

IF YOU'RE NOT PART OF THE SOLUTION, YOU'RE PART OF THE PROBLEM: EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

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Employer liability is rarely disputed in most claims under Title VII of the Civil Rights Act of 1964.¹ The more routine decisions constituting employment discrimination – hirings, firings, promotions, etc. – are easily attributed to the employer who granted her or his supervisors or agents the authority to make such judgments. Strict liability is the norm and few decisions even address the issue. When the claim of “harassment” was added to the list of possible discriminatory acts, however, employers challenged both the validity of the claim and their own responsibility for it.

In 1986, the Supreme Court recognized the claim of hostile environment sexual harassment as a form of sex discrimination under Title VII. But the Court’s ruling offered some hope to employers by narrowly defining the cause of action and limiting the employer’s responsibility for actions of both supervisors and co-workers. The Court rejected the strict liability principle applicable to virtually every other employment claim under the statute, but offered no clear guidelines on when liability was appropriate. Instead, the parties were directed simply to “look to agency principles.”² The lower courts struggled with this concept for over a decade with varying results. Finally, in 1998, the Court provided much-needed guidance and ended some of the uncertainty on the employer liability issue. In the companion cases of *Faragher v. City of Boca Raton*³ and *Burlington Industries, Inc. v. Ellerth*,⁴ the Court resolved the question of when a company might be held vicariously responsible for the actions of its supervisors even when the harassing conduct was unknown to it.

At the time *Faragher* and *Burlington Industries* were handed down, the Court’s instructions seemed relatively straightforward. Although the holdings were limited to the issue of vicarious liability for unreported supervisor harassment, the Court’s opinions included a comprehensive review of sexual harassment liability theories. Applying the agency law principles established in 1986, the Court addressed the most common possibilities: 1) supervisor harassment resulting in a tangible employment action (e.g., loss of job, failure to obtain promotion, etc., formerly labeled as “quid pro quo” harassment), 2) co-

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

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

3. 524 U.S. 775 (1998).

4. 524 U.S. 742 (1998).

worker hostile environment harassment, 3) supervisor hostile environment harassment reported to the employer, and 4) supervisor hostile environment harassment unknown to the employer.

The Court suggested a somewhat different liability analysis for each of the four categories of sexual harassment, although much of the analysis was dicta concerning issues not presented in the cases before it. Tangible employment actions result in strict liability. Co-worker harassment, the Court indicated, is subject to a negligence standard for liability – actionable only when the employer knew (or should have known) of the misconduct and failed to take action. Liability for supervisor harassment *reported* to the employer also turns on the question of “negligence,” focusing on the employer’s own actions in responding to the complaint. The actual holdings of *Faragher* and *Burlington Industries*, however, considered only the fourth category of supervisor harassment *unknown* to the employer. The Court concluded that an employer is vicariously liable in these circumstances unless the employer can establish, by a preponderance of the evidence, a two-prong affirmative defense. Prong one asks whether the employer has made past efforts to prevent and correct harassment, usually satisfied by the existence of an anti-harassment policy including a complaint process. Prong two requires the employer to establish that the plaintiff unreasonably failed to utilize that policy’s grievance procedure or to avoid the harm otherwise.

In spite of the care taken by the *Faragher/Burlington Industries* Court to distinguish the various liability situations, most lower courts have used the Court’s affirmative defense to determine both “vicarious” liability for *unknown* supervisor harassment and “direct” liability for the employer’s response (or lack of response) to *known* supervisor harassment. Only three circuits seem to acknowledge that the situations are different, and that the Court’s holdings were limited to those cases in which the employer is ignorant of the supervisor’s conduct.

The extension (or misapplication) of the *Faragher/Burlington Industries* standard raises several fundamental questions. First, is such an extension warranted by those cases as the next logical step in the development of liability law, or have the lower courts unintentionally overstepped the Supreme Court’s carefully erected boundaries? Policies articulated in *Faragher/Burlington Industries* may be well served by such an extension, but at a minimum the courts need to consider modifications to the defense to better match the standard to the difference in circumstances. In a case where the plaintiff promptly reports the harassment, the employer is unable to satisfy the literal meaning of prong two of the *Faragher/Burlington Industries* defense, regardless of how laudably he may have responded to the complaint.

Second, if different analyses are warranted for vicarious and direct liability, the courts may need to evaluate more carefully what constitutes “knowledge” within this context. In many cases of direct liability, the plaintiff has utilized the employer’s grievance process and the fact of knowledge is undisputed. In other

cases, however, there is some disagreement among the lower courts about when knowledge may be imputed to the employer and the extent to which an employer may control the issue by insisting on formal reporting channels.

Finally, and perhaps most significantly, does the extension/misapplication of *Faragher/Burlington Industries* mean claims of *reported* supervisor harassment are being decided differently under the affirmative defense than they would be under a negligence analysis? In many cases the answer may be “no,” even though the courts are unnecessarily complicating their analyses. The questions of whether an employer was “negligent” in responding to a complaint (under a “direct” liability/negligence analysis) and whether the employer acted “reasonably” in correcting reported harassment (under the *Faragher/Burlington Industries* affirmative defense) are much the same from a practical perspective, particularly in a trial context. A jury is likely to view the negligence/reasonableness issues as two sides of the same coin. Nonetheless, under a negligence analysis the plaintiff retains the burden of proof on liability, while that burden shifts to the defendant under the affirmative defense of *Faragher* and *Burlington Industries*. It seems inherently troubling – if not downright backwards – to conclude that an employer who never knew of the harassment is actually worse off (in terms of the burden of proof) than the employer who knew of the alleged misconduct and had an opportunity to respond.

Furthermore, for those cases decided on summary judgment, shifting the burden of proof could – or should – have an impact. If the courts are placing the burden of proof on liability on the back of the employer in *all* hostile environment cases, one might expect fewer summary judgments for employers on that issue. By the same token, the plaintiff’s ability to obtain summary judgment on the liability question should be enhanced. In fact, neither appears to be happening. No cases are granting summary judgment for the plaintiff on this issue (and, indeed, research has failed to reveal a single attempt at such a motion). Summary judgment for the defendant, on the other hand, often is granted with little serious discussion or analysis of the burden of proof issue.

Part One of my analysis provides a brief overview of the development of employer liability standards in sexual harassment law, including a discussion of the *Faragher* and *Burlington Industries* holdings. Part Two surveys the application of these cases in the lower courts since the 1998 decisions, including the developing conflict of what constitutes “knowledge” on the part of the employer and the courts’ use of summary judgment. Finally, Part Three examines the possible solutions to the lower courts’ confusion and proposes a set of standard designed to further Title VII’s “primary objective” of prevention.

I. THE DEVELOPMENT OF EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

"Hostile environment" harassment, as an actionable form of discrimination under Title VII, was first recognized under the protected classification of race.⁵ When presented with allegations of a racially charged work environment, many courts were willing to acknowledge that such an atmosphere could become sufficiently offensive to alter the "terms, conditions, or privileges of employment"⁶ within the meaning of the statute. Accepting the claim of harassment on the basis of sex proved to be more of a challenge, however. The courts readily adopted the concept of "quid pro quo" harassment, where a job or benefit was made dependant on a subordinate's reaction to a supervisor's demands or advances (e.g., "sleep with me or you're fired").⁷ But with respect to hostile environment claims – involving offensive conduct but without any impact on job benefits, such as pay or promotions – some courts worried about distinguishing welcome flirtations from abusive advances.⁸

The controversy about the viability of hostile environment sexual harassment claims was put to rest in 1986. In *Meritor Savings Bank v. Vinson*,⁹ plaintiff Mechelle Vinson alleged that she was repeatedly fondled and even raped by her supervisor over a three-year period. Ms. Vinson made no claim that her pay or advancement was affected by this behavior. The Supreme Court agreed that a claim of sex discrimination under Title VII could be based on such allegations even absent some effect on more tangible employment terms. Ending years of debate, the Court concluded that harassment could constitute a violation of Title VII when it became "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"¹⁰

A subsidiary dispute in *Meritor Savings* was the issue of the bank's liability for the supervisor's actions, even assuming the behavior could be categorized as "discrimination" within the meaning of the statute. For most discrimination claims under Title VII, employer liability is imputed to the employer without

5. See *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (acknowledging the existence of a possible claim based on the employer's practice of segregating patients by race, later described by the Supreme Court as "apparently the first case to recognize a cause of action based upon discriminatory work environment," *Meritor Sav. Bank*, 477 U.S. at 65). For a more complete discussion of the development of harassment law, see Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-26 (1991); B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 8-13 (1993).

6. 42 U.S.C. § 2000e-2(a)(1).

7. See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211, 212-13 (9th Cir. 1979) (plaintiff fired for refusing supervisor's demands for sexual favors); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977) (plaintiff's continued employment conditioned on sexual relations with her supervisor).

8. See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (speculating that hostile environment claims on the basis of sex could create "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another"), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977).

9. 477 U.S. 57 (1986).

10. *Id.* at 67, quoting *Rogers*, 454 F.2d at 238.

discussion. The Act prohibits discrimination by an employer and its agents,¹¹ and the courts have always held the employer responsible for a supervisor's misuse of delegated authority to hire, fire, or otherwise control employment terms.¹² As noted by the Supreme Court, "[c]ourts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."¹³

Based on the strict liability standard applied in other types of Title VII claims, Ms. Vinson argued in *Meritor Savings Bank* that the employer similarly should be held legally responsible for the supervisor's actions, regardless of management's knowledge of the behavior.¹⁴ The district court had denied liability because the bank had a policy prohibiting harassment and the plaintiff failed to file a complaint under that policy.¹⁵ The appellate court, on the other hand, agreed with Ms. Vinson that employers are absolutely liable for their supervisors' discriminatory actions, whether aware of the misconduct or not.¹⁶ The Supreme Court was clear in its rejection of the strict liability standard, but not much else. The Court concluded that the Court of Appeals "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors," but explicitly declined the opportunity to "issue a definitive rule."¹⁷ Instead, the Court agreed with the position of the Equal Employment Opportunity Commission (EEOC)¹⁸ that the courts should "look to agency principles" for guidance.¹⁹

Until 1998, the lower courts struggled with the application of agency principles, with varying results. The courts uniformly applied strict liability for quid pro quo harassment, since such cases closely parallel the more traditional claims of Title VII discrimination, such as a termination decision based on race.²⁰ There was also judicial consensus in co-worker (non-supervisor) harassment cases; the courts consistently held the employer liable for the harassment only where the employer had knowledge of the misconduct and

11. 42 U.S.C. § 2000e(b) (defining the term "employer" to include "any agent of such a person").

12. See Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GEORGIA L. REV. 509, 516-22 (1996) (discussing vicarious liability in employment discrimination law).

13. *Meritor Sav. Bank*, 477 U.S. at 70-71.

14. *Id.* at 70.

15. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd on other grounds sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

16. *Vinson v. Taylor*, 753 F.2d 141, 150-51 (D.C. Cir. 1985), *aff'd on other grounds sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

17. *Meritor Sav. Bank*, 477 U.S. at 72. The rejection of strict liability was by a narrow five to four margin, however. Justices Marshall, Brennan, Blackmun, and Stevens would have adopted the strict liability standard. *Id.* at 74-78 (Marshall, J., concurring).

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

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

20. *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 112, 1127 (10th Cir. 1993); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.3d 1311, 1316 (11th Cir. 1989); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983).

failed to respond appropriately.²¹ For supervisor hostile environment harassment, however, the lower court approaches ranged from versions of strict liability to negligence liability for failure to correct known harassment.²² *Burlington Industries v. Ellerth*²³ and *Faragher v. City of Boca Raton*,²⁴ handed down near the end of the Supreme Court's 1997-98 term, sought to resolve at least some of this conflict.

Burlington Industries and *Faragher* considered identical issues. In both cases, the question was whether an employer could be subject to vicarious liability for supervisor misconduct that was never reported or otherwise known to the employer, thus giving the employer no opportunity to correct or address the misconduct. "We decide whether . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer *without showing the employer is negligent or otherwise at fault* for the supervisor's actions."²⁵

Burlington Industries involved the claims of Kimberly Ellerth, a former salesperson for the defendant. Ms. Ellerth alleged various acts of inappropriate conduct by her second level supervisor, but focused on three specific incidents as possible threats to her continued employment.²⁶ On one occasion, her supervisor told her to "loosen up" and that he could make her life "very hard or very easy."²⁷ During a promotion interview, the supervisor rubbed her knee and told her she was not "loose enough."²⁸ Finally, in a third incident, the supervisor suggested shorter skirts would make Ms. Ellerth's job "a whole heck of a lot easier."²⁹ Ms. Ellerth resigned her position without reporting the behavior, although she was aware of the company's anti-harassment policy and knew how to make a complaint under that policy.³⁰ The trial court granted summary

21. See, e.g., *Blankenship v. Parke Care Ctrs., Inc.* 123 F.3d 868, 872 (6th Cir. 1997); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996).

22. See, e.g., *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (strict liability); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994) (negligence liability); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992) (negligence liability); *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988) (strict liability). See generally George, *supra* note 5, at 3-8 (reviewing the development of liability standards prior to *Burlington Industries* and *Faragher*); Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 687-730 (offering a circuit-by-circuit review of liability cases in this area). Cf. White, *supra* note 12, at 523-53 (discussing vicarious liability as applied to hostile environment sexual harassment).

