very willing to construe the facts such that the employees were shown to be unreasonable in their care to avoid the situation. Thus, although some may have feared that establishing vicarious liability as a standard for supervisor-created hostile environment sexual harassment would sound a death knell to employers, this does not appear to be happening in application of this standard at the district court level.

In actuality, the affirmative defense could prove to be a very strong weapon in the employers' arsenal. All the employer need do is make sure that it has an effective policy, and liability on this standard should be fairly easy to avoid. The defense merely needs to attack the employee's response to the situation. While this appears to have happened in at least three cases,[201] it seems unlikely that the Supreme Court intended to put on trial the already possibly victimized employee for how well they responded to

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201. *See* Montero v. AGCO Corp., 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998); Marsicano v. American Soc'y of Safety Eng'rs, No. 97 C 7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998); Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998).

Sconce appears to be the more reasonable application of the *Faragher* affirmative defense. In this case, Nicole Sconce was allegedly sexually harassed by her supervisor. *See* 9 F. Supp. 2d at 775. The supervisor would grope Sconce and frequently make sexual innuendos. *See id.* Sconce never complained while working with her supervisor because she was afraid of retaliation. *See id.* Her supervisor warned her not tell anyone. *See id.* After requesting and being granted a transfer, Sconce complained to the EEOC. *See id.* It was not until a complaint was filed that the employer learned of the harassment. *See id.*

Applying the affirmative defense to the facts in ruling on a summary judgment motion, the court first looked to the employer's sexual harassment policy. *See id.* at 778. The court held that Tandy Corp. had a clear harassment policy against sexual harassment, which did not require reports to be made to immediate supervisors. *See id.* Further, the policy helped to assure that there would be no retaliation. *See id.*

Addressing the second prong of the affirmative defense, the court noted Sconce's complete failure to use the sexual harassment policy, of which she was aware. *See id.* The court stated that "a threat of termination without more, is not enough to excuse an employee from following procedures adopted for her protection. To hold otherwise would render the affirmative defense meaningless." *Id.* For this reason, the court granted the employer's motion for summary judgment. *See id.*

This result appears to be more in line with what the Supreme Court intended. Here, the plaintiff totally failed to take any action to protect herself, or to provide the employer an opportunity to take corrective action. In this situation, it would be unreasonable to hold an employer liable for sexual harassment it knew nothing about and was never given an opportunity to correct.

acts of harassment. It is easy to understand that people respond differently to acts of harassment. Some people will report harassment immediately upon the first occurrence. Others will wait a long period of time, hoping that the harassment will eventually stop, and not wanting to cause any trouble. Many will be somewhere in the middle. However, one court has already held that a victim, who testified that she was afraid to report the harassment, unreasonably waited too long.[202]

In that case, Carrie Ann Montero was employed by AGCO Corporation at one of its Parts Distribution Centers, until she resigned.[203] Montero worked in the business office with Glenn Carpenter, the Warehouse Manager, and Russ Newmann, the Warehouse Supervisor, two of Montero's harassers.[204] AGCO had a policy against sexual harassment which Montero was aware of, which required reporting harassment to either the Human Resources Department or her supervisor.[205] The harassment occurred over a period of two years, but Montero did not report the harassment until the latter part of the two year period.[206] At that time she reported the harassment to a Human Resources Manager in another state.[207] Montero testified that she waited to report the harassment out of fear.[208] She was afraid of retaliation by the harassers, and afraid that her confidentiality would not be kept.[209]

Shortly after Montero reported the harassment, AGCO launched an investigation into the reported harassment.[210] This investigation resulted in one harasser being fired, and two others being severely warned.[211] During the time of the investigation, Montero was on paid administrative leave.[212] When Montero was scheduled to return to work, she delayed and later resigned.[213]

Thereafter she brought suit against AGCO.[214] The court granted summary judgment in favor of AGCO, the employer, applying the *Faragher* affirmative defense.[215] The court found that AGCO had a policy against sexual harassment of which Montero was aware, and therefore met

202. *See Montero*, 19 F. Supp. 2d at 1146.
203. *See id.* at 1144.
204. *See id.*
205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.* at 1146.
209. *See id.*
210. *See id.* at 1144.
211. *See id.*
212. *See id.*
213. *See id.* at 1145.
214. *See id.* at 1143.
215. *See id.* at 1145-46.

