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Note*


TABLE OF CONTENTS

I. Introduction ........................................... 444
II. Background ........................................... 446
   A. Evolution of Sexual Harassment Law ............. 446
   B. Rejected Standard — “Direct” and “Indirect” Liability ........................................... 449
   C. Facts of Faragher ................................ 452
III. Analysis .............................................. 454
   A. Adopted Standard — Vicarious Liability for Supervisory Sexual Harassment ............... 454
   B. Vicarious Liability — More Punitive Than Preventive ........................................... 456
   C. Liability Not Automatic — Employer Defenses ........................................... 463
   D. Practical Application for Employers .......... 467
IV. Conclusion ............................................ 468

I. INTRODUCTION

Employee complaints of sexual harassment are on the rise. A recent survey of 266 organizations showed that the average number of complaints per organization rose from .69 in 1995 to 1.47 in 1997.1 Of

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* Brian S. Kruse, University of Nebraska-Lincoln, B.S.B.A., 1995; University of Nebraska College of Law, J.D., 2000; Editor-in-Chief, *Nebraska Law Review*, 1999. Thank you to my parents, Steve and Nancy for their guidance. Thank you also to Professor Steven Willborn for his advice on how to tackle writing this Note. All opinions and errors contained herein are my own.

444
those complaints, 51% involved an employee accusing a co-worker and 24% involved an employee accusing a supervisor. Additionally, damage awards and settlement costs can cost an organization thousands of dollars.\(^2\) Along with this backdrop, the United States Supreme Court recently issued a number of opinions regarding sexual harassment.

In two of those opinions, \textit{Faragher v. City of Boca Raton}\(^3\) and \textit{Burlington Industries, Inc. v. Ellerth},\(^4\) the United States Supreme Court created a new standard for hostile environment sexual harassment claims. Through the opinions, authored by Justice Souter and Justice Kennedy, respectively, the Court held that "[a]n employer is subject to vicarious liability\(^5\) to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."\(^6\) The Court also set out an affirmative defense to employer liability and damages when no tangible employment action\(^7\) is taken. Summarizing the defense, the Court stated:

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 to avoid harm otherwise.\(^8\)

This Note will examine the impact the \textit{Faragher} and \textit{Burlington} decisions will have on an employer's liability for hostile environment sexual harassment claims. First, the Note will review the evolution of sexual harassment law, and discuss the standard the Court overturned. The background material will also include a review of the

\footnotesize
2. \textit{See}, \textit{e.g.}, Blackmon v. Pinkerton Sec. & Investigative Servs., 182 F.3d 629 (8th Cir. 1999) (upholding a $100,000 punitive damage award even though the employee was not physically injured); Leslie Kaufman, \textit{Toxic Employees}, \textit{Newsweek}, May 4, 1998, at 46 (noting that in 1998 the average sexual harassment settlement in California was $65,000). The United States Supreme Court took up the issue of employer liability and punitive damages under Title VII during the 1999 term. See \textit{Kolstad v. American Dental Ass'n}, 119 S. Ct. 2118, 2123 (1999) (holding punitive damages are improper, under a vicarious liability standard, for the discriminatory employment decisions of managerial agents where the decisions are contrary to the employer's "good-faith efforts to comply with Title VII").


5. Vicarious liability is "the imposition of liability for the actionable conduct of another, based solely on a relationship between the two persons." \textit{Black's Law Dictionary} 1566 (6th ed. 1990). Here the relationship is that of employer and employee.


7. Examples of tangible employment actions are loss of seniority, wages, or other quantifiable monetary benefits. \textit{See} \textit{EEOC v. Hacienda Hotel}, 881 F.2d 1504, 1511 (9th Cir. 1989).

facts surrounding Faragher's sexual harassment lawsuit against the City of Boca Raton. Second, the Note will examine vicarious liability and the policy reasons for and against it. Next the scope of the affirmative defense, and its effect on innocent employers, will be covered. Finally, this Note will provide a practical application of the Faragher and Burlington decisions for employers.

II. BACKGROUND

A. Evolution of Sexual Harassment Law

Historically, courts have not been open-minded to the idea that sexual harassment violates the anti-discrimination provisions in Title VII of the Civil Rights Act of 1964.9 "Sex" was not even included in the original Civil Rights Act. Its addition was an attempt by certain members of the House of Representatives to block passage of the Civil Rights Act.10 Consistent with this congressional antagonism, most courts ruled that the insertion of "sex" was not intended to cover harassment.11 For example, in Diaz v. Pan American World Airways,12 the Fifth Circuit, in determining the purpose of the "sex" amendment to Title VII concluded, "it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women."13 The concept of sexual harassment did not come into the Diaz Court's analysis. In addition, many courts dismissed sexual harassment lawsuits because, unless an employer had a policy that authorized discrimination, it was unfair to hold it liable for acts for which it received no benefit.

The initial push to recognize that discrimination on the basis of sex included sexual harassment was made by legal scholars and the media.14 Over time, courts became more receptive to this idea, especially when concrete employment benefits were conditioned upon sexual fa-

9. 42 U.S.C. § 2000e-2 (1998) (It is an "unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.").
11. See Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 483 (E.D. Wis. 1979) ("Title VII is directed at acts of employment discrimination and not at individual acts of discrimination."); Miller v. Bank of Am., 418 F. Supp. 233, 235 (N.D. Cal. 1976) (holding that a "reasonably intelligent reading" of Title VII indicates that verbal and physical sexual conduct is not actionable even if done by a supervisor), rev'd, 600 F.2d 211 (9th Cir. 1979).
12. 442 F.2d 385 (5th Cir. 1971).
13. Id. at 386.
vors. This ultimately became known as quid pro quo sexual harassment. Even though Equal Employment Opportunity Commission ("EEOC") guidelines stated that employers are strictly liable for all supervisory sexual harassment, the courts divided sexual harassment into two types: quid pro quo sexual harassment and hostile environment sexual harassment. Hostile environment sexual harassment differs from quid pro quo sexual harassment in that no economic consequence for the employee is involved with the former. Courts continued to disfavor hostile environment claims even after quid pro quo was legitimized.

*Henson v. City of Dundee* was the first major decision by a court of appeals to recognize that sexual harassment claims do not require an adverse employment consequence. The plaintiff in *Henson* claimed that she was subjected to numerous questions about her sex life and that the Chief of Police for Dundee, Florida had subjected her to sexual vulgarities. The Eleventh Circuit Court of Appeals held sexual harassment that created a hostile working environment is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." In its decision, the court, using the language of Title VII, reasoned that demeaning conduct, "inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment." The court also held that to state a proper claim against an employer, a plaintiff must show the employer either knew or should have known of the harassment and failed to promptly correct it.

