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Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of American, Columbus School of Law; B.A., 2004, Bates College. The author wishes to thank Professor Suzette Malveaux for her guidance and assistance during this process. Additionally, many thanks to the members of the Catholic University Law Review for their contributions to this Comment. Finally, a special thanks to my family and friends for their love and support, especially to my father for his years of providing me with writing advice and “constructive criticism.”

ONCE IS ENOUGH: THE NEED TO APPLY THE FULL *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE IN SINGLE INCIDENT AND INCIPIENT HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CLAIMS

By Charles W. Garrison⁺

In 1964, the House of Representatives held what today would be considered a historic debate on an amendment to Title VII of the Civil Rights Act of 1964. The amendment proposed adding “sex” as a protected class under the bill, making it illegal for employers to discriminate on the basis of gender.¹ Yet, the historic nature of the amendment was not apparent to the representatives at the time, and one Justice Department official remarked, “They thought it was a joke. They didn’t think there was any discrimination against women that mattered. They were laughing down on the floor as they were talking about it.”² Despite the levity in the House, “sex” was added to Title VII and remained in the final bill.³ In the mid-1970s, courts determined that sexual

⁺ J.D. Candidate, May 2013, The Catholic University of American, Columbus School of Law; B.A., 2004, Bates College. The author wishes to thank Professor Suzette Malveaux for her guidance and assistance during this process. Additionally, many thanks to the members of the *Catholic University Law Review* for their contributions to this Comment. Finally, a special thanks to my family and friends for their love and support, especially to my father for his years of providing me with writing advice and “constructive criticism.”

1. CARRIE N. BAKER, *THE WOMEN’S MOVEMENT AGAINST SEXUAL HARASSMENT* 14–15 (2008). The amendment to add “sex” as a protected class was offered by Representative Howard Smith, an opponent of the Civil Rights Act, whom many argue proposed the amendment as a “congressional joke” designed to defeat the bill. ABIGAIL C. SAGUY, *WHAT IS SEXUAL HARASSMENT? FROM CAPITOL HILL TO SORBORNE* 28 (2003). Courts have acknowledged this motive in discussing the legislative history of Title VII. See e.g., *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) (“This Court . . . is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted . . .”) *aff’d*, 805 F.2d 611 (6th Cir. 1986). The Supreme Court has used more muted terms, but noted that “[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House . . . and we are left with little legislative history to guide us in interpreting of the Act’s prohibition against discrimination based on ‘sex.’” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986). See generally Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. OF WOMEN & L. 137 (1997) (providing a discussion of the rationale for the inclusion of the amendment and an argument that the conventional wisdom surrounding it is incorrect).

2. BAKER, *supra* note 1, at 15.

3. LEGISLATIVE HISTORY OF THE TITLES VII AND IX OF THE CIVIL RIGHTS ACT OF 1964, 3213–32–32 (1964) (debating and adopting the Smith Amendment); Civil Rights Act of 1964, § 703, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2 (2006)).

harassment was a form of sex discrimination prohibited under Title VII.⁴ In the subsequent decades, Title VII has become one of the most effective tools in combating sexual harassment in the workplace.⁵ Even so, courts struggle to adopt clear standards for determining what constitutes sexual harassment and when an employer should be liable for sexual harassment under Title VII.⁶

Title VII of the Civil Rights Act of 1964 protects employees from workplace discrimination based on race, color, sex, national origin, and religion.⁷ Title VII accomplishes this important objective by allowing employees who suffer discrimination to recover damages or other remedies from their employers.⁸ Although the term “sexual harassment” does not appear in the text of Title VII, employers can be held vicariously liable for a supervisor’s sexual harassment of an employee.⁹

Broadly, courts recognize two categories of sexual harassment as actionable under Title VII, triggering various degrees of employer liability.¹⁰ The most blatant category, sometimes called “quid pro quo” harassment, where an employer conditions an employee’s job status or takes a tangible employment

4. See *infra* Part I.B.; *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), is generally regarded as the first appellate-level case recognizing sexual harassment as a form of sex discrimination actionable under Title VII. SAGUY, *supra* note 1, at 31 (2003). In *Costle*, a woman brought a Title VII sex discrimination claim against her employer after she was fired for refusing the sexual advances of her superior. *Costle*, 561 F.2d at 984-85. The D.C. Court of Appeals stated that at “no time during our intensive study of this case have we encountered anything to support the notion that employment conditions summoning sexual relations between employees and superiors are somehow exempted from the coverage of Title VII . . . [A]gainst this backdrop, we cannot doubt that Title VII intercepts the discriminatory practice charged here.” *Id.* at 994-95. In the same year, the Third and Fourth Circuit Courts of Appeal also recognized sexual harassment as actionable under Title VII. See *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1045 (3d Cir. 1977); *Garber v. Saxon Bus. Prods.*, 568 F.2d 1032, 1032 (4th Cir. 1977).

5. See BARBARA LINDEMANN & DAVID D. KADUE, PRIMER ON SEXUAL HARASSMENT 1 (1992) (describing Title VII as “[c]hief” among the laws prohibiting sexual harassment); Eileen Goldsmith, *Sexual Harassment: Legal Perspectives*, in INTERNATIONAL ENCYC. OF SOCIAL AND BEHAVIORAL SCIS., 13982, 13982 (Paul B. Bates and Neil J. Smelse eds., 2001) (“Title VII remains the primary legal weapon against sexual harassment in the United States . . .”).

6. See *e.g.*, Aric G. Elsenheimer, *Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions*, 54 AM. U. L. REV. 1635, 1636 (2005). It has been suggested that the court’s struggle in defining the scope of employer liability under Title VII stems from a lack of definition of unlawful harassment. See GAVIN S. APPLEBY, HARASSMENT AND DISCRIMINATION AND OTHER WORKPLACE LANDMINES 61 (2008).

7. 42 U.S.C. § 2000e-2(a) (2006).

8. 42 U.S.C. § 2000e-5(b) (declaring that a civil action may be brought against the respondent named in the charge by the “person claiming to be aggrieved” or by any person whom the charge claims was aggrieved by the alleged “unlawful employment practice”).

9. CAROL M. MERCHASIN, MINDY H. CHAPMAN & JEFF POLINSKY, CASE DISMISSED! TAKING YOUR HARASSMENT PREVENTION TRAINING TO TRIAL 4-5 (2d ed. 2003) (discussing situations in which courts have held employers liable for sexual harassment).

10. JODY FEDER, CONG. RESEARCH SERV., RL 30253, SEX DISCRIMINATION AND THE UNITED STATES SUPREME COURT: DEVELOPMENTS IN THE LAW, 11 (2008).

action based on the employee's submission to a supervisor's harassing actions.¹¹ The United States Supreme Court has held that employers are strictly liable for harassment that results in a tangible employment action.¹² The second category of sexual harassment called a "hostile work environment claim" occurs when no action is taken against the employee, but the supervisor's harassment is so severe or pervasive that it makes the workplace "hostile" or "abusive" for the employee.¹³

In 1998, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court issued two rulings regarding employer liability in hostile work-environment actions.¹⁴ In both cases, the Court held that an employer is liable for hostile work-environment claims created by a supervisor's sexual harassment.¹⁵ However, the Court limited employer liability when no tangible employment action is taken, where the employer proves, "(a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."¹⁶ Although this affirmative defense appears straightforward,¹⁷ circuit courts are split as to whether an employer must prove both elements of the *Ellerth* and *Faragher* affirmative defense in two situations: (1) incipient, or early-stage, hostile work-environment claims in which an employer remedies the harassment after notification; and (2) single-incident situations in which one act of harassment creates a hostile work environment.¹⁸

Less than one year after *Ellerth* and *Faragher*, in *Indest v. Freeman Decorating, Inc.*, the Court of Appeals for the Fifth Circuit affirmed a district court's dismissal of a hostile work-environment claim because the employer took prompt and proper action to address the harassment after the employee

11. See 29 C.F.R. § 1604.11(a)(2) (1980) (defining the category as harassment in which "submission to or rejection of [the unwelcomed sexual] conduct . . . is used as the basis for employment decisions affecting" the employee); see also FEDER, *supra* note 10, at 11.

12. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J. concurring) (noting unanimity among federal appellate courts that employers should be strictly liable for quid pro quo harassment); see also *Burlington Indus. v. Ellerth* 524 U.S. 742, 762 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–91 (1998) (quoting BARBARA LINDEMAN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 776 (3d ed. 1996)) ("[C]ourts hold employers 'automatically liable' in *quid pro quo* cases because the 'supervisor's actions . . . are deemed as a matter of law those of the employer.'").

13. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); see FEDER, *supra* note 10, at 11.

14. *Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 790–91.

15. *Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 790–91.

16. *Ellerth*, 524 U.S. at 765–66; *Faragher*, 524 U.S. at 807.

17. See, e.g., *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) [hereinafter *Indest II*] (Weiner, J., specially concurring) (characterizing the *Ellerth* and *Faragher* rule as "remarkably straightforward and perfectly consistent").