23. 524 U.S. 742 (1998).

24. 524 U.S. 775 (1998).

25. *Burlington Indus.*, 524 U.S. at 746-47 (emphasis added).

26. One of the central issues of the case was whether Ms. Ellerth had alleged quid pro quo or hostile environment harassment. Hoping to take advantage of the strict liability standard applied by the lower courts for quid pro quo harassment, Ms. Ellerth argued that these "threats," even though never carried out, amounted to quid pro quo harassment. The Supreme Court held that unfulfilled threats could only provide evidence of hostile environment harassment. *Id.* at 751-54.

27. *Id.* at 748.

28. *Id.*

29. *Id.*

30. *Id.* at 748-49 ("During her tenure at Burlington, Ellerth did not inform anyone in authority about Slowik's conduct, despite knowing Burlington had a policy against sexual harassment. In fact, she chose not to

judgment for the defendant on the ground that the employer was not responsible for any harassment that may have occurred.³¹

Beth Ann Faragher was a lifeguard over a five-year period for the City of Boca Raton, Florida. She alleged repeated incidents of crude comments and unwelcome touching by two of her supervisors. On one occasion she was physically tackled and on another occasion, a supervisor pantomimed oral sex.³² Although the city had a sexual harassment policy, the policy had not been communicated to the employees in Ms. Faragher's unit. Ms. Faragher was unaware that the policy existed and never filed a complaint.³³ The city lost at trial, but the court of appeals reversed on the issue of liability.³⁴

Unlike its brief reference in *Meritor Savings*, the Court in *Burlington Industries/Faragher* offered a thorough primer on the application of agency principles to the problem of sexual harassment liability. The Court began by dispensing with the issue of "scope of employment," since torts committed within that scope generally are the responsibility of the master without further analysis.³⁵ Consistent with the conclusion reached by the courts of appeals, the Supreme Court agreed that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."³⁶

With respect to torts outside of the scope of employment, the Court continued, the Restatement (Second) of Agency recognizes four possible bases for liability: (a) "the master intended the conduct," (b) "the master was negligent," (c) "the conduct violated a non-delegable duty," or (d) "the servant purported to act [for] the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."³⁷ The Court quickly dismissed subsections (a) and (c) of the Restatement as inapplicable to the usual circumstances of harassment and moved on to concentrate on liability theories under subsections (b) and (d).

Before considering the issue of supervisor harassment, the Court referenced the issue of co-worker harassment where the harasser has no supervisory authority over the victim. The Court implicitly approved, albeit in dicta, the unanimous conclusion of the lower courts that employers can be held responsible for co-worker harassment only if they "knew (or should have known) of the harassment and failed to take appropriate remedial action"³⁸—

inform her immediate supervisor (not Slowik) because "it would be his duty as my supervisor to report any incidents of sexual harassment.") (citations omitted).

31. *Id.* at 749.

32. *Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998).

33. *Id.* at 781-83.

34. *Id.* at 783-85.

35. RESTATEMENT (SECOND) OF AGENCY, § 219(1) (1957) [hereinafter "RESTATEMENT"]; *Burlington Industries*, 524 U.S. at 756-57.

36. *Burlington Industries*, 524 U.S. at 757 (1998).

37. RESTATEMENT, § 219(2).

38. See *supra* note 22 and accompanying text. Some courts have suggested, however—both before and after *Faragher* and *Burlington Industries*—that the duty goes beyond the correction of reported harassment and also includes some affirmative preventive obligation, described either as a duty to provide some avenue for complaints, e.g., *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994); *Newtown v. Shell Oil Co.*,

described by the Supreme Court as “a negligence standard.”³⁹ As characterized by the Court, such liability presumably is justifiable only under subsection (b) of the Restatement, based on the employer’s own negligence.⁴⁰ No concept of “vicarious” liability is available in such circumstances. “In co-worker harassment cases, the employer is liable, if at all, directly, not derivatively.”⁴¹

Turning to the question of supervisor harassment, the Court began with subsection (b) of the Restatement. The employer’s own negligence is at issue, according to the Court, once the employer becomes aware of the alleged misconduct:

Under subsection (b) [of Section 219(2) of the Restatement], an employer is liable when the tort is attributable to the employer’s own negligence. § 219(2)(b). Thus, although a supervisor’s sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. . . . [B]ut Ellerth seeks to invoke the more stringent standard of vicarious liability.⁴²

The Court thus makes an explicit distinction between “direct” liability (based on the employer’s own behavior in failing to correct known harassment) and “vicarious” liability (based on the supervisor’s conduct which is unknown to the employer).

52 F. Supp. 2d 366, 372 (D. Conn. 1999), or reasonable actions to “discover” the harassment, *e.g.*, *Perry v. Harris Chermín, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (ruling that the standard for liability for co-worker harassment is whether the employer has been “negligent either in discovering or remedying the harassment”); *Franklin v. King Lincoln-Mercury-Suzuki, Inc.*, 51 F. Supp. 2d 661, 665 (D. Md. 1999) (quoting *Perry* for the same rule).

39. *Faragher*, 524 U.S. at 799.

40. *Id.* at 799 (“Those courts [District Courts and Courts of Appeal] have . . . uniformly judg[ed] employer liability for co-worker harassment under a negligence standard”); *Burlington Industries*, 524 U.S. at 760 (“We turn to the aided in the agency relation standard [under subsection (d) of the RESTATEMENT]. In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relations standard, *an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.*”) (emphasis added); *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997) (“[W]e have defined the test as whether the employer ‘knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action’”) (quoting *Fleener v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996)); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (“When an employee is harassed by a co-worker, the employer may be held responsible only if ‘the employer knew or should have known about an employee’s acts of harassment and fails to take appropriate remedial action,’”) (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989)); *Daniels v. Essex Group, Inc.*, 938 F.2d 1264, 1275 (7th Cir. 1991) (“an employer will be liable for discrimination by an employee ‘if the employer knew or should have known about an employee’s acts of harassment and fails to take remedial action’”) (quoting *Brooms*, 881 F.2d at 42); 29 C.F.R. § 1604.11(d) (1997).

41. *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997) (cited by the Supreme Court with approval in *Burlington Industries*, 524 U.S. at 760).

42. *Burlington Indus.*, 524 U.S. at 758-59 (emphasis added). Note that the standard generally applied by the lower courts has been not that the employer actually “stop” the harassment but rather that he take action “reasonably calculated” to end the behavior. *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999); *Intelkofer v. Turnage*, 973 F.2d 773, 338 (9th Cir. 1992); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

Moving on to the issue of vicarious liability presented in both *Burlington Industries* and *Faragher*—assuming no knowledge of the harassment on the part of the employer—the Court turned to the remaining provision of the Restatement. Under Section 219(2)(d), a master may be responsible for acts outside the scope of employment where “the servant . . . was aided in accomplishing the tort by the existence of the agency relationship.”⁴³ Where a supervisor’s conduct involves “a tangible employment action” (such as a pay raise or promotion), the Court held, vicarious liability is clear; it was the agency relationship that provided the supervisor the authority to commit the “tort”— “[t]he supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.”⁴⁴

When hostile environment harassment is alleged in the absence of a “tangible employment action,” however, the Court described other considerations.

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would effect Congress’ intention to promote conciliation rather than litigation in the Title VII context. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation to employer liability in certain circumstances.⁴⁵

In fact, the “primary objective” of Title VII, according to the Court, “is not to provide redress but to avoid harm.”⁴⁶

Against this backdrop of policy concerns, the Court concluded that an employer will be held vicariously liable for *unreported* supervisor harassment *unless* he can establish, “by a preponderance of the evidence,” a two part affirmative defense. In general terms, if the employer had an anti-harassment

43. RESTATEMENT, § 219(2)(d).

44. *Burlington Indus.*, 524 U.S. at 654. The court goes on to say: “[W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate. Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action. . . . Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard. . . . When a supervisor makes a tangible employment decision, there is assurance that the injury could not have been inflicted absent the agency relation. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. . . . Whatever the exact contours of the aided in the agency relation standard, its requirement will always be met when a supervisor takes a tangible employment action against a subordinate.” *Id.* at 760-61.

45. *Id.* at 764 (citations omitted).

46. *Faragher*, 524 U.S. at 805-806.

policy in place and the employee failed to use it, the employer will not be held responsible for the harassment.

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.⁴⁷

Thus, in reviewing the possible avenues of liability for the employer, the Supreme Court implicitly or explicitly outlined the appropriate liability standards in virtually all sexual harassment cases.

For co-worker harassment, the standard is one of direct liability based on the employer's negligence—the employer is held responsible only if it knew (or should have known) of the conduct and failed to respond appropriately. The plaintiff retains the burden of proof on both issues.

For harassment resulting in a tangible employment action, strict liability is imposed regardless of the employer's knowledge of the supervisor's actions.

Finally, for supervisor hostile environment harassment (not involving a tangible employment action), the Court suggested one of two possibilities.

First, applying Section 219(2)(b) of the Restatement (Second) of Agency, an employer may be directly liable for his or her own negligence in responding to *known* sexual harassment.

Second, under Section 219(2)(d), the employer is vicariously liable for *unknown* harassment by a supervisor unless the defendant can establish by a preponderance of the evidence the two part affirmative defense.

II. THE CIRCUITS REACT

A. *Vicarious and Direct Liability United*

In spite of the lengthy discussions and analyses of employer liability in *Faragher* and *Burlington Industries*, the lower courts are not in complete

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

agreement over their application. A substantial majority of the circuit courts have adopted the *Faragher/Burlington Industries* affirmative defense as one of universal application for *all* supervisor hostile environment harassment claims—making no distinction between direct and vicarious liability. For cases in which the plaintiff reported the harassment to the employer, the application is at best awkward and at worst a complete misfit. The second prong of the defense, requiring the defendant to prove that the plaintiff unreasonably failed to utilize the employer's grievance procedure, is often clearly refuted by the undisputed fact of an internal grievance.

*Richardson v. New York State Department of Correctional Services*⁴⁸ illustrates the problem. The plaintiff complained repeatedly to the employer about several arguably racist remarks made by both supervisors and co-workers.⁴⁹ The district court granted summary judgment for the defendant on the ground that the alleged incidents were not sufficiently pervasive to constitute hostile environment racial harassment. The Second Circuit disagreed, concluding that the pervasiveness and severity of the alleged conduct warranted a trial and could not be rejected as a matter of law.

On the question of the employer's liability, the Second Circuit assumed that the *Faragher/Burlington Industries* defense was applicable to all situations of supervisor harassment. "The Supreme Court recently held that an employer is presumed absolutely liable in cases where the harassment is perpetrated by the victim's supervisor, although employers may interpose an affirmative defense to rebut that presumption."⁵⁰ The plaintiff's allegations included two incidents of comments made by supervisors. Under the first prong of the affirmative defense, the court considered whether the defendant had responded reasonably to the plaintiff's complaints. Again, the court concluded that the issue was one for the fact-finder at trial and could not be determined on summary judgment. With respect to the second prong of the defense, however, the court noted there was no dispute "that Richardson took advantage of all avenues of complaint [the employer] made available to her," thus refuting part two of the employer's defense.⁵¹

In *Smith v. First Union National Bank*,⁵² the Fourth Circuit similarly reviewed a grant of summary judgment for the defendant in a case of reported

48. 180 F.3d 426 (2d Cir. 1999).

49. The Supreme Court in *Faragher* noted that "Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." *Faragher*, 524 U.S. at 787 n.1 (citation omitted). In *Burlington Industries*, the Court cited racial harassment and sexual harassment cases interchangeably when discussing liability for co-worker harassment. 524 U.S. at 760 (citing *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991)). The lower courts appropriately have applied the same liability standards to both claims. See, e.g., *Walker v. Thompson*, 214 F.3d 615 (5th Cir. 2000); *Tutman v. WBBM-TV Inc.*, 209 F.3d 1044 (7th Cir. 2000); *Hafford v. Seidner*, 167 F.3d 1074 (6th Cir. 1999); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998).

50. *Richardson*, 180 F.3d at 441.

51. *Id.* at 442-43.

52. 202 F.3d 234 (4th Cir. 2000).

supervisor harassment. The plaintiff alleged a number of derogatory comments made by her supervisor (Scroggins), including remarks that female employees, when upset, must be “menstruating” or “needed a ‘good banging,’” and “the only way for a woman to get ahead at First Union was to spread her legs.”⁵³ The supervisor also threatened the plaintiff on several occasions. Ms. Smith reported the harassment to the employer but ultimately was dissatisfied both with the investigation and the employer’s response to Mr. Scroggins’ behavior.⁵⁴ The district court granted summary judgment on the sexual harassment claim because the alleged conduct was not sufficient to constitute actionable harassment or, alternatively, there was no liability for any harassment that did occur.⁵⁵

After first concluding that Ms. Smith’s allegations were adequate to warrant a trial on the issue of whether hostile environment harassment had occurred, the Fourth Circuit turned to the question of liability. Again, the court agreed a trial was required (this time under the *Faragher/Burlington Industries* cases) to allow a jury to consider the adequacy of the employer’s policy and the reasonableness of the employer’s response once the conduct was reported⁵⁶ – both of which the court assumed were relevant to prong one of the *Faragher/Burlington Industries* defense. The court recognized that the affirmative defense included two parts but failed to provide any guidance to the trial court on how the second prong might be satisfied in a case where the employee complained of the misconduct.

