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ARTICLE: Walking a Fine Line: Avoiding Vicarious Liability for Supervisor Harassment Under the Ellerth
n1/Faragher n2 Affirmative Defense in the Tenth Circuit

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I. Introduction

Imagine the following scenario: Acme is a large employer that has vigorously sought to eliminate all forms of discrimination, including sexual harassment, from its workplace. To do so, Acme mandates that all new employees must attend sexual harassment training during employee orientation prior to beginning work for Acme. All supervisors receive additional training and are required to attend at least one sexual harassment prevention seminar each year. Acme has also promulgated an official sexual harassment policy, which is first distributed to all new employees in the employee handbook, and subsequently reprinted and distributed to all employees at the beginning of every year. The policy provides clear examples of prohibited sexual harassment and encourages any employee who believes she has been sexually harassed to report the behavior immediately to her supervisor. If an employee is uncomfortable or unable to report the misbehavior to a supervisor, the policy provides a mechanism by which an employee may bypass her supervisor and report directly to higher management. If an employee is still reluctant to notify her employer through higher management, Acme has provided a "1-800" number employees may use to report any harassment anonymously, twenty-four hours a day.

Jane was employed by Acme for almost six months and worked closely during that time with her supervisor, Joe, without any incident. But one night when Jane remained at work with Joe to finish a last-minute project, Joe started "coming on" to her. At first he only touched her hair and back but then began to describe erotic dreams he had had of Jane in great detail. Despite Jane's requests that he stop, Joe began touching Jane's breasts and tried to remove her sweater. Joe promised Jane that if she would agree to have sex with him, he would see about increasing her salary at Acme. To remove herself from the situation, Jane told Joe she needed to think about it and left for the night. Because Jane was familiar with Acme's sexual harassment policy and knew Joe's conduct was prohibited, Jane immediately reported the incident to the appropriate authority in higher management the next morning.

Upon learning of the incident, Acme temporarily suspended Joe with pay and conducted an immediate investigation. After determining the inappropriate [*650] conduct had occurred, Acme reprimanded, demoted, and

transferred Joe to another area in which he would have no contact with Jane. Acme also gave Jane a formal apology and offered to provide her with both paid leave and counseling, if necessary. After two months of therapy, however, Jane quit her job and filed a lawsuit against Acme in the Tenth Circuit, claiming Joe's sexual harassment had created a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 n3 and the regulations promulgated thereunder n4 (collectively Title VII).

Unfortunately, under the Tenth Circuit Court of Appeals' current approach to employer liability for a hostile work environment created by supervisor harassment, Acme would almost certainly be vicariously liable, despite Acme's extensive efforts to not only prevent, but to immediately stop and effectively remedy the conduct.

Like all circuits, the Tenth Circuit must follow the affirmative defense set forth by the United States Supreme Court in *Burlington Industries, Inc. v. Ellerth* n5 and *Faragher v. City of Boca Raton*. n6 Employers may use this defense to avoid vicarious liability for a supervisor's harassment when the employer proves: (1) the employer used reasonable care to prevent and promptly correct any sexual harassment, and (2) the employee unreasonably failed to utilize "any preventative or corrective opportunities provided by the employer" or to otherwise avoid the harm. n7 However, as will be demonstrated in this Note, the Tenth Circuit has erroneously applied the affirmative defense in a way that frustrates the objectives of Title VII and discourages employers from developing more effective sexual harassment policies. n8

This Note will first cover the development of employer liability for a supervisor-created hostile work environment in courts generally, and the Tenth Circuit specifically, prior to the establishment of the *Ellerth/Faragher* affirmative defense. This Note will then examine the two Supreme Court cases that define employers' vicarious liability for hostile work environments and establish an affirmative defense for avoiding liability. This Note will explore the Tenth Circuit's decisions, as well as several district court decisions within the Tenth Circuit, in order to understand the liability facing employers who are confronted with litigating the affirmative defense in the Tenth Circuit. This Note will address the problems caused by the Tenth Circuit's current approach to employer liability. It will provide suggestions regarding how the Tenth Circuit could more [*651] effectively apply the affirmative defense to better advance the preventative policy behind Title VII, giving employers a better incentive to eliminate sexual harassment in the workplace. Finally, this Note will provide recommendations to employers for maximizing their ability to avoid vicarious liability under the Tenth Circuit's current application of the *Ellerth/Faragher* affirmative defense.