Four years later, the United States Supreme Court in *Meritor Savings Bank v. Vinson* agreed with the Eleventh Circuit's analysis in *Henson*. The *Meritor* Court concluded, "the language of Title VII is not limited to 'economic' or 'tangible' discrimination." Consequently, the Court ruled that hostile environment claims are a form of discrim-

15. *Quid pro quo* is Latin and means "what for what," or "something for something." Black's Law Dictionary 1248 (6th ed. 1990). An employer is generally held strictly liable for *quid pro quo* sexual harassment, regardless of who does the harassing, because the harasser is acting within the apparent scope of his authority. See, e.g., Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994).


18. 682 F.2d 897 (11th Cir. 1982).

19. See *Henson*, 682 F.2d at 899.

20. *Id.* at 902.

21. *Id.*

22. *See id.* at 905.


ination and are actionable under Title VII.25 However, the Court recognized that a balance had to be struck between simple intra-office horseplay and serious violations of law.26 As stated in Henson, in order for sexual harassment to be actionable, it must be "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'"27

The Meritor Court also took up the issue of an employer's liability for sexual harassment claims brought by its employees. Meritor involved Mechelle Vinson, a female bank employee who brought a hostile environment claim against her supervisor and the bank. One afternoon, Vinson and her supervisor, Sidney Taylor, went to dinner. During dinner he suggested they go to a nearby hotel to engage in sexual relations.28 Vinson complied, fearing the loss of her job if she refused. Taylor, however, never actually indicated that she would lose her job if she refused. Vinson testified that Taylor repeatedly demanded sex, fondled her in front of other employees, and forcibly raped her on several occasions.29 Taylor, of course, denied all accusations.30 The district court dismissed the case because Vinson did not suffer an "economic consequence," and because she voluntarily engaged in the sexual activity.31 The Court of Appeals for the District of Columbia took the opposite position, reversed the district court ruling, and held the bank strictly liable.32

The United States Supreme Court granted certiorari, reversed the court of appeals and rejected strict liability for employers.33 Although it refused to issue a definitive rule of law regarding employer liability for hostile environment claims, it instructed lower courts to look to the common law of agency for guidance.34 Specifically the Court cited §§ 219-237 of the Restatement (Second) of Agency with general ap-

25. See id. at 73.
26. See id. at 67 (quoting Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) ("Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to sufficiently significant degree to violate Title VII.").
27. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (citing Rogers, 454 F.2d at 238).
28. See Meritor, 477 U.S. at 60.
29. See id.
30. See id. at 61.
31. See id.
33. See Meritor, 477 U.S. at 57.
34. See id. at 72 ("Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.").
proval. This was consistent with EEOC guidelines in effect at the
time, which also incorporated agency law with respect to employer lia-

36. Significantly, the Court also held that employers are not al-

ways automatically liable for the sexually harassing conduct of their

supervisors. In its holding, the Court also rejected the bank’s argu-

ment that the mere existence of a grievance procedure, and the em-

ployee’s failure to use it, shielded an employer from liability. The

Court remanded the case to the district court to determine whether or

not Vinson had a legitimate hostile environment claim based on its

newly created rule of law.

The United States Supreme Court expanded on the definition of a

hostile environment claim in Harris v. Forklift Systems, Inc. In

Harris, the Court held that whether a working environment is hostile

or abusive is based on both an objective and subjective standard under

the circumstances. Under this test, an employee’s psychological well

being is relevant but not dispositive. A reasonable employee would

have to believe the conduct is severe or pervasive enough to create a

sexually hostile environment. Moreover, the employee who brings

the lawsuit must also subjectively believe it to be so.

B. Rejected Standard — “Direct” and “Indirect” Liability

Most circuit courts did as they were told, but dismissed many hos-
tile environment lawsuits based on traditional agency law. When em-
ployers were found liable it was as a result of what the Eleventh
Circuit called “direct” and “indirect” liability. Under traditional
agency law, liability results when an employee acts as the agent of the
employer. An employee acts as an agent of the employer when he or
she acts within the scope of his or her employment. As § 219(2) of

35. See id.
36. See also 42 U.S.C. § 2000e(b) (1998) (defining “employer” as “a person engaged in

an industry affecting commerce . . . and any agent of such a person.”) (emphasis

added).
37. See Meritor, 477 U.S. at 72.
38. See id.
39. See id. Moreover, the Court held that the “voluntary” nature of the sexual activ-

ity is irrelevant. “The gravamen of any sexual harassment is that the alleged

sexual advances were ‘unwelcome.’” Id. at 68 (citing 29 C.F.R. § 1604.11(a)

(1985)).
41. See Harris, 510 U.S. at 21.
42. See id. at 23.
43. See id. at 21.
44. See id.
45. See Jansen v. Packaging Corp. of Am., 123 F.3d 490, 526 (7th Cir. 1997) (“[S]cope

of employment refers to those acts which are so closely connected with what the

servant is employed to do, and so fairly and reasonably incidental to it, that they

may be regarded as methods, even though quite improper ones, of carrying out
the Restatement (Second) of Agency states, "a master is not liable for the torts of his servants acting outside the scope of their employment." Exceptions to this rule include instances when (1) the master intended the conduct; (2) the master had notice of it and was negligent or reckless in allowing it to occur; or (3) if the servant was aided in accomplishing the tort by the existence of the agency relationship. In any event, it is generally held that because an employee's sexually harassing conduct does not benefit the employer, when an employee creates a hostile environment, he or she is acting outside the scope of his or her employment.

Under the third exception above, traditional agency law imposes liability upon a master for the conduct of his servants when the servants are aided in accomplishing a tort by the existence of the agency relationship. The circuit courts had rejected this as a basis for imputing liability to an employer in hostile environment sexual harassment claims because the agency relation always aids a sexual harasser. The phrase "aided by the agency relationship" has been read narrowly because the agency relation necessarily aids a harasser if for no other reason than the agency relation brought the harasser and victim together through a common employment. If they had not been brought together, the harassment could not have taken place. Moreover, it has been held that common law did not intend the word "aided" to be used in such a broad sense. The circuits held, therefore, that a supervisor was "aided" only if the harassment was accomplished by an instrumentality of the agency or through conduct associated with the agency status. As a consequence, employers

the objectives of the employment.