18. See *infra* Parts I.E., I.F.

complained.¹⁹ The court held that *Ellerth* and *Faragher* did not control in cases involving an “incipient hostile environment” when the employer took timely action to “nip [the] hostile environment in the bud.”²⁰ Stated differently, the Fifth Circuit devised a new rule for incipient hostile-environment claims, allowing employers to escape liability by satisfying only the first element of the *Ellerth/Faragher* affirmative defense.²¹

Similarly, in *McCurdy v. Arkansas State Police*, the Court of Appeals for the Eighth Circuit held that an employer does not have to establish the second element of the *Ellerth/Faragher* affirmative defense in a hostile work-environment case stemming from a single incident of harassment.²² The court analogized the application of the *Ellerth/Faragher* affirmative defense to single-incident cases as “trying to fit a square peg into a round hole.”²³

Despite the Fifth and Eighth Circuit precedent, other circuits have faithfully applied both elements of the *Ellerth/Faragher* affirmative defense. In *Harrison v. Eddy Potash Inc.*, the Court of Appeals for the Tenth Circuit upheld a district court’s use of the full *Ellerth/Faragher* affirmative defense in a hostile work-environment case, despite an employer’s prompt action to redress the harassment.²⁴ Last year, in *Alalade v. AWS Assistance Corp.*, the United States District Court for the Northern District of Indiana held that an employer must establish both elements of the affirmative defense in a single-incident hostile work-environment case.²⁵

This Comment examines the appropriate application of the *Ellerth/Faragher* affirmative defense to hostile work-environment cases involving incipient and single incident sexual harassment by a supervisor. Part I provides an overview of employer liability under Title VII and a history of sexual harassment liability by examining statutory provisions, Equal Employment Opportunity Commission (EEOC) guidance, and Supreme Court precedent. Part I also explains the development of the *Ellerth/Faragher* affirmative defense and describes the current circuit split on its application in single incident and incipient hostile work-environment claims. Part II analyzes this circuit split by evaluating the decisions in light of *Ellerth* and *Faragher*, policy concerns, and Title VII’s legislative history and underlying policy goals. This Comment argues that the Tenth Circuit and Northern District of Indiana’s application of

19. *Indest v. Freeman Decorating, Inc.* 164 F.3d 258, 260 (5th Cir. 1999) [hereinafter *Indest I*].

20. *Id.* at 265–67.

21. *Id.* at 267 (stating that a company’s prompt response to a harassment complaint relieves it of liability).

22. *McCurdy v. Ark. State Police*, 375 F.3d 762, 771–72 (8th Cir. 2004) (noting that the Supreme Court did not “change course” in its sexual harassment jurisprudence).

23. *Id.* at 771.

24. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1027 (10th Cir. 2001) (affirming the district court’s use of jury instructions based on both elements of the *Ellerth/Faragher* defense).

25. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 946 (N.D. Ind. 2011).

both elements of the *Ellerth/Faragher* affirmative defense better serves Title VII's goal of deterrence by encouraging employers and employees to take proactive steps to prevent harassment. Part III contends that incentivizing reporting of harassment is even more imperative in the current job market, as employees feel increased pressure to endure harassment rather than to risk losing or leaving their jobs. Further, this Comment urges the Supreme Court to resolve this circuit split by finding that both elements of the *Ellerth/Faragher* affirmative defense should govern single-incident and incipient hostile work-environment claims, as this approach best preserves Title VII as a strong tool to fight workplace discrimination.

I. DEVELOPMENT OF EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

A. Title VII and Employer Liability

The prohibition of employment discrimination under Section 703 of Title VII of the Civil Rights Act of 1964 was designed to afford economic opportunity to African Americans and other minority groups that had long been denied jobs due to their minority status.²⁶ The statute prohibits an employer or “any agent of such person”²⁷ from discriminating in hiring or firing or discriminating “with respect to . . . compensation, terms, conditions, or privileges of employment” based on the employee’s “race, color, religion, sex, or national origin.”²⁸

Courts recognize that Title VII has dual goals of (1) deterring discrimination, and (2) redressing harm by requiring violators to compensate victims of discrimination.²⁹ Title VII seeks to deter discrimination by imposing on employers “civil liability for civil rights violations.”³⁰ Implicit in this philosophy lies the belief that employers will take proactive steps to create a workplace free of discrimination if faced with potential civil liability.³¹

Because of the inclusion of “agents,” courts have looked to basic common law agency doctrine for guidance when determining employer liability for

26. See 110 CONG. REC. 6547 (statement of Sen. Humphrey) (reciting statistics that documented the effect of discrimination of nonwhites in the workplace and noting that “no civil rights legislation would be complete unless it dealt with this problem”).

27. 42 U.S.C. § 2000e-5 (2006).

28. § 2000e-2.

29. *Id.*; see also *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (noting that deterrence and victim compensation are two purposes of Title VII); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) (“The dominant purpose of the Title, of course, is to root out discrimination in employment.”).

30. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Civil Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 756 (1999).

31. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (“The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”).

discriminatory acts by an employee.³² Of particular importance in liability questions is the agency doctrine of *respondeat superior*, which holds an employer vicariously liable for “torts committed by employees while acting within the scope of their employment.”³³ Additionally, an employer can be held liable even when employees commit a tort outside the “scope of their employment” if the employer negligently or recklessly allows the action, or if the employee’s conduct is aided by his agency relation with the employer.³⁴

Despite Title VII’s twin goals of deterrence and compensation,³⁵ the statute remains silent on the scope of vicarious liability for employers.³⁶ In hostile work-environment cases where a supervisor discriminates against or sexually harasses an employee but the employee’s job status is not altered, the employer’s connection to the harassment is more attenuated because the supervisor did not overtly exert his or her supervisory power by taking employment action against the employee.³⁷ In these cases, courts have struggled to develop clear rules for employer liability. This uncertainty was especially prevalent in the decade following the passage of Title VII when women first tried to use Title VII to combat sexual harassment at work.³⁸

32. See e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (declining to give a definitive rule on employer liability, but noting that Congress wanted the courts to look to common agency principles for guidance).

33. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). The Restatement defines agency as “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” *Id.* § 1.01. For instance, when a supervisor, authorized by the employer to make decisions that affect an employee’s job status, fires an employee based on the employee’s sex, the employer can be held vicariously liable. See, e.g., *Meritor*, 477 U.S. at 75–77 (Marshall, J., concurring) (discussing the Court’s application of strict liability in tangible employment-action cases).

34. See e.g., RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (“A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”).

35. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (explaining that employer liability for discrimination not only compensates the victim, but it also bolsters Title VII’s broader goal of ending workplace discrimination). Broader liability encourages employers to ensure that there is no discrimination and also allows victims of workplace discrimination to seek compensation from the “deeper pocket[ed]” employers rather than the individual employee who actually violates the law. See Fisk & Chemerinsky, *supra* note 30, at 757.

36. Fisk & Chemerinsky, *supra* note 30, at 762 (speculating that this silence is likely due to the fact that Congress designed Title VII with overtly discriminatory employment practices in mind, such as hiring or firing due to race, where establishing employer liability would not be problematic).

37. See *Meritor*, 477 U.S. at 76–77 (Marshall, J., concurring). This position is the subject of some debate, as a supervisor is also tasked with oversight and regulation of the workplace, thereby enabling a supervisor’s actions to create a hostile environment. *Id.*

38. SAGUY, *supra* note 1, at 28–30.

B. Establishing Sexual Harassment as a Form of Actionable Discrimination Under Title VII

The unprecedented influx of women into the workforce in the second half of the twentieth century³⁹ marked one of the biggest societal and economic shifts in American history.⁴⁰ Despite this breakthrough, women entering the workforce in the 1960s and 1970s faced severe discrimination⁴¹ and sexual harassment.⁴² As the degree and prevalence of sexual harassment came to light, women's groups began to publicize the problem and search for legal remedies under Title VII.⁴³ The groups argued that sexual harassment was covered under Title VII when an employee's job status was tied to unwanted sexual advances by a supervisor (quid pro quo harassment) because this behavior creates an employment barrier that would not be otherwise present

39. In 1950, approximately thirty-three percent of women participated in the labor force; by 1980 that number skyrocketed to over fifty percent. Howard N. Fullerton Jr., Bureau of Labor Statistics, *Labor Force Participation: 75 Years of Change, 1950–98 and 1998–2025*, MONTHLY LABOR REV., Dec. 1999, at 3–5, available at <http://www.bls.gov/opub/mlr/1999/12/art1full.pdf>.

40. Harold V. Hayghe, Bureau of Labor Statistics, *Developments in Women's Labor Force Participation*, *Monthly Labor Rev.*, Sept. 1997, at 41, available at <http://www.bls.gov/opub/mlr/1997/09/art6full.pdf>; see also Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 591–92 (1997) (attributing the rise of women in the workplace to cultural and historical factors, including increased educational opportunities, more progressive views of gender roles, the rising cost of living, and antidiscrimination laws).