Given First Union’s inadequate investigation, its failure to discuss or even mention the topic of sexual harassment with Scoggins, and its insistence on keeping Smith working in close proximity to Scoggins, a jury could find that First Union did not act with reasonable care to correct promptly Scoggins’ harassing behavior. Because a dispute of fact exists as to whether First Union exercised reasonable care to prevent and correct promptly Scoggins’ harassment of Smith, First Union cannot rely on an affirmative defense to justify the district court’s grant of summary judgment. Accordingly, we decline to decide whether First Union proved the second element of the Faragher- Ellereth test, which is whether Smith unreasonably failed to take advantage of any preventive or corrective opportunities by First Union.⁵⁷

If applying *Faragher/Burlington Industries*, as the courts claim to be doing in both *Richardson* and *Smith*, these facts arguably should have resulted in

53. *Id.* at 238-39.

54. As described by the court, First Union failed to investigate several of Ms. Smith’s allegations and also failed to characterize the complaint as one involving sexual harassment. As a consequence of this “inadequate investigation,” Mr. Scroggins was placed on probation and counseled to “improve his management style and ‘smile more.’” *Id.* at 245-46.

55. *Id.* at 243-44.

56. *Id.* at 246-47. The conduct persisted for more than two years before Ms. Smith filed a formal complaint, although Ms. Smith also alleged management discouraged her from using the grievance processes. *Id.* at 239. Nonetheless, the issue of Ms. Smith’s delay in reporting might be raised by the defendant as part of prong two of the affirmative defense. See *infra* notes 64-74 and accompanying text.

57. *Id.* at 246.

summary judgment on liability *for the plaintiff*. Vicarious liability is imposed, according to the Supreme Court *unless* both parts of the affirmative defense can be established. Since the facts of the plaintiffs' internal reports were undisputed in both cases – thus refuting the second prong of the defense – the courts logically should have granted summary judgment for the plaintiff. Yet both the Second and Fourth Circuits clearly assumed that liability would not be imposed at trial if the employer met only prong one of the defense by proving it “exercised reasonable care” in responding to the complaints of supervisor misconduct. Otherwise, there would have been no reason to remand for trial on that issue.⁵⁸

The “one size fits all” approach of the Second and Fourth Circuits is not an aberration. Other circuits have similarly failed to recognize any distinction in vicarious liability (for unreported harassment) and direct liability (for reported harassment). The Third,⁵⁹ Fifth,⁶⁰ Sixth,⁶¹ Seventh,⁶² Eighth,⁶³ and Ninth Circuits⁶⁴ all have applied the *Faragher/Burlington Industries* affirmative defense to cases of reported supervisor hostile environment harassment. Numerous district courts have followed suit.⁶⁵

58. *Richardson*, 180 F.3d at 442-43 (“We thus believe that reasonable jurors could disagree about whether [the employer’s] responses were so ‘effectively remedial and prompt’ as to shield [the employer] from liability as a matter of law. . . . Accordingly, [the employer] was not entitled to summary judgment on the question of employer liability for the hostile work environment at ACF. We reverse the court’s order granting defendant’s motion and remand with instructions to deny the motion.”).

59. *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 117-20 (3d Cir. 1999) (analyzing the trial court’s jury instructions under the two prong affirmative defense in an action involving both supervisor and co-worker harassment reported to the employer).

60. *Walker v. Thompson*, 214 F.3d 615, 626-27 (5th Cir. 2000) (applying affirmative defense to claims of racial harassment where the harassment was reported and investigated).

61. *Hafford v. Seidner*, 167 F.3d 1074, 1080-81 (6th Cir. 1999) (applying affirmative defense to reported racial harassment by supervisors). *But see* *Jackson v. Quanex Corp.*, 191 F.3d 647, 659, 663 (6th Cir. 1999) (suggesting a distinction between direct and derivative liability for racial harassment but ultimately applying the two part affirmative defense of *Burlington Industries* to harassment known by the employer).

62. *Hill v. Am. Gen. Fin.*, 218 F.3d 639, 642-43 (7th Cir. 2000) (applying affirmative defense to reported incidents of racial and sexual harassment).

63. *Miller v. Woodharbor Molding & Millworks, Inc.*, 174 F.3d 948, 949 (8th Cir. 1999) (remanding case to give defendant a chance to prove affirmative defense for supervisor sexual harassment, although plaintiff alleged that the employer “knew or should have known” about the misconduct); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 597-98 (8th Cir. 1999) (assuming affirmative defense applies in case of reported supervisor harassment).

64. *Montero v. Agco Corp.*, 192 F.3d 856, 861-63 (9th Cir. 1999) (applying affirmative defense to reported supervisor harassment).

65. *E.g.*, *Lonergan v. Minolta Bus. Sys.*, 1999 U.S. Dist. LEXIS 511 (N.D. Ill. 1999) (dicta); *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870 (N.D. Ind. 1998); *Dunegan v. City of Council Grove*, 77 F. Supp. 2d 1192 (D. Kan. 1999); *Fiscus v. Triumph Group Operations, Inc.*, 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998) (dicta); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998); *Sowemimo v. D.A.O.R. Security, Inc.*, 43 F. Supp. 2d 477 (S.D.N.Y. 1999); *Dewitt v. Lieberman*, 48 F. Supp. 2d 280 (S.D.N.Y. 1999); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812 (W.D.N.Y. 1998); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254 (E.D. Okla. 1999); *Brandrup v. Starkey*, 30 F. Supp. 2d 1279 (D. Or. 1998); *Glickstein v. Neshaminy Sch. Dist.*, 1999 U.S. Dist. LEXIS 727 (E.D. Pa. 1999); *Corcoran v. Shoney’s Colonial Inc.*, 24 F. Supp. 2d 601 (W.D. Va. 1998); *Reinhold v. Virginia*, 1998 U.S. Dist. LEXIS 19532 (E.D. Va. 1998).

B. Reporting Delays

In those cases applying the *Faragher/Burlington Industries* affirmative defense to instances of reported harassment, some courts have avoided the problem of applying the second part of the defense by focusing on the plaintiff's alleged failure to make a *prompt* complaint under the employer's policy. Thus, courts deem prong two of the defense satisfied by characterizing any delay in reporting as an unreasonable failure to take advantage of the employer's complaint process.

In *Hill v. American General Finance*,⁶⁶ for example, the Seventh Circuit considered claims involving both sexual and racial harassment. Shortly after she began work, Ms. Hill's supervisor began making crude and suggestive comments. On one occasion, he allegedly rubbed his pelvis against her buttocks, stating, "Boy that feels good."⁶⁷ A few months after the harassment began, Ms. Hill sent a letter to the company's chief executive officer complaining of the supervisor's behavior towards customers, signing a customer's name to the letter. A few days later, she wrote a second letter signed "a very worried and frightened employee."⁶⁸ The Human Resources department conducted an investigation as a result, but Ms. Hill still did not admit to being the author of the letter. Finally, Ms. Hill wrote a third letter to the director of operations describing instances of harassment and signing her name. Within three weeks, after a follow-up investigation, the supervisor was transferred and demoted with a reduction in pay.⁶⁹

Under the *Faragher/Burlington Industries* standard, according to the Seventh Circuit, American General Finance acted "in a flash" upon receipt of the signed letter to investigate and correct the problem, thus meeting the first prong of the affirmative defense.⁷⁰ Two members of the panel also concluded that Ms. Hill did not take advantage of the company's corrective opportunities under prong two of the defense until she signed and sent her third letter – the delay constituting an "unreasonable" failure to take advantage of the grievance process available. Having met both parts of the affirmative defense on liability, the court concluded, summary judgment for the employer was appropriate.

Similarly, in *Watts v. Kroger Co.*,⁷¹ the plaintiff ultimately reported the harassment by her supervisor but waited several months to do so. According to the plaintiff's allegations, the harassment began in March 1993 but intensified in the spring of 1994. The plaintiff met with the store manager to complain in July 1994. The manager told the accused supervisor to stop his behavior, but did not

66. 218 F.3d 639 (7th Cir. 2000).

67. *Id.* at 641.

68. *Id.*

69. *Id.* at 642.

70. *Id.* at 643.

71. 170 F.3d 505 (5th Cir. 1999).

report the incident to the Human Resources Department. About two weeks later, on July 19, 1994, the plaintiff also filed a union grievance claiming sexual harassment. Kroger initiated no investigation until September. The district court granted summary judgment for the defendant on the liability issue, based on precedent predating the Supreme Court's 1998 decisions.

In addressing the *Faragher/Burlington Industries* standard before the Fifth Circuit, Kroger argued that the plaintiff's delay in reporting amounted to an unreasonable failure to take advantage of available complaint procedures under the second prong of the affirmative defense.⁷² The circuit court remanded this question for trial, finding a "genuine issue of material fact such that a reasonable juror could decide against Kroger" on the question of whether the reporting delay constituted an unreasonable failure on the part of the plaintiff to take advantage of corrective opportunities.⁷³ (Curiously, the court made no mention of the first prong of the defense, although the manager did nothing to follow up on the plaintiff's complaints after telling the supervisor to stop the behavior, and the employer waited two months to begin an investigation after the report to the store manager and the union grievance.)⁷⁴

In *Montero v. Agco Corporation*,⁷⁵ the Ninth Circuit considered a case of sexual harassment involving two supervisors and one co-worker. Plaintiff Carrie Ann Montero was the only female employee in the company's Parts Division Distribution Center. Plaintiff alleged a variety of offensive conduct and some unwanted touching, beginning with the time that she was hired almost two years earlier and ending approximately four months before she complained to the Human Resources Manager. Within ten days of the complaint, the employer investigated the allegations, fired one of the accused supervisors, and disciplined the second supervisor and co-worker. Applying the *Faragher/Burlington Industries* holding, the trial court granted summary judgment to the defendant based on the employer's prompt response (satisfying prong one) and the plaintiff's delay in reporting (satisfying prong two). The Ninth Circuit affirmed.⁷⁶

But in *Hill*, *Watts* and *Montero*, the delay in reporting was beside the point. The real issue at stake, as in *Richardson*, was how the employer responded once the complaint was made. Neither a prompt nor postponed report should shield the employer in *Watts* from liability if the employer's procrastination in initiating an investigation could be considered "negligent" or "unreasonable" as a response to Ms. Watts' complaints. In *Hill* and *Montero*, the court seemed determined to reward the employer for its prompt investigation by rejecting liability and

72. *Id.* at 510.

73. *Id.*

74. *Id.* at 508, 510.

75. 192 F.3d 856 (9th Cir. 1999).

76. Several district courts have followed a similar analysis in cases of reported harassment where the plaintiff's delay in reporting is used to satisfy the second prong of *Faragher/Burlington Industries*. See, e.g., *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029 (E.D. Mo. 2000); *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067 (D.Kan. 1999); *Chambers v. Wal-Mart Stores*, 70 F. Supp. 2d 1311 (N.D. Ga. 1998).

apparently was seeking a rationale to make the *Faragher/Burlington Industries* defense “work” to reach the “right” answer. The issue of delay in reporting added nothing to the analyses or the results. A simple negligence standard applied in all three cases could have provided appropriate results using a much more direct approach.

C. *Vicarious and Direct Liability Divided*

Only the Tenth, Eleventh and (sometimes) Fifth Circuits seem to distinguish those situations of “direct” liability, where the employer was aware of the harassment, and “vicarious” liability, where the employer had no knowledge of the events in question. The issue perhaps has been most clearly articulated by the Tenth Circuit. In the case of *Wilson v. Tulsa Junior College*,⁷⁷ Ms. Wilson promptly reported her supervisor’s propositions and threats to the employer and later won her case at trial. The employer appealed on the issue of whether it should be absolved from liability for the supervisor’s actions based on its policies and appropriate handling of Ms. Wilson’s complaint. In a note on the applicable standard to be applied, the court stated:

In contrast to the vicarious liability claims addressed in [*Faragher and Burlington Industries*], the only basis for employer liability that [the plaintiff] raised below was a negligence theory. She alleged that TJC was itself negligent because it knew or should have known of the harassing conduct of Mr. Hall and failed to take appropriate action. The Supreme Court recognized in *Burlington* and *Faragher* the continuing validity of negligence as a separate basis for employer liability. Although many of the same facts will be relevant to both negligence and vicarious liability claims, in asserting that the employer was negligent the plaintiff bears the burden of establishing that the employer’s conduct was unreasonable, while in the misuse of authority claim the employer bears the burden of establishing as a affirmative defense that it exercised reasonable care to prevent the harassment.⁷⁸

In the Eleventh Circuit case of *Dees v. Johnson Controls World Services, Inc.*,⁷⁹ the plaintiff was employed at a fire station and subjected to repeated harassment by both her co-workers and her supervisors. The plaintiff alleged that she complained frequently to her supervisor, but her supervisor was one of the harassers and took no action. In addition, the plaintiff was threatened with

77. *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1998).