47. See id.
49. See Restatement (Second) of Agency § 219(2)(d) (1958).
51. In a concurring opinion in Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), Judge MacKinnon argues that a supervisor is always aided in accomplishing the tort by existence of the agency because the agency provides contact with victim. He held such a reading "argues too much," and the Restatement contemplates a narrower reading involving use of an instrumentality of the agency. See id. at 996.
52. See, e.g., Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (suggesting a telegraph company could be held liable if a telegraph operator sent a libelous message because he used an instrumentality of the principal).
SEXUAL HARASSMENT

were usually held liable for quid pro quo sexual harassment, but rarely held liable in cases of hostile environment discrimination.

A majority of the cases where employers were held liable occurred as a result of the employer’s negligence or recklessness. Liability attached when an employer either knew or should have known about the prohibited conduct, or in other words, when the employer was at fault. Additionally, even if the employer did not have actual knowledge of a hostile environment, knowledge was imputed when an employee complained to higher management or to an employee with sufficient supervisory status. Moreover an employer could be charged with constructive knowledge when the harassment was severe or pervasive enough that the employer should have known of its existence.

The policy reasons for refusing to hold employers liable without first proving they were at fault were logical and clearly articulated. Employers should not be responsible for conduct that they do not sanction and of which they neither have nor should have knowledge. The negligence standard applied whether the harassing employee was a supervisor or coworker because, regardless of who is doing the harassing, the harassment is outside the scope of employment. Moreover, as the Eleventh Circuit stated in Henson, “the capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers upon that individual.” Additionally, an employer does not benefit from a hostile environment in its workplace, and since no instrumentality of the employer is used to accomplish it, no liability attached to the employer. In addition, courts held if an employee commits an act that employees are routinely instructed not to do, they are acting outside the scope of employment.

53. See Bouton, 29 F.3d at 107 (“Courts of appeals that have spoken readily accept the negligence concept of § 219(2)(b).”).
55. See, e.g., Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997) (“A plaintiff can prove that the employer had knowledge of the harassment by showing that she complained to higher management.”).
56. See id. at 647; Faragher v. City of Boca Raton, 76 F.3d 1155, 1167 (11th Cir. 1996), cert. granted, 118 S. Ct. 438 (1997), and rev’d, 118 S. Ct. 2275 (1998).
57. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982). The court went on to distinguish quid pro quo discrimination because this type of discrimination relies on the authority given to the supervisor to “hire, fire, discipline, or promote.” Id.
58. See Ottinger v. Shaw’s Supermarket, Inc., 635 A.2d 948, 950 (Me. 1993) (holding that since employer routinely instructed employees not to eat food in the working
assment would certainly fit this type of conduct in organizations where the employer acts cautiously to prevent such conduct.

C. Facts of Faragher

The City of Boca Raton hired Beth Ann Faragher as a lifeguard in September 1985. She worked for the City part-time and during summers while attending college. Faragher's supervisors included two men, Bill Terry and David Silverman. The district court specifically found that neither of these men was sufficiently situated to constitute higher management of the City.

Faragher alleged, and the district court concluded, that Terry and Silverman's conduct constituted unwelcome harassment based upon sex. The district court found that Terry "exuded an aura of hostility" and had a "propensity to touch female employees." Terry's harassing acts were not confined to Faragher. In one instance, Terry pressed himself against co-plaintiff Nancy Ewanchew and moved his hips, simulating the physical act of sex. Another lifeguard testified that Terry placed his hand on her thigh, and generally called women derogatory names. Terry also made insulting and inappropriate comments to other employees. He once commented to Ewanchew that Faragher was "male-like because she had no breasts." Terry's hostile comments even made their way into interviews. An employee testified that when she interviewed for a lifeguard position with the City, Terry asked her if she was going to have sex with the male employees "like the rest of the female lifeguards" did.

David Silverman also contributed to the hostile environment on the beach during Faragher's employment as a lifeguard. The dis-

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60. See id.

61. See id. An employee is considered "higher management" if as a supervisor, he or she exercises significant control over hiring, firing, or conditions of employment. These employees always subject an employer to liability for unlawful employment practices. See Preston v. Income Producing Management, Inc., 871 F. Supp. 411, 414 (D. Kan. 1994) (citing Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993)).

62. See id. at 1551.

63. See Faragher, 864 F. Supp. at 1561.

64. Id. at 1556.

65. See id.

66. See id. at 1557.

67. Id.

68. Id. at 1557.

69. See id. at 1562.
strict court concluded that Silverman once told Faragher, "If you had [breasts] I would do you in a minute." He also flicked his tongue at Faragher and Ewanchew to mimic cunnilingus. An employee testified that Silverman commented about her nipples and told her he wanted to perform oral sex on her. Another lifeguard testified similarly.

The District Court for the Southern District of Florida held that the Terry and Silverman's conduct towards Faragher and the other female lifeguards constituted hostile environment sexual harassment, and was pervasive enough to affect the terms, conditions, and privileges of Faragher's employment. It also found the City did not have actual knowledge of Terry and Silverman's harassment. However, it still found the City liable because it held that Terry and Silverman were "agents" of the City. The City was therefore held liable by the district court regardless of its lack of notice of the harassing conduct. As an alternative ground for imposing liability, the court held that Faragher had told Robert Gordon, another supervisor, and "agent" of the City, about the conduct, and Gordon failed to inform higher management. The district court also found that although the City had a policy against sexual harassment, it completely failed to disseminate it.

A panel of the Eleventh Circuit Court of Appeals reversed. Using the concepts of direct and indirect liability, the Eleventh Circuit held that the district court erred in its application of direct liability. The Eleventh Circuit noted that the district court held the City directly liable for the hostile environment. However, the Eleventh Circuit held that although an employer is always directly liable for quid pro quo harassment, it is not always directly liable for a hostile environment. The court stated that, in reality, employers are rarely directly liable for a hostile environment. In this case, the City was not directly liable because Terry and Silverman were acting outside the

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70. Id. at 1557.
71. See id.
72. See id. at 1558.
73. See id.
74. See id. at 1562.
75. See id. at 1560.
76. See id. at 1564.
77. See id.
78. See id.
79. See Faragher v. City of Boca Raton, 76 F.3d 1155 (11th Cir. 1996), reh'g granted & opinion vacated, 83 F.3d 1346 (11th Cir. 1996), reh'g en banc, 111 F.3d 1530 (11th Cir. 1997), cert. granted, 118 S. Ct. 438 (1997), and rev'd, 118 S. Ct. 2275 (1998).
80. See Faragher, 76 F.3d at 1164.
81. See id.
82. See id.
The scope of their employment. As such, they were not acting as the City's agents when the harassment took place. The Eleventh Circuit also held the City was not indirectly liable because the City did not know of the harassment. The City was not on constructive notice either because Terry, Silverman, and Gordon were not legally considered "higher management." The Eleventh Circuit also rejected that constructive notice arose because it held that the harassing conduct was not sufficiently pervasive.