II. Early Development of the Hostile Work Environment Doctrine

A. Title VII

Under Title VII, it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." n9 The prohibition against sexual discrimination was a last-minute addition to the Act made by the House of Representatives one day before the Act passed. n10 Courts were first reluctant to recognize sexual harassment as a cause of action under Title VII. n11 However, in 1980 the Equal Employment Opportunity Commission (EEOC) recognized that sexual harassment by a supervisor was a form of discrimination and expanded its guidelines to include sexual harassment as a violation of Title VII. n12 Following this lead, courts routinely began to hold that sexual harassment leading to a hostile work environment created a valid cause of action under Title VII. n13

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B. Defining Hostile Work Environment Claims and Liability in *Meritor Savings Bank v. Vinson* n14

Although the Supreme Court recognized that employers were liable for hostile work environments under Title VII, n15 disagreement developed in lower courts as to what standard of liability attached. n16 Under the majority approach, an

employer was liable only if the employee could demonstrate her employer "had actual or constructive knowledge of the [sexual] harassment and failed to take appropriate remedial actions." n17 A minority of courts, however, reasoned that employers should be subject to the same strict liability as for quid pro quo harassment. n18

In *Meritor*, the Supreme Court sought to guide lower courts in the area of hostile work environment sexual harassment claims by addressing a case in which a bank employee filed a Title VII action against her employer. n19 Unfortunately, the Court only addressed the subject of employer liability for a hostile work environment in dicta.

Because the Court believed Congress wanted courts to look to agency principles for guidance, n20 the Court turned to the Restatement (Second) of Agency for direction. n21 The Court reasoned that by following agency principles, Congress must have intended to place some limitations on the acts of employees for which employers under Title VII are to be held responsible. n22 Therefore, the Court found that employers are not always automatically liable for sexual harassment committed by their supervisors. n23 However, the Court was also careful to point out that the "mere existence of a grievance procedure and a policy [*653] against discrimination, coupled with [the employee's] failure to invoke that procedure" will not always insulate an employer from liability. n24

C. The Tenth Circuit Approach to Hostile Work Environment Prior to *Ellerth* and *Faragher*

Following *Meritor's* direction, courts turned to the Restatement to establish employer liability for a supervisor's sexual harassment. For hostile work environment claims, courts looked primarily to section 219 of the Restatement. n25 While courts recognized that subsections (1) and (2)(b) were possible avenues for employer liability, n26 courts primarily focused on the two clauses in subsection (2)(d) as a source of vicarious liability. n27 The first "purports to act on behalf of principle" clause applied when the plaintiff established that the "employer vested its supervisor with the authority to control significant aspects of the work environment," n28 the supervisor sexually harassed plaintiff, and the "plaintiff acted or relied on the apparent authority of her supervisor." n29

But courts were divided over the interpretation of the second "aided by the existence of the agency relation" clause. n30 When the agency clause is interpreted [*654] broadly, the court may base employer liability on the assumption that supervisors were authorized by employers to harass. n31 These courts ignored any attempts by an employer to negate the supervisor's apparent authority or provide reasonable complaint procedures. n32 Other courts adopted a narrower view and determined that an employer could not be held liable if the employee could not reasonably rely on the supervisor's representations. n33

In *Harrison I*, the Tenth Circuit confronted a hostile work environment supervisor harassment claim and was forced to choose between the two different interpretations of subsection (2)(d) of the Restatement. n34 Although the court acknowledged the narrower view that focused on the reasonableness of an employer's actions, the court chose to adopt the broader approach advanced by the Second Circuit in *Karibian*. n35 Under this interpretation of the "aided by the agency relation" clause, "an employer ... [could] be held liable, even if a sexual harassment policy [was] in place and [was] made known to plaintiff, where the supervisor used his actual or apparent authority to aid or facilitate his perpetration of the harassment." n36

Harrison I clearly illustrates that prior to the establishment of the *Ellerth/Faragher* affirmative defense, the Tenth Circuit treated employers with disfavor in the area of supervisor-created hostile work environment liability. n37

III. Relief for Employers? Creation of the *Ellerth/Faragher* Affirmative Defense

In the Tenth Circuit Court of Appeals, employers had been subjected to a high degree of liability for hostile work environments caused by a supervisor's harassment. In the two cases of *Burlington Industries, Inc. v. Ellerth* n38 and [*655] *Faragher v. City of Boca Raton*, n39 the Supreme Court provided employers with a potential way to avoid the Tenth Circuit's strict application of vicarious liability. With the creation of the *Ellerth/Faragher* affirmative defense, it initially appeared as if employers had been given a new means by which to ameliorate the Tenth Circuit's unyielding

approach to employer liability.