78. *Id.* at 541, n.4 (10th Cir. 1998) (citations omitted). See also *Wright-Simmon v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998). *Wright-Simmon* was an action involving allegations of racial harassment: The court referenced “employer negligence” as a basis for liability “not addressed in either *Burlington* or *Faragher*,” where the employer “knew, or should have known, about the hostile work environment and failed to respond in an appropriate manner.” Because the district court grant of summary judgment had preceded the *Burlington Industries* and *Faragher* decisions, the appellate court remanded the case for consideration of the new liability standard.

79. 168 F.3d 417 (11th Cir. 1999).

retaliation if she took her complaints outside of the unit. When the plaintiff eventually filed a grievance with the human resources department, the employer immediately transferred her to another department and the harassers were fired or disciplined. Based on these facts, the trial court granted summary judgment for the employer because of the prompt remedial action taken once a formal complaint was made.⁸⁰

In reviewing the applicable standard for employer liability under *Faragher* and *Burlington*, the Eleventh Circuit noted the distinction between direct and vicarious liability:

First, an employer can be held directly liable for a supervisor's harassment when the employer either intended, or negligently permitted, the tortious conduct to occur. The harassment can be ascribed to the employer's negligence when the employer knew or should have known about the harassment and failed to take remedial action. Second, an employer can be held vicariously liable for a supervisor's sexual harassment under any one of the following theories: (1) the supervisor holds such a high position in the company that he could be considered the employer's "alter ego"; (2) the harassment violates a nondelegable duty of the employer; (3) the supervisor uses "apparent authority" granted by the employer; or (4) the supervisor is aided in committing the harassment by the existence of his agency relationship with the employer.⁸¹

The appellate court reversed the grant of summary judgment because of "an issue of material fact" as to whether the employer had knowledge of the harassment prior to the plaintiff's formal report to the Human Resources Department.⁸²

Finally, at least one panel of the Fifth Circuit (in contrast to the *Watts* panel) has addressed the direct/vicarious distinction as well. In *Indest v. Freeman Decorating, Inc.*,⁸³ again involving a case of reported harassment, the court explicitly acknowledged that the *Faragher/Burlington* holding did not address the issue in question:

80. *Id.* at 420-21.

81. *Id.* at 421-22 (citations omitted) (emphasis added).

82. *Id.* at 422. The plaintiff alleged two facts to support this conclusion. First, she claimed that an employee in the human resources department, following the formal complaint, had commented to her that those in the fire department were "up to their old tricks again." *Id.* at 423. Second, she alleged that another fire department employee had told her he had made several complaints to the human resources department of the harassment on her behalf prior to her own complaint. *Id.* at 422-23. Thus, the employer arguably could be found liable for its failure to respond to earlier "knowledge" of the harassment.

83. 164 F.3d 258 (5th Cir. 1999).

Ellerth and Faragher do not, however, directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to [the employer's] policy and grievance procedure against sexual harassment, and the employer took prompt remedial action. The Supreme Court cases both involve complaints of longstanding supervisor misbehavior, and the plaintiffs either never utilized or claimed not to be aware of the company policies. But for purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment.⁸⁴

In furtherance of the policies underlying *Faragher* and *Burlington Industries* – providing incentives to the employer to prevent and address harassment⁸⁵ – the *Indest* court nonetheless affirmed the district court's grant of summary judgment. The employer had established both prevention efforts (through an anti-harassment policy) and correction efforts (through its prompt response to the plaintiff's internally filed grievance).

D. Assessing Employer Knowledge

Under either a uniform standard for all employer liability questions for supervisor hostile environment harassment or separate standards for vicarious and direct liability, the question of employer knowledge is a significant threshold inquiry. If separate standards are used, employer knowledge is critical in order to determine which standard should be applied. If a uniform *Faragher/Burlington Industries* standard is applicable, lack of knowledge may be the employer's only defense if no investigation or remedial efforts were attempted.

Dees v. Johnson Controls World Services, Inc.,⁸⁶ discussed earlier, is a good example of the problem. When the plaintiff did file a formal complaint, her employer immediately transferred her to another position, investigated the allegations, and fired or disciplined the harassers. Such prompt and effective action likely would satisfy the affirmative defense as applied by most of the lower courts. There were additional allegations, however, that suggested the human resources department was already aware of the harassment.⁸⁷ If the evidence substantiated those allegations, knowledge might be imputed to the

84. *Id.* at 265. See also *Wright v. N.C. Dep't of Corrections*, 2000 U.S. Dist. LEXIS 8782, n. 16, (M.D.N.C. 2000) ("Although the Supreme Court did not speak to this issue [of liability for reported harassment] in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense. Such a result would be wholly contrary to a laudable purpose behind limitations on the employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation.") (citations omitted).

85. *Id.* at 265-66.

86. 168 F.3d 417 (11th Cir. 1999). See *supra* notes 79-92 and accompanying text.

87. See *supra* note 82.

employer prior to the formal complaint. If so, liability could be imposed for an earlier failure to respond to known harassment.

The courts have had plenty of experience in evaluating whether the employer knew or should have known about the misconduct in co-worker harassment cases where employer knowledge has always been a prerequisite for liability.⁸⁸ For supervisor harassment, however, the knowledge issue has been muddled since *Faragher* and *Burlington Industries*. The “early returns” since those decisions suggest at least some disagreement among the circuits.

For some claims, the knowledge issue will be undisputed when the plaintiff has filed a complaint under the employer’s applicable grievance process. In other cases, such as *Dees*, “knowledge” may be a question for the fact finder. For example, the plaintiff may argue that the employer was aware of the conduct because of the direct observations of management employees.⁸⁹ Alternatively, if the plaintiff failed to utilize a formal complaint process in place but did notify a supervisor or manager, the parties may dispute whether such notification constituted “knowledge” for the purpose of triggering the employer’s obligation to respond. In either case, a preliminary finding on the issue of “knowledge” may be determinative. If knowledge is found, the fact-finder will focus primarily or exclusively on the employer’s response. If the employer has taken no action, having relied on a “no knowledge” defense, liability should be imposed (assuming the offending conduct is found to constitute “harassment” within the meaning of the statute). If knowledge is lacking, the court’s focus is limited under *Faragher/Burlington Industries* to past efforts to prevent harassment, usually in the form of a well-publicized anti-harassment policy.

Assume that the employer’s sexual harassment policy has been widely distributed and designates the Human Resources Department as the place to take any complaints about sexual harassment in the workplace. The plaintiff fails to file a formal complaint with the Human Resources Department, as required under the employer’s procedures, but does report the harassment to a supervisor. The supervisor takes no action on the complaint and does not notify the HR Department of the problem. If knowledge is not imputed to the employer in this situation, and *Faragher/Burlington Industries* is deemed applicable, the plaintiff loses because of her failure to utilize the complaint procedure available under the second prong of the affirmative defense. If “knowledge” is found and the employer failed to respond, however, the plaintiff should prevail – either because the employer failed to correct the harassment under the first prong of the defense (for those courts applying the *Faragher/Burlington Industries* defense even in cases of reported harassment) or because of the employer’s own negligence in not addressing the complaint.

A similar fact situation was considered in *Madray v. Publix Supermarkets, Inc.*⁹⁰ The Eleventh Circuit concluded that knowledge of the alleged harassment

88. See *supra* notes 21, 35-39 and accompanying text.

89. See e.g., *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 118 (3d Cir. 1999).

90. 208 F.3d 1290 (11th Cir.), *cert. denied*, 531 U.S. 926 (2000).

could not be imputed to the employer even though the plaintiff had reported informally the misconduct to three mid-level managers. The court relied on several factors in reaching this conclusion. First, the employer had a well-publicized anti-harassment policy that clearly designated to whom complaints should be made. Second, the managers to whom the plaintiff reported her concerns were unaware of an ongoing pattern of behavior or any expectations on the part of the plaintiff that they would take action to address the situation. Finally, when the plaintiff ultimately did make a formal complaint pursuant to the employer's procedures, the employer promptly investigated the allegations and took appropriate action.⁹¹

By contrast, the Tenth Circuit has indicated that a report of harassment to any supervisor may be considered notice to the employer. In *Wilson v. Tulsa Junior College*,⁹² the plaintiff worked on the night shift cleaning crew. One evening, her supervisor Kenneth Hall exposed himself, requested oral sex, and told her he could make her life "hell" if she refused. Returning home at the end of her shift (at 1:00 a.m.), Ms. Wilson contacted the local police department and described the incident. The next morning, a city police officer (who also worked part-time for the campus police) reported to a campus police area supervisor that an unknown "hysterical female" had claimed Mr. Hall had exposed himself to her.⁹³

The defendant in *Wilson* argued that the area supervisor was such a "low level" supervisor that he could not be considered "the employer" for the purpose of imputing knowledge of the harassment to the college. The Tenth Circuit rejected this view:

"[A]ctual knowledge will be demonstrated in most cases where the plaintiff has reported harassment to management-level employees." We have further held that an employee who is a "low-level supervisor" may also be a management-level employee for purposes of imputing knowledge to the employer when he is [a] titled supervisor and has some authority over other employees.⁹⁴

Indeed, the *Wilson* court went so far as to suggest that an anti-harassment policy that did not require *all* supervisors to take some action on reported sexual harassment would likely be considered inadequate to shield the employer from liability. "A procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take action falls short of that which might absolve an employer of liability."⁹⁵

91. Compare *id.* at 1293 with *Breda v. Wolf Camera & Video*, 222 F.3d 886 (11th Cir. 2000) (finding that plaintiff's complaint to her manager was sufficient to establish employer knowledge where the employer's policy specifically permitted reports to managers. The Court also found that plaintiff's failure to also contact the personnel department did not defeat her claim that the employer was on notice of the harassment).

92. 164 F.3d 534 (10th Cir. 1998).

93. *Id.* at 537-38.

94. *Id.* at 542 (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998)).

95. *Id.* at 541-42 (citing *Varner v. Nat'l Super Mkts.*, 94 F.3d 1209, 1214 (8th Cir. 1996)).

Other courts have rejected the need for formal reporting as well. In the context of co-worker racial harassment in *Jackson v. Quanex Corp.*,⁹⁶ the Sixth Circuit criticized the lower court for requiring the plaintiff to follow formal complaint procedures:

[N]owhere do the above delineated standards specify that the plaintiff, or any other individual, must “report” the offensive conduct of co-workers to the employer. Rather, to succeed, the plaintiff must establish that the employer “knew or should have known” of the offenses. The case at hand illustrates the relevance of this distinction, since, particularly as to the slurs and racial graffiti presumably perpetrated by co-workers and hostile to Jackson, it is important to observe that although Jackson herself did not report every instance of what she saw to management, other African-American employees testified that they did report them to management Moreover, in cases such as this, where harassment is pervasive, courts may impute constructive notice to an employer. Employees testified that much of the offensive graffiti was in restrooms commonly used by workers and supervisory foremen alike.⁹⁷

Similarly, in *Hurley v. Atlantic City Police Department*,⁹⁸ the Third Circuit rejected the defendant’s contention that the plaintiff was obligated to utilize five available mechanisms for pursuing her harassment complaint:

Hurley had no obligation to try all these mechanisms, because her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to ACPD’s own policy, was on notice of the harassment. An employer cannot “use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law.”⁹⁹

An employer who has studied the implications of these decisions may design his or her policy and implementation process quite differently, depending on the circuit in which he or she happens to reside. Based on *Madray*, employers in the Eleventh Circuit may be encouraged to “control” the issue of employer knowledge by designating a complaint “gate-keeper” in their harassment policies – requiring all complainants to go to a single individual or office. Employers in the Eleventh Circuit, and perhaps the Third Circuit, also may be wise to avoid any suggestion in the policy language that supervisors have an obligation to

96. 191 F.3d 647 (6th Cir. 1999).

97. *Id.* at 663 (citation omitted).

98. 174 F.3d 95 (3rd Cir. 1999).

99. *Id.* at 118. *See also* *Watts v. Kroger, Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (rejecting employer’s argument that filing a union grievance, instead of filing a complaint under the employer’s sexual harassment policy, failed to satisfy prong two of the affirmative defense); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 64 (2nd Cir. 1998) (plaintiff satisfied burden of employer “knowledge” of co-worker harassment by reports to her direct supervisor; employer’s policy explicitly stated that “an employer is considered to have direct knowledge when an employee has complained directly to a supervisor”); *Green v. Servicemaster Co.*, 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999) (complaint to “lead” man and union steward may raise an issue of material fact as to whether plaintiff had otherwise avoided harm under second prong of *Faragher/Burlington Industries* affirmative defense) (dictum). Arguably, this case is distinguishable because the policy itself required all supervisors to report any harassment complaints.

report or prevent harassment. By contrast, an employer in the Tenth Circuit is encouraged to place reporting responsibilities on all supervisors, presumably requiring extensive communication and/or training efforts to ensure that even the first level supervisors are aware of the obligation and can recognize possible harassment complaints.