The Eleventh Circuit, sitting en banc, vacated the panel decision and reheard the case. It virtually agreed with the panel decision and reversed the district court's ruling, and dismissed Faragher's claim.

The United States Supreme Court granted certiorari to Faragher's claim and a Seventh Circuit hostile environment case, Burlington Industries, Inc. v. Ellerth. In two 7-2 decisions, the Supreme Court did away with direct and indirect liability considerations in regard to supervisory employees. Instead, the Court in Faragher held the City vicariously liable for Terry and Silverman's conduct. Under the new rule set forth in Faragher and Burlington, employers are vicariously liable for actionable discrimination caused by any supervisor regardless of the level of their authority. However, if no tangible employment action is taken, an employer may raise an affirmative defense. An employer must show it took all steps reasonable to prevent and correct sexual discrimination, and that the employee unreasonably failed to take advantage of those opportunities.

III. ANALYSIS

A. Adopted Standard — Vicarious Liability for Supervisory Sexual Harassment

In Faragher and Burlington, the United States Supreme Court refused to premise employer liability solely on whether an employer had

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83. See id.
84. See id. at 1167.
85. See id.
86. See id. at 1167-68.
88. However, the court stated that the titles "direct" and "indirect" liability are incorrectly reversed in most case law on the subject and in reversing them, "[married] the common law agency terms to their proper, traditional common law principles." Id. at 1535 n.4.
89. See id. at 1539.
93. See Faragher, 118 S. Ct. at 2293; Burlington, 118 S. Ct. at 2270.
or should have had knowledge of the sexual harassment. Moreover, unlike a majority of the circuit courts, the United States Supreme Court was willing to expand the common law meaning of "aided by the agency relationship" to cover hostile environment claims. When the harassing employee is an immediate or higher supervisor, the Supreme Court eliminated any requirement that the employer be on actual or constructive notice that the sexual harassment occurred. It also eliminated the requirement that the employee prove that the employer was negligent. Both Faragher and Burlington held that an employer is vicariously liable for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." The Court also included a quid pro quo element in the new rule. An employer is always vicariously liable for supervisory harassment when it is coupled with a tangible adverse employment action. If no tangible adverse employment action is taken, then an affirmative defense is available.

In formulating its decision in Faragher and Burlington, the Court builds on the foundation it laid in Meritor. The Court in both opinions based liability on the common law of agency. However, in Faragher and Burlington, the Court expanded traditional agency principles and the legal meaning of the term "aided by the agency relation." Justice Souter was more specific and advanced a definition of "aided by the agency relation" in his opinion in Faragher. Justice Souter stated that the "aided by the agency relation" may be "the unspoken suggestion of retaliation by misuse of supervisory authority." Conversely, Justice Kennedy in Burlington refused to concretely describe how a supervisor is aided by the agency or employment relationship because he believes this is a "developing feature of agency law."

The circuit courts had rejected vicarious liability because hostile environment sexual harassment is outside the scope of employment. Harassment serves the purpose of the harasser not the purpose of an employer. However, the new rule adopted in Faragher and Burlington allows the Court to accept this conclusion. Under the new

94. See Faragher, 118 S. Ct. at 2289; Burlington, 118 S. Ct. at 2267-68.
95. See Faragher, 118 S. Ct. at 2290; Burlington, 118 S. Ct. at 2268.
97. Faragher, 118 S. Ct. at 2292-93; Burlington, 118 S. Ct. at 2270.
98. However, Justice Kennedy in Burlington noted that for the purposes of establishing employer liability the labels "quid pro quo" and "hostile environment" are not controlling. See Burlington, 118 S. Ct. at 2271.
99. See Faragher, 118 S. Ct. at 2293; Burlington, 118 S. Ct. at 2270.
100. See Faragher, 118 S. Ct. at 2293; Burlington, 118 S. Ct. at 2270.
101. See Faragher, 118 S. Ct. at 2285; Burlington, 118 S. Ct. at 2265.
104. See supra Part II.B.
ruling, an employer is not vicariously liable for a hostile environment claim because the harassment is now deemed to be inside the scope of the employment relationship. Instead, liability results because of the aided by the agency relationship. This exception to non-liability is provided in § 219(2)(d) of the Restatement (Second) of Agency and is separate from the "outside the scope of employment" rule in § 219(1).

In Faragher, the United States Supreme Court agreed with the district court that the level of hostility to which Faragher was subjected reached an actionable level. Moreover, since Silverman, Terry, and the City did not take a tangible employment action against Faragher, the affirmative defense was available. However, the Court agreed with the district court that the City made no attempt to disseminate its sexual harassment policy and that it did not keep track of its supervisor's conduct. The Court also noted that the City did not create an avenue through which Faragher could complain without having to go through either Silverman or Terry. These actions and procedures were held highly inappropriate and hopelessly ineffective. As such, the City could not meet the first element of the affirmative defense, and the decision of the district court was reinstated.

B. Vicarious Liability — More Punitive Than Preventive

Title VII is primarily a preventive measure, not a punitive one. However, a vicarious liability standard will work an extremely unfair and punitive hardship on employers who proactively and cautiously try to prevent harassment. Under a vicarious liability standard, it will be easier for employees to win lawsuits regardless of an employer's fault. A faultless employer who in good faith attempts to

105. See Faragher, 118 S. Ct. at 2288 (holding that there is no indication that Congress wished courts to consider harassment as being within scope of employment); Burlington, 118 S. Ct. at 2267 ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.").

106. See Faragher, 118 S. Ct. at 2291; Burlington, 118 S. Ct. at 2269.

107. See Faragher, 118 S. Ct. at 2293.

108. See id.

109. See id.

110. See id.

111. See id.

112. See id.

113. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998); see also Jansen v. Packaging Corp. of Am., 123 F.3d 490, 510 (7th Cir. 1997) (Posner, C.J., concurring) (stating that damages in sexual harassment cases are not primarily for the purpose of compensating the victim, but to prevent future incidents).

prevent sexual harassment in its workplace is still subject to liability. The EEOC recently made this abundantly clear:

In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered. Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care and that the employee unreasonably failed to avoid the harm. While a notice-based negligence standard would absolve the employer of liability, the standard set forth in [Burlington] and Faragher does not. As the Court explained, vicarious liability sets a "more stringent standard" for the employer than the "minimum standard" of negligence theory.