However, while the Supreme Court may have sought to correct the various circuits' differing standards of liability, in reality, the Court created a new standard that has simply succeeded in promulgating more confusion among lower courts. Most significantly, the Court's lack of guidance has allowed the Tenth Circuit to maintain its pre-Ellerth and Faragher hostility toward relieving employers of liability. As a result, this Note will show that the Tenth Circuit has applied the new affirmative defense in such a way as to both undermine the primary preventative objective of Title VII and retard employer efforts to eliminate sexual harassment in the workplace. n40

A. The Ellerth and Faragher Decisions

In Ellerth, the plaintiff worked as a Burlington Industries salesperson for approximately one year, during which time she was allegedly sexually harassed by a midlevel manager. n41 Although plaintiff knew her employer had a policy against sexual harassment, she failed to utilize the procedures for reporting the misconduct, choosing instead to simply quit her job. n42 The plaintiff then filed a suit against Burlington, and the district court observed that there was a component of quid pro quo harassment in violation of Title VII. n43 The district court granted summary judgment in favor of Burlington. n44 The Seventh Circuit Court of Appeals en banc reversed, but the eight separate opinions issued gave "no consensus for a controlling rationale." n45 The Supreme Court granted certiorari "to assist in defining the relevant standards of employer liability." n46

In Faragher, the plaintiff was repeatedly harassed by two of her supervisors during the five years she worked as a lifeguard for the City of Boca Raton (City). n47 During the first year plaintiff was employed as a lifeguard, the City had [*656] no policy against sexual harassment - and even after the City adopted a policy, it was never disseminated among its lifeguards. n48 While she was employed by the City, plaintiff never complained to higher City management about the harassment, although she did informally complain of the behavior to her training captain. n49 The training captain did not report these complaints to his own supervisor or any other City official. n50 After five years of harassment, plaintiff resigned. n51 The plaintiff then filed suit against the City, alleging her supervisors had created a hostile work environment in violation of Title VII. n52 The district court determined the harassment was serious enough to constitute an abusive working environment under Title VII. n53 The Court of Appeals for the Eleventh Circuit reversed. n54

The Supreme Court used Ellerth and Faragher to define employer liability in the area of supervisor hostile work environment, and the framework set forth in each opinion establishes essentially the same principles. In turning to section 219(2)(d) of the Restatement, the Court dismissed the first "apparent authority" clause on the basis that "supervisor's harassment involves misuse of actual power, not the false impression of its existence." n55 The Court then focused on the second, arguably more controversial "aided in the agency relation" portion of the Restatement section. n56 The Court defined tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

The Supreme Court appeared prepared to accept the broader reading of the "aided by the agency relation" vicarious liability on the basis that an "employer has a greater opportunity to guard against misconduct by supervisors than" regular employees, as well as a "greater opportunity and incentive to screen them, train them, and monitor [supervisor] performance." n57 However, the Court was limited to creating a standard consistent with Meritor's holding that employers [*657] cannot be "automatically" liable for supervisor harassment, n58 the congressional intent to place limits on employer liability under Title VII, n59 and the preventative (as opposed to remedial) policies of Title VII. n60 Because imposing vicarious liability would be at odds with Title VII statutory policy if it failed to provide employers with some incentive to prevent harassment, n61 the Court created an affirmative defense that allows employers to avoid vicarious liability for a supervisor-created hostile work environment. n62 Under Ellerth/Faragher, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." n63 However, the new affirmative defense provides that an employer may avoid vicarious liability if "no tangible employment action [has been] taken" and the employer

proves by a preponderance of the evidence "(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." n64

To give guidance to lower courts in their application of the new affirmative defense, the Supreme Court provided limited clarification of the new liability standard. The Court explained that an employer need not always have an antiharassment policy as a matter of law but that "the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." n65 And while evidence that an employee failed to use an employer's complaint procedure is not dispositive, "a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." n66

The Court then applied the new standard of employer liability in each case. In *Ellerth*, the Court reasoned Burlington was vicariously liable but remanded the [*658] case in order to give Burlington the opportunity to assert and prove the affirmative defense. n67 In *Faragher*, the City was also deemed to be vicariously liable for its supervisor's conduct. n68 Unlike *Ellerth*, however, the City was unable to raise the affirmative defense because it had entirely failed to disseminate its policy to its employee lifeguards, City officials made no attempt to track the conduct of its supervisors, and the City policy did not include any assurance that an employee could bypass the harassing supervisor to register the complaint. n69