41. Bridge, *supra* note 40, at 591–93. Although there was a significant increase in the presence of women in the workforce, women still faced discrimination in hiring, salary, and promotions. *Id.* at 592. A 1963 report by the Presidential Commission on the Status of Women, commissioned by President Kennedy and chaired by Eleanor Roosevelt, also uncovered widespread gender discrimination against women in hiring and pay. BAKER, *supra* note 1, at 13. The report prompted President Kennedy to issue an executive order that prohibited sexual discrimination in the hiring of federal workers. *Id.*

42. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 26–27 (1979). *Redbook Magazine's* 1976 poll surveying 9,000 women reported that nine out of ten women experienced sexual harassment at work. *Id.* at 26–27. Similarly, a 1981 study of federal workers found that forty-two percent of females had been victims of sexual harassment. *Sexual Harassment in the Federal Workplace: Is It a Problem?*, MERIT SYSTEMS PROTECTION BOARD (1981), reprinted in LAURA W. STEIN, *SEXUAL HARASSMENT IN AMERICA: A DOCUMENT HISTORY* 19 2–21 (1999). Scholars point to the treatment of female slaves as an example of early sexual harassment before the term was coined in the 1970s. See e.g., Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3–8 (Catharine A. MacKinnon & Reva Siegel eds., 2004).

43. See Susan Brownmiller & Delores Alexander, *How We Got Here: From Carmita Wood to Anita Hill* (1992), reprinted in STEIN, *supra* note 42, at 1–2 (discussing the grassroots effort to publicize sexual harassment in the early 1970s); see also Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment at Work*, N.Y. TIMES, Aug. 19, 1975, at 38 (chronicling women's groups' attempts to raise awareness about sexual harassment and their search for legal remedies). Nemy's article was among the first mainstream press given to the subject of sexual harassment and was widely syndicated in newspapers across the country. BAKER, *supra* note 1, at 35–36.

but for the employee's sex.⁴⁴ Initially, courts dismissed the argument that sexual harassment rose to the level of discrimination,⁴⁵ reading Title VII as prohibiting only employment discrimination based on sex stereotypes in hiring or firing practices.⁴⁶

Notwithstanding early setbacks, the law evolved over time. First, Congress passed the Equal Employment Opportunity Act of 1972, which amended Title VII to strengthen the enforcement power of the EEOC,⁴⁷ and reaffirmed Congress's intent to end sex discrimination in employment.⁴⁸ Second, in 1976, the Federal District Court for the District of Columbia issued a landmark ruling in *Williams v. Saxbe* that recognized quid pro quo sexual harassment as discrimination under Title VII.⁴⁹ The *Williams* court broadly read Title VII's intent as prohibiting all forms of sex discrimination, including sexual harassment.⁵⁰ Additionally, the court in *Williams* found the employer vicariously liable for the supervisor's decision to tie employment status to the employee's reaction to his sexual advances.⁵¹ The D.C. Court's ruling gave

44. See SAGUY, *supra* note 1, at 29–30 (discussing the strategy of framing sexual harassment as a Title VII issue).

45. See *Miller v. Bank of Am.*, 418 F. Supp. 233, 235–36 (N.D. Cal. 1976) (finding no liability for the employer in a quid pro quo claim by a female employee who was fired for refusing to have sex with a supervisor because the employee failed to report the conduct), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding that plaintiff's complaint alleging verbal and sexual advances did not qualify as an "unlawful employment practice" that fell within the scope of Title VII), *vacated*, 562 F.2d 55 (9th Cir. 1977); *Barnes v. Train*, No. 1828-73, 13 FEP Cases 123, 1974 WL 10628 (D.D.C. Aug. 9, 1974) (characterizing sexual harassment as an interpersonal problem between employees rather than workplace sex discrimination), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

46. See *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194, 1197–98 (7th Cir. 1971) (holding that firing a female employee based on marital status violated Title VII). The *Sprogis* court explained that a prohibition on employment practices based on gender stereotypes fell within Title VII's goal of eliminating workplace sex discrimination. *Id.* at 1198.

47. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); see H.R. REP. NO. 92-238, at 8–17 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2143–53 [hereinafter H.R. REP. NO. 92-238] (discussing enhanced enforcement for the EEOC); see also *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77–78 (explaining that Congress's hope that employers would voluntarily comply with Title VII was overly optimistic and thereby led Congress to strengthen the EEOC's investigatory and enforcement powers in 1972).

48. H.R. REP. NO. 92-238, *supra* note 47, at 65. Congress noted that sex discrimination continued to be widespread and as significant as other forms of employment discrimination. *Id.*

49. *Williams v. Saxbe*, 413 F. Supp. 654, 654–57 (D.D.C. 1976).

50. *Id.* at 657 (noting that "sex discrimination" as used in the Equal Employment Opportunity Act encompassed a wide range of discriminatory practices). The *Williams* court rejected the argument that a sexually harassed employee was discriminated against because she refused sex, rather than because of her gender, stating that the argument ignored the fact that the harassment created a barrier to employment that is only present but for the employee's gender. *Id.* at 657–58.

51. *Id.* at 660–61 (explaining that Title VII was violated when the supervisor sexually harassed the plaintiff, and that the supervisor's actions were imputed to the employer). The court

courts across the country the much-needed impetus to begin to recognize quid pro quo harassment claims under Title VII.⁵²

The 1970s and early 1980s also saw the development of hostile work-environment discrimination claims. In 1971, the Fifth Circuit held in *Rogers v. EEOC* that Title VII prohibited employment practices or supervisor conduct that did not tangibly alter the employment status of an employee but created a racially hostile work environment.⁵³ Ten years later, in *Bundy v. Jackson*, the D.C. Circuit applied the same reasoning in the gender context when it held that sexual harassment could create an actionable hostile work environment.⁵⁴

C. The 1980 EEOC Guidance

Despite these positive developments, sexual harassment litigation remained unsettled.⁵⁵ As a result, in 1980, the EEOC issued guidelines⁵⁶ that defined sexual harassment generally,⁵⁷ recognizing both quid pro quo harassment⁵⁸

went on to quell concerns that this finding would expose employers to too much liability. *Id.* The court explained that Title VII prohibits discriminatory employment conditions from being imposed on an employee based on sex, and that holding employers vicariously liable for a supervisor's actions falls within the statute. *Id.*

52. See *Tompkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048–49 (3d Cir. 1977); *Barnes v. Train*, No. 1828-73, 13 FEP Cases 123, 1974 WL 10628 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55, 55 (9th Cir. 1977); see also BAKER, *supra* note 1, at 22–25 (discussing the significance of the *Williams* decision); GWENDOLYN MINK, *HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN* 48–51 (2000) (discussing the impact of the *Williams* decision and the subsequent history of *Barnes*, *Tompkins*, and *Corne*).

53. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (defining a hostile work environment as one “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers”).

54. *Bundy v. Jackson*, 641 F.3d 935, 945 (D.C. Cir. 1981). The *Bundy* court noted that if employers were not liable for a hostile work environment created by sexual harassment, “an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her.” *Id.*

55. See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1721 (2002) (noting that quid pro quo and hostile work-environment cases did not address “garden variety sexual harassment” wherein humiliation or other non-sexual motivations arose).

56. 29 C.F.R. § 1604.11 (1980); see also Schwartz, *supra* note 55, at 1721.

57. § 1604.11(a) (defining sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”).

58. The Commission stated quid pro quo harassment occurred when “(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.” *Id.*

and hostile work-environment harassment⁵⁹ as actionable under Title VII.⁶⁰ The guidelines also imposed liability on employers if the employer or the employer's agents knew or should have known about the harassment, unless the employer or agent took adequate corrective actions.⁶¹ Additionally, the EEOC reaffirmed Title VII's prevention goal by urging employers to use preventative steps to curb sexual harassment.⁶²

D. Meritor Savings Bank, FSB v. Vinson: Supreme Court Recognition of Sexual Harassment as Discrimination

Ten years after the *Williams* court recognized sexual harassment as a form of employment discrimination, the Supreme Court finally addressed Title VII sexual harassment claims in *Meritor Savings Bank, FSB v. Vinson*.⁶³ Justice William Rehnquist, writing for the Court, began his analysis by recognizing that sexual harassment constituted a form of sex discrimination, and that Title VII's prohibition against gender discrimination was not limited to harassment that resulted in "economic" or "tangible" discrimination.⁶⁴ Echoing the EEOC guidelines,⁶⁵ the Court recognized two basic types of sexual harassment as actionable under Title VII: (1) quid pro quo, where harassment results in a tangible employment action; and (2) hostile work environment, where an employee's status is unaffected but the sexual harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁶⁶

Despite establishing a Title VII claim for sexual harassment, the Court did not define the scope of employer liability.⁶⁷ The Court rejected the view that

59. The Commission defined hostile work-environment sexual harassment as involving "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.*

60. § 1604.11(c).

61. § 1604.11(d).

62. § 1604.11(e) (providing that an employer must affirmatively prevent sexual harassment from occurring by raising the subject of harassment, expressing disapproval of harassing conduct, and imposing sanctions).

63. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986).

64. *Id.* at 64. Justice William Rehnquist interpreted the phrase "terms, conditions or privileges of employment" in Title VII to mean that Congress intended to broadly "strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* (quoting *L.A. Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978), *vacated*, 461 U.S. 951 (1983)).