The real question involved in these lawsuits is not whether sexual harassment should be prevented or stopped. It should. Rather, the question is whether a proactive, cautious, and innocent employer should be held liable when it did nothing wrong. One incident of supervisory sexual harassment, if severe enough could subject the employer to liability, despite an employer taking aggressive, proactive, preventative steps.

Part of the Supreme Court's reasoning is that employers have more contact with supervisors than with regular employees. However, the Court failed to note that employers do not necessarily have control over the inherently personal sexual actions and attitudes of any employee, supervisory or otherwise. Vicarious liability is an especially hard pill for employers to swallow because the Court in both Faragher and Burlington conceded that sexual harassment without a tangible employment action is outside the scope of a supervisor's employment. Sexual harassment is done for the satisfaction of the harasser, not for the benefit of the employer. One might well ask if it is

115. Vicarious liability is liability for torts of another even if the one held responsible did nothing wrong. See BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).
117. The sexually harassing conduct must be severe or pervasive. The frequency of the discriminatory conduct is just one factor to determine whether harassment occurred. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (8th Cir. 1998).
118. See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2290 (1998) ("[I]t is better to reject reliance on misuse of supervisory authority . . . as irrelevant to scope-of-employment analysis.").
justifiable to hold an innocent employer liable for conduct that is unrelated to the supervisor’s job and inconsistent with the employer’s policy.

Nevertheless, the Supreme Court in *Faragher and Burlington* created a two-tiered system of liability based on the status of the harasser. The Court’s premise is that supervisory harassment is somehow different than coworker or customer sexual harassment because of the inherent power supervisors have. The *Faragher* majority argued that when a supervisor is involved, a harassed employee might be too intimidated to report the harassing conduct, fearing retaliation. Intimidation arises because supervisors generally have the power to hire, fire, promote, or increase the pay of an employee. Conversely, coworkers and customers supposedly have a lesser ability to exert power. Applying this rationale, a stricter standard for supervisors seems logical, as employers will naturally have more contact with and more control over these individuals.

However, this underlying premise is misguided. An employee’s ability to harass coworker is not increased by his or her job status. Anyone can engage in improper sexual conduct or make improper statements and advances whether or not they are a supervisor, coworker or customer. Furthermore, sexual harassment is no less demeaning because it comes from someone other than a supervisor. The harassed employee will no doubt have the same reaction to harassment regardless of its source. Moreover, customers and coworkers can have a great deal of power, or even more power, than a supervisor has. For example, a single customer may account for a large portion of an employer’s revenues. In certain industries qualified employees

120. *See, e.g., Henderson v. Whirlpool Corp.*, 17 F. Supp. 2d 1238, 1244 n.4 (N.D. Okla. 1998). The *Henderson* Court stated:

The Court finds that the standard for employer liability enunciated in *Faragher and Burlington Indus.* is inapplicable to the instant case since the alleged sexual harassment is by a coworker. . . . Accordingly, the Court will continue to apply the standards previously discussed when the sexual harassment is perpetrated by a coworker, rather than by a supervisor.

*Id.*

121. *See Faragher*, 118 S. Ct. at 2291. The EEOC has also specifically categorized sexual harassment into three classes. *See* 29 C.F.R. § 1604 (1998). Section 1604.11(c) covers supervisors, § 1604.11(d) covers fellow employees, and §1604.11(e) covers non-employees. *See* 29 C.F.R. § 1604.11 (1998). Generally, the negligence standard applies to the latter two with a concern over whether the employer can control the non-employee as well.

122. *See Faragher*, 118 S. Ct. at 2291; *OMILIA & KAMP*, supra note 16, § 23:06 (stating that a supervisor’s capacity to create a hostile work environment is enhanced by the degree of authority conferred on him by the employer and he may rely upon apparent authority to force an employee to endure a harassing atmosphere for fear of retaliation).

123. *See Faragher*, 118 S. Ct. at 2291.
may be difficult to find, especially when the labor market is tight. In
these instances, an employer is not vicariously liable even though the
customer or coworker has a great deal of power over the employer and
its employees. Yet, in these instances, the employer must act negli-
gently to be liable.

The logical question then is, “who is a supervisor”? Lower courts
have found some room to wiggle in defining “supervisor.” In Parkins v. Civil Constructors of Illinois, Inc., the Seventh Circuit distin-
guished between employees who are supervisors merely as a
“function of nomenclature” from those who actually have “supervisory
powers.” A real supervisor has certain essential attributes includ-
ing the power to hire, fire, demote, promote, transfer, or discipline an
employee. Without some of these attributes, an employee is not a
supervisor for Faragher purposes. In Parkins, two male dispatch-
ers sexually harassed a female construction worker. The court held
that although both men occasionally worked as foremen, they were not “supervisors” for Faragher purposes. The court noted that the
men had to answer to a superintendent who held the actual decision
making power. The foremen’s authority was so limited that one of the
harassers declared himself a “glorified time keeper.” Although the
foremen could recommend discharge of employees, the court noted
that this was not dispositive of whether they were “supervisors” since
any employee could do the same. The court stated that since the
foreman had such little authority that complaints to them would be

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124. The EEOC’s position is that “supervisors” include employees with the authority
to make or recommend tangible employment decisions that affect another em-
ployee or the authority to direct another employee’s day to day work activities.
Additionally, the EEOC states that a worker may have no control over the
harassed employee yet still be held to be a supervisor. Such an “unusual” case
may arise where the employee reasonably believes that the harasser is a supervi-
sor, such as where the chain of command in an organization is unclear. See
EEOC Guidance on Vicarious Employer Liability For Unlawful Harassment By
Supervisors, 118 Daily Lab. Rep. (BNA) No. 915.002, at E-22 (June 21, 1999) (em-
phasis added).

125. 163 F.3d 1027 (7th Cir. 1998).

126. Parkins, 163 F.3d at 1033 (citing Saxton v. AT&T, 10 F.3d 526, 536 n.19 (7th Cir.
1993)).

127. See id. at 1033.

128. See id. at 1034. But see Williams v. City of Houston, 148 F.3d 462, 466 (5th Cir.
1998) (holding that where an employer designates a person to whom an employee
may complain, the designee will be treated as a supervisor, and Faragher and
Burlington rules will apply).