B. The Dissent

Justice Thomas, joined by Justice Scalia, dissented in both cases. n70 They argued that because employers cannot wholly prevent sexual harassment without taking extraordinary and unrealistic measures such as constant video and audio surveillance, employers should only be charged with a "duty to act reasonably under the circumstances" (i.e., a negligence standard). n71

Justice Thomas criticized the majority's application of a vicarious liability standard and affirmative defense. n72 "Section 219(2)(d) of the Restatement[, Thomas argued,] provides no basis whatsoever for imposing vicarious liability" on employers because "liability under [that section] depends upon the plaintiff's belief that the agent acted ... within the scope of his apparent authority." n73 Thomas noted, "In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf." n74 Thomas also argued the new rule not only provided employers with "shockingly little guidance" for avoiding liability, but could hold employers liable "even though they acted reasonably" if a plaintiff [*659] fulfilled her duty to avoid the harm. n75 Employers, the dissent concluded, should only be liable "if the employer is truly at fault." n76

IV. The *Ellerth/Faragher* Affirmative Defense in the Tenth Circuit

Following the *Ellerth* and *Faragher* opinions, employers may now attempt to avoid the Tenth Circuit's harsh approach to vicarious liability under the new affirmative defense. However, the Tenth Circuit's continued adherence to its pre-*EOP* *Ellerth* and *Faragher* position has limited employers' abilities to effectively raise the defense. As a result, the Tenth Circuit inadequately applies the *Ellerth/Faragher* standard and thus undermines the Title VII policies for preventing sexual harassment. The Tenth Circuit's failure to acknowledge and compensate for measures taken by an employer to prevent and immediately correct harassment discourages employers from developing more effective antiharassment procedures and policies, and thus retards the effective prevention of supervisor-created hostile work environments.

A. The Tenth Circuit's Application of the *Ellerth/Faragher* Affirmative Defense

At the outset it is important to note that not all of the Tenth Circuit's applications of the affirmative defense are objectionable. For example, employers who either lack antiharassment policies or refuse to adequately correct reported

misconduct have justifiably failed to meet the first "reasonableness" prong of the affirmative defense. n77 An employer may also effectively raise the affirmative defense if the employer has an effective antiharassment policy that meets the first [*660] prong, and an employee acts "unreasonably" under the second prong by failing to complain to her employer of the harassment through the provided procedures. n78

But several of the Tenth Circuit's post-Ellerth and Faragher decisions are troubling, as the standard of care the Court has required for meeting the first prong of the defense may actually undermine an employer's ability to meet the requirements of the second prong. As a result, employers are forced to walk a fine line to effectively raise the Ellerth/Faragher affirmative defense, and in doing so are left with little margin for error. To understand this position, one must examine the Tenth Circuit's most significant applications of the defense in *Wilson v. Tulsa Junior College*, n79 *Gunnell v. Utah Valley State College*, n80 and *Harrison v. Eddy Potash, Inc. (Harrison II)*. n81

1. Establishing the First Prong - An Employer's Use of Reasonable Care

The Tenth Circuit has suggested that under some circumstances, an employer may be required to go to unreasonable lengths to establish the employer's first "reasonable care" burden. Specifically, in *Wilson*, the court addressed the standard of care an employer would need to meet the first prong of the affirmative defense. n82

The plaintiff in *Wilson* was a night custodian employed by Tulsa Junior College ("TJC"). n83 During her employment, TJC had a formal written sexual harassment policy, which was included in every new employee's orientation packet and redistributed annually in an employee handbook. n84 The policy encouraged any employee who felt she had been sexually harassed to report to [*661] her supervisor. n85 If the employee was uncomfortable notifying her supervisor, the employee was directed to report to the Director of Personnel Services. n86

Near midnight one evening while the plaintiff was cleaning alone, plaintiff's supervisor, Mr. Hall, entered a classroom, exposed himself to her, and requested oral sex in exchange for every Friday off with pay. n87 Plaintiff rejected the offer. n88 When her shift ended at 1:00 a.m., plaintiff drove home and reported the incident to both the Broken Arrow Police Department ("BAPD") and the Tulsa Police Department. n89 An officer from the BAPD contacted the campus police the next morning, and a campus officer interviewed Mr. Hall that night when he reported for duty. n90 Shortly after midnight the day after the incident occurred, Mr. Hall was arrested by the BAPD. n91 When Mr. Hall next reported to work, TJC immediately suspended him. n92 Three weeks later, TJC transferred Mr. Hall to the day shift on another portion of the campus and also reassigned plaintiff to a different building where she would be closer to the campus police office. n93 However, the plaintiff subsequently resigned and filed suit against TJC for hostile work environment sexual harassment in violation of Title VII. n94

