EMPLOYER LIABILITY FOR SEXUAL HARASSMENT IN
THE WAKE OF FARAGHER AND ELLERTH.

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INTRODUCTION

Sexual harassment in the workplace has emerged in the past two
decades as one of the most complex and emotional issues facing employ-
ers, employees, and human resource professionals today. In 1980, the
Equal Employment Opportunity Commission (EEOC) declared sexual
harassment a violation of Title VII of the Civil Rights Act of 1964. Since
then, the courts have struggled to determine what constitutes sexual har-
assment and the circumstances under which employers may incur lia-
ability for the sexual harassment of employees by coworkers and
supervisors.

No one seriously criticizes the strides that courts have made in pro-
tecting employees from what has been described as quid pro quo sexual
harassment, or harassment when a tangible job benefit is at stake, such as
a promotion or continued employment.¹ In such a case, courts impose
liability on employers for the conduct of supervisors, consistent with the
EEOC Guidelines.² When courts tackle the second recognizable cate-
gory of sexual harassment cases, or hostile work environment claims,
they have been less clear. A hostile work environment occurs when an
employee is not threatened with loss of a tangible job benefit but still is
subjected to a hostile or offensive working environment.³ Scholars have
criticized courts in hostile work environment cases for not only refusing
to set out cognizable guidelines under which employers can prevent lia-
bility but also for sometimes going too far and enforcing liability when
the alleged harm is not so easy to see.⁴ The Meritor court determined the
hostile work place harassment to be a form of clear sexual discrimination
under Title VII.⁵ Lower courts have grappled with the issue ever since,
with varying degrees of clarity.

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³ See Estrich, supra note 1, at 824.
⁴ See, e.g., Katherine Philippakis, Comment, When Employers Should be Liable for Su-
ervisory Personnel: Applying Agency Principles to Hostile Environment Sexual Harassment
⁵ See Meritor, 477 U.S. at 65.
After twelve years of confusion, the Supreme Court has finally addressed the issue of hostile work environment head on, particularly in the case of supervisor to subordinate employee harassment. In parallel decisions in June of 1998, the Supreme Court clarified an employer's obligation to rid the workplace of sexual harassment by finding employers vicariously liable for harassment that does not result in a tangible job detriment. Such liability, however, is subject to an affirmative defense that the employer had promulgated an effective sexual harassment policy and complaint system and that the allegedly harassed employee failed to take advantage of such procedures in place. The Court also clarified its position on quid pro quo harassment, asserting that when a supervisor's sexual harassment leads to a tangible job detriment, the defined affirmative defenses are not available and the employer will be absolutely liable for the harassment.

Employers' liability for sexual harassment has had and will continue to have a positive effect in American workplaces. Imposing liability for sexual harassment under the law has a deterrent effect that motivates the employer to prevent and resolve the problem, as well as provide relief for the victims. The process works because employers are in the best position to carry the burden - to stop harassment before it starts, by educating employees, by providing avenues of redress, and by holding harassing employees accountable for their actions.

Keeping that burden in mind, however, the law has arguably gone too far. By holding employers strictly liable for sexual harassment in the workplace – whether or not the victim has actually been injured in some measurable way – the Supreme Court has put employers in a tough position. Under the Supreme Court's new rulings, employers are liable for the sexual harassment by their supervising employees if the company does not have a sexual harassment policy that provides a process for reporting and dealing with offensive behavior. Further, the opinions seem to suggest that even if the company does have such a sexual harassment policy but the harassed employee reasonably follows through with his or her responsibilities under that policy by filing a grievance with a company representative, for example, the employer is still liable. Even after doing their best, employers are left with no line of defense, but instead bear the costs of facilitating the sexual harassment redress and prevention system that the courts have forced upon them.

7 See Faragher, 524 U.S. at 807; Burlington, 524 U.S. at 766.
8 See Faragher, 524 U.S. at 807; Burlington, 524 U.S. at 766.
9 See Faragher, 524 U.S. at 807; Burlington, 524 U.S. at 766.
10 See infra notes 82-84 and accompanying text.
Based on an expansive interpretation of the rulings, nothing short of twenty-four hour surveillance of employees, or hope that an employee will fail to do his or her job in reporting the offensive behavior, will prevent employer liability. In such a situation, the costs of prevention are too high – employers must bear the enormous costs arising out of an impossible system in order to prevent a small number of sexual harassment cases. At some point, the costs start to outweigh the benefits and the law is too burdensome. Further, under such a system employers are pitted against employees. When a responsible employer’s only hope of escaping liability for the acts of its supervising employees is the remote chance that the harassed employee will slip and not follow the company’s grievance procedure, the law has failed. A common assumption in the workplace is that most employers share employees concerns in preventing sexual harassment, but when they cannot trust each other, that concern becomes subordinate to one of self interest in preventing liability. This Note will examine in detail the many costs to employers and determine whether they outweigh the benefit society receives from current sexual harassment law.

Part I of this Note sketches out in detail the history of sexual harassment law in the United States, from its origin in Title VII of the Civil Rights Act of 1964, to the Equal Employment Opportunity Commission’s Guidelines in 1980, to the U.S. Supreme Court’s Meritor decision in 1986. Part II details the new standard set forth in the 1998 Faragher and Ellerth decisions by the Supreme Court. Part III discusses the costs and benefits of the new standards using both an economic and societal analysis in an attempt to evaluate the wisdom of the Supreme Court’s recent decisions. Concluding that the judicial standards are generally unreasonably burdensome, Part IV discusses these decisions’ implications for employers, sketching out the risks and solutions to counter those risks.