Perhaps the issue of reporting channels is not an “either/or” proposition. No doubt there is a fine line for the employer between the “safe harbor” suggested by *Madray* and the rejection of a place to “hide” suggested by *Wilson*. One would be more inclined to recognize the “safe harbor” approach of *Madray* if the employer could demonstrate extensive efforts to ensure all employees were aware of where and how to complain. An employer reasonably could argue that a centralized and well-trained human resources staff could better accomplish the responsible and sensitive handling of such grievances. On the other hand, the realities of the workplace make it far more likely that employees will present their problems to a first-line supervisor rather than make a formal complaint to human resources director. And the policy need not require the supervisor to investigate or address the complaint; the supervisor’s responsibility could end with passing the information along to the HR specialists. Furthermore, if a report made to any supervisor constitutes knowledge on the part of the employer, the necessity for supervisor training and education about the company’s policies becomes far more compelling for the employer – thus serving the policies of prevention articulated in *Faragher* and *Burlington Industries*.¹⁰⁰

E. Burdens of Proof and Summary Judgment

While the lower courts may be less than clear on their analytical approach to liability for *reported* (or known) harassment, the *Faragher/Burlington Industries* Court left no confusion about who bears the burden of proof on the issue of employer liability for *unreported* harassment. The defendant must establish the affirmative defense by a preponderance of the evidence.¹⁰¹ Even in cases of reported harassment, a similar approach may be warranted, and certainly has been implicitly used by most of the circuits presented with the problem.

For cases tried before a jury, the burden shifting on liability may have little practical impact. Whether the standard for reported harassment is characterized as an issue of employer negligence in responding to the complaint (with the burden of proof on the plaintiff) or the reasonableness of the employer’s response (with the burden of proof on the defendant), juries likely would view the issue as one in the same. For the employer/defendant who promptly investigates a claim of harassment and takes appropriate remedial action, juries probably will find that the employer acted “reasonably” or “not negligently” under either characterization.

100. See *supra* notes 45-46 and accompanying text.

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

At the summary judgment stage, however, one might expect the burden of proof issue to have far more significance. In the traditional lore of summary judgment, the texts and treatises assert that it is both difficult and rare for the party carrying the burden of proof to move successfully for summary judgment. We typically think in terms of summary judgment motions filed by the defendant on claims for which the plaintiff (the non-moving party) carries the burden of proof. As described in *Moore's Federal Practice*:

Ordinarily, a party defending the case or claim is the party seeking summary judgment and the party opposing summary judgment is a plaintiff or counter or cross-claimant bearing the burden of persuasion on the matter. . . . [S]ummary judgment for claimants is relatively rare, even in cases controlled by the preponderance of the evidence standard, because a movant who is also a claimant must do more than a defendant because the burden of proof is placed on claimants rather than defendants, a factor that often proves decisive even when the burden is only the preponderance standard. . . . [T]he claimant movant must, even when faced with only the preponderance burden of proof, establish a right to summary judgment by showing that the pretrial record demonstrates that the claimant movant is entitled to judgment as a matter of law and that no reasonable factfinder at trial could fail to regard the claimant as having discharged its preponderance of the evidence burden.¹⁰²

Moore further mentions that the annotations for Federal Rule of Civil Procedure 56 (governing summary judgment) list “few cases even discussing situations in which the plaintiff obtained summary judgment.”¹⁰³

Given that a “reasonableness” standard is at stake (i.e., the reasonableness of the employer’s conduct in preventing and correcting harassment), even fewer summary judgments may be warranted. In a different context, the Supreme Court has noted that “the jury’s unique competence in applying the ‘reasonable man’ standard is thought ordinarily to preclude summary judgment in negligence cases.”¹⁰⁴ In the context of a sexual harassment case, Judge Michael of the Fourth Circuit has expressed similar reservations in a concurring opinion:

102. 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶56.36-.38 (emphasis added).

103. *Id.* at ¶56.38. The treatise goes on to conclude that summary judgment under such circumstances is “infrequent but not impossible.” *Id.* at ¶56.90.

104. See *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1975) (“the jury’s unique competence in applying the ‘reasonable man’ standard is thought ordinarily to preclude summary judgment in negligence cases.”); *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1316 (7th Cir. 1983) (“[Q]uestions concerning the reasonableness of the parties’ conduct, foreseeability and proximate cause particularly lend themselves to decision by a jury.”); *Gross v. S. Ry.*, 414 F.2d 292, 296 (5th Cir. 1969) (“issues of negligence, contributory negligence and proximate cause, the resolution of which requires the determination of reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.”).

I believe we are ill-advised to encourage the district court to consider, on summary judgment, whether Southern has established the new Faragher- Ellerth affirmative defense. I say this because the defense is especially fact intensive. . . . When the reasonableness of conduct is in question, summary judgment is rarely appropriate because juries have “unique competence in applying the reasonable person standard” to the facts of the case. . . . If Faragher and Ellerth signal anything, it is that fewer sexual harassment cases will be resolved on summary judgment.¹⁰⁵

With this backdrop, one would assume that the courts approach with caution defendant summary judgment motions on the liability issue in supervisor hostile environment harassment cases. Indeed, summary judgment for the plaintiff may be more appropriate, as the party without the burden of proof on the issue. A cursory review of cases decided since *Faragher* and *Burlington Industries* refutes those assumptions, however. As discussed, many of these cases use the *Faragher/Burlington Industries* affirmative defense for both “direct” liability cases of reported harassment and “vicarious” liability cases of unreported harassment. In both circumstances, summary judgment often is granted for the defendant on the liability issue with little substantive discussion of the burden of proof issue.¹⁰⁶

The courts generally acknowledge that the defendant must establish the affirmative defense to avoid liability but rarely address the clearly higher burden on the defendant as both the moving party and the party carrying the burden of proof on the matter. Nor do the courts even suggest that summary judgment for the plaintiff may be warranted, even when they explicitly conclude that the defendant is unable to satisfy one of the prongs of the defense. Summary judgment for the plaintiff on liability is simply nonexistent (although perhaps even the idea of a plaintiff getting summary judgment on any issue in a Title VII case is so foreign to experience that few plaintiff lawyers would even consider filing such a motion).¹⁰⁷

105. *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 184 (4th Cir. 1998) (Michael, J., concurring) (emphasis added). The majority dismissed Judge Michael’s concerns in a footnote, observing, “[W]e think this reads too much into *Faragher* and *Ellerth*. Those cases in no way indicate that a variation from the normal requirements of Rule 56 is appropriate of that grants of summary judgment will be infrequent.” *Id.* at 182.

106. See, e.g., *Seals v. Onondaga*, 2000 U.S. App. LEXIS 1858 (2nd Cir. 2000); *Montero v. Agco Corp.*, 192 F.3d 856 (9th Cir. 1999); *Meadows v. Tulare*, 1999 U.S. App. LEXIS 21083 (9th Cir. 1999); *Hill v. Am. Gen. Fin.*, 218 F.3d 639 (7th Cir. 2000); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254 (E.D. Okla. 1999); *Kohler v. Inter-Tel Techs.*, 1999 U.S. Dist. LEXIS 5425 (N.D. Cal. 1999); *Morris v. SEPTA*, 1999 U.S. Dist. LEXIS 15830 (E.D. Pa. 1999); *Riffle v. Sports Auth., Inc.*, 1999 U.S. Dist. LEXIS 14588 (D. Md. 1999); *Bishop v. Interim Indus. Serv.*, 1998 U.S. Dist. LEXIS 17350 (N.D. Tex. 1998); *Marsicano v. Am. Soc’y of Safety Eng’rs*, 1998 U.S. Dist. LEXIS 14314 (N.D. Ill. 1998); *Barua v. Credit Lyonnais-U. S. Branches*, 1998 U.S. Dist. LEXIS 20338 (S.D.N.Y. 1998) (dicta).

107. Cf. *Pacheco v. New Life Bakery, Inc.*, 187 F.3d 1055, 1062 (9th Cir. 1999) (judgment was entered for the plaintiff on liability but only after the court concluded that the defendant’s actions constituted a tangible employment action – thus subjecting the employer to strict liability). But see *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 699-70 (7th Cir. 2001) (holding that the defendant, “as a matter of law,” was “not entitled to present an affirmative defense” to plaintiff’s claim where the plaintiff filed an external complaint as permitted under the defendant’s policy, and the defendant did not conduct an investigation or take any remedial action upon learning of the alleged harassment).

In *Hill v. American General Finance*,¹⁰⁸ for example, summary judgment turned on the reasonableness of the employer's efforts to prevent and correct harassment. As discussed earlier,¹⁰⁹ Ms. Hill accused her supervisor of making crude remarks and initiating unwanted physical contacts. Ms. Hill complained of the conduct in three letters sent to the employer but only signed her name to the third one. An investigation followed and the supervisor was transferred and demoted.¹¹⁰ Applying *Faragher/Burlington Industries*, two members of the three judge panel concluded that the company satisfied part one of the affirmative defense by moving quickly to investigate and correct the problem.¹¹¹ Under part two of the defense, the majority found that Ms. Hill unreasonably had failed to take advantage of the employer's complaint process by not identifying herself until the third letter. Thus, having met both prongs of the affirmative defense, the employer was entitled to summary judgment.

In dissent, however, Judge Wood painted a very different picture of the employer's commitment to the prevention of sexual harassment. Judge Wood took issue with the court's finding on the first prong of the affirmative defense because of arguable inadequacies in the company's policies. The employer had pointed to three separate documents that purportedly combined to constitute the defendant's anti-harassment policy. One merely stated that the company complied with laws regarding equal employment. The second document addressed sexual harassment explicitly but did little more than prohibit harassment in general terms. The third document provided a generic complaint procedure. What was lacking in the case, according to Judge Wood, was any effort on the part of the employer to distribute or publicize these policies:

Hill claimed that she did not recall ever receiving those policies. AGF did not try to refute this testimony by showing, as many employers do, that Hill signed for receipt of the policies when she joined the company, nor did it introduce evidence indicating when the policies were first released to the workforce. It did not do this because, at least as the record shows so far, that never happened. Instead, the best AGF could do was to assert that the policies were buried in some notebooks that were themselves located in a "public access area" and accessible to employees.¹¹²

Judge Wood concluded that summary judgment would be inappropriate under these circumstances. "Employees cannot be expected to go around

108. 218 F.3d 639 (7th Cir. 2000).

109. See *supra* notes 66-70 and accompanying text.

110. *Hill*, 218 F.3d at 642.

111. *Id.* at 641-42.

112. *Id.* at 647 (Wood, J., dissenting). By comparison, the majority concluded, "While [the policies] may leave room for improvement, the policies get the job done." *Id.* at 643. The Seventh Circuit's arguably "minimalist" approach to prong one of the affirmative defense is in sharp contrast to the analysis of a district court in Iowa. In *Miller v. Woodharbor Molding & Millworks*, 80 F. Supp. 2d 1026 (N.D. Iowa 2000) the court indicated that an "effective anti-harassment policy" would include training for supervisors, an express anti-retaliation provision, and multiple channels for reporting. The employer's sexual harassment policy contained none of those safeguards and was judged inadequate to satisfy the first prong of the defense.

opening up all sorts of unmarked binders, to see if by any chance they might contain the company's harassment policy."¹¹³

The facts in *Hill*, as described by Judge Wood are reminiscent of the facts in *Faragher* – although the City of Boca Raton had a sexual harassment policy, no effort was made to disseminate the policy to the lifeguards or their work areas. On the other hand, Ms. Hill did know how to file a complaint (as evidenced by the reports she actually made) and the company responded in some fashion each time she did so. But the issue here is not whether Ms. Hill should win or lose on this argument – rather, was the undisputed evidence of the employer's efforts to "prevent" and "correct" harassment so compelling as to warrant judgment for the defendant *as a matter of law* on an issue where the defendant carries the burden of proof?

By comparison, the D.C. Circuit in *Greene v. Dalton*,¹¹⁴ in an opinion by then-Judge Ruth Bader Ginsburg, refused to exonerate a defendant in spite of the apparently prompt and serious sanctions imposed once a formal complaint was lodged. The plaintiff, Luria Greene, sued the United States Navy for sexual harassment by her immediate supervisor, Lieutenant Commander Donald Clause. According to Ms. Greene, the harassment began on her first day of employment in June, 1995 and culminated in rape on June 29. Ms. Greene reported the alleged rape to the EEO counselor on August 2, and later filed a formal complaint in October. As a result, court martial proceedings were initiated and Clause eventually was convicted by a military court of adultery and conduct unbecoming an officer.¹¹⁵ Nonetheless, the district court granted summary judgment for the Navy on liability.