129. See id. at 1031.

130. See id. at 1034.

131. Id.

132. See id. at 1035.
futile, they were "clearly not supervisors with immediate or successively higher authority." 133

Another reason why the Court imposed vicarious liability was to forward a social policy agenda. 134 However, forwarding a social policy agenda is not a function of the courts. Moreover, in actively furthering its agenda, the Court stripped employers of a substantial, yet fair, defense to supervisory sexual harassment. There was near unanimity among the circuit courts that notice and negligence were essential elements of a prima facie claim for all hostile environment sexual harassment claims. 135 An employer could successfully defend the first incidence of sexual harassment if it was unaware the conduct was occurring. If the wrongful conduct had been brought to its attention, an employer would have had the opportunity to take prompt corrective action. In effect, employers were given "one free incident" to become aware of sexual harassment and an opportunity to rid the company of sexual misconduct in the workplace prior to the extreme remedy of judicial interference. Upon notification, an employer would obviously be aware that one of its employees possibly engaged in wrongful conduct. The employer would therefore have to take prompt and effective action or else face liability for future incidents. Failure to do so would be negligent or reckless. Punitive judicial intervention should only occur when an employer is negligent or when it is necessary to force compliance with the provisions of Title VII if the employer refuses to comply on his own.

The "one free incident" allowance is inherently fair. It does not encourage employers to ignore violations and sweep them under the carpet. In fact, such a rule has the opposite effect. Since a violation puts an employer on notice, it has a vested interest in ending the wrongful conduct by disciplining or terminating the aggressor. Failing to do so would be negligent or even reckless. 136 It would also be in an em-

133. Id.
134. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." American Soc'y of Mechanical Eng'rs, Inc., v. Hydrolevel Corp., 456 U.S. 556, 568 (1982) (quoting Gleason v. Seaboard Airline Ry. Co., 278 U.S. 349, 356 (1929). One should ask if it is the job of the courts to do this. Social policy questions are largely political questions and should be handled by the legislative branch.
136. Considering that the most recent Supreme Court decision, Kolstad v. American Dental Ass'n, 119 S. Ct. 2118, 2123 (1999), holds that an employer will not have to pay punitive damages for the decisions of its managerial agents where those
ployer’s interest to make any necessary changes in their sexual harassment policy after an incident occurred. Moreover, the negligence standard was flexible enough to recognize that situations often arose where the harassing behavior was “frequent enough and both common and continuous.” In those cases, an employer was said to have constructive notice of the acts. It could not claim lack of notice because the employer reasonably should have known of the violations because of the pervasiveness. This promoted employer attention to discovering and ending workplace harassment.

Under the old standard, employees had an incentive to report sexual harassment even though they may not be able to successfully sue an employer for damages after the first incidence. First, the employee has an interest in reporting the harassment because he or she wants it to end. This fact coupled with a proactive employer’s attempts to disseminate a sexual harassment policy and reporting procedure encouraged reporting. If after an employee reported sexual harassment the employer took no action, the employer would be negligent and liable for the conduct.

Although the new standard gives more power to employees, it does a disservice to an innocent employer by taking away its opportunity to remedy a single wrongful situation without judicial interference. Assume for example Equal Employer, Inc., a small company with no previous violations, and covered by Title VII, bends over backwards to comply with EEOC guidelines. It has a sexual harassment policy, disseminates it, and actively applies it. Further assume that prior to hiring a supervisor, Equal Employer, Inc. scrutinizes the applicants with a fine toothed comb. Under Faragher and Burlington, Equal Employer, Inc. can still be liable for supervisory sexual harassment, assuming the victimized employee otherwise meets his burden of proof. Equal Employer is liable though it is without fault. It has taken all reasonable and available precautions. Such is the sting of vicarious liability. As seen in the next section of this Note, the affirmative defense may be of no benefit to the employer either. Vicarious liability in this instance also conflicts with the primary purpose of Title VII to influence conduct to avoid harm, not to punish bad conduct. As decisions are contrary to the employer’s “good-faith efforts to comply with Title VII,” the employer has an even greater incentive to not turn a blind eye to harassment.

137. See Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997); Faragher v. City of Boca Raton, 76 F.3d 1155, 1167 (11th Cir. 1996), reh'g granted & opinion vacated, 83 F.3d 1346 (11th Cir. 1996), reh'g en banc, 111 F.3d 1530 (11th Cir. 1997), cert. granted, 118 S. Ct. 438 (1997), and rev'd, 118 S. Ct. 2275 (1998).

138. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (holding the primary purpose of Title VII was to influence primary conduct to avoid harm, not to compensate victim); Jansen v. Packaging Corp. of Am., 123 F.3d 490, 510 (7th Cir. 1997) (Posner, C.J., concurring) (stating that damages in sexual harassment
Justice Kennedy stated in *Burlington*, “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.” Here, however, the judicial remedy is purely punitive.

In *Jansen v. Packaging Corp.*, Seventh Circuit Chief Justice Posner advanced a law and economics argument in favor of holding employers liable only when they are negligent. In his concurring opinion he discussed how sexual harassment differs from other torts because although a harassed employee may feel its effects, it is largely “invisible” to the employer. That is, an employer is likely to recognize when an employee has been physically injured, but a sexually harassing hostile environment does not leave physical evidence. Therefore, an employer cannot feasibly control its employees and end the harassment. The employer is not aware harassment is occurring. As such, it is impossible to deter sexual harassment without imposing an “unreasonable burden on employers.” A negligence standard achieves deterrence without increasing an employer’s preventive costs to a prohibitive level and without subjecting employees to continuous and demeaning surveillance procedures.

Chief Justice Posner also dispelled the argument that supervisors are aided by the agency relation because of the “unspoken suggestion of retaliation by misuse of supervisory authority.” Since everyone knows that sexual harassment is illegal, a company with a stern, disseminated and actively enforced policy can virtually eliminate the apparent authority of a harassing supervisor. In such a situation, no reasonable employee should fear retaliation. If a company takes these actions, it has acted as reasonably as it possibly can under the circumstances and should not face liability.