65. *Id.* at 65 (explaining that while the EEOC guidelines are not controlling, litigants and courts can refer to them for guidance). The EEOC also filed an amicus brief on behalf of Vinson, arguing that a hostile work-environment claim can prevail even when no adverse employment action took place. *Id.* at 70–71.

66. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 867, 904 (11th Cir. 1982)).

67. *Id.* at 70, 72 (declining to create a definitive rule on employer liability but noting that it agreed with "the EEOC that Congress wanted courts to look to agency principles for guidance in this area").

an employer should be “automatically liable” for sexual harassment by supervisors, but also declared that the mere existence of a complaint procedure did not shield an employer from all liability.⁶⁸ Thus, the Court remanded the case to determine if the supervisor’s conduct was “severe or pervasive” enough to constitute an actionable Title VII claim.⁶⁹ The lack of direction by the Supreme Court on the issue of employer liability resulted in continued struggles by the lower courts to determine liability in hostile work-environment claims.⁷⁰

E. Ellerth and Faragher: The Court Clarifies Liability

Sexual harassment claims greatly increased following *Meritor*⁷¹ and Congress’s passage of the Civil Rights Act of 1991.⁷² After a number of highly publicized scandals, sexual harassment became a hotly debated issue, and the Supreme Court was urged to address the matter.⁷³

Finally, in 1998, the Supreme Court announced *Burlington Industries, Inc. v. Ellerth*⁷⁴ and *Faragher v. City of Boca Raton*,⁷⁵ providing much-needed

68. *Id.* at 72–73. Justice Rehnquist explained that under agency principles courts have correctly held employers strictly liable for tangible employment actions. *Id.* at 70–72 (explaining that lower courts consistently held employers liable for quid pro quo harassment).

69. *Id.* at 72–73.

70. For a discussion of the impact of the *Meritor* decision, see Elsenheimer, *supra* note 6, at 1641–42. See also B. Glenn George, *If You’re Not Part of the Solution, You’re Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 137 (2001) (noting the courts’ struggle with employer liability until 1998); John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1414 nn. 69–71 (2002) (listing cases that hold employers vicariously liable, and cases that apply a “knew-or-should-have-known standard.”).

71. From 1980 to 1985, the EEOC received only sixteen Title VII complaints, but following the *Meritor* decision, 624 charges were filed in 1986 and 1658 charges were filed in 1987. Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945, 953 (2008).

72. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 105-1071 (1991) (codified in scattered sections of 42 U.S.C.). The Civil Rights Act of 1991 added provisions expanding the rights of women to sue and collect compensatory and punitive damages for sexual discrimination or harassment, which led to more litigation surrounding sexual harassment, and heightened the need for more clearly defined liability standards. See Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 320–21 (2004).

73. See MINK, *supra* note 52, at 97–102 (discussing high profile sexual harassment cases including the Clarence Thomas Supreme Court nomination hearing, which focused on his alleged sexual harassment of Anita Hill while Thomas was Commissioner of the EEOC). Senator Edward Kennedy, a chief opponent of Thomas’s Supreme Court nomination, commented that due to Anita Hill’s testimony, the general public had a greater understanding of the severity of sexual harassment. STEIN, *supra* note 42 at 116–19; see also, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692–96 (1998) (chronicling the litany of sexual harassment news stories in the 1990s).

74. 524 U.S. 742 (1998).

75. 524 U.S. 775 (1998).

direction on the question of employer liability in hostile work-environment claims.⁷⁶ These rulings are the “guideposts” for employer liability in hostile work-environment claims.⁷⁷

I. Burlington Industries v. Ellerth

In *Ellerth*, Kimberly Ellerth alleged that her supervisor groped her and made inappropriate sexual remarks over the course of several months; however, Ellerth suffered no tangible employment actions nor did she report her supervisor’s conduct.⁷⁸ Justice Anthony Kennedy, writing for the majority, clarified that the terms “quid pro quo” and “hostile work environment” do not control in determining liability.⁷⁹ Instead, the Court, reaffirming *Meritor*,⁸⁰ stressed that tangible employment actions are important in finding liability.⁸⁰ However, the Court also held that when the harassing behavior does *not* result in a tangible employment action, a claim becomes actionable when the conduct is “severe or pervasive.”⁸¹

On the issue of liability, the Court relied on agency principles.⁸² Under agency principles, an employer is not liable for torts committed by a supervisor acting outside the scope of employment unless the employer was “negligent or reckless” or the supervisor was “aided in the commission of the tort by the existence of the agency relation.”⁸³ The Court did not find Ellerth’s employer

76. In the 1993 case, *Harris v. Forklift Systems*, the Court provided further guidance on what constitutes an actionable hostile work-environment claim by holding that a hostile work-environment claim will be based on a totality of circumstances test. *Harris*, 510 U.S. 17, 23 (1993) (listing the following factors as helpful for determining if harassment creates a hostile work environment: “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”).

77. Elsenheimer, *supra* note 6, at 1645.

78. *Ellerth*, 524 U.S. at 747–49. The Seventh Circuit overturned the district court’s dismissal of Kimberly Ellerth’s claims in eight separate opinions with no consensus regarding employer liability claims. *Id.* at 749.

79. *Id.* at 751. The Court noted that the terms “quid pro quo” and “hostile work environment” were not included in Title VII, nor were they used to establish liability in *Meritor*. *Id.* at 752 (noting that the terms serve specific and limited purposes in *Meritor*). The Court noted, however, that lower courts used the terms as a benchmark for determining whether an employer was automatically, vicariously liable, or if the employee had to prove that the harassment was “severe or pervasive.” *Id.* at 754–55; *see also* Nancy R. Mansfield & Joan T. A. Gabel, *An Analysis of the Burlington and Faragher Affirmative Defense: When Are Employers Liable?*, 19 LAB. LAW. 107, 110 (2003) (detailing the affirmative defense standard in *Ellerth* and *Faragher*).

80. *Ellerth*, 524 U.S. at 762–63 (explaining that under Title VII, liability for quid pro quo harassment imputes the employer because the company empowered the supervisor to make tangible employment decisions about the victim-employee).

81. *Id.* at 752.

82. *Id.* at 758–61 (stating that under agency principles, liability for torts committed outside the scope of employment will still be imputed to the employer under certain situations).

83. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1996); *see also Ellerth*, 524 U.S. at 758–59 (discussing section 219(2) of the Restatement). Since it was cited by the *Ellerth* court,

liable because although “[n]egligence sets a minimum standard for employer liability under Title VII,” Ellerth did not report the harassment to her employer.⁸⁴ Despite her lack of reporting, Ellerth asserted that her employer should be liable because the agency relation between the employee and the supervisor enabled the supervisor’s harassment.⁸⁵ Essentially, Ellerth raised a “more stringent standard of vicarious liability.”⁸⁶

Justice Kennedy, noting the tension between agency law and the *Meritor* rule,⁸⁷ focused the Court’s analysis on Congress’s intent in enacting Title VII.⁸⁸ The Court found that Title VII was intended to eliminate harassment in the workplace, a policy best supported by encouraging employers to implement antiharassment and notification policies.⁸⁹ Based on that rationale, the Court established that an employer can still be liable even when no tangible employment action is taken, unless it successfully raises an affirmative defense to the claim.⁹⁰ The defense consisted of two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁹¹ Furthermore, the Court held that when a tangible employment action is taken against an employee, an employee is strictly liable.⁹²

Ultimately, the Court remanded the case, stating that Ellerth should be allowed to show that the harassment was “pervasive or severe” and that the employer should be able to assert the affirmative defense.⁹³ Justice Thomas

the Second Restatement has published a new edition; however, section 219 remains substantively unchanged. *See generally* RESTATEMENT (THIRD) OF AGENCY §§ 2.04, 7.07, 7.08 (2005).

84. *Ellerth*, 524 U.S. at 748–49, 759 (finding negligence when the employer knew or should have known of the conduct).

85. *See id.* at 759.

86. *Id.*

87. *Id.* at 763. Justice Kennedy acknowledged the logic in holding employers strictly liable under agency law because a supervisor’s superior position and ability to affect the employee’s job status was always at least an implicit factor in the sexual harassment. *Id.* On the other hand, Justice Kennedy noted that in some harassing situations the agency relation has no bearing on the supervisor’s conduct. *Id.*

88. *Id.* at 763–64.

89. *Id.* (noting that Title VII was intended to encourage companies to create antiharassment policies and more effective grievance mechanisms). The Court explained that attaching liability to an employer’s effort to create antiharassment procedures would support “Congress’ intention to promote reconciliation rather than litigation,” and limiting liability where an employee does not report the harassment “could encourage employees to report harassing conduct before it becomes severe or pervasive. . . [and] serve Title VII’s deterrent purpose.” *Id.* at 764.

90. *Id.* at 764–65.

91. *Id.* at 765.

92. *Id.* (explaining that the defense is not available if harassment results in a tangible employment action).