In overturning the District Court's grant of summary judgment, the Court of Appeals focused its discussion on the second prong of the *Faragher/Burlington Industries* affirmative defense. The Navy argued that Ms. Greene's delay in reporting the rape established her "unreasonable" failure to utilize the employer's complaint process, thus satisfying part two of the defense. The Circuit Court disagreed, holding that the Navy would be required to establish not only Ms. Greene's unreasonable delay, but also that a reasonable person would have come forward early enough to prevent the subsequent harassment. "A jury may resolve both these issues in favor of the Navy, but without improperly resolving disputed issues of fact, we cannot."¹¹⁶ In conclusion, the Court further noted that Ms. Greene's delay in reporting "is not causally related to the harm for

113. 218 F.3d at 647 (Wood, J., dissenting). See also *Williams v. Spartan Communications, Inc.*, No. 99-1566, 2000 U.S. App. LEXIS 5776 (4th Cir. Mar. 30, 2000) (unpublished opinion) ("[W]hile the existence of an antiharassment policy and prompt corrective action pursuant to it provides important evidence that an employer has acted to meet the first prong of the *Faragher-Elzerth* affirmative defense, such evidence does not compel this conclusion. Rather, any anti-harassment policy offered to satisfy the first prong of the defense must be 'both reasonably designed and reasonably effectual.'").

114. 164 F.3d 671 (D.C. Cir. 1999).

115. *Id.* at 673. Clause admitted a sexual relationship with Ms. Greene but claimed the relationship was consensual. To support his claim, he produced a diary allegedly written by Ms. Greene, as well as evidence of a number of frivolous sexual harassment complaints filed by her in the past.

116. *Id.* at 675.

which she is suing and hence does not preclude her recovery as a matter of law.”¹¹⁷

Summary judgment also is granted routinely on liability in the more “traditional” summary judgment situation involving co-worker harassment cases, where the negligence standard clearly applies. Thus, the defendant is moving for summary judgment on liability where the plaintiff carries the burden of proof. Nonetheless, some courts seem to be going out of their way to protect the employer as long as *some* response was made to the internal complaint. *Curry v. District of Columbia*¹¹⁸ offers one example.

Curry involved harassment by a fellow officer in the city police department. The plaintiff, Cynthia Curry, had ended a six-month intimate relationship with her co-worker, Detective Condell Freeman. Approximately a year later, when Ms. Curry was transferred back to Freeman’s unit, Freeman began a campaign of verbal harassment that lasted several months. Curry first reported the conduct to her supervisor, who, in turn, referred the matter to the department’s EEO officer. The EEO officer began an immediate investigation, but the process took over four months. The final report of the investigation found “probable cause” to believe that sexual harassment had occurred. Although Freeman was verbally admonished for the conduct (both before and after the investigation), no disciplinary action was taken because the collective bargaining agreement and a municipal ordinance prohibited disciplinary action more than 45 days after any misconduct had occurred.¹¹⁹

It was undisputed that the Department’s investigation into Curry’s complaint took over four months, thus insuring that Freeman could not be disciplined because of the 45-day rule. Nonetheless, the Court of Appeals concluded *as a matter of law* that the employer “responded quickly and reasonably.”¹²⁰ In other words, according to this court, no reasonable jury could have concluded that a four-month investigation – by definition preventing any disciplinary action regardless of the finding of the investigation – was less than a prompt and effective response to Ms. Curry’s complaint. The appellate court ruled that the trial court should have granted the defendant’s motion for judgment as a matter of law on this issue following the jury verdict.¹²¹

117. *Id.* at 676. Under a more straightforward application of the *Faragher/Burlington Industries* dicta, the delay in reporting would be irrelevant – rather, the issue would simply be one of “negligence” in evaluating the Navy’s response when the report was made. See *supra* note 40 and accompanying text.

118. 195 F.3d 654 (D.C. Cir. 1999).

119. Although Freeman’s verbal harassment stopped in August, 1994 (when Curry stopped speaking to him), Freeman allegedly continued to glare at Curry. Curry first complained of this behavior in November, 1995, but the department apparently concluded it was unable to act on this complaint because of the 45-day rule that had previously been invoked. *Id.* at 658.

120. *Id.* at 661.

121. *Id.* The court also distinguished between the nonverbal harassment which occurred before and after the plaintiff’s complaint in November, 1995. *Supra* note 119. According to the court’s reading of the relevant precedent, the plaintiff could only recover for the nonverbal harassment *after* the complaint (due to the department’s inadequate response) but could not be held responsible for the harassment prior to the complaint. *Id.* at 663.

Equally questionable is the Eighth Circuit decision in *Whitmore v. O'Connor Management, Inc.*¹²² The plaintiff in that case had been repeatedly harassed by her co-worker in the maintenance department at a shopping mall. The perpetrator, Mr. Bartee, hid in closets to catch Ms. Whitmore alone and repeatedly touched her breasts and thighs. The harassment escalated and included grabbing her neck, threatening to kill her, exposing himself, and attempting to force her to perform fellatio. Ms. Whitmore reported these events to mall management, as well as to the police. In the criminal action, Mr. Bartee was convicted of third-degree sexual abuse. In the meantime, another company had assumed mall management. Both the general manager and the operations manager of the new company (Mr. Hibben) were aware of the assaults, however.

Mr. Bartee continued to stalk Ms. Whitmore in the mall and refer to her as his "prostitute."¹²³ The operations manager was aware of these comments but did not follow up on them or question Mr. Bartee, because it was "just hearsay", and there was "no proof." In addition, Ms. Whitmore reported to Mr. Hibben a confrontation and apparent threat by Mr. Bartee's sister. Mr. Hibben's response was, "I thought all that stuff was over with between you and [Mr. Bartee]."¹²⁴ In affirming summary judgment on liability for the defendant, the court of appeals concluded:

The record does indeed amply demonstrate that General Growth was on notice of the outrageous and deplorable conduct on Mr. Bartee's part that occurred before General Growth took over management of the mall. . . . The fact, if it is one, that Mr. Hibben knew that Mr. Bartee's sister had threatened Ms. Whitmore in some unspecified way, is hardly sufficient to put General Growth on notice that Mr. Bartee had continued to harass Ms. Whitmore sexually. The same can be said of Mr. Hibben's testimony that he knew that Mr. Bartee was defaming Ms. Whitmore. . . . We note that General Growth prohibited Mr. Bartee from going within view of Ms. Whitmore immediately after she filed an EEOC charge complaining about his activities. In other words, an explicit communication to General Growth's management of Ms. Whitmore's complaints brought a prompt and appropriate remedial response.¹²⁵

While Mr. Hibben's casual response to Ms. Whitmore's situation might have seemed appropriate absent the extensive history involved, one could certainly argue that a reasonable jury might find his reaction inadequate and unreasonable under these particular circumstances.¹²⁶

122. 156 F.3d 796 (8th Cir. 1998).

123. *Id.* at 798.

124. *Id.*

125. *Id.* at 800.

126. In applying the negligence standard for co-worker harassment, other courts have been willing to split the negligence "hair" between not responding at all and responding but in a negligent manner – holding the employer liable only in the former situation. "Once an employer is aware of and responds to charges of sexual harassment . . . mere negligence as to the content of the response cannot be enough to make the employer liable." *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 873 (6th Cir. 1997), *cert. denied*, 522

The frequent grant of summary judgment for employers on liability in co-worker harassment cases, where the plaintiff carries the burden of proof, may be somewhat more defensible. These results are harder to justify in supervisor harassment cases, however, where an affirmative defense is in question. The willingness of the lower courts to grant summary judgment to employers on an issue on which they carry the burden of proof – sometimes based on only minimal efforts by the employer to prevent or correct the harassment – may suggest a fundamental resistance by the courts to accept *any* employer liability in this area.¹²⁷

III. THE EMPLOYER AS PART OF THE SOLUTION OR PART OF THE PROBLEM

A. *The Employer as Part of the Problem: Defining the Liability Standard for Reported Supervisor Harassment*

If the Supreme Court has suggested two different standards for liability depending on employer knowledge – negligence for direct liability involving known harassment and the affirmative defense for vicarious liability for unknown harassment – are these two approaches mutually exclusive? In other words, can only one theory of liability be applied in a given case depending on whether the employer had knowledge of the harassment or is the plaintiff free to use either or both? On the one hand, the issue of “vicarious” liability arguably evaporates once the employer is notified of the alleged harassment. With knowledge, the employer must either implicitly affirm the harassment (by taking no or inadequate action in response) or repudiate it (by investigating and disciplining the perpetrator).¹²⁸ Either way, the analysis and focus shift to the employer’s own behavior in response to misconduct deemed by the Supreme Court as outside the scope of employment.¹²⁹

U.S. 1110 (1998), *quoted with approval* in *Boykin v. Michigan Dep’t of Corrections*, 2000 U.S. App. LEXIS 7283 (6th Cir. 2000).

127. The Supreme Court’s recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), arguably offers some hope for plaintiffs on the summary judgment front. The case involved neither sexual harassment nor employer liability issues but may suggest a more general admonition by the Supreme Court concerning the availability of summary judgment. *Reeves* addressed the summary judgment standard in the context of age discrimination allegations under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (2001). Although not directly relevant to the liability question under discussion here, the Court’s holding and recital of traditional summary judgment tenets (reinforcing the general principles of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and its progeny) may signal caution to the lower courts in the consideration of summary judgment in employment discrimination claims. “[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. [Citation omitted.] ‘Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.’ [Citation omitted.] Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves*, 530 U.S. at 150-51.

128. *Cf. Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 266 (5th Cir. 1999) (“Where the company, on hearing a plaintiff’s complaint about inappropriate sexual behavior, moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed.”).

129. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 at 757 (“The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.”).

The *Faragher/Burlington Industries* affirmative defense is clearly misplaced when the plaintiff has promptly complained of the offending conduct to the employer. Under a literal application, the defendant would be unable to establish the second prong of the affirmative defense – the plaintiff's unreasonable failure to take advantage of the complaint procedure offered. Consequently, since the employer could not satisfy both parts of the defense, liability should be imposed. But the Court never intended to apply strict liability in hostile environment cases where the misconduct was reported and remedied; indeed, the application of strict liability was explicitly rejected in *Meritor Savings*.¹³⁰ Such a result also directly contradicts the Court's policy rationale of prevention by failing to encourage anti-harassment policies, reporting, and internal resolution.¹³¹

The lower courts have managed to avoid this logical but unsupportable conclusion, but only by manipulating or partially ignoring the affirmative defense to address a situation it was never intended to cover. Some courts have simply ignored the second prong altogether if the employer acted responsively to the reported harassment under prong one. Other courts, clearly uncomfortable with examining only one part of a clearly articulated two-part test, have turned the focus and blame on the employee. Thus, the courts use the employee's delay in reporting to get past the second prong, thus reaching the desired result: An employer will not be found liable for the harassment as long as he responds appropriately once the misconduct is reported. Surely neither approach can be satisfying for the courts or the litigants. Another solution is needed; *Faragher/Burlington Industries* simply does not fit.

Perhaps the Court did not mean to suggest that negligence is the *only* means of imposing liability for reported harassment, although it would seem more than a little odd (if not completely unmanageable) to have two liability standards in play that may lead to different results. Consider an employer who has no sexual harassment policy or complaint procedure in place and has done nothing to address this potential problem in the workplace. Nonetheless, when an employee reports harassment to management, the employer immediately separates the parties, investigates the allegations, and promptly imposes serious sanctions against the harasser (e.g., firing the harasser or removing him from a supervisory position). Applying the negligence standard articulated by the Supreme Court – “An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it”¹³² – the claim should fail. The employer cannot be labeled as “negligent” in his behavior in the face of a known complaint.

Yet one could argue for a less literal reading of the Court's language and a broader interpretation of “negligence” theory in these circumstances. The employer's failure to “prevent” the harassment (e.g., by the creation and dissemination of an anti-harassment policy, related training, etc.) also could be

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

131. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06.

132. *Burlington Industries*, 524 U.S. at 759.

considered “negligent,” even though he acted quickly to correct the specific complaint.¹³³ Had such a policy been in place, the harassment and the harm might never have occurred. In other words, negligence is established by the employer’s failure to at least attempt harassment prevention by establishing an effective anti-harassment policy. Under this analysis, the plaintiff wins on the liability question, in spite of the employer’s response to the complaint. The *Faragher/Burlington Industries* defense would presumably yield the same result. The employer would be unable to present any evidence on that part of the first prong that considers efforts to “prevent” harassment. Further, the second prong could not be met both because there was no procedure in place to follow and because a report was actually made. Thus the defense fails and the plaintiff succeeds, at least on liability.

From a policy perspective, there are at least two competing views from which to evaluate liability for the employer who has no anti-harassment policy but responds appropriately when a complaint is made. Should our primary goal be rewarding the employer for his appropriate response to the harm in question, thus encouraging the same behavior by other employers in the future? Alternatively, are we more concerned with punishing this employer for his past derelict behavior in preventing harassment, which may have created or contributed to an atmosphere that permitted the harassment to occur at all? If our primary concern is to reward employers for prompt action when presented with a complaint, then the courts should apply the more limited negligence analysis above that absolves the employer from liability. While this result arguably provides no prevention incentives for the employer, recall that only reported harassment is at issue here. The risk of liability for unreported harassment (that is, the clear incentive to establish and enforce anti-harassment policies under *Faragher/Burlington Industries* for cases of vicarious liability) should prove sufficient to address that problem.