I. THE HISTORY OF AMERICAN SEXUAL HARASSMENT LAW

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prevents discrimination in employment on the basis of race, religion, national origin, or sex.\textsuperscript{11} Ironically enough, despite the far-reaching implications the category “sex” has had on the law, the inclusion of the protected category of “sex” was

\textsuperscript{11} See 42 U.S.C. 2000e-2(a) (1994) (“It shall be an unlawful employment practice for an employer...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.”).
an accident. Members of Congress opposing the bill added the language as an amendment one day before the House passed the Civil Rights Act in 1964.\textsuperscript{12} The members thought that the inclusion of the category would emphasize the bill’s absurdity and effectively kill it by making it too extreme.\textsuperscript{13} The tactic obviously failed, but it explains why there is little legislative history to guide the courts in interpreting the meaning of sex discrimination.\textsuperscript{14} However, as sexual harassment became more visible through the efforts of modern feminist scholars and popular magazines in the 1970s and 1980s, advocates began to view Title VII as a possible avenue for sexual harassment litigation.\textsuperscript{15}

Title VII is a powerful tool for traditionally disadvantaged individuals. First, it allows individuals the opportunity to take up a cause of action in federal court and consequently avoid strict state law and possible prejudice from state court juries.\textsuperscript{16} Second, its procedural rules are traditionally structured to work in favor of the plaintiff by lessening the plaintiff’s burden of establishing the prima facie case.\textsuperscript{17} Instead of meeting the difficult requirement of invidious intent, plaintiffs only need to present quantitative data or testimony about particular events or the discriminatory character of questionable policies.\textsuperscript{18}

Prior to the 1980s, sexual harassment was not available as a cause of action under Title VII. Women attempted to recover damages for mental distress and humiliation occasioned by proposals of illicit intercourse but recovery was usually denied because courts reasoned there was no harm in just asking for sex.\textsuperscript{19} Courts would dismiss cases because they considered sexual advances made by one employee to another, and even by a supervisor to a subordinate employee, merely personal conduct and not employment related.\textsuperscript{20}

This rationale continued in more recent judicial reasoning. Until 1980, the federal judiciary had few cases in which the interaction of Title VII and sexual harassment was the central issue of the case. While the judicial system first interpreted Title VII as forbidding sexual harassment

\textsuperscript{12} See 110 Cong. Rec. 2577-84 (1964).
\textsuperscript{13} See id. (Members Smith, Tuten, Andrews, Green, and Rivers commenting on the introduction of gender into the statute).
\textsuperscript{14} See Estrich, supra note 1, at 824.
\textsuperscript{15} See id.
\textsuperscript{16} See id.
\textsuperscript{17} See id.
\textsuperscript{18} See id.
\textsuperscript{19} See id.
\textsuperscript{20} See, e.g., Reed v. Muley, 115 Ky. 816, 74 S.W. 1079 (1903) (holding that “as there was no assault upon or trespass against the person of the plaintiff, and no physical injury produced, it seems to us that no recovery can be had”); cf., Rolland v. Batchelder, 84 Va. 665, 5 S.E. 695 (1888). See generally Susan G. Mezey, In Pursuit of Equality: Women, Public Policy, and the Federal Courts (1992).
in a case in 1976, the vast majority of courts refused to hold sexual harassment actionable as a form of gender-based discrimination in many other cases until the mid-1980s. Those courts that did allow a cause of action under Title VII differed on the nature and the circumstances under which they held employers liable for acts of sexual harassment by employees. For example, in 1975 the Arizona District Court in Corne v. Bausch denied recovery against an employer for the quid pro quo harassment. In that case, two female clerical workers alleged harassment by their supervisor when he offered favorable employment treatment for compliance with his verbal and physical sexual advances, propositions, and demands. The court refused to find Title VII applicable, holding that Congress did not intend sexual harassment to be a cause of action, and suggested that, absent a policy permitting, encouraging, or requiring sexual harassment, no employer is liable for sexual harassment of its employees by their coworkers or supervisors. The courts asserted it was unwise to delve into the issue in other cases, such as Tompkins v. Public Serv. Elec & Gas and Miller v. Bank of America, finding that sexual attraction was natural and would probably play into personnel decisions subtly.

B. 1980 EEOC GUIDELINES

In a landmark work, Sexual Harassment of Working Women, Professor Catherine MacKinnon argued that sexual harassment should be

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22 See, e.g., Tompkins v. Public Service Electric & Gas Co., 422 F. Supp. 553 (D. N.H. 1976) (requiring actual or constructive knowledge of supervisor’s conduct and failure to take remedial action before holding employer liable for sexual harassment involving tangible job detriment); Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977) (complaint alleging an employer policy of compelling female employees to submit to sexual advances by male supervisors stated a cause of action under Title VII); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (finding an employer would be liable for the tortious conduct of its employees under Title VII, at least where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated in part, 562 F.2d 55 (9th Cir. 1977) (holding there was no right to relief under the Civil Rights Act of 1964 for sexual harassment by a supervisor, where there was no employer policy served by the alleged conduct, no benefit to the employer was involved and the supervisor’s alleged conduct had no relationship to the nature of the employment); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (finding that sexual harassment by a supervisor was unlawful under Title VII even though the statute does not specifically speak to such circumstances).
24 See id. See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (noting that this “discrimination policy” had not been applied to other forms of discrimination prohibited by Title VII).
26 422 F. Supp. at 557 (permitting such actions would create the need for "4,000 federal trial judges instead of some 400").
27 418 F. Supp. at 236.
considered sexual discrimination actionable under Title VII in 1979.28 The following year, in 1980, the EEOC followed her lead and adopted Guidelines declaring sexual harassment a violation of Title VII ("EEOC Guidelines" or "Guidelines").29 The Guidelines established criteria for determining what constitutes sexual harassment and defined the circumstances under which employer liability for the sexual harassment of employees by supervisory personnel and other agents or coworkers may be imposed.30 The courts finally had some guidance to turn to in deciding difficult sexual harassment issues. The EEOC defined sexual harassment as:

[unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . .when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.31

Further, the EEOC issued instructions to its agents in the field to look at and investigate the whole record and totality of the circumstances leading up to the filing of the claim by the complainant.32 Under the Guidelines, the investigation may consider the nature and context of the acts alleged to have occurred to determine the legality of the challenged activity, the nature of employer liability, and the appropriate remedies available in that particular case.33

The 1980 EEOC Guidelines were the first to bifurcate employer liability to include the two categories that affect the nature of employer liability for sexual harassment and the proof required to establish it. In the first category, quid pro quo harassment, or harassment resulting in tangible job detriment, employers were held to a theory of strict liability.34 In the second category, employers were liable in agency under a theory of respondeat superior, for hostile environment sexual harass-

29 See 29 C.F.R. § 1604.11 (1980).
30 See id. Courts generally accept that the EEOC Guidelines represent the relevant administrative agency’s interpretation of the Act, and thus may constitute experience and judgment to which courts and litigants may resort for guidance, but they are not necessarily controlling. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).
31 See 29 C.F.R. § 1604.11(a) (1980).
32 See id. § 1604.11(b).
33 See id.
ment. In addition, the EEOC made a distinction between supervisor-subordinate harassment and coworker harassment. The Guidelines determined that employers will be liable for their acts and the acts of their agents with respect to sexual harassment “regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.” When harassment is between fellow employees, employers are liable for the harassing employee’s conduct whether they knew or should have known of their occurrence unless the employer can show that it took immediate and appropriate corrective action. Finally, the EEOC made suggestions to employers regarding what they could do to avoid liability, such as expressing strong disapproval, taking preventive action in the nature of training, policy development, implementation, enforcement, and affirmatively sensitizing the workforce about sexual harassment laws and guidelines.

C. Meritor and the Resulting Confusion

By the mid-1980s patterns began to emerge in the courts’ treatment of employer liability. Generally, employers faced strict liability for quid pro quo harassment. Employer liability for hostile work environment however proved to be a more difficult issue for courts and there was a clear lack of consensus. The majority view was that an employer was liable for harassment only if it had actual or constructive knowledge of the harassment and failed to take appropriate remedial actions. A minority of courts held that hostile environment harassment by a supervisor should subject employers to strict liability, for the same reasons the standard existed for quid pro quo harassment, but the employer should be

35 See id.
36 29 C.F.R. § 1604.11(c) (1980).
37 See id. § 1604.11(d).
38 See id. § 1604.11(f).
39 See e.g. Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
40 See e.g. Henson, 682 F.2d at 905 (holding that an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to a subordinate employee. In a hostile work environment case, the plaintiff must prove that higher management knew or should have known of the sexual harassment before the employer may be held liable); Katz, 709 F.2d at 255 (holding that a plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment in a “condition of work” case); Jones v. Flagship Int’l, 793 F.2d 714, 720 (5th Cir. 1986) (holding that while an employee need not prove tangible job detriment to establish a sexual harassment, the absence of such proof requires a higher showing that the harassment was pervasive and destructive to the work environment).
liable under an actual or constructive knowledge standard for hostile environment harassment by coemployees.\textsuperscript{41}

In 1986 the Supreme Court, acknowledging the disparity between jurisdictions, finally decided to resolve many of the questions the courts were struggling with and granted certiorari to hear its first sexual harassment decision. In \textit{Meritor Savings Bank, FSB v. Vinson},\textsuperscript{42} the Supreme Court tackled a series of issues. First, the Court addressed whether a claim solely alleging a “hostile environment” is actionable under Title VII and whether a claimant is required to prove a loss of an economic or tangible job benefit to have a cause of action for such violation.\textsuperscript{43} Second, it tackled whether a court may properly inquire into the voluntariness of a claimant’s participation in the claimed sexual episodes and to what extent the court may inquire into the welcomeness of sexual advances.\textsuperscript{44} Third, the Court inquired under what circumstances the employer may be strictly liable for the acts of its agents and supervisors and how may the employer insulate or defend itself from such liability.\textsuperscript{45}

The Court, holding that a hostile environment claim is actionable, first reasoned that the Title VII phrase “‘terms, conditions, or privileges of employment’...evinces a congressional intent” to strike at the entire spectrum of disparate treatment of men and women in employment and is not limited to economic or tangible loss.\textsuperscript{46} Such a claim is actionable if the harassment is sufficiently pervasive to alter the conditions of the victim’s employment and create an abusive working environment.\textsuperscript{47} The Court quoted a Fifth Circuit racial discrimination case to suggest that the “‘utterance of an ethnic or racial epithet which engenders offensive feelings in an employee’ would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.”\textsuperscript{48}

Second, on the relevance of voluntariness, the Court decided that the appropriate inquiry was not whether the complainant acted voluntarily but whether the particular conduct was unwelcome.\textsuperscript{49} The Court pointed to the EEOC Guidelines and the need to review the whole record

\textsuperscript{41} See, e.g., Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981) (finding a Title VII violation for sexual harassment regardless of whether the complaining employees lost any tangible job benefits as a result); Jeppsen v. Wunnice, 611 F.Supp. 78, 82-83 (D.Alaska 1985) (rejecting the notion that knowledge would be required for quid pro quo harassment but not for hostile work environment).

\textsuperscript{42} 477 U.S. 57 (1986).

\textsuperscript{43} See id.

\textsuperscript{44} See id.

\textsuperscript{45} See id.

\textsuperscript{46} Id. at 64.