Judge Learned Hand first developed a mathematical metaphor to quantify negligence. Judge Hand stated that if $B$ represents the burden or cost of a precaution, $P$ the probability of loss, and $L$ the reasonably foreseeable liability, negligence (and therefore liability) oc-

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140. 123 F.3d 490, 509 (7th Cir. 1997).
141. See *Jansen*, 123 F.3d at 509 (Posner, C.J., concurring).
142. See id.
143. See id.
144. *Id.* at 510.
145. *See id.* at 511.
147. See *id.* at 512.
148. See *id.*
149. See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
SEXUAL HARASSMENT

When \( B < P^*L \), there is no incentive to take the "untaken precaution." \(^{150}\) Likewise, under a strict liability standard, when \( B > P^*L \) there is still no incentive to take the "untaken precaution." \(^{151}\) If an employer takes this precaution, it is liable. If it does not, it is liable. This creates serious doubts about the preventive ability of vicarious liability imposed by the *Faragher* and *Burlington* decisions because strict liability does not enhance deterrence.

**C. Liability Not Automatic — Employer Defenses**

To "accommodate" the preventive aim of Title VII, the Court provided employers with an affirmative defense. In both *Faragher* and *Burlington*, the United States Supreme Court claimed to stop short of declaring strict or automatic liability for employers. The Court held liability is not automatic because an employer has an affirmative defense to sexual harassment when no tangible employment action is taken. \(^{152}\) However, the availability of the affirmative defense does not achieve this. An affirmative defense does not eliminate the strict nature of liability. Strict liability is imposed in product's liability lawsuits or for unreasonably dangerous activities and there are affirmative defenses for these torts. Liability under them is no less strict.

In any event, the defense is available when an employer can prove by a preponderance of the evidence that it acted with reasonable care, but the employee did not. \(^{153}\) The defense has two necessary elements. \(^{154}\) The employer must prove:

- (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. \(^{155}\)

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150. See id. at 173.
151. *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring). Posner further noted that [e]mployers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability — by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that the employer would not be negligent for failing to incur them, that strict liability bites. *Id.*
152. Strict liability is liability without fault. Similarly vicarious liability is the imposition of liability on one person for the conduct of another, based solely on their relationship. They are similar because an employer can be liable for their supervisor’s conduct even if they took all reasonable precautions and were without fault. 
154. See *Faragher*, 118 S. Ct. at 2293; *Burlington*, 118 S. Ct. at 2270.
155. See *Faragher*, 118 S. Ct. at 2293; *Burlington*, 118 S. Ct. at 2270.
156. *Id.* (emphasis added).
In terms of an effect on employers with no history of sexual harassment, the affirmative defense offers protection, but less protection than a negligence, "one free incident," defense. Its preventative nature is also questionable. Assuming the employer meets the first element by acting reasonably, an employer still may not meet the second element because it is entirely dependent on the conduct of the harassed employee. For example, assume Victor Victim, an employee of Equal Employer, Inc., reports, through the proper channels, the sexually hostile environment created by his immediate supervisors, Henry Hostile and Ellen Environment. Equal Employer, Inc., having no prior notice, takes corrective action. While Equal Employer, Inc. took reasonable care to prevent and correct the behavior, the second prong of the test is not met because Victor Victim took advantage of Equal Employer's available opportunities. Equal Employer, Inc. can be held liable in a subsequent lawsuit. Because half of the affirmative defense focuses on the employee's conduct, Title VII's preventive nature, which is supposed to be expanded because of the affirmative defense, is frustrated. An employer can be proactive and preventative and still be subject to liability.

However, if the courts construe the language of the defense broadly, especially the second element, the affirmative defense could still provide some protection for employers. Some courts have done this. In Jones v. USA Petroleum Corp., the court announced that a "generalized fear of repercussions can never constitute reasonable grounds for an employee's failure to complain to his or her employer." Jones, a gas station attendant claimed her supervisor intentionally rubbed up against her, directed sexual statements at her, and on one occasion forcibly kissed her. Her employer, USA Petroleum, had a sexual harassment policy and reporting procedure, and

157. Sexual harassment is not limited to a man harassing a woman. It can be a woman harassing a man or same sex harassment. See Oncale v. Sundown Offshore Servs., Inc., 118 S. Ct. 998 (1998) (holding same-sex discrimination is actionable under Title VII). However, the harassment must be because of sex. The key issue is whether members of one sex are exposed to disadvantageous terms and conditions of employment that members of another sex are not exposed. See id. at 1002. For this reason the court in Simonton v. Runyon, 50 F. Supp. 2d 159 (E.D.N.Y. 1999), held that harassment based on sexual orientation is not actionable under Title VII because in these instances, the individual is not harassed because of his or her sex (male or female), but because of his or her sexual orientation (heterosexual, bisexual, or homosexual).

158. The author wishes to thank the producers of the PBS show The Letter People for teaching him that names can start with the same sounds and be descriptive at the same time. Note that both Harry and Hostile start with the same sound that starts Horrible Hair.


161. See id. at 1382.
SEXUAL HARASSMENT

The district court ruled Jones had made a prima facie case of sexual harassment. However, her lawsuit was dismissed because she failed to report the harassment fearing repercussions. The court, citing Burlington, noted "failure to use the complaint procedure administered by an employer 'will normally suffice to satisfy the employer's burden under the second element.'"

In an even broader interpretation, the district court in Marsicano v. American Society of Safety Engineers, held that merely reporting sexual harassment may not constitute taking advantage of preventive or corrective opportunities provided by the employer. From the beginning of her employment on January 21, Marsicano suffered what she claimed were incidents of sexual harassment from her supervisor, Mr. Hatter. On January 30, Hatter took Marsicano to lunch at a restaurant twenty miles from work to "be alone with her." During lunch Hatter asked Marsicano about her personal life and commented that a painting depicting a man on top of a woman with her shirt up was an "interesting position." As they were leaving, Hatter brought Marsicano's hair out of her coat and caressed her hair and face. On January 31, Marsicano followed the employer's procedure and formally filed a sexual harassment complaint. However, the court granted summary judgment for the employer because on January 30, immediately before the lunch, a different supervisor asked Marsicano how she was settling into her new job. In response, Marsicano failed to mention the incidents that occurred during the week. The court ruled this was a corrective opportunity of which Marsicano unreasonably failed to take advantage. More importantly, however, this was a preventative opportunity of which she failed to take advantage since most of the harassing conduct occurred subsequently at the lunch.