93. *Id.* at 766.

dissented, arguing that employers should only be liable if they negligently allow harassment to occur.⁹⁴

2. Faragher v. City of Boca Raton

In *Faragher v. City of Boca Raton*, the Court applied the affirmative defense set forth in *Ellerth* and further expounded on its underlying principles.⁹⁵ Similar to *Ellerth*, the facts of *Faragher* involved a hostile work-environment claim that did not result in a tangible employment action.⁹⁶ Justice David Souter, writing for the majority, elaborated on the agency principles underpinning vicarious liability for sexual harassment by a supervisor.⁹⁷

Recognizing that the *Meritor* holding did not make an employer “automatically” liable under Title VII, the Court explained that the affirmative defense outlined in *Ellerth* best wedded the agency principles of vicarious liability and *Meritor*’s prohibition on strict liability under Title VII.⁹⁸ The Court also asserted that *Ellerth*’s affirmative defense addressed Congress’s goal of making victims whole, encouraging employers to implement antiharassment procedures, and supporting employees to utilize these procedures to mitigate harm.⁹⁹ Applying the affirmative defense, the Court found that the City of Boca Raton had not taken reasonable steps to prevent harassment.¹⁰⁰

94. *Id.* at 767 (Thomas, J., dissenting). Justice Thomas also warned that the new standard delineated in *Ellerth* would lead to more litigation and perpetuate the uncertainty surrounding employer liability. *Id.* at 774 (characterizing the affirmative defense outlined in *Ellerth* as “vague”).

95. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

96. *Id.* at 780–83. Beth Ann Faragher, a part-time lifeguard for the City of Boca Raton, Florida, alleged that two supervisors repeatedly sexually harassed her, both verbally and physically. *Id.* The City adopted an antiharassment policy, but failed to circulate the policy to Faragher’s supervisors and co-workers. *Id.* at 781–82.

97. *Id.* at 793. The Eleventh Circuit rejected vicarious liability in Faragher’s claim, holding: (1) the supervisors were not acting within the scope of their employment; (2) their harassment was not “aided by the agency relationship;” and (3) the employer was not negligent in failing to prevent the harassment. *Id.* Justice David Souter explained that although sexual harassment did not literally fall within the scope of employment, courts have expanded the definition to include actions that are foreseeable consequences of the workplace such as sexual harassment. *Id.* at 794–96. Justice Souter next concluded that supervisors are “aided by the agency relationship” when sexually harassing a subordinate employee because of the employee’s inability to ignore or avoid a supervisor in the workplace and their likely reluctance to risk “blowing the whistle.” *Id.* at 802–03.

98. *Id.* at 804–05.

99. *Id.* at 806–07 (stating that the *Ellerth* affirmative defense gives deference to responsible employers while encouraging victims to mitigate harm through reasonable means).

100. *Id.* at 808–10 (finding that the City failed to notify its employees of its sexual harassment policies).

F. The Fifth and Eighth Circuits Do Not Follow the Ellerth/Faragher Test in Incipient or Single Incident Sexual Hostile Work-Environment Sexual Harassment Cases

Following the Supreme Court decisions in *Ellerth* and *Faragher*, the EEOC issued policy guidance clarifying the application of the new framework and voicing their support for the use of the *Ellerth/Faragher* affirmative defense.¹⁰¹ In 2004, the Court reaffirmed the use of the *Ellerth/Faragher* defense in *Pennsylvania State Police v. Sanders*.¹⁰²

1. Incipient Harassment

Despite this new rule, in 1999, the Fifth Circuit declined to apply the *Ellerth/Faragher* affirmative defense in *Indest v. Freeman Decorating, Inc.*¹⁰³ The case arose after Constance Indest filed a Title VII lawsuit against her employer, Freeman Decorating, alleging that a company vice president sexually harassed her during a week-long design convention.¹⁰⁴ Indest reported the harassment to her branch manager, and the company reprimanded the vice president.¹⁰⁵ Indest's employment status was not altered following the incident.¹⁰⁶

The district court dismissed the case before the Supreme Court announced *Ellerth* and *Faragher*.¹⁰⁷ When the case reached the Fifth Circuit, however, a three-judge panel heard the case in light of the new standard articulated in *Ellerth* and *Faragher*.¹⁰⁸ The Fifth Circuit affirmed the district court's dismissal in a *per curiam* decision, but there was no majority to provide a clear rationale for the holding.¹⁰⁹

The first opinion, issued by Judge Edith Jones, recognized that the case should be examined in light of the *Ellerth* and *Faragher* decisions.¹¹⁰ Nonetheless, Judge Jones did not apply the *Ellerth/Faragher* affirmative

101. Equal Opportunity Comm'n, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, [hereinafter *Enforcement Guidance*] available at <http://www.eeoc.gov/policy/docs/harassment.html>.

102. *Pa. State Police v. Sanders*, 542 U.S. 129, 133–34 (2004) (reiterating a summation of the *Ellerth/Faragher* affirmative defense).

103. *Indest I*, 164 F.3d 258 (5th Cir. 1999) (distinguishing the case on the immediate response of the employer).

104. *Id.* at 260.

105. *Id.*

106. *Id.* at 260–61 (noting that Constance Indest received periodic raises after the incident). After the company reprimanded the vice president, Indest notified the human resources director that she intended to file a complaint with the EEOC, fearing retaliation from the vice president. *Id.* The director assured Indest that no retaliation would occur and that the company would suspend the vice president for one week. *Id.* at 261

107. *Id.* at 258, 260.

108. *Id.* at 263.

109. *See Indest II*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Weiner, J., specially concurring).

110. *Indest I*, 164 F.3d at 260.

defense¹¹¹ and found that Freeman Decorating should not be liable because the company promptly and properly responded to the harassment claim.¹¹² Judge Jones noted that holding Freeman Decorating liable for the sexual harassment of Indest could be equated to strict liability, an outcome that runs counter to the rule expressed in *Meritor* and was subsequently affirmed in *Ellerth* and *Faragher* that Title VII does not impose absolute liability on employers.¹¹³ In reaching this conclusion, Judge Jones distinguished the company's quick response to Indest's claim from *Ellerth* and *Faragher*, cases involving repeated harassment where the victims were unaware of or never utilized the companies' antiharassment policies.¹¹⁴ Thus, the court held that *Ellerth* and *Faragher* did not control in "incipient" or early-stage hostile work-environment claims.¹¹⁵

Judge Jacques Weiner concurred with the judgment, but rejected Judge Jones's abandonment of the *Ellerth/Faragher* affirmative defense in incipient hostile work environments.¹¹⁶ Judge Weiner noted that the Supreme Court did not expressly limit *Ellerth* and *Faragher* to exclude incipient claims.¹¹⁷ Judge Weiner also rejected the argument that applying *Ellerth* and *Faragher* in incipient sexual harassment claims would create a strict liability standard, stressing that claims are actionable only if they are "severe or pervasive."¹¹⁸ Judge Weiner found that the case should be dismissed because the harassment did not breach the "severe or pervasive" threshold.¹¹⁹

Since neither Judge Jones nor Judge Weiner reached a quorum, their opinions are not precedential.¹²⁰ However, Judge Jones's opinion has been cited in subsequent cases holding that there is no vicarious liability when an employer takes prompt actions to remediate sexual harassment.¹²¹

111. Under the *Ellerth/Faragher* affirmative defense, Freeman Decorating would be liable even though it responded promptly because Indest reported the harassment to the company. See *supra* note 84.

112. *Indest I*, 164 F.3d at 264.

113. *Id.* at 266.

114. *Id.* at 265.

115. *Id.* at 265–66 (explaining that holding an employer liable when it "nipped the hostile environment in the bud" would undermine Title VII's deterrent policy).

116. *Indest II*, 168 F.3d 795, 796 (5th Cir. 1999) (Weiner, J., specially concurring).

117. *Id.* at 798 (stating that the Court designed the *Ellerth/Faragher* defense to apply to all hostile work-environment claims). Quoting the *Ellerth/Faragher* affirmative defense, Judge Weiner concluded that the Court designed the defense "as the only hatch through which an employer might escape vicarious liability when 'harassment by a supervisor . . . creates the requisite degree of discrimination.'" *Id.* at 801 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998)).

118. *Id.* at 803–04.

119. *Id.* at 806.

120. *Id.* at 796 n.1; see also *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (stating that a case reached absent a quorum has no precedential weight).

121. See *Kreamer v. Henry's Towing*, 150 F. App'x 378, 382–83 (5th Cir. 2005) (citing *Indest I* and holding that because the defendant employer "took prompt remedial action as a

2. Single-Incident Harassment

In *McCurdy v. Arkansas State Police*, a case involving a single incident of sexual harassment, the Eighth Circuit also declined to apply the *Ellerth/Faragher* affirmative defense.¹²² Jamie McCurdy, a radio dispatcher for the Arkansas State Police (ASP), sued the ASP after a police officer fondled and verbally harassed her during an evening shift.¹²³ McCurdy reported the incident, and the officer was demoted and transferred as the result of the ensuing investigation.¹²⁴ The Eighth Circuit cited Judge Jones's opinion in *Indest*, and distinguished this single incident of sexual harassment and the ASP's remedial actions from *Ellerth* and *Faragher*.¹²⁵ The court determined that under the *Ellerth/Faragher* affirmative defense, the ASP would be liable despite its prompt response because McCurdy reported the incident.¹²⁶ Like Judge Jones, the Eighth Circuit rejected this outcome as creating strict liability for employers in single-incident cases,¹²⁷ stating, "[s]trict adherence to the Supreme Court's two-prong affirmative defense in this case is like trying to fit a square peg in a round hole."¹²⁸ Thus, the court held that the *Ellerth/Faragher* affirmative defense did not apply to single-incident harassment cases, and that employers were vicariously liable only under a negligence theory.¹²⁹ Because the ASP took "swift and effective action," it was not negligent.¹³⁰

G. The Tenth Circuit and United States District Court for the Northern District of Indiana Apply the Full Ellerth/Faragher Defense in Incipient and Single-Incident Cases

In 2001, in *Harrison v. Eddy Potash, Inc.*, the Tenth Circuit diverged from the Fifth Circuit and applied the *Ellerth/Faragher* affirmative defense to an

matter of law" the employer is not liable). In later opinions, Judge Weiner has reiterated that neither of the *Indest* opinions are precedential, but has applied the *Ellerth* and *Faragher* defense in full by distinguishing the cases from the facts of *Indest*. See, e.g., *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 n.2 (5th Cir. 2002); see also Marks, *supra* note 70, at 1423–24.