\textsuperscript{47} See id. at 66-67. The Supreme Court later decided that Title VII may be violated regardless of whether the victim suffered psychological harm in an abusive or hostile working environment. See Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

\textsuperscript{48} Id. at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

\textsuperscript{49} See Meritor, 477 U.S. at 69.
and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.\textsuperscript{50} Sexually provocative dress or speech would be relevant then only in determining the "welcomeness" of the incident.

Third, while the Supreme Court refused to issue a definitive ruling on employer liability, it did direct the lower courts to consult agency principles for guidance on the issue.\textsuperscript{51} The Court reasoned that because Title VII's definition of "employer" includes an "agent" of the employer, it evidences a congressional intent to use agency law to place some limits on employers' liability for sexual harassment.\textsuperscript{52} The Court rejected the notion that absolute liability should be imposed on employers in every claim of hostile environment regardless of the circumstances of the particular case. In hostile environment cases, no employer, or at least those employers that have instituted policies against harassment, would be liable in the absence of actual or constructive knowledge.\textsuperscript{53}

II. \textit{FARAGHER AND ELLERTH: THE SUPREME COURT SETS NEW STANDARDS}

The guidance of \textit{Meritor} has proven inadequate. Despite \textit{Meritor}'s suggestions, disagreement persists among jurisdictions as to what the standard of employer liability for hostile environment sexual harassment should be. Some courts hold employers liable for hostile environment sexual harassment only if the employer knew or should have known of the problem.\textsuperscript{54} Other courts make a distinction depending upon the identity of the harasser and hold employers strictly liable for supervisors' hostile environment harassment, but impose employer liability for co-workers' harassment only if the employer knew or should have known of the harassment.\textsuperscript{55} Still other courts hinge employer liability on the employer's response to the harassment once it is brought to their attention.\textsuperscript{56} Quid pro quo harassment seems to be settled; while the Supreme Court,

\begin{itemize}
  \item \textsuperscript{50} See id. (citing 29 C.F.R. § 1604.11(b)).
  \item \textsuperscript{51} See id. at 72.
  \item \textsuperscript{52} See id.
  \item \textsuperscript{53} See id. at 72-73 ("Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible").
  \item \textsuperscript{54} See, e.g., Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir. 1990); Baker v. Yeyerhauin Co., 903 F.2d 1342, 1346 (10th Cir. 1990); Rabideau v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1985).
  \item \textsuperscript{55} See, e.g., Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558(11th Cir. 1987).
  \item \textsuperscript{56} See, e.g., Bouton v. BMW, 29 F.3d 103, 106 (3rd Cir. 1994) (holding that an effective grievance procedure that is known to the victim and timely stops the harasser shields the employer from Title VII liability).
\end{itemize}
in *Meritor* did not address it, circuits consistently hold that employers are strictly liable.\(^{57}\)

The inadequacy of the *Meritor* decision, as exemplified in the confusion of subsequent rulings by the lower courts, led the Supreme Court to revisit the issue of sexual harassment in two recent parallel cases. In *Faragher v. City of Boca Raton*\(^ {58}\) and *Burlington Indus., Inc. v. Ellerth*,\(^ {59}\) the Supreme Court, in 7-2 decisions, clarified an employer’s obligation to rid the workplace of sexual harassment.

*Faragher* involved a female lifeguard who worked for the City of Boca Raton from 1985 until she resigned in 1990.\(^ {60}\) During her employment, two of her supervisors engaged in unwanted physical touching, pantomimed various sexual acts, and made vulgar references.\(^ {61}\) Ms. Faragher did not formally complain about the actions but instead informally discussed them with a third supervisor.\(^ {62}\) The City ultimately learned of the behavior of the two supervisors before Faragher’s resignation but not from Faragher herself.\(^ {63}\) The District Court granted judgment in favor of Faragher but the Eleventh Circuit reversed the judgment against the City, finding that the two supervisors were not acting within the scope of their employment when harassing Faragher and the City had no constructive or actual knowledge of the harassment.\(^ {64}\) The Supreme Court reversed, holding that even when an employer is unaware of the harassment “there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship.”\(^ {65}\) The Court further said, “[w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him.”\(^ {66}\) The Court determined that the loss resulting from the supervisor’s acts should be considered to be one of the normal risks to be borne by the business in which the supervisor is employed.\(^ {67}\)

In *Ellerth*, a salesperson was subjected to fifteen months of repeated offensive remarks and gestures by her supervisor but also received a pro-

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\(^{58}\) See 524 U.S. 775 (1998).


\(^{60}\) See *Faragher*, 524 U.S. at 780.

\(^{61}\) See id. at 782.

\(^{62}\) See id.

\(^{63}\) See id. at 783.

\(^{64}\) See id. at 783-84.

\(^{65}\) Id. at 802.

\(^{66}\) Id. at 803.

\(^{67}\) See id. at 797.
motion and suffered no tangible job detriment.  

Like Ms. Faragher, Ms. Ellerth failed to complain about the harassment. Unlike the City of Boca Raton however, Burlington Industries had a sexual harassment policy that had been distributed to all employees. Ms. Ellerth was aware of the policy but chose not to use it. The district court granted summary judgment in favor of Burlington but the Seventh Circuit reversed, finding the evidence sufficient to sustain a claim of quid pro quo harassment. The Supreme Court affirmed, determining that Ms. Ellerth presented a viable sexual harassment claim, despite the fact that she suffered no tangible job injury. The court determined that the characterization of Ellerth’s claim as quid pro quo or hostile work environment was not dispositive and Burlington was subject to liability for the supervisor’s activity whether tangible job detriment occurred or not. 