A jury found TJC liable for "hostile environment sexual harassment," and the district court denied TJC's motion for judgment as a matter of law. n95 The district court reasoned that the policy was materially deficient because it established no procedure for employees who were harassed at night and provided no procedure instructing the campus police on handling sexual harassment complaints. n96 The district court also reasoned that the campus police response was inadequate because they failed to report the incident to appropriate TJC management. n97

The Tenth Circuit affirmed the holding and agreed that "the policy was deficient in several respects." n98 Although the policy had a bypass mechanism by [*662] which an employee could report her supervisor's harassment to the Director of Personnel, the policy failed to "define what constitutes a 'formal complaint' as opposed to an informal one" and failed to instruct supervisors of their responsibilities if they learned of harassment through informal means. n99 Additionally, the policy was held to be inadequate because "the Director's office [was] located in a separate facility and [was] not accessible during the evening or weekend hours when many employees and students [were] on the various campuses." n100

Although *Wilson*'s harsh approach may be limited in application to larger employers like TJC, n101 the Tenth Circuit again demonstrated its continued willingness to hold employers liable for supervisor-created hostile work

environment by raising the bar as to when an employer has exercised sufficient "reasonable care" to meet the first prong of the affirmative defense. After *Wilson*, it appeared as if a formal antiharassment policy disseminated to all employees with a mechanism to bypass a harassing supervisor was no longer sufficient to meet the employer's burden. In fact, it seemed as though the Tenth Circuit was not far from requiring measures, not unlike the constant video and audio surveillance criticized by Justice Thomas in *Ellerth*, that would "revolutionize the workplace in a manner incompatible with a free society." n102 *Wilson* suggested that a policy could be deemed unreasonable simply because an employee was required to take her complaint to a different building or even wait until normal business hours to file a grievance.

A more recent Tenth Circuit decision, however, suggests the court may be leaning towards a more ameliorative approach. In *Hollins v. Delta Airlines*, n103 another relatively large employer sought to establish that its policy was reasonable under the first prong of the defense. n104 Delta's policy encouraged employees to go to their supervisors or, if they "[could not] resolve the matter" within their own department, to go directly to a designated official to file a complaint. n105 The policy apparently did not provide for the twenty-four hour [*663] reporting capabilities found lacking in *Wilson*. n106 Unlike *Wilson*, however, the Tenth Circuit spent relatively little time discussing the "reasonable care" taken by Delta necessary for establishing the first prong of the defense. The court stated only that the description of the relatively simple policy included in the court opinion "satisfied the requirements placed on harassment policies by the Supreme Court in [*Ellerth and Faragher*]." n107

Hollins provides some indication that perhaps the Tenth Circuit has softened its approach to the reasonableness requirement of the first prong of the *Ellerth/Faragher* affirmative defense. n108 However, employers may wish to remain somewhat cautious. *Hollins* is an anomaly from other Tenth Circuit decisions not only because it is the single case in which an employer has successfully asserted the affirmative defense, but also because the court focused little on Delta's ability to meet the "reasonable care" requirement of the first prong. n109 As a general rule, the Tenth Circuit has been more willing to critically examine the policy and reasonableness of the employer response when the employee effectively complains of the harassment. n110

2. Establishing the Second Prong: An Employee's Unreasonable Failure to Avoid the Harm

The Tenth Circuit has not been limited to holding employers to a high standard with respect to the first prong of the affirmative defense. The more troubling aspect of the Tenth Circuit's application of the affirmative defense is the court's misguided interpretation of an employee's "unreasonable failure to otherwise avoid the harm" under the second prong of the defense.