If we are more concerned with the goal of prevention, then the treatment of liability should punish the employer for his failure to establish an anti-harassment policy regardless of his commendable efforts to address a specific complaint. If this is our goal, a broader conception of negligence might be appropriate to provide a double incentive to put anti-harassment policies in place even if the employer cannot be faulted for his response to the plaintiff’s complaint. An employer without a policy thus would be strictly liable for any actionable harassment. Nonetheless, incentives remain for the employer without a policy to redress specific grievances. An employer’s prompt efforts to remedy the problem may stop inappropriate behavior before it reaches the level of actionable harassment within the meaning of the statute, may limit possible

133. The focus of the Court in the circumstances of *Faragher* and *Burlington Industries* (i.e., on vicarious liability for unknown harassment rather than negligence for the employer’s response to a complaint) was solely on the prevention of harassment prior to the incident(s) in question, not on the prevention of future harassment of the victim in question, since the employer was unaware there even was a victim.

damages for any harassment that has occurred,¹³⁴ or may convince the employee not to sue at all.

A more troubling consequence of the different standards for liability (negligence for direct liability and the *Faragher/Burlington Industries* defense for vicarious liability) may be the implications of creating or applying a distinction that results in different burdens of proof. The burden of proof for liability is placed squarely on the employer for unknown harassment under *Faragher* and *Burlington Industries* but presumably remains with the plaintiff under a negligence analysis. Why should the plaintiff retain a higher burden of proof when she reports the harassment (thus acting as the Supreme Court hopes to encourage¹³⁵) than when she fails to do so? Conversely, why should the employer be subjected to a higher standard of proof when the harassment is unknown to him than when the harassment has been reported? It seems backward.

One “quick fix” to the problem of dual standards might be to shift the burden of proof in cases of known harassment, while reformulating the *Faragher/Burlington Industries* defense to match the changed circumstances. If the plaintiff reports the harassment, the employer is liable unless it can establish as an affirmative defense that it responded to the complaint reasonably and appropriately. This analysis would parallel the Court’s holding in *Faragher* and *Burlington Industries* and offer some symmetry and consistency. And, in fact, this approach is, in essence, the one taken by most of the lower courts, although it is often articulated as applying the two prong *Faragher/Burlington Industries* affirmative defense.

An alternative articulation of the modified *Faragher/Burlington Industries* defense for known harassment might include past acts as well – in other words, this affirmative defense would also consist of two prongs, part one considering the employer’s actions to “prevent” harassment in the past (through a policy, training, etc.) and part two considering the employer’s efforts to “correct” the reported harassment in question. Such an expanded version would impose liability, for example, for an employer without an anti-harassment policy who nonetheless investigated and corrected an internal grievance. Without the prevention prong, the employer might be absolved of liability based on his prompt response. With the prevention prong, the employer’s past inaction would still provide a basis for liability.

Adopting an affirmative defense approach should also impact – at least in theory – the availability of summary judgment on the liability question. As discussed, the employer should have a harder time obtaining summary judgment on an issue for which it carries the burden of proof. Thus, one would anticipate

134. For example, prompt remedial efforts likely would limit the extent (both in time and severity) of the harassment and avoid an assessment of punitive damages under the standards of *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

135. *Burlington Industries*, 524 U.S. at 764 (“To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”).

more frequent summary judgments on liability for the defendant under a negligence standard than under the reformulated affirmative defense. The *Faragher/Burlington Industries* Court gave no hint as to whether it anticipated or intended such a consequence.

Thus, for analyzing supervisor harassment reported or otherwise known to the employer, four approaches seem feasible within the broad parameters of *Faragher/Burlington Industries* and its progeny.¹³⁶ Under two of these approaches, the burden of proof on liability would remain with the plaintiff. The other alternatives would shift the burden of proof to the employer, parallel to the *Faragher/Burlington Industries* defense.

First, consistent with the position taken by the Tenth Circuit,¹³⁷ the courts could apply *Faragher/Burlington Industries* as written. A negligence standard would be used for liability focusing solely on the employer's response to the alleged harassment, with the burden of proof on the plaintiff.

Second, the courts could apply essentially the same standard, focusing solely on the employer's efforts to "correct" reported harassment, but place the burden of proof on the defendant. This would consistently place the burden on liability on the employer in all supervisor harassment cases, regardless of employer knowledge.

Third, the lower courts could apply an expanded negligence standard to instances of known harassment, including examinations of both pre-complaint prevention and post-complaint correction. This two-part analysis would be consistent with the Court's policy concerns, although arguably inconsistent with the Court's literal language. As a "negligence standard," the burden of proof on liability would remain with the plaintiff.

Fourth, the courts could expand *Faragher* and *Burlington Industries* to create a comparable, two prong affirmative defense in cases of known harassment, shifting the burden of proof to the defendant. Part one would ask whether the employer has acted in the past to prevent harassment; part two would ask whether the employer acted promptly and appropriately to correct the harassment of the plaintiff once it was known to management.

Which is the correct standard? In some situations, all of the approaches would result in the same conclusion. An employer who failed to respond to known or reported harassment should be found liable under each of the four standards. At the opposite end of the continuum, an employer with an anti-harassment policy who acts appropriately to correct reported misconduct should be absolved under any of these theories. Finally, an employer who has acted in the past to prevent harassment but fails to respond to a reported complaint in the particular instance that forms the basis for the current claim should also be found

136. Under any of these theories, the courts would first need to determine as a preliminary matter that the employer did, in fact, have knowledge of the harassment. The knowledge determination would, in turn, clarify whether the case is one of vicarious or direct liability.

137. See *Wilson v. Tulsa Junior Coll.*, 164 F.3d 536, 541 n.4 (10th Cir. 1998), discussed *supra* at notes 77-78.

liable using any of the approaches. The only scenario in which the result may differ is when the employer has acted to correct the reported harassment at issue but has made no (or inadequate) past efforts to prevent the behavior. In this last situation, only the more narrow analyses under options one and two would avoid liability.

If one returns to the Court's policy discussions in *Faragher* and *Burlington Industries*, the argument for an expanded liability analysis that includes "prevention" as well as correction (options three and four) may be more compelling. As noted earlier, the Court's justifications included incentives to develop harassment policies with complaint procedures, to promote internal resolution, and to encourage prompt reporting by victims of harassment.¹³⁸ Indeed, the Court stated in *Faragher* that the statute's "'primary objective'... [was] not to provide redress but to avoid harm."¹³⁹ If this statement is taken at face value, the prevention incentive seems a necessary part of any approach selected. Adding the "prevention" element to the employer's defense even in the case of reported harassment would further these principles.¹⁴⁰

Including "prevention" as part of the liability standard for sexual harassment effectively would impose strict liability for the employer with no anti-harassment policy or grievance procedure in place. Would the Court go so far, even for the hypothetical employer without an anti-harassment policy who nonetheless responded in a model fashion as soon as the complaint was made? The employer might argue "no harm, no foul" if the report were made immediately after the offending conduct – that is, a policy would have speeded neither the complaint nor the response. But the plaintiff could contend that the harassment might never have occurred had the employer implemented and distributed an anti-harassment policy.

Accepting the principle of prevention as critical to the Court's policy approach, options three and four are the only acceptable alternatives – the distinction between the two being the assignment of the burden of proof. As noted, in "true" vicarious liability cases in which the harassment is unknown to the employer, the defendant must sustain the burden on the affirmative defense to avoid liability. Under a negligence approach in direct liability cases in which the harassment was reported or otherwise known to the employer, the plaintiff retains the burden on liability to establish the defendant's negligence. If the Supreme Court indeed intended to retain a negligence standard for sexual harassment claims reported to the employer, we are left with the anomaly that the burden of proof on liability shifts depending on whether or not the employer had knowledge of supervisor harassment.

138. *Burlington Industries*, 524 U.S. at 764.

139. *Faragher v. City of Boca Raton*, 524 U.S. 773 at 806 (*quoting* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1977)) (emphasis added).

140. Some courts have added the "prevention" element to the liability standard for co-worker harassment, as well. See *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767 (2d Cir. 1998) (articulating as the liability standard for co-worker harassment that the employer failed to respond to known harassment or "failed to provide a reasonable complaint procedure").

The fourth option – a reformulated affirmative defense shifting the burden of proof to the employer/defendant for reported harassment and including elements of both “prevention” in the past and “correction” of the reported conduct – has much to commend it. It offers an approach closely parallel to the Court’s treatment of liability for unreported harassment in *Faragher* and *Burlington Industries*, it addresses the policy concerns expressed by the Court, and it consistently imposes the burden of proof on liability on the employer in all supervisor hostile environment cases. The only real problem with this extension of *Faragher/Burlington Industries* seems to be the Court’s contradictory suggestion that negligence is the appropriate standard. “[A]lthough a supervisor’s sexual harassment is outside the scope of employment because the conduct was for personal motive, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”¹⁴¹ Did the Court really “mean it,” or were these ill-considered remarks without sufficient focus on the full implications of this approach?

The Court certainly had the opportunity to consider a broader application of the affirmative defense and indicated no reluctance to discuss liability standards for other types of sexual harassment claims. In the context of its discussion, described earlier at length, the Court used careful and deliberate language; its reference to negligence liability for harassment known to the employer is hard to dismiss as an offhand remark. The shifting of the burden of proof is – or should be – a significant decision not to be undertaken lightly. As suggested by the Tenth Circuit, the Supreme Court’s analysis in *Faragher* and *Burlington Industries* seems to retain the negligence standard for harassment known to the employer.

None of the options are completely satisfactory. While option four may be the most defensible alternative from a policy perspective, one cannot ignore the Supreme Court’s quite comprehensive discussion of liability issues in *Faragher* and *Burlington Industries*; one would have expected some indication from the Court if it intended an affirmative defense for reported harassment cases as well. Nor can one be confident that the Court would adopt the two-part defense (prevention plus correction) to impose strict liability for all employers without an effective anti-harassment policy, regardless of how exemplary the employer may have acted in responding to a complaint. But option four seems the only logical conclusion to both promote the prevention concerns spotlighted by the Court and avoid the uncomfortable anomaly of shifting burdens of proof.

141. *Burlington Industries*, 524 U.S. at 759. Furthermore, the two circuits that clearly have recognized the direct/vicarious liability distinction have both assumed that a negligence standard is applicable in cases of reported harassment. See *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 421 (11th Cir. 1999) (“The harassment can be ascribed to the employer’s negligence when the employer knew or should have known about the harassment and failed to take remedial action.”); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (“employer negligence” is liability standard where the employer “knew, or should have known, about the hostile environment and failed to respond in an appropriate manner”).

B. The Employer As Part of the Solution: Meeting the "Primary Objective"

If one is to take heed of the Supreme Court's overriding interest in prevention – as Title VII's "primary objective"¹⁴² – in fashioning a set of rules to govern employer liability for sexual harassment, the answers to these layered questions more easily fall into place. First, in addressing the threshold issue of knowledge, notice to any supervisory employee should be sufficient to impute knowledge to the employer. Second, liability for reported supervisor harassment should be subject to a two-part inquiry examining both the employer's past efforts to prevent harassment and the employer's current efforts to address the reported misconduct. Third, the employer's defense should operate as an affirmative defense with the burden of proof on the employer. Finally, summary judgment on liability must be closely scrutinized by the courts within the context of the applicable burden of proof, resulting in far fewer judgments for the employer and far more for the plaintiff.

The issue of "knowledge" remains a key question regardless of which standard is used in assessing employer liability. For the employer who has done nothing to correct supervisor harassment, the employer's lack of knowledge provides the only possibility for avoiding liability.¹⁴³ The employer cannot be expected to correct misconduct about which he knows nothing. In addressing the question of knowledge, courts should resist the implication of *Madray*¹⁴⁴ that employers may be able to isolate themselves from knowledge of harassment by insisting on a single, formal reporting channel. Victims of sexual harassment often are reluctant to report at all,¹⁴⁵ particularly when the perpetrator is a supervisor; any additional barriers erected by the employer will serve only to dissuade them further.

In the reality of the workplace, an employee is far more likely to mention her complaint to a low-level (and thus less intimidating) supervisor or manager than to file a formal grievance with the human relations director. An employer need not expect all of his supervisors to address the complaint; the supervisor need only pass along the information to someone in the company designated, and appropriately trained, to deal with the problem. Imputing knowledge based on a complaint to any supervisor may motivate the employer to disseminate its policy, if not provide training, to all supervisors so that this reporting obligation is known and understood. But such an incentive should only increase the

142. *Faragher*, 524 U.S. at 806 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

143. Where the employer succeeds in establishing its lack of knowledge, liability may still be imposed under *Faragher* and *Burlington Industries*, but a finding of knowledge should result in clear liability where the employer has done nothing to correct the problem.

144. *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000), discussed *supra* at notes 90-91 and accompanying text.

145. See, e.g., Ronni Sandroff, *Sexual Harassment: The Inside Story*, WORKING WOMAN, June 1992, at 47-48 (survey of 9,680 readers reported that over 60% of the respondents had been harassed, but only one in four reported the conduct to their employer).

possibility that the harassment will not occur at all or at least will be “caught” at an early stage – both in support of Title VII’s prevention and correction goals.

With respect to the liability standard, a two-part affirmative defense that parallels the Supreme Court’s approach in *Faragher* and *Burlington Industries* again has the best chance of prompting the employer to focus on early preventions and cures rather than after-the-fact defenses. Under part one, a court would examine the employer’s past efforts at prevention. In general, an employer without an anti-harassment policy would be unable to meet this burden and thus would become strictly liable for any harassment that occurred. Under part two, the court would consider the adequacy of the employer’s response to the reported claim. Again, strict liability should be imposed for any employer who failed to respond at all to a complaint of harassment.