Both the Faragher and Ellerth decisions used identical language to set forth an employer’s obligations and the scope of an employer’s liability for sexual harassment in the workplace: “[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. Such a defense consists of two necessary elements: first, that the employer must exercise “reasonable care” to prevent and promptly correct any sexually harassing behavior; and second, that the plaintiff-employee “unreasonably” failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm or otherwise. According to the Court, “[n]o affirmative defense is available when the supervisor’s harassment culminates in a tangible employment action, such as a discharge, demotion, or undesirable reassignment.”

In Faragher, although the plaintiff employee suffered no tangible job action, the City would not have the opportunity to raise an affirmative defense to her claim because it “entirely failed to disseminate its policy against sexual harassment among the beach employees.” Conversely, in Ellerth, the Court affirmed the appellate court’s reversal of

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69 See id. at 748.
70 See id.
71 See id. at 749-50.
72 See id. at 766.
73 See id.
74 Id. at 765. See also Faragher v. City of Boca Raton, 524 U.S. 742, 807 (1998).
75 See Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
76 See Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
77 See Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
78 Faragher, 524 U.S. at 808.
summary judgment in favor of Burlington, but remanded the case to permit the employer the opportunity to assert and prove the affirmative defense that it maintained and promulgated its sexual harassment policy and that Ms. Ellerth unreasonably failed to utilize the policy.\(^{79}\)

These two decisions place far more weight upon the employer to take proactive steps to eradicate sexual harassment in the workplace than previous decisions. The exact implications however, are not clear. For example, what must an employer do to take “reasonable care” to prevent and correct sexual harassment? Further, when has an employee “unreasonably failed to take advantage of any preventive or corrective opportunities?”\(^{80}\) The Court has carelessly left these important details to the discretion of the lower courts but did at least send a clear message that a premium has been placed upon employers taking a proactive approach to sexual harassment in their workplaces.

III. THE BURDENS OF FARAGHER AND ELLERTH: TOO MUCH TO JUSTIFY STRICT LIABILITY?

A. JUDICIAL EFFICIENCY

From an efficiency perspective, it is only worthwhile to allocate costs of sexual harassment through the judicial system to employers to the extent that the costs of doing so do not outweigh the benefits. Many feminist writers argue that all loss from sexual harassment must be eliminated without regard to the cost.\(^{81}\) However, in a world where resources are exhaustible and economics drive individual expectations and goals, employers cannot afford to ignore the balancing of costs and benefits.

Several commentators have suggested that the imposition of vicarious liability may be the most cost effective and efficient manner of preventing sexual harassment.\(^{82}\) The employer, rather than the supervisor or employer, is in the best position to prevent harm because the employer, being “the master”, selects “the servant” (or supervisor), controls the servant’s responsibilities, and promulgates workplace policy.\(^{83}\) Further, commentators assert that holding employers vicariously liable for the acts of their employees dramatically increases the likelihood that the

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\(^{79}\) See Ellerth, 524 U.S. at 766.

\(^{80}\) Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

\(^{81}\) See e.g. Jan Byeff Korn, The Fungible Woman and Other Myths of Sexual Harassment, 67 Tul. L. Rev. 1363, 1386 (1993) (arguing that “[a]lthough sexual harassment is commonplace, we need not accept it as a risk inherent in the workplace. It can, unlike true industrial accidents, be eliminated.”).

\(^{82}\) See, e.g., David Benjamin Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors, 81 Cornell L. Rev. 66 (1995); Marie T. Reilly, A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss, 47 Vand. L. Rev. 427 (1994).

\(^{83}\) See Oppenheimer, supra note 82, at 93.
victim will be compensated for his or her injuries because the employer can insure against vicarious liability for harassment or treat the liability as a price of doing business.\textsuperscript{84} While these assertions may very well be true generally, they are too broad, and when incorporated as justification for sexual harassment law, as they have been with the \textit{Ellerth} and \textit{Faragher} decisions, create a dangerous burden of liability for employers.

Professor Marie Reilly proposes an economic paradigm for sexual harassment.\textsuperscript{85} The paradigm mimics Judge Learned Hand's formula for negligence by "encourag[ing] prevention of loss up to the point at which the saved loss is no longer worth the price of precaution."\textsuperscript{86} In her pre-\textit{Faragher/Ellerth} article, Professor Reilly applies her paradigm to strict employer liability for both quid pro quo harassment and hostile work environment harassment, finding the former economically efficient but the latter inefficient when imposed without regard to notice or fault of the employer itself.\textsuperscript{87}

Professor Reilly asserts that making an employer strictly liable for the negligence of its employees makes sense because it creates an incentive for employers to require the level of care from employees that they themselves would take when responding to their own personal liability.\textsuperscript{88} The employer has an incentive to supervise its employees and impose sanctions or rewards where justified as long as the cost is offset by an equivalent reduction in the expected loss.\textsuperscript{89} She maintains however that the vicarious liability of an employer is subject to an economically important limitation.\textsuperscript{90} In the case of quid pro quo harassment, the employer, by definition, has "caused" the loss - the effects of sexual harassment - in the economic sense.\textsuperscript{91} Therefore, the loss is properly considered a cost of the operation of the employer's business.\textsuperscript{92}

In the case of hostile work environment harassment however, finding efficiency becomes more complex. Unlike quid pro quo harassment, the employment relationship does not fully cause the loss in the same sense. Professor Reilly illustrates this point:

\textit{[f]or example, suppose a female worker alleges that her co-workers tell sexual jokes and use vulgar language in her presence. Hypothetically removing the employment relationship between the offensive co-workers and