In *Gunnell*, the Tenth Circuit demonstrated its continuing willingness to hold employers liable by ignoring an employer's preventative or remedial efforts when an employee utilizes an employer's complaint procedures. *Gunnell* involved a plaintiff employed by Utah Valley State College ("UVSC") who, pursuant to the UVSC sexual harassment policy, complained to UVSC's Personnel Director that [*664] her supervisor had sexually harassed her over the past year. n111 Upon notification, UVSC took action, and immediately after the plaintiff complained, the sexual harassment stopped. n112 However, the plaintiff subsequently filed suit against UVSC and claimed she had been subjected to sexual harassment in violation of Title VII. n113 The district court granted summary judgment in favor of UVSC, in part because the sexual harassment stopped after the plaintiff complained. n114 But the Tenth Circuit reversed. n115 The court reasoned that under *Faragher* and *Ellerth*, "an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment." n116 The Tenth Circuit then remanded the claim for re-evaluation in light of the affirmative defense. n117

Unfortunately for employers, the holding in *Gunnell* was not isolated. Instead, it merely predicated an even harsher approach to come. In *Harrison II*, the Tenth Circuit reaffirmed that employers will be held vicariously liable once an employee has complained to her employer about supervisor harassment, regardless of what steps the employer took to prevent, immediately stop, and appropriately correct the misconduct. n118

The plaintiff in *Harrison I* was a female potash miner employed by Eddy Potash, Inc. . n119 During *Harrison's*

employment, Potash had an official policy against sexual harassment. n120 Although the policy was not included in the materials given to new employees, it was posted in areas in which employees worked. n121 Approximately one year after plaintiff first began working for Potash, plaintiff's supervisor attempted to kiss her in an isolated portion of a mine. n122 For the next two months, plaintiff's supervisor subjected her to severe forms of sexual harassment. n123 When she was no longer willing to return to work due to the severity of the harassment, plaintiff contacted a Potash safety manager and, for [*665] the first time, reported the misconduct. n124 Potash immediately began an investigation and within one week after plaintiff's report, Potash issued a formal report in which Potash volunteered to reimburse plaintiff for lost work time, provide her with any necessary counseling or medical treatment and prescription drugs, and move plaintiff to a different crew. n125 Potash also formally reprimanded the supervisor, placed him on permanent probation, and ordered the supervisor to have no contact with plaintiff other than what was absolutely necessary as a part of his duties. n126 Plaintiff remained on the payroll for the next year without returning to work. n127 When her position was terminated due to a reduction in the work force, plaintiff filed suit against Potash under Title VII for hostile work environment sexual harassment. n128

The Tenth Circuit upheld the district court's refusal to give a jury instruction which provided that an employer would not be liable where the employer "promptly responded, disciplined appropriately, and stopped the harassment" following an employee's complaint. n129 In doing so, the court refused to follow the Fifth Circuit's proposed standard under which an employer may avoid vicarious liability for "incipient" hostile environment by appropriately addressing and promptly responding to the harassment once it has been brought to the employer's attention. n130 The Tenth Circuit's failure to use the Indest incipient hostile environment standard was likely justified because, in contrast to Indest, the supervisor harassment in Harrison II was "most certainly "severe." n131 But the court suggested that it would refuse to apply the standard even in lesser "incipient" situations due to several other "major" problems with the Indest standard. n132

Gunnell and Harrison II represent the Tenth Circuit's willingness to ignore an employer's reasonable efforts to prevent and correct a supervisor's sexual harassment under Title VII. Under this current approach, an employer who has an effective policy for reporting sexual harassment and who takes immediate steps to remedy a hostile work environment once the employer has been notified of its existence is placed on equal footing with other employers who have created [*666] no sexual harassment policy, or who unreasonably allow the harassment to continue. In both instances, the employer is denied the ability to raise the Ellerth/Faragher affirmative defense.

In applying the defense, the Tenth Circuit also seems to ignore the fact that neither plaintiff in Ellerth or Faragher complained of the harassment to her employer through the established policy channels. n133 Although the Supreme Court suggested a failure to complain "will normally suffice to satisfy the employer's burden under the second element of the defense," the Court also clearly stated that failure to complain is not dispositive. n134 The Tenth Circuit thus fails to acknowledge that basing the ability to raise a defense on whether the employee complains under the second prong of the defense may not be entirely justified in situations where an employee uses effective harassment procedures to complain and an employer immediately and appropriately responds to the complaint.

B. The Problems with the Tenth Circuit's Approach and Proposals for More Appropriately Applying the Affirmative Defense

In the strictest sense, the Tenth Circuit's approach to employer liability cannot be faulted. Although it may seem unfair to hold an employer vicariously liable when an employee acts reasonably, reports the harassment to her employer, and the employer does all it reasonably can to prevent the harassment from occurring, the stricter standard has sometimes been justified due to an employer's greater regulation of and interaction with its supervisors. n135 But the benefits of mechanically holding employers vicariously liable may be outweighed by the costs, n136 since the Tenth Circuit's approach both undermines Title VII objectives and effectively discourages employers from creating antiharassment policies above and beyond the mere minimum required to be considered "reasonable."