its burden under the first prong of the affirmative defense.[216] As to the second prong of the affirmative defense, the court again looked to AGCO's policy against sexual harassment which provided a reporting mechanism outside of an immediate supervisor and guaranteed confidentiality within reason.[217] Based on these statements in AGCO's sexual harassment policy, the court concluded that Montero was unreasonable in waiting two years to report the harassment.[218] Furthermore, since AGCO acted promptly and took corrective action, the court found that Montero unreasonably failed to take advantage of both the preventative and corrective measures provided by AGCO.[219]

What this opinion does not adequately take into account is the reality of how fear may operate in a person who is victimized. Many rational people are not quick to act. They debate and deliberate for some time before acting, especially when a highly sensitive issue such as sexual harassment is involved. Add to this the normal fears that one's action may be retaliated against, or that one may be labeled a troublemaker, or that one may not want to call attention to one's self and one's situation, and it is more than reasonable for a person to wait a significant period of time before being compelled to take action. Therefore, in the context of supervisor-created harassment, the focus of analysis should be on an employer's emotionally detached response to knowledge of sexual harassment, not the employee's highly personal and individualized sexual harassment coping process.

Moreover, since AGCO did take prompt corrective action against the harassment, a question remains as to whether the decision the court reached could have been based on these facts alone: granting summary judgment because AGCO had an effective policy against sexual harassment, and because Montero unreasonably failed to take advantage of the *corrective* action AGCO provided.[220] If the case could be decided on that basis alone, there was no need to attack Montero as unreasonably failing to take advantage of the *preventative* opportunities provided by the sexual harassment policy unless both must be proven to satisfy the second prong of the affirmative defense.

Similarly, in another recent case, Linda Marsicano left her job at American Society of Safety Engineers (ASSE) after working only 8 days due to harassment by her supervisor, Ken Hatter.[221] The harassment began on Marsicano's second day on the job and lasted until her last day of

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216. *See id.* at 1146.
217. *See id.*
218. *See id.*
219. *See id.*
220. *See id.*
221. *See Marsicano*, 1998 WL 603128 at *1.

work.[222] Again, applying the *Faragher* affirmative defense, summary judgment was granted to Marsicano's employer, ASSE.[223] The court found that ASSE had an effective sexual harassment policy and thus satisfied the first prong of the affirmative defense.[224] As to the second prong, the court first looked to Marsicano's use of the sexual harassment policy.[225] Since Marsicano reported the harassment after working only eight days, Marsicano argued that she promptly took action against the harassment.[226] While the court acknowledged Marsicano's promptness in that respect, the court looked to another incident to find that Marsicano was unreasonable in failing to take preventative action.[227]

On the morning of Marsicano's last day on the job, her supervisor Hatter asked her to lunch.[228] The harassment that occurred at that lunch was the impetus for Marsicano complaining to higher management.[229] However, just prior to Marsicano's lunch with Hatter, the person Marsicano eventually complained to stopped by her office to see how she was settling in.[230] At that time, Marsicano made no mention of the harassment that had been occurring.[231] Since Marsicano did not complain at that time, but rather waited until after the lunch, the court concluded that she unreasonably failed to take advantage of a preventative opportunity provided by her employer.[232] The court then addressed whether Marsicano unreasonably failed to take advantage of corrective opportunities provided by the employer, referring to this analysis as "relevant to the second element of ASSE's affirmative defense."[233]

It appears that the courts are uncertain as to exactly what is required to be analyzed under the second prong of the defense. Must the employer establish both unreasonable failure to take preventative *and* corrective action, or just one or the other? If the employee is reasonable in taking advantage of preventative opportunities, can the employer still avoid liability by establishing unreasonable failure to take advantage of corrective opportunities? So far, no cases have addressed these issues.

Moreover, in crafting the affirmative defense, the Supreme Court was concerned with complying with *Meritor*'s directive that employers were

222. *See id.* at *2.
223. *See id.* at *9.
224. *See id.* at *7.
225. *See id.* at *8.
226. *See id.*
227. *See id.*
228. *See id.* at *3.
229. *See id.* at *4.
230. *See id.* at *8.
231. *See id.*
232. *See id.*
233. *Id.*

not to be held strictly liable for hostile environment sexual harassment, yet they fail to comply with *Meritor*'s other directive: that the mere existence of a grievance procedure and a policy against sexual harassment, coupled with the victim's failure to invoke that procedure, would not necessarily insulate an employer from liability.[234] However, in *Faragher*, the Supreme Court went so far as to say that not only is it not always necessary for an employer to prove that it has a promulgated sexual harassment policy, but also that an employee's failure to use an outlined grievance procedure will normally be sufficient to establish that the employee unreasonably failed to avoid harm.[235] This is in direct contradiction to *Meritor*. Furthermore, the Court provides no guidance as to when it might be reasonable for an employee to fail to follow established procedure. Therefore, contrary to what Justice Thomas feared, in practice, employer liability may very well never be the rule,[236] except in the most extreme of factual circumstances.