\textsuperscript{84} See id. at 93-94.
\textsuperscript{85} See Reilly, supra note 82, at 427.
\textsuperscript{86} Id. at 441.
\textsuperscript{87} See id. at 453, 469.
\textsuperscript{88} See id. at 455.
\textsuperscript{89} See id.
\textsuperscript{90} See id.
\textsuperscript{91} See id.
\textsuperscript{92} See id.
the employer would not reduce the probability of loss to zero. Thus, according to the economic concept of probabilistic causation, the employer did not fully cause the loss.93

Consequently, by imposing strict liability on the employer without regard to its fault or notice results in production inefficiency.94

Judge Posner appears to agree with Professor Reilly’s paradigm. In his pre-Faragher/Ellerth writings, he discusses the economic rationale for employer liability in sexual harassment cases. He argues that employers are more responsive to the threat of tort liability unlike most employees, who do not have the resources to pay a judgment if they injure someone seriously - because employers can induce employees to be careful.95 By making an employer liable for the torts of its employees, the law will give the employer incentive to use such inducements.96 Judge Posner reviews the law as widely recognized under Meritor Savings Bank, FSB v. Vinson,97 where an employer would only be liable for harassment if it had reason to know that sexual harassment was a problem and failed to do anything about it.98 Under pre-Faragher/Ellerth law the employer would not be liable in such a case unless negligent, which Posner explains is due to the virtual impossibility of an employer preventing all incidents of sexual harassment by employees and therefore the imposition of strict liability has no beneficial allocative effects.99

Applying this economic analysis to the current state of the law, it is clear that the total cost to employers of ensuring that incidents of sexual harassment do not occur is so great as to outweigh the importance of attempting to eliminate such harassment from workplaces. The burden of strict liability is too much to impose for sexual threats or comments that affect the lives and well-being of the victim but do not do so in any recognizable or measurable way that an employer can cognizably prevent.

93 Id. at 469. Other commentators disagree. For example, Professor Alan O. Sykes asserts that a strong argument can be made that the harassment by a supervisor is caused by the employer’s enterprise, whether or not tangible job detriment is involved or not. See Alan O. Sykes, The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 Harv. L. Rev. 563, 606-07 (1988). Professor Sykes argues that “absent the existence of a supervisor-subordinate relationship, the supervisor would have no leverage over the subordinate, and the likelihood of sexual harassment would be significantly reduced.” Id. While Professor Sykes acknowledges that the causal relationship to the employer enterprise is strongest in quid pro quo cases, he argues that it also maybe quite strong for hostile-environment harassment by supervisors. See id.
94 See Reilly, supra note 82, at 469.
96 See id.
98 See Posner, supra note 95, at 188.
99 See id.
The U.S. Supreme Court has taken strict liability too far with the *Faragher* and *Ellerth* decisions when this economic analysis is taken into account. The rationale that justifies strict liability in the case of quid pro quo harassment does not justify it in the case of hostile work environment harassment that results in no tangible job detriment. In quid pro quo harassment, the employer knows or should know of the harassment because it is in effect part of the employment enterprise. The employer therefore, at least in theory, has an opportunity to stop harassment by scrutinizing its supervisors for improper behavior and firing, demoting, etc. in response. While the court treats them the same, the hostile environment harassment that results in no tangible job detriment, even when subject to an affirmative defense, is distinctly different from quid pro quo harassment. A supervisor in the hostile work environment case has not actually used any of his or her authority; at best he or she has only contemplated it.\(^{100}\) The employer has not acted in any official capacity because it has no notice or record of the action which gives rise to the employee’s claim because no tangible effect on the employee’s employment status has occurred.\(^{101}\)

Expecting an employer to prevent all such harassment is impossible and such liability thus places a bigger burden upon employers than is economically efficient or feasible. Strict liability that is imposed when no reasonable measures could have prevented the harassment will have no deterrent effect and is actually contrary to public policy. The law as promulgated in *Ellerth* and *Faragher* could, in a sense, backfire if employers become discouraged from implementing reasonable sexual harassment policies that afford them no protection from liability.\(^{102}\) Despite their best efforts in implementing a fair and reasonable policy to combat such harassment, and despite what they knew or should have known as a result of such a policy, if an employee follows through on his or her end of the Court’s bargain and reports the harassment, employers are strictly liable for the sexual harassment of their employees. In practicality, even 24-hour-a-day video surveillance may not be enough to help employers prevent harassment, creating a burden of liability that can in no way be lightened.

Employers are faced with an impossible burden of attempting to eradicate workplace harassment while respecting employee privacy. Employers may go to great lengths to prevent liability, implementing highly invasive means of detecting and monitoring the daily actions and conversations of their workers. Such strides could prove dangerous, invading the constitutional privacy rights that employees do not necessarily

\(^{100}\) See Brief for Petitioner at 11, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
\(^{101}\) See id.
\(^{102}\) See id.
shed at their company's doorstep. In addition, in their efforts to prove the efficacy of their anti-harassment policies under the first prong of the Faragher/Ellerth affirmative defense, employers will have incentives to show the corrective actions they took regarding any suspicious conduct in the workplace, without regard to the privacy concerns on the part of the people involved. Employers can hardly be blamed, as anything less will imperil their proof that their policies are effective. Moreover, serious First Amendment violations could result if employers attempt to restrict any sexually-suggestive speech, whether or not it creates a hostile work environment under the law. These risks only add to the costs of strict liability for such harassment, tipping the scale even further towards inefficiency.

B. Societal Efficiency

This analysis can be taken a step further. When cost-benefit analysis is taken beyond evaluation of costs of implementing effective sexual harassment policies or costs of resulting litigation, the scale of efficiency possibly can be tipped in the opposite direction so that benefits outweigh costs. In that balance, strict liability for all forms of sexual harassment can be justified, at least more effectively than it can under the current method of assessing costs.