122. 375 F.3d 762, 774 (8th Cir. 2003).

123. *Id.* at 764.

124. *Id.* at 765, 767.

125. *Id.* at 773–74 (citing *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999)).

126. *Id.* at 774.

127. *Id.*; see *supra* notes 110–15 and accompanying text (outlining Judge Jones's arguments for limiting the defense).

128. *McCurdy*, 375 F.3d at 771.

129. See *id.* at 771, 773.

130. *Id.* at 773–74 ("We conclude by applauding the ASP for its swift and effective response to McCurdy's report of the single instance of sexual harassment. Title VII forbids sexual harassment in the workplace, and the ASP followed this prohibition . . ."). In a dissenting opinion, Judge Michael Melloy rejected this limitation of *Ellerth* and *Faragher* as unsupported by the text of those opinions and noted that the EEOC supported application of both prongs of the affirmative defense in all situations. *Id.* at 775–76 (Melloy, J., dissenting).

incipient-harassment claim.¹³¹ Jeanne Harrison, a mineworker, filed a Title VII sexual harassment claim after enduring two months of severe sexual harassment and assault by her supervisor.¹³² The case reached the Tenth Circuit after the district court ruled in favor of Harrison by applying the *Ellerth/Faragher* affirmative defense.¹³³ On appeal, the employer asserted that it should not have been required to meet the second element of the *Ellerth/Faragher* affirmative defense, an argument consistent with Judge Jones's opinion in *Indest*.¹³⁴ The Tenth Circuit refuted this argument, finding that the district court correctly applied the full *Ellerth/Faragher* affirmative defense.¹³⁵ The Tenth Circuit rejected the employer's position for a number of reasons. First, it noted that the lack of a majority opinion in *Indest* stripped either opinion of any precedential authority.¹³⁶ Rather, the *Harrison* court relied on Tenth Circuit precedent that upheld the use of the *Ellerth/Faragher* affirmative defense, even when an employer took prompt action to remedy the harassment.¹³⁷ Additionally, the court also noted significant factual differences between the conduct in *Indest* and the severe conduct Harrison alleged.¹³⁸

More recently, the United States District Court for the Northern District of Indiana applied the full *Ellerth/Faragher* affirmative defense in a single-incident case in *Alalade v. AWS Assistance Corp.*¹³⁹ Annastacia Alalade filed a sexual harassment claim against her employer AWS alleging that her supervisor sexually assaulted her.¹⁴⁰ Alalade promptly complained to her

131. 248 F.3d 1014, 1024–26 (10th Cir. 2001).

132. *Id.* at 1016–18 (describing a number of occasions when Harrison's supervisor forced her to perform sexual acts in isolated areas of the mine).

133. *Id.* at 1020–23. The court found for Harrison on the grounds that the employer could not meet both elements of the *Ellerth/Faragher* affirmative defense, because although the employer acted promptly upon notification of the conduct, Harrison did not unreasonably delay filing the complaint against her supervisor. *Id.* at 1024.

134. *Id.* (rejecting the company's argument that *Indest* correctly limited the *Ellerth/Faragher* affirmative defense).

135. *Id.* at 1026.

136. *Id.* at 1025. The Tenth Circuit explained, "As outlined in *Indest II*, there is no reason to believe that the 'remarkably straightforward' framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment." *Id.* at 1026 (quoting *Indest II*, 168 F.3d 795, 796 (5th Cir. 1999) (Weiner, J., specially concurring)).

137. *Id.* at 1025–26 (citing *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1259 (10th Cir. 1998)). In *Gunnell*, the Tenth Circuit held that the *Ellerth/Faragher* affirmative defense applied even where the employer ultimately stopped further harassment. *Gunnell*, 152 F.3d at 1261.

138. *Harrison*, 248 F.3d at 1026 (distinguishing the *Indest* facts from the more severe misconduct in the present case).

139. 796 F. Supp. 2d 936, 944 (N.D. Ind. 2011).

140. *Id.* at 937. A full description of the events can be found in the district court's denial of summary judgment for AWS. *Alalade v. AWS Assistance Corp.*, No. 3:09-CV-338-PPS, 2011 WL 1884339, *1-3 (N.D. Ind. May 18, 2011).

employer, and her supervisor was terminated.¹⁴¹ The district court denied AWS's summary judgment motion, and AWS filed a motion to reconsider on the grounds that it should not have had to satisfy the second element of the *Ellerth/Faragher* affirmative defense because it had promptly responded to Alalade's complaint.¹⁴²

The court first explained that although *Ellerth* and *Faragher* involved prolonged harassment, *Ellerth* and *Faragher* did not suggest that the rulings were not intended to include single-incident harassment cases.¹⁴³ The court conceded that the modification for single-incident sexual harassment claims asserted by AWS and used in *McCurdy* would incentivize employers to take preventative steps to end sexual harassment.¹⁴⁴ The court contended, however, that disregarding the second element of the test would ignore the goal of encouraging employees to mitigate harm by reporting harassment.¹⁴⁵ Thus, the court denied AWS's motion to reconsider.¹⁴⁶

II. REVIEWING THE REASONING IN THE CIRCUIT SPLIT: STARE DECISIS AND STRICT LIABILITY CONCERNS

A. *Stare Decisis: The Sixth Circuit and the Eighth Circuit Narrow the Ellerth and Faragher Holdings, While the Tenth Circuit and the Alalade Court Follow Precedent*

The Fifth and Eighth Circuits in *Indest* and *McCurdy* interpreted *Ellerth* and *Faragher* to apply only to cases involving sexual harassment that occurred over a period of time.¹⁴⁷ In incipient and single-instance harassment cases, the Fifth and Eighth Circuits limit the *Ellerth/Faragher* affirmative defense to its first element, imputing liability only if the employer failed to take steps to prevent sexual harassment or did not properly respond to complaints.¹⁴⁸ This approach essentially imposes the "negligence" standard Justice Thomas urged in his dissenting opinion in *Ellerth*.¹⁴⁹ The negligence standard, however,

141. *Alalade*, 2011 WL 1884339, at *1.

142. *Alalade*, 796 F. Supp. 2d at 937–38.

143. *Id.* at 940. AWS argued that employers with antiharassment policies and who promptly respond to complaints should only have to satisfy the first element of the defense to avoid liability. *Id.* at 944. The court rejected this argument: "[t]he Supreme Court did not see fit to carve off single-instance harassment cases for special treatment under *Ellerth* and *Faragher*. So even if I was convinced *Ellerth/Faragher*'s second prong should not apply to single-instance harassment cases, that would not permit me to modify the defense here." *Id.* at 946.

144. *Id.* at 945.

145. *Id.*

146. *Id.* at 945–56.

147. *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004); *Indest I*, 164 F.3d 258, 265 (5th Cir. 1999) (distinguishing the *Ellerth* and *Faragher* facts from situations where the employer takes prompt remedial action upon receiving a complaint).

148. See *McCurdy*, 375 F.3d at 773–74; *Indest I*, 164 F.3d at 266–67.

149. See *supra* note 94 and accompanying text.

ignores the Court's holding that negligence merely sets the floor for employer liability, and that even non-negligent employers can be liable for hostile work-environment claims.¹⁵⁰

Indeed, in *Ellerth* and *Faragher*, the Supreme Court did not include any language limiting the application of the *Ellerth/Faragher* affirmative defense to strictly analogous patterns of discrimination.¹⁵¹ In fact, *Meritor*, *Ellerth*, and *Faragher*—the Court's seminal opinions on employer liability for sexual harassment—all noted that the existence of an antiharassment policy should not wholly shield an employer from liability.¹⁵²

In *Ellerth* and *Faragher*, the Court discussed other limits on the application of the *Ellerth/Faragher* affirmative defense. For instance, the defense only applies to alleged harassment by a “supervisor,”¹⁵³ and states that an employer should be liable only for coworker-on-coworker sexual harassment under the negligence standard.¹⁵⁴ Thus, it seems probable that, if the Court wished to limit the *Ellerth/Faragher* affirmative defense to longer patterns of harassment, it would have said as much. Judge Weiner's concurrence in *Indest*, the Tenth Circuit in *Harrison*, and the district court in *Alalade* all explained that, absent specific limitations from the Court, the full *Ellerth/Faragher* affirmative defense should be followed.¹⁵⁵

150. See *McCurdy*, 375 F.3d at 759.

151. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (citing *Ellerth*'s holding that employers are vicariously liable for an actionable hostile work environment created by a supervisor).

152. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762 (1998) (stating that the *Ellerth/Faragher* affirmative defense can be satisfied or refined in multiple ways and is not limited to a finding of employer grievance procedures); *Faragher*, 524 U.S. at 792 (noting that *Meritor* held that neither the mere existence of a grievance procedure nor the lack of notice of harassment was enough to automatically shield an employer from liability); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72–73 (1986) (“[W]e reject the petitioner's view that the mere existence of a grievance procedure or policy against discrimination, coupled with the respondent's failure to invoke that procedure must insulate petitioner from liability.”).

153. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 762–63. Interestingly, the *McCurdy* court noted that even under the *Ellerth/Faragher* affirmative defense, the ASP might not be liable because no agency relationship existed, as the offending police officer was not *McCurdy*'s supervisor. *McCurdy*, 375 F.3d at 773.

154. See e.g., *Ellerth*, 524 U.S. at 760, 762 (explaining that the “aided by agency” requirement for imputing liability on employers does not encompass coworker harassment, even though the agency relationship afforded the coworker-harasser proximity to the victim).

155. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1104, 1026 (10th Cir. 2001) (finding no support for the claim that the Court intended to limit the application of the *Ellerth/Faragher* defense) (citing *Indest II*, 168 F.3d 795, 796 (8th Cir. 1999) (Weiner, J., specially concurring)); *Indest II*, 168 F.3d at 796 (5th Cir. 1999) (stating that *Ellerth* and *Faragher* apply to all hostile work-environment claims); *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 940 (N.D. Ind. 2011).

B. Strict Liability: The Fifth and Eighth Circuits Equate the Application of Ellerth/Faragher as Imposing Strict Liability on Employers

Central to the Supreme Court's reasoning in *Meritor*, *Ellerth*, and *Faragher* is the notion that Title VII does not hold employers strictly liable for all supervisor-sexual harassment in the workplace.¹⁵⁶ The Fifth and Tenth Circuits justify their departures from the *Ellerth/Faragher* defense by claiming that the defense's application to incipient or single-instance sexual harassment cases imposes liability on the employer regardless of any preventative measures in place.¹⁵⁷

Judge Weiner's concurrence in *Indest* and the district court's opinion in *Alalade* took a more holistic view of the *Ellerth/Faragher* affirmative defense and did not find that it imposed strict liability.¹⁵⁸ These decisions noted that the threshold question before the application of the *Ellerth/Faragher* affirmative defense is even reached is whether the sexual harassment was so "severe" or "pervasive" that it creates a hostile work environment.¹⁵⁹ Therefore, this high threshold results in a built-in defense to imposing strict liability on employers.¹⁶⁰ If employers promptly respond to harassment claims, rarely will sexual harassment create a work environment "so polluted with discrimination" that it becomes actionable under Title VII.¹⁶¹ Indeed, Judge Jones in *Indest* noted that because the employer promptly handled the

156. See *Faragher*, 524 U.S. at 524; *Ellerth*, 524 U.S. at 762; *Meritor*, 477 U.S. at 71.

157. *McCurdy*, 375 F.3d at 772 (stating that imposing liability after an employer's quick and appropriate response is in contrast to *Meritor*'s holding and creates strict liability); *Indest I*, 164 F.3d 258, 266 (5th Cir. 1999) (claiming that vicarious liability would amount to strict liability and undermine *Meritor* where an employer is held vicariously liable even though it responded quickly and appropriately to the sexual harassment claim).

158. *Indest II*, 168 F.3d at 803 (Weiner, J., specially concurring) (stating the fear of strict liability is "as unwarranted as it is inaccurate"); *Alalade*, 796 F. Supp. 2d at 945 (disputing the argument that applying the full defense conflicts with *Meritor*'s rejection of strict liability). For a detailed discussion of why the *Ellerth/Faragher* standard does not impose strict liability, see Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 635 (2006) (arguing that the *Ellerth/Faragher* does not go far enough in holding employers strictly liable).

159. *Faragher*, 524 U.S. at 788–89; *Ellerth*, 524 U.S. at 751.

160. *Faragher*, 524 U.S. at 788 (noting that isolated incidents do not rise to the level of a hostile-work environment, ensuring that Title VII is not transformed into a "general civility code"); *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (explaining that a hostile work-environment is determined by looking at a variety of factors including frequency and severity of the conduct, its physically threatening or humiliating nature, and the degree to which it interferes with the victim's work. The opinion distinguishes severe actionable conduct from "mere offensive utterance[s]"); *Meritor*, 477 U.S. at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972)) (stating that a sexual harassment claim is only actionable if it is "severe or pervasive" enough to alter the conditions of the victim's employment) (internal citations omitted).

161. See *Indest II*, 168 F.3d at 804 (explaining that the threat of liability for sexual harassment motivates employers).

harassment, no hostile work environment ever existed.¹⁶² Judge Weiner argued that the case should be dismissed on the same grounds.¹⁶³ Additionally, the *Ellerth/Faragher* affirmative defense applies to “liability or damages,”¹⁶⁴ thereby allowing an employer to shield itself from damages that accrue after an employee should have reasonably reported the harassment.¹⁶⁵

It is true that if the full defense is required in incipient or single-incident contexts where the harassment is severe enough to be actionable, employers will still be liable, even if they respond promptly upon learning of the harassment.¹⁶⁶ These situations do resemble the strict liability situations that *Meritor*, *Ellerth*, and *Faragher* prohibit.¹⁶⁷ Yet, the EEOC points out that this result is consistent with other Title VII violations, and the employer can still limit damages by promptly thwarting the harassment.¹⁶⁸

Additionally, shielding the employer from liability in these situations will often leave the employee-victim without a means to recover damages for his or her injury outside of a tort action.¹⁶⁹ Shielding employers also contradicts Title VII’s policy of allowing recovery from the “deep[er]-pocket[ed]” employer.¹⁷⁰

162. *Indest I*, 164 F.3d at 264 (finding that brief exposure to the harassment did not amount to an actionable hostile work environment in light of the high demanding structure).

163. *Indest II*, 168 F.3d at 803–04.

164. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

165. *Faragher*, 524 U.S. at 806–07 (noting that a plaintiff should not recover if she occasionally failed to utilize existing preventative or remedial procedures).

166. *Meritor*, 477 U.S. at 72–73.

167. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 792; *Meritor*, 477 U.S. at 72;

168. *Enforcement Guidance*, *supra* note 101, at *7 (“While this result may seem harsh to a law-abiding employer, it is consistent with liability standards under the antidiscrimination statutes that generally make employers responsible for the discriminatory acts of their supervisor”). The EEOC also noted that the employer would still be liable where harm occurred even though requisite action was taken by the employer. *Id.* at *7. While a negligence standard would absolve employer liability in that situation, the EEOC has held that the *Ellerth/Faragher* affirmative defense does not. *Id.* In fact, the EEOC expressly rejected the holding in *Indest I*:

The Commission agrees with Judge Wiener that *Ellerth* and *Faragher* do control the analysis in [incipient] cases, and that an employee’s prompt complaint to management forecloses the employer from proving the affirmative defense. However, as Judge Wiener pointed out, an employer’s quick remedial action will often thwart the creation of an unlawful hostile environment, rendering any consideration of employer liability unnecessary.

Id. at *7 n.46.

169. See Joanna Stromberg, *Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN’S L.J. 317, 326–27 (2003). Stromberg argues that Title VII suits, rather than common law tort suits, provide the plaintiff with a better opportunity to recover from an employer for sexual harassment. *Id.* at 326. Stromberg notes that Title VII’s intent standard is lower and courts recognize that more acts qualify as harassment under Title VII than under traditional common law. *Id.* at 327.

170. See Fisk & Chemerinsky, *supra* note 30, at 757. The Civil Rights Act of 1991 was passed, in part, to allow monetary recovery from employers for discrimination than in the hopes that risk of financial losses would cause employers to eradicate proactively discrimination from the workplace. See Sandra Tafuri, *Title VII’s Antiretaliation Provision: Are Employees Protected*

Furthermore, the Court noted in *Faragher* that imposing liability, or the threat of liability, for the actions of supervisors encourages employers to screen, train, and monitor supervisors more closely.¹⁷¹

Moreover, many scholars suggest that courts “are unduly impressed” by a company that has a sexual harassment policy in place, finding that the existence of a policy alone satisfies the first prong of the test.¹⁷² Thus, if the court were to modify the *Ellerth/Faragher* affirmative defense to only the first element, an employer could entirely shield itself from liability by having a policy in place, regardless of the effectiveness or level of implementation of the policy.¹⁷³ In the words of the *Alalade* court, this result “creates an exception that swallows the *Ellerth/Faragher* rule.”¹⁷⁴

Therefore, the full application of the *Ellerth/Faragher* affirmative defense strikes the better balance. Employers possess the ability to shield themselves from liability or damages by responding promptly to sexual harassment and preventing a hostile work environment from materializing, yet employees are not barred from recovery simply because an antiharassment policy exists.