As the Supreme Court recognized in Faragher, the affirmative defense was created to "complement the

Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give [*667] credit [] to employers who make reasonable efforts to discharge their duty." n137 The Court acknowledged, "Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive." n138 This is because Title VII's primary objective is not to provide redress, but to avoid harm. n139

By punishing employers who have taken reasonable efforts to prevent and correct sexual harassment simply because an employee justifiably notifies her employer through company procedures, the Tenth Circuit provides only a remedy to the victim. Such a position does little to advance the preventative purposes of Title VII. And when the Tenth Circuit rewards an employer merely because an employee fails to complain, the Tenth Circuit effectively discourages other employers from establishing more effective complaint procedures that encourage employees to notify their employers when harassment occurs.

Unlike the Tenth Circuit, most courts want to reward employers for taking appropriate steps to prevent and correct harassment, instead of punishing them when an employee utilizes the policy provided to notify her employer of harassment. n140 To do so, courts have used several different methods to factor in the employer's actions when applying the affirmative defense to achieve a fairer result. Although each of these approaches may be criticized to a greater or lesser extent, any would be more appropriate than the Tenth Circuit's current approach.

1. Distinguishing Incipient Hostile Work Environments

Perhaps the best application of the affirmative defense is the approach taken by those courts that have distinguished the harassment in *Ellerth* and *Faragher* from situations where the harassment is neither severe nor pervasive. In *Indest v. Freeman Decorating, Inc.*, n141 one Fifth Circuit judge proposed that the affirmative defense created by the Supreme Court does not apply to incipient n142 hostile environments when an employee utilizes an employer's policies and procedures, and the employer takes prompt remedial action. n143 The court reasoned that such an approach was supported by four policy considerations. First, a plaintiff who [*668] promptly complains about a supervisor's sexual harassment can thwart the creation of a hostile work environment, thereby receiving the preventative benefit Title VII was meant to confer. n144 Second, an employer's swift response to an employee's complaint should limit vicarious liability exposure because the company forestalled the creation of a hostile environment. n145 Third, imposing vicarious liability on an employer despite swift and appropriate remedial action undermines Title VII's deterrent policy. n146 Appropriate employer response also eradicates any semblance of authority the supervisor may have possessed and eliminates the agency-created basis for vicarious liability. n147 Finally, the discussion of the avoidable consequences doctrine and an employee's duty to mitigate damages in *Faragher* supports relieving an employer from liability where an employer reacts to an employee complaint quickly and effectively. n148

The Tenth Circuit rejected this approach to incipient hostile environments in *Harrison II*. n149 However, the rationale it provided for doing so was weak and unpersuasive. The Tenth Circuit refused to adopt the *Indest* standard because it was not a majority holding, and because the court had rejected a similar position in *Gunnell*. n150 These justifications lack merit. Simply because an opinion from another circuit lacks a majority does not prevent the Tenth Circuit from adopting a similar position if the rationale is persuasive. Likewise, the Tenth Circuit can and has a duty to modify or change rules from its own prior decisions if an alternative approach would better advance Title VII objectives. The court also reasoned that because the *Ellerth/Faragher* affirmative defense provided a "'remarkably straightforward'" framework, there was no need to adopt a different approach. n151 But many commentators have argued just the opposite, that in fact the defense provides relatively little guidance, and most agree that the ambiguity left by the two cases has resulted in a myriad of differing applications of the defense. n152

[*669] It is important to remember that neither *Faragher* nor *Ellerth* involved an employee who utilized the effective procedures provided by her employer to complain of the harassment. n153 Likewise, the supervisor harassment in both cases was also committed over a relatively long period of time. n154 In cases where neither of these facts is present, the Tenth Circuit would be well-advised to look again at the proposed *Indest* standard for hostile work

environments, especially in cases like the fictional Acme example discussed at the beginning of this Note, n155 where an employer has an effective sexual harassment policy, only one or very few instances of sexual harassment have occurred between an employee and a supervisor, the employee timely notifies the employer through proper channels, and the employer promptly and satisfactorily remedies the harassment.