No one can deny that sexual harassment in the workplace creates a variety of foreseeable consequences, and thus costs, affecting the well-being of employees and the productivity of organizations. Many commentators assert therefore that identification of the various consequences of sexual harassment is needed to fully understand its implications. Such a variety of costs can quickly add up to a substantial dollar amount for organizations when aggregated across a large number of employees.

Several methods have been used to determine the economic impact of employee actions, including sexual harassment. Deborah Erdos Knapp and Gary A. Kustis created a comprehensive behavior costing model framed in terms of three broad categories of costs: productivity-related costs, administrative costs, and other costs. First, productivity-related costs include actual reductions in productivity as a result of harassment, the cost of time spent during the harassing incident, and the cost of any unplanned leave or absenteeism that results from the harass-

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103 See supra notes 75-77 and accompanying text.
ment. Second, administrative costs reflect the separation, replacement, and transfer costs that result when harassment occurs. Finally, the third category represents all direct "other" costs of sexual harassment in an employment situation, including the costs of litigation and medical or professional counseling. The aggregate of these several costs represents the total cost of sexual harassment to an organization.

Kathy A. Hanisch used a different method to study the costs of sexual harassment, by researching the multiple outcomes or consequences of sexual harassment for individuals and organizations. Hanisch's general outcomes categories include health conditions, work role attitudes, work withdrawal, job withdrawal, and litigation. Many of these costs have never been included in the studies used to determine the costs of sexual harassment in the U.S. Hanisch asserts that this can only lead to the conclusion that the costs of sexual harassment are potentially much higher than any of the reported studies that have previously estimated costs, and it therefore behooves organizations to have policies and plans to discourage and discover sexual harassment to prevent many of these costs.

When the multiple costs of sexual harassment are considered, it is easier to justify strict liability for employers. Not only are there costs that employers as organizations should avoid in order to increase their efficiency and productivity, but there are also costs to the individual employees that have not previously been so distinctly calculated. Employers are in the best position to avoid such costs by implementing effective sexual harassment policies and procedures. If such policies can reduce the costs of sexual harassment to individuals and organizations effectively enough so that their benefits outweigh their costs, strict liability for all sexual harassment may be warranted.

IV. LIVING WITH FARAGHER AND ELLERTH: IMPLICATIONS FOR EMPLOYERS

A. CASES SINCE FARAGHER AND ELLERTH

Putting aside the confusion in the Supreme Court's wisdom of assigning strict liability to employers in all forms of sexual harassment, employers can be thankful that they are at least left with a more clear
vision of their responsibilities under the law. Since June of 1998 advocates for both employees and employers have praised the Supreme Court for clearing up much of the murkiness that was left after the Meritor decision in 1986.\textsuperscript{115} Unlike before, employers now know that the Supreme Court will acknowledge an organization's sexual harassment policy and place a premium upon it when the situation warrants. Employers should watch the courts carefully and follow their lead to avoid liability where possible.

Because the new affirmative defense created by the Supreme Court requires an analysis of both reasonableness and unreasonableness, it appears at first glance that it would be difficult for employers to prevail on summary judgment. A review of cases by the New York Law Journal since the Faragher/Ellerth ruling was set down, however, suggests that summary judgment can be obtained where appropriate.\textsuperscript{116} For example, in Jones v. USA Petroleum Corp., a Southern District of Georgia judge issued summary judgment for the employer because it had adequate sexual harassment policies and procedures, and because the employees failed to report the alleged harassment.\textsuperscript{117}

The need for an effective sexual harassment policy is highlighted by the courts' refusal to grant summary judgment.\textsuperscript{118} For example, in Seepersaad v. D.A.O.R. Security, Inc., the Southern District of New York found fact issues concerning the Faragher/Ellerth affirmative defense that precluded summary judgment.\textsuperscript{119} In that case, there was a question as to whether the employer had used reasonable care in preventing and correcting the harassment when it waited a week before transferring the employee-plaintiff and beginning an investigation.\textsuperscript{120} The plaintiff-employee had allegedly given repeated notice of her supervisor's harass-

\textsuperscript{115} See Linda Greenhouse, Court Spells Out Rules For Finding Sex Harassment, N.Y. Times, June 27, 1998 at A1. See also supra Part I.C.


\textsuperscript{120} See id.
ment, to which the employer failed to respond.121 Study of cases such as this can help employers determine what works and what does not in designing and implementing their sexual harassment policies.

B. Responding To and Preventing Sexual Harassment

In time, courts will determine which sexual harassment policies are reasonable and which are not. Eventually a clear standard may emerge that will lessen the litigation on the subject. In the meantime however, the combination of this uncertainty and the large increase in the number of sexual harassment charges filed with the EEOC,122 a figure sure to increase as a result of the recent high media attention to high-profile sexual harassment cases, make it clear that employers should assume that there is a single strict standard on what is acceptable conduct.

Over the years a number of commentators have attempted to describe the “right” policy and procedure for dealing with harassment and, with the infusion of new standards, are sure to do so increasingly in the future. Mary P. Rowe however believes that there is no perfect policy or procedure for at least three reasons.123 First, Rowe believes it is nearly impossible to design a complaint system that users will think is satisfactory because it is nearly impossible to bring about a positive solution in response to a subject like harassment.124 Employers can only do their best to lessen pain and learn how to better deal with the problem in the future. Second, institutions differ in their purpose and structure.125 Solutions that may be appropriate for one industry or company may not be appropriate for another. Third, people disagree about what should actually be contained in such a policy or procedure.126 Individuals weigh costs and benefits differently and that drives our conceptions of solutions and approaches.