The issue of employee delay in reporting becomes largely irrelevant under this standard of assessing liability, although it may well be relevant on the damage question. Rather than suggesting the plaintiff should be “blamed” or “punished” for a delay in reporting, the delay merely postpones the employer’s obligation to respond to the harassment. Until the report is made, no duty to correct is triggered. If the employer then acts promptly to address the complaint, and there are other past efforts to prevent the harassment from occurring (e.g., an anti-harassment policy), liability should be avoided altogether.¹⁴⁶ If the employer fails to respond to the report of harassment or responds inadequately, liability should be imposed. The plaintiff’s delay in reporting might result in more limited damages, however, if the plaintiff unreasonably failed to report the misconduct at an earlier point in time that would have avoided some of the harm.¹⁴⁷ But no such relief should be available if the employer is unable to satisfy part one of the defense by demonstrating past prevention efforts.

In spite of the Court’s apparent suggestion to the contrary, the burden of proof on this defense must rest with the employer. Incentives to correct ongoing harassment are no less important than incentives to prevent the misconduct in the first place. Placing this heightened responsibility on the employer will further enhance those incentives, as well as avoid the confusion of shifting the burden of proof in cases of known and unknown harassment.

C. Reassessing Summary Judgment

Finally, with respect to the question of summary judgment, the defendants’ surprising success rate on the liability affirmative defense deserves closer scrutiny. Why the reluctance to hold employers’ responsible for the

146. If the employer is responsible for the delay, however (e.g., by discouraging the plaintiff from filing an internal complaint) the employer should be held responsible for the harassment because of his inadequate prevention efforts under part one of the affirmative defense. *See, e.g.,* *Smith v. First Union Nat’l Bank*, 202 F.3d 234 (4th Cir. 2000), discussed *supra* at notes 52-57.

147. *Cf. Burlington Industries*, 524 U.S. at 764 (“Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.”) (citations omitted).

discriminatory acts of their supervisors? While examining the underlying factors that may explain this phenomenon is beyond the scope of this article, several possibilities come to mind.

One possibility is that the premise is wrong: defendants are *not*, in fact, winning summary judgment motions on liability at a significant rate; rather we are only reading about the grants, not the denials. Published judicial opinions simply may fail to provide an unbiased sampling – the denial of summary judgment motions are far less likely to result in significant opinions at the trial court level selected for publication. Furthermore, summary judgment typically ends the case and provides grounds for immediate appeal, and hence an opportunity for an appellate decision that is also more likely to be published. In contrast, a summary judgment denial does not constitute a final order subject to immediate appeal. Once the case has proceeded to a trial on the merits, the earlier denial of summary judgment is far less likely to be included in any appeal.¹⁴⁸ Consequently, as a practical matter, we are only accessing in the federal court reporters those cases where summary judgment has been granted. These cases may represent only a fraction of the cases in which summary judgment has been sought, yet there is no readily available record of these decisions.¹⁴⁹ It may well be that defendants are losing the vast majority of such motions.

Yet another possible explanation is that claims involving reported harassment may be less likely to involve factual disputes about the employer's response to sexual harassment complaints. Courts routinely deny summary judgment where the parties dispute a "material fact" but are accustomed to granting summary judgments where the facts are uncontested – suggesting only an "issue of law" remains. If the parties are in agreement about the employer's actions following the complaint, the courts may consider such cases appropriate for summary judgment. Nonetheless, even in the absence of a factual dispute, the plaintiff may legitimately dispute the "reasonableness" of the employer's actions. As illustrated above in *Curry*¹⁵⁰ and *Whitmore*,¹⁵¹ the question of whether the response was "reasonable" under the circumstances should present a jury issue even when the parties largely agree on the "facts."

Perhaps summary judgments on affirmative defenses are resolved "differently" in some way than the more classic circumstance of summary

148. The reasons for this are both practical and strategic. If the defendant wins at trial, the defendant would have no grounds for an appeal. Should the plaintiff appeal, the legal arguments supporting the trial victory are likely to be far stronger and more convincing than an argument about the higher thresholds of summary judgment. Should the defendant lose at trial, the summary judgment argument may make more sense, yet it seems awkward at best to argue no "reasonable" fact-finder could find against you when the fact-finder did just that at trial.

149. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 882-83 (1999) ("Judges may be more inclined to publish opinions granting summary judgment, to either party, than opinions denying summary judgment because they believe that a decision that resolves the dispute is more significant, and thus precedent-worthy, decision."); 884-85 ([T]he largest category of appealable trial court decisions is likely to be orders granting summary judgment.").

150. See *supra* notes 118-121 and accompanying text.

151. See *supra* notes 122-126 and accompanying text

judgment motions filed by defendants where the moving party does not have the burden of proof on the underlying claim. The courts' treatment of such motions may not fit the standard "hornbook" law in this area. Although I am unaware of any other area of law in which defendants are successfully pursuing summary judgment on affirmative defenses, further research may suggest the difference in treatment is not unique to the sexual harassment area.

Other, less benign, explanations also come to mind. Perhaps these results are part of a broader trend of granting summary judgment in employment discrimination claims in general and sexual harassment claims in particular. Certainly some commentators have argued that the lower courts have been unusually hostile to employment discrimination claims.¹⁵² If this perceived resistance to employment discrimination claims exists, the results here could be a subset of that larger problem.

Yet underlying these possibilities remains a disturbing suspicion that many lower courts are particularly resistant to sexual harassment claims in particular – a resistance that often manifests itself in the courts' response to the liability question. Beginning with the premise endorsed by the Supreme Court that harassment is conduct outside the "scope of employment," perhaps the courts find it unfair to impose liability unless the culpability of the employer is clear. If so, the courts' perspective is fundamentally at odds with the liability regime

152. See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L. REV. 203 (1993); B. GLENN GEORGE, *IF YOU'RE NOT PART OF THE SOLUTION, YOU'RE PART OF THE PROBLEM: EMPLOYER LIABILITY FOR SEXUAL HARASSMENT*, 13 YALE J. L. & FEMINISM [PAGE?](2001/2?)

Sexual harassment claims already include a more demanding prima facie case than other types of discrimination claims under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A claim that the plaintiff was refused a promotion because of his race requires at the pleading stage only the minimal allegations that the plaintiff is a member of a protected class, he applied and was qualified for the position, the employer rejected him, and the employer continued to seek other applicants. *Id.* at 802. By contrast, a plaintiff seeking to state a claim for hostile environment sexual harassment must establish that the plaintiff is a member of a protected class, the offending conduct was unwelcome, the harassment was based on the plaintiff's protected status, and the conduct both objectively and subjectively is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"

Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986). See generally B. Glenn George, *The Back Door*, *supra* note 5 (discussing the more burdensome prima facie case for harassment cases as compared to other types of discrimination claims under Title VII); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, Gender and Employment Law* 67 S. CAL. L. REV. 745, 884 (1994) ("[F]ederal district judges are widely perceived to be less receptive to employment discrimination cases of all types than they are to commercial cases with high monetary stakes.").

Some courts, however, continue to articulate a particular need for caution in employment discrimination cases. See, e.g., *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant."); *Gallo v. Prudential Residential Services, L.P.*, 22 F.3d 1219, 1224 (2nd Cir. 1994) (finding that "additional considerations should be taken into account" in granting summary judgment to an employer in a discrimination case when "intent is at issue"); *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (declaring that "summary judgment should seldom be used in employment discrimination cases"); *Green v. Servicemaster Co.*, 66 F.Supp. 2d 1003, 1006-07 (N.D. Iowa 1999) (citing *Crawford's* warning against the use of summary judgment in employment discrimination cases); *Newtown v. Shell Oil Co.*, 52 F.Supp.2d 366, 369 (D.Conn. 1999) (citing the Second Circuit's warning to district courts in *Gallo* to exercise caution summary judgment in employment discrimination cases).

created by the Court. Liability is the presumption rather than another hurdle for the plaintiff to jump.

Harassment cases are the only cases in Title VII law that treat liability as an issue to be litigated separately from the underlying discrimination claim. And only in sexual harassment cases has the Supreme Court chosen to place the liability burden of proof on the defendant. In such cases – certainly for vicarious liability for unknown harassment, and perhaps for liability for reported harassment as well – the courts should proceed with care and deliberation, acknowledging the added burden on the defendant to establish the defense. That burden should permit plaintiffs more opportunities to proceed to trial, if not win partial summary judgments of their own.

The problem is not one of changing the law but of adhering to well-established legal principles. Defendants face a double hurdle in seeking summary judgment on liability in both carrying the burden of persuasion on the issue and arguing under a reasonableness standard. In many cases, those barriers should combine to deny the summary judgment. Any questions about past prevention efforts or the speed or extent of the employer's response generally should be left to the jury to evaluate. The question for the court is whether an employer's efforts on both fronts are so far above question that summary judgment should determine these issues as a matter of law. Conversely, the courts should entertain summary judgment on liability for the plaintiff when the employer's failure to engage in any significant prevention efforts or failure to respond to the plaintiff's complaint make it clear that one of the affirmative defense prongs cannot be satisfied.¹⁵³

This is not to suggest that summary judgment is never or even rarely appropriate on liability in harassment cases. In *Matvia v. Bald Head Island Management*¹⁵⁴ for example, the employer had an anti-harassment policy and included training on the issue in its new employee orientation. When the plaintiff complained about her supervisor's harassing behavior, the company suspended the supervisor pending the investigation and then terminated him twelve days later once its investigation was complete. The plaintiff's only response to these facts was that she did not "understand" the policy or recall the orientation.¹⁵⁵ In such circumstances, where there is no factual dispute and no legitimate issue of "reasonableness," summary judgment should be available to terminate the proceedings.

I advocate nothing more than a uniform application of standards regardless of the substantive nature of the underlying claim. Perhaps the court should ask itself how often, in other contexts, it has granted a plaintiff's motion for summary judgment in the context of a "negligence" or "reasonableness"

153. Cf. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 700 (7th Cir. 2001) ("We thus conclude, as a matter of law, that the Board 'could not be found to have exercised reasonable care' to prevent Norsted's and Sanders' harassing conduct and is thus not entitled to present an affirmative defense to plaintiff's claim that she was subjected to a hostile work environment by her supervisors").

154. 259 F.3d 261 (4th Cir. 2001).

155. *Id.* at 268.

standard on which the plaintiff bore the burden or proof.¹⁵⁶ If the answer is “almost never,” the court may want to rethink its consideration of the employer liability issue at the summary judgment phase. If summary judgment is to be granted at all, the courts at a minimum owe the plaintiff an explicit justification in light of the defendant’s heightened burden. The courts should be wary of creating their own hostile environment for plaintiffs’ sexual harassment claims.

IV. CONCLUSION

In spite of the extensive guidance provided in *Faragher* and *Burlington Industries*, the appropriate liability standard for supervisor sexual harassment remains at least partially unsettled. The Supreme Court’s roadmap is clear on issues of harassment resulting in a tangible employment action (quid pro quo harassment), co-worker harassment, and supervisor harassment never reported to the employer. But the status of liability for supervisor harassment reported to the employer remains muddled by the failure of most lower courts to distinguish between issues of vicarious liability (for harassment unknown to the employer) and direct liability (for harassment reported to the employer). For many claims of direct liability, the error is unlikely to change the ultimate result. Even when the “right” results are reached, however, the courts have been forced to twist the *Faragher/Burlington Industries* analysis to apply a defense that simply does not fit the circumstances presented.

In other cases, the courts’ failure to address the distinction between vicarious and direct liability may have special implications for disposition on summary judgment. Where the employer is denying liability regardless of the severity of the harassment alleged, appropriately assessing the burden of proof becomes critical. Even if the courts have legitimately expanded the affirmative defense of *Faragher* and *Burlington Industries*, the employer’s burden of proof on the liability question would suggest an enhanced opportunity for the plaintiff to be awarded summary judgment on that issue, while diminishing the employer’s prospects on that question. The fact that neither of those results is reflected in the early returns demands the courts’ more careful scrutiny and explicit justification of their rationales.

The courts need to address these problems head-on to create an interconnected and coherent set of standards that work consistently to foster the prevention objectives of Title VII. A report to any supervisor should place the employer on “notice” of the harassment and trigger the obligation to respond, thus encouraging employers to provide adequate information and training to those in the best position to prevent this pervasive problem. Once knowledge is established, the employer should be able to avoid liability only by proving, as an affirmative defense, both past prevention efforts and an adequate response to the reported harassment. The defense closely parallels the Supreme Court’s

156. See *supra* note 104 and accompanying text.

approach in vicarious liability cases for unreported harassment, avoids the problems inherent in a shifting burden of proof, and maximizes the incentives for encouraging prevention behavior. Finally, recognizing the impact of burdens of proof and standards of “reasonableness,” the courts should hold the parties to the same stringent standard of summary judgment applied to other kinds of claims – practicing a judicial form of non-discrimination in the handling of sexual harassment claims.