In Fall v. Indiana University Board of Trustees, the district court held that reasonableness was for the fact finder to determine, and that waiting three months to report harassing conduct was neither reasonable or unreasonable as a matter of law. Therefore,
a jury could find it unreasonable. In *Fall*, the plaintiff's supervisor grabbed her "like a gorilla" and started kissing her. Moreover, he forced his tongue into her mouth, and groped her breasts.\textsuperscript{174} However, the plaintiff waited three months to complain through the proper channels.\textsuperscript{175} The case was pending as the *Faragher* and *Burlington* decisions were released, and the defendant employer argued it qualified for, and met, the affirmative defense. The court found that the employer did not meet the first prong of the defense because it had notice of the conduct.\textsuperscript{176} However, the court discussed the second prong of the affirmative defense anyway. In doing so, it reaffirmed that in all cases where reasonableness is at issue, it is up to the fact finder to apply this standard.\textsuperscript{177} The *Fall* court refused to grant summary judgment for the employer, and remanded the case to the district court.\textsuperscript{178}

As these cases indicate, the affirmative defense does put some responsibility on an employee to prevent or correct workplace harassment. As seen in *Marsicano*, employees are in a unique position to prevent harassment if they report it. This portion of the *Faragher* and *Burlington* decisions is consistent with the primary objective of Title VII to prevent harm.\textsuperscript{179} The court in *Fierro v. Saks Fifth Avenue*\textsuperscript{180} commended the *Faragher* and *Burlington* decisions for this reason.\textsuperscript{181} In its decision, the *Fierro* court recognized that employers' policies to combat sexual harassment are useless if an employee fails to make use of them. "At some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment."\textsuperscript{182} In this way, employers are assisted in their preventative measures.

However, viewed another way, putting the responsibility to take advantage of opportunities on the employee could also frustrate the preventative purpose of Title VII. If the "aid" in the "aided in agency relation" is "the unspoken suggestion of retaliation by misuse of super-

\textsuperscript{174} See *Fall*, 12 F. Supp. 2d at 873.
\textsuperscript{175} See id. at 884.
\textsuperscript{176} See id. at 883-84.
\textsuperscript{177} See id. at 884.
\textsuperscript{178} See id.
\textsuperscript{179} See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (holding the primary purpose of Title VII was to influence primary conduct to avoid harm, not to compensate victim).
\textsuperscript{180} 13 F. Supp. 2d 481 (S.D.N.Y. 1998).
\textsuperscript{181} See *Fierro*, 13 F. Supp. 2d at 492 ("In the Court's view, the *Faragher* and *Burlington* opinions synthesize these principles into a long overdue rule.").
\textsuperscript{182} Id.
visory authority,” an employee may be too afraid to take advantage of opportunities even if the harassing supervisor is taken out of the reporting process. As indicated earlier, merely waiting too long or not taking advantage of an opportunity outside of the formal procedural requirements may be unreasonable and trigger the affirmative defense.

D. Practical Application for Employers

The practical requirements of the new sexual harassment law are clear. Employers should implement a proactive, preventative strategy to combat sexual harassment. To prevent sexual harassment, the EEOC recommends employers take all possible steps to stigmatize it. At a minimum an employer should have a strong policy against sexual harassment. Although failure to have a policy is not dispositive of meeting the employer’s burden to exercise reasonable care, it still has weight. Faragher clearly indicates that the anti-harassment policy should be disseminated to all employees. A policy that is not effectively communicated is useless.

When possible, an employer should condemn harassment in a public forum and conduct anti-harassment workshops or training for its supervisors. Employers clearly have an interest in supervisory training. Once a supervisor takes tangible employment action against an employee who has been subjected to a hostile work environment, the affirmative defense will not be available.

184. “An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII and developing methods to sensitize all concerned.” 29 C.F.R. § 1604.11(f) (1998).
185. For an example of an employer’s policy that met judicial scrutiny, see Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 1203 (D. Colo. 1998).
186. See Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (citing Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998)).
187. See Faragher, 118 S. Ct. at 2293 (holding City did not meet first prong of the affirmative defense because their sexual harassment policy was not disseminated).
188. See, e.g., Fiscus v. Triumph Group Operations, Inc., 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998) (holding that even if plaintiffs presented actionable hostile work environment claims, the employer satisfied the affirmative defense provided by Burlington since it had a written anti-harassment policy in place, it condemned harassing behavior in public forum, and it conducted anti-harassment training for supervisors).
The employer should also have policies against discrimination based on the other protected classes in Title VII. Lower courts are already applying Faragher and Burlington to these classes. For example, in Edwards v. Connecticut Department of Transportation, the district court applied the new rule to hostile environment claims based on race and gender.

Furthermore, any employer's policy should contain a clear complaint procedure. In case the harasser is the supervisor, the complaint procedure should allow an employee to report harassment without having to go through their supervisor or any other harassing employee in a position of power, from the company president on down.

If and when an incident of sexual harassment occurs, the employer should promptly and completely investigate the complaint while maintaining employee confidentiality. Documentation is also critical. The affirmative defense requires an employer to prove that they took reasonable steps to prevent and correct the conduct and that the employee unreasonably failed to take advantage of those steps. An employer that effectively and accurately documents complaints, investigations, and disciplinary actions will have a better chance to meet its burden of proof.

IV. CONCLUSION

Sexual harassment as a tort and body of law has only recently been given the judicial notice and recognition. The common law has evolved slowly to ensure proper judicial action is taken. However, the Faragher and Burlington decisions have ignored this evolution and rapidly made a dramatic change in sexual discrimination law. The United States Supreme Court has taken a giant leap without regard to the effect it will have on the employers involved. While all of the cases to which this Note refers involve extremely bad conduct by supervisors, the real issue is whether the employer should be held responsible when they are without fault.

Many of the regulations imposed on business throughout this century have been necessary and beneficial. Child labor laws, safe working conditions, and other regulatory reforms have benefited society as a whole. The standards imposed on employers in these instances were


192. By now we all are well aware of the type of sexual environment a president can create. See Clinton v. Jones, 520 U.S. 681 (1997).
all achievable because they did not involve the employer controlling the conduct of other individuals. However, the current interpretation of Title VII in *Faragher* and *Burlington* will constrict the ability of businesses to operate while providing only a slight benefit to employees.

In imposing vicarious liability on employers for their supervisor’s conduct, the Court is encouraging a costly monitoring system that is not feasible for many employers to implement. Moreover, the preventive purpose of Title VII has slowly evolved into a penal purpose. It will be interesting to see how courts apply its rationale to coworkers and customers. A nonsupervisory employee can be well liked and trusted by management. If this employee, call him employee A sexually harasses employee B, employee B may well feel that reporting A will lead to retaliation. The same could be said of a large, powerful and important customer. Many customers exert a great deal of influence over employers. The Supreme Court in *Faragher* and *Burlington* has taken a step that could lead to a large, complex, multi-tiered system of liability when a simple negligence standard, applicable to all employees and customers, was appropriate.

*Brian S. Kruse 2000*