Rowe does believe however, that there are common issues that all institutions reviewing their needs for harassment policies and procedures must look at. First, Rowe believes that it is important to identify all individuals who have interests at stake.127 Second, institutions must preliminarily determine whether they need and want a specific or general policy.128 Those who argue for specific policies note that there are dif-

121 See id.
122 See The Supreme Court issued two sexual harassment rulings last summer that should both worry and hearten employers, Nation’s Business, Dec., 1998 at 1.
124 See id. at 243.
125 See id. at 244.
126 See id.
127 See id. at 246.
128 See id. at 247.
ferences in types of harassment and victims that require separate strategies.\textsuperscript{129} Those who argue for general policies note that harassment affects everyone and a single general policy would be more widely understood.\textsuperscript{130} Third, employers need to determine what options will be provided to victims of sexual harassment.\textsuperscript{131} Will employees be provided with a rights-based, win-lose investigation and adjudication? Will employers instead deal only informally with harassment? Or will employers provide multiple options within the same sexual harassment procedural system? Rowe believes that no single option is right for most complainants and instead they should be offered a choice so that the employee can himself or herself choose how to deal with the situation.\textsuperscript{132} Fourth, employers need to determine whether the structure of their policy will be centralized or decentralized.\textsuperscript{133} Fifth, institutions need to be prepared to deal with a number of inevitable issues, such as employees' fear of reprisal, privacy versus an employer's right to know, free speech, consensual relationships between supervisors and subordinate employees.\textsuperscript{134} Finally, the most important function of the system is on-going prevention. Employers should decide what is best for their company based upon its own individual characteristics.\textsuperscript{135}

While there is no single policy that is universally accepted as perfect, attorney Michael F. Kleine asserts that the courts and the EEOC have identified six core components that are essential to an effective sexual harassment policy.\textsuperscript{136} First, a policy should be in writing and contain clear and unequivocal language stating that offenders will be disciplined and could be disciplined up to and including termination.\textsuperscript{137} Second, as sexual harassment means different things to different people an employer should clearly define harassment and provide examples of sexually harassing conduct.\textsuperscript{138} Third, a sexual harassment policy should contain an effective reporting mechanism.\textsuperscript{139} The policy should mandate that conduct be reported immediately to a particular person or department charged with the responsibility of investigating such complaints and provide an alternative person or department in the event that the designee is

\textsuperscript{129} See id.
\textsuperscript{130} See id. at 248.
\textsuperscript{131} See id.
\textsuperscript{132} See id. at 251.
\textsuperscript{133} See id. at 257.
\textsuperscript{134} See id. at 261-68.
\textsuperscript{135} See id. at 268.
\textsuperscript{136} See Michael F. Kleine, Practical Advice for Employers in Anticipation of Faragher's Outcome, EMPLOYMENT LAW STRATEGIST, June 1998, at 1.
\textsuperscript{137} See id.
\textsuperscript{138} See id.
\textsuperscript{139} See id.
the harasser himself or herself.\textsuperscript{140} Fourth, the harassment policy should assure employees that they would not be retaliated against for reporting harassment.\textsuperscript{141} Fifth, the policy should provide for prompt investigation of any complaints and assure privacy to the extent possible.\textsuperscript{142} Sixth and finally, the policy must be communicated to all employees.\textsuperscript{143} Employers should collect acknowledgements from all employees and periodically review the policy with employees to assure them of its continued viability.\textsuperscript{144}

Beyond an effective sexual harassment policy, employers can use other techniques to protect themselves as far as is allowed under the \textit{Faragher/Ellerth} decisions. Because the Supreme Court’s rulings indicate that an affirmative defense can be established when the plaintiff failed to bring his or her complaint to the attention of the employer, some commentators believe that other personnel policies designed to provide alternative mechanisms for workers to assert grievances could provide further protection.\textsuperscript{145} For example, an “open door policy” coupled with an internal complaint review procedure enables an employer to identify problems before they explode into lawsuits and also locks employees into a factual scenario without later having the opportunity to change the situation to their benefit in the proceedings.\textsuperscript{146} An employee who offers a belated claim of harassment will have trouble establishing a legitimate complaint in light of the complaint procedures in place.\textsuperscript{147} In addition, employers should develop ways to disseminate their policies to their work forces in order to show that there is no question among employees as to their rights and duties under the company’s policy.\textsuperscript{148} Also, employers can show their seriousness about the issue by providing supervisors sensitivity training, forcefully showing a “zero tolerance” attitude towards discrimination and harassment, and promptly responding to any claims of harassment.\textsuperscript{149} Further, employers can protect themselves against those employees who resign and later claim harassment by requiring all departing employees to complete an exit interview.\textsuperscript{150}

\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See id.
\textsuperscript{149} See id.
\textsuperscript{150} See id.
would serve to lock an employee into their assessment of their treatment on the job.

While these methods are not foolproof, they do provide a loss control and risk management device to resolve and prevent problems. With the little protection the law offers employers after Faragher and Ellerth, they would be wise to do all they can to prevent liability or at least lighten its blow. Until the lower courts sort out the confusion about the standard that the Supreme Court has left, no one can definitively tell employers what will work and what will not. However, by following the above general guidelines and suggestions, even at their high cost, they will be one step ahead of those employers who chose to take their chances with nothing.

CONCLUSION

While the Supreme Court’s recent decision may have increased the liability of employers for the acts of their supervising employees in the realm of sexual harassment, employers are also fortunate in knowing the extent of their possible liability under the law. The Faragher/Ellerth standard sorts out much of the questions regarding which party is responsible for what – the supervising employee or the employer – and now at least employers can make strides to protect themselves as much as possible with more guidance than they were afforded before. Only time, and many lower court, decisions will tell employers what works and what does not. Until then, it would be wise for employers to take the advice of their attorneys in developing the most effective sexual harassment policies and prevention strategies.