After the Employment Relationship Has Ended?, 71 N.Y.U. L. REV. 797, 816–18 (1996) (discussing the changes made to Title VII in the Civil Rights Act of 1991).

171. *Faragher*, 524 U.S. at 803 (noting that because there are fewer supervisors than employees, employers have a greater ability to control and monitor supervisors’ actions, making the imposition of greater liability more fair); see also Tafuri, *supra* note 170, at 817 (noting that Title VII’s monetary damages gave incentive for enforcement of the statute).

172. David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 472–73 (2009); see also Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 5 (2001) (noting “the willingness of some courts to defer to procedures that lack due process protections and the full panoply of remedies existing under Title VII raises grave concerns about the ability of grievance procedures to vindicate employee rights.”). A study of employment sexual harassment cases conducted three years after *Ellerth* and *Faragher* found that in all but one case, courts held that employers that disseminated an antiharassment policy to all employees had satisfied the reasonable care requirement, summarizing, “the law is relatively clear: a so-called ‘good policy’ constitutes ‘reasonable care.’” David Sherwyn, Michael Heise, & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1290 (2001).

173. Sherwyn, *supra* note 172, at 1290.

174. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 944 (N.D. Ind. 2011). The court explained that the reasoning for narrowly applying the *Ellerth/Faragher* framework was to avoid punishing an employer who has satisfied his or her duty to prevent and address harassment. *Id.* However, the court stated that this rationale applies equally to employers who responded promptly after being alerted to harassments in cases involving prolonged harassment, so, extended, the argument would suggest dropping the second element whenever the first element is met. *Id.* at 944–45.

III. TENTH CIRCUIT AND *ALALADE* COURT CAN BETTER ACCOMPLISH TITLE VII'S PREVENTION GOAL BY ENCOURAGING PROMPT REPORTING OF SEXUAL HARASSMENT

The Supreme Court has often repeated that Title VII's ultimate goal is to rid the workplace of discrimination.¹⁷⁵ The statutory purpose resonates in the *Ellerth/Faragher* affirmative defense, which seeks to eliminate sexual harassment by encouraging implementation of employer anti-harassment policies by offering an affirmative defense, while also incentivizing employee reporting.¹⁷⁶

The Fifth and Eighth Circuits as well as the *Alalade* court all emphasized Title VII's deterrence goal.¹⁷⁷ However, the Fifth and Eighth Circuits' elimination of the second element of the defense does not deter sexual harassment in the workplace as strongly as the full *Ellerth/Faragher* affirmative defense.¹⁷⁸ Under the Fifth and Eighth Circuits' rule, an employee who suffers incipient or single-instance harassment may come forward to thwart future harassment, but will receive no remedy for the harm already suffered if the employer establishes that it responded to the harassment promptly and adequately.¹⁷⁹ This result serves as a disincentive for employees to report harassment, undermines the deterrence goal of Title VII, and prohibits Title VII's goal to provide victims an avenue to recover for their harms.¹⁸⁰

In contrast, the Tenth Circuit's and the *Alalade* approach creates an incentive for employees to report harassment, because failure to do so shields

175. See e.g., *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).

176. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (upholding Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employee[s]"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998).

177. *McCurdy v. Ark. State Police*, 375 F.3d 762, 775 (8th Cir. 2004) ("The underlying theme under Title VII is employers should nip harassment in the bud."); *Indest I*, 164 F.3d 258, 365 (5th Cir. 1999) ("[T]he purpose of Title VII, which cannot guarantee civility in the American workplace but, at its best, inspires prophylactic measures to deter unwanted sexual harassment."); *Alalade*, 796 F. Supp. 2d at 945.

178. See *Alalade*, 796 F. Supp. 2d at 944–45.

179. *Id.* at 944.

180. See e.g., Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 726 (2000) ("The typical employee will weigh the consequences of reporting against the benefits that will likely accrue to her personally. Because she has no incentive to internalize the potential benefits to other employees, the level of reporting may be dampened."). Grossman argues that the *Ellerth/Faragher* affirmative defense itself can disincentivize reporting because once an employee fails to report the first incident, he or she will be foreclosed from recovering damages and has less reason to file a complaint. *Id.* at 721; see also Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 900–05 (2008) (discussing the myriad of reasons why employees do not bring harassment charges, including fear of alienation from peers and fear of retaliation from supervisors).

the employer from liability.¹⁸¹ Title VII's deterrence goal is accomplished more meaningfully when reporting prompts an employer to eliminate sexual harassment in its early stages.¹⁸²

Indeed, recent studies have shown that less than half of all women who sue their employers for sexual harassment report the behavior,¹⁸³ a statistic attributed to fear of retaliation, general skepticism, and ambivalence towards sexual harassment.¹⁸⁴ In 2010, at the height of the current economic downturn, in which 14 million Americans were unemployed and another 8.8 million were underemployed,¹⁸⁵ the reporting problem was exacerbated, leaving sexual harassment victims unwilling to leave their jobs and unlikely to risk speaking out.¹⁸⁶ In light of this, it is even more important for courts to use Title VII as an incentive for employees to report sexual harassment, and the Tenth Circuit and *Alalade* court's approach better encourages reporting by allowing employees to recover from employers under Title VII, even when the employers have an antiharassment policy in place.¹⁸⁷

181. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 101, 1026 (10th Cir. 2001); *Alalade*, 796 F. Supp. 2d at 945–46.

182. *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 803–04 (8th Cir. 1999) (Weiner, J., specially concurring).

183. *See*, Chamallas, *supra* note 72, at 374 (citing a recent study of federal workers finding that approximately ten percent of employees reported their harassment). Chamallas also notes that, of the employees who sued their employers for harassment, nearly half did not report the harassment at first. *Id.*; *see also* MINK, *supra* note 52, at 77 (noting that an estimated ninety-five percent of harassment goes unreported).

184. *See, e.g.*, MINK, *supra* note 52, at 76–77 (discussing the skepticism women face in reporting harassment); Saguy, *supra* note 1, at 81–82 (chronicling the media's response to sexual harassment around the time of *Ellerth* and *Faragher* as delegitimizing sexual harassment in “a backlash against feminism”).

185. Paul Wiseman & Christopher Leonard, *Dismal Jobs Data Shakes World Markets*, ASSOCIATED PRESS (Sept. 5, 2011), available at <http://finance.yahoo.com/news/Dismal-jobs-data-shakes-world-apf-1614624743.html>.

186. Dana Mattoli, *More Men Make Harassment Claims*, WALL ST. J., March 23, 2010, at D4. Mattoli's article interviews attorney Greg Grant who explains the problem:

In the past, victims of harassment—especially men—have ‘voted with their feet’ and found new jobs rather than turning to the legal system When they can't get other jobs and they still have to pay the bills and support families' they have to either live with the harassment or risk the potential stigma of speaking out.

Id.

187. By passing the Civil Rights Act of 1991, which allowed increased damages for discrimination victims, Congress stressed the important role monetary relief plays in encouraging victims to file discrimination claims. Congress explained that victims of intentional discrimination would otherwise not be compensated for their injuries nor encouraged to “vindicate their civil rights.” H.R. Rep. 102-40, pt. 2, at 25 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 718. Some commentators believe that Title VII remedies are ineffective in encouraging employees to vindicate their rights, arguing instead for language broadening Title VII so all victims can recover from their harasser, instead of just from the employer. *See, e.g.*, Tracy L. Gonos, *A Policy Analysis of Individual Liability—the Case for Amending Title VII to*

IV. CONCLUSION

After a long struggle, courts finally recognize that Title VII affords important protection for employees from sexual harassment by supervisors.¹⁸⁸ The Supreme Court crafted the *Ellerth/Faragher* affirmative defense to resolve the tension between imputing absolute liability on employers under agency principles and Title VII's proscription of strict liability, while at the same time promoting Title VII's goal of eliminating workplace discrimination.¹⁸⁹ However, currently the Fifth and Eighth Circuits depart from the *Ellerth/Faragher* affirmative defense in single- and incipient-harassment situations, applying only the first element of the defense.¹⁹⁰ In an attempt to justify this departure, these circuits arguably overstate the imposition of strict liability, and do not meet Title VII's goal of deterring sexual harassment by encouraging employees to report harassment. The Supreme Court should end this departure by articulating that the full *Ellerth/Faragher* affirmative defense must be applied in situations of incipient- or single-instance sexual harassment cases, as the Tenth Circuit and *Alalade* court presently do. Furthermore, given the current challenges faced by employee-victims of sexual harassment, the *Ellerth/Faragher* affirmative defense better meets Title VII's deterrence goal by encouraging, rather than foreclosing on, an employee's ability to recover for harms. This framework provides assurance that Title VII will remain a powerful tool to combat sexual harassment in the workplace.

Hold Individuals Personally Liable for Their Illegal Discriminatory Actions, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 265, 281 (1999).

188. See *supra* Part I.B.

189. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).

190. See generally *supra* Part II.B.