If the affirmative defense is applied as outlined in the cases above, negligence could actually prove to be the stronger standard for an employee to sue under. Under negligence, the employee merely can try to prove that the employer "should have known" about the harassment, and failed to take prompt remedial action. Under a negligence standard, the employee can go as far as not even giving actual notice to the employer. Furthermore, the employee's response to the situation is not attacked and fully analyzed as under the second prong of the affirmative defense. With some courts viewing the first prong of the affirmative defense as a negligence type of standard, it remains to be seen how the negligence standard and the affirmative defense can co-exist as alternative theories.

VII. CONCLUSION

The Supreme Court, after distinguishing quid pro quo from hostile environment sexual harassment, should have used these cases as an opportunity to provide a clearly defined standard for employers, as well as courts, to follow. The Court's two major concerns in this area appear to be protecting employers from strict liability for all the harassing acts of their agents, while attempting to emphasize the importance of taking measures to prevent sexual harassment before it occurs. As such, it would seem that the majority envisioned the use of the affirmative defense in a way far different from its current application. With emphasis on prevention of harassment, the affirmative defense could be read to require employers to take preventative measures and further bolster those preventative measures

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

235. *See Faragher*, 118 S. Ct. at 2293.

236. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2274 (1998) (Thomas & Scalia, JJ., dissenting).

by establishing a history of taking prompt corrective action. As such, not only the preventative measures, but also the employer's history of swift and appropriate response in the face of harassment would serve to deter future personnel from engaging in such acts. Then, if sexual harassment still occurred, and the employee was reasonable in their response to the harassment, the employer would be vicariously liable and any post-harassment corrective action would not mitigate the employer's liability to that particular employee. The employee must still act reasonably in mitigating their own injuries and damages by following appropriate procedures and acting in a reasonably timely fashion. Reading the affirmative defense in this way seems logical since the Supreme Court was attempting to make available a vicarious liability standard for victims of supervisor-created hostile environment sexual harassment, as opposed to current district court level treatment which is much more reminiscent of a negligence-type treatment. It is just this type of treatment that Justice Thomas feared and specifically addressed in his dissent.

It does seem harsh to hold an employer vicariously liable for the acts of a harasser, even though it did all it reasonably could to prevent harassment from occurring, if the employee acts reasonably in their response to the situation to mitigate their own damages. However, it is logical to place a stricter standard on supervisor-created hostile environment sexual harassment, as opposed to co-employee harassment.[237] In the supervisor context, the harasser has specifically been charged with more duties and responsibilities in the work place environment, and has more influence and control over the employees. Additionally, as a policy issue, who should bear the heaviest burden for preventing sexual harassment? The employer is in the best position to prevent harassment from initially occurring through hiring practices, sexual harassment policies, sexual harassment training, and monitoring procedures. The employee is only in the best position to mitigate the extent of their damages once harassment occurs. Thus, if an employee allows harassment to continue for an extended period of time, assuming the employer has reasonably attempted to prevent and correct harassment in the past, the employer should not be liable for the full extent of the employee's damages. However, the fact that harassment (an injury) has occurred, under a vicarious liability standard, requires that the employer bear some responsibility for the acts of its supervisory personnel. While such a construction seems harsh, an employer's damages should be limited. In an ideal world, harassment would not occur. Once damage has been done, the employer is in the best position to remedy the

237. As to Justice Thomas' identification of the disparity between sexual harassment and racial harassment, *see supra* Part V., hopefully when the appropriate case comes along, the Supreme Court will again take the opportunity to impose a stricter standard on racial harassment that is created by supervisors.

damage that occurred because of its supervisory personnel—but that damage should be limited to the initial and short-term injuries. Anything beyond that is the employee's responsibility because they unreasonably failed to take advantage of the employer's preventative and corrective stance against harassment in the work place.

As previously mentioned, it remains to be seen how the federal courts of appeals will apply the affirmative defense, as well as other standards, as alternative theories to supervisor-created hostile environment sexual harassment cases. The affirmative defense still creates many ambiguities that need to be sorted out through the courts; specifically, guidelines for when an employee acts reasonably in response to harassment.[238] However, one thing that seems fairly certain is that the confusion that has plagued this area of law, leading up to the opinions in *Faragher* and *Burlington Industries*, will in one form or another continue to exist until the legislature steps in or the Court sets forth a clearly defined standard.

238. *See also supra* Part VI.