Dividing the application of the affirmative defense into incipient and severe categories is particularly appropriate for important practical and policy considerations. In cases like Ellerth and Faragher, where a supervisor's sexual harassment has progressed to a severe or pervasive stage, vicarious liability regardless of an employer's preventative and remedial actions may be justified even when an employee complains. In those cases, an employer who fails to take the necessary care to prevent these more advanced and disturbing forms of sexual harassment may be seen as more blameworthy, or "truly at fault." n156 Holding employers strictly liable in such instances also effectively advances Title VII's preventative purpose. Penalizing employers who allow sexual harassment to become severe or pervasive encourages other employers to take better measures to prevent and eliminate harassment early, before a hostile work environment has developed to an advanced degree.

However, in incipient situations where the hostile work environment has been created by only one, or very few instances of less severe forms of sexual harassment, employers who have created reasonable policies to prevent sexual harassment no longer seem as blameworthy as their above-mentioned counterparts. Holding these employers to the same degree of liability because an employee complains is simply incorrect and potentially damaging. It has been noted that sexual harassment cannot be wholly prevented without requiring extraordinary and unrealistic measures. n157 Therefore, penalizing an employer who has taken reasonable steps to prevent and correct harassment when the harassment is neither severe nor pervasive certainly provides a remedy to the [*670] victim but does little to advance the preventative policies of Title VII. Employers who have already taken reasonable measures to prevent and correct this type of harassment, and who are then penalized when an employee uses complaint procedures to report the harassment, are actually discouraged from creating better preventative policies. n158

Rewarding employers who have gone the extra mile to prevent sexual harassment gives employers incentive to create better sexual harassment policies that encourage employees to report harassment before it has progressed to a severe or pervasive stage, thereby allowing an employer to more effectively prevent hostile work environments from the outset. Such an application of the Ellerth/Faragher affirmative defense not only would be more reasonable but would also be more consistent with the congressional intent behind Title VII.

If the Tenth Circuit ultimately remains unpersuaded by an Indest-like approach in situations where a supervisor's sexual harassment has been neither severe nor pervasive, the court should at least provide persuasive reasons for refusing to adopt a similar approach in appropriate situations, and propose a suitable alternative. Otherwise, the result will continue to be that some employers, like the fictional Acme, will be unfairly punished equally with those employers who have no policy, or who refuse to correct harassment following employee complaints.

2. Expanding an Employee's Unreasonable Failure to Complain or Avoid the Harm

Another way courts have avoided an unfair application of the Ellerth/Faragher affirmative defense when an employee complains has been to focus more broadly on instances where the employee has acted "unreasonably" under the second prong of the affirmative defense. Courts have accomplished this primarily in two different ways. n159

The first approach focuses on an employee's "unreasonable" delay in reporting the harassment. For example, employers in various circuits have prevailed on the affirmative defense where an employee "unreasonably" failed to complain only several weeks after the harassment began. n160 Several district [*671] courts within the Tenth Circuit have been amenable to this "unreasonable delay" approach in situations where an employer has taken reasonable steps to prevent and correct sexual harassment. n161 In *Desmarteau v. City of Wichita*, n162 for example, an employer effectively raised the affirmative defense where an employee failed to complain until five months after the harassment first began. n163 Because the primary objective of Title VII is to avoid harm, the district court reasoned that under

Faragher, ""If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care." n164 Another district court took a similar approach in *Dedner v. Oklahoma* n165 and held that an employee unreasonably failed to take advantage of any preventative or corrective opportunities under the second prong because the employee did not complain of her supervisor's misconduct for three months. n166

The Tenth Circuit might look to this approach as a way to advance Title VII objectives while applying the Ellerth/Faragher affirmative defense. Although some have suggested establishing a set time, such as thirty days, outside of which an employee who fails to complain will be considered to have failed to reasonably avoid the harm, n167 a "reasonable" time should and will most likely vary according to each case and the surrounding circumstances. To advance Title VII objectives and encourage employers to create more effective harassment policies, the Tenth Circuit would do better to abandon its current "any notification is reasonable" approach and more broadly consider whether the employee acted unreasonably by failing to bring a claim within a reasonable time after the harassment began. While not ideal, this would at least give lower courts [*672] the flexibility to reward employers for having taken effective preventative and remedial action by relieving them of liability under appropriate circumstances. Allowing courts to do so would encourage employers who knew their actions would be rewarded to establish more effective harassment policies, thereby better advancing the preventative policies of Title VII.

The second approach courts have used to relieve employers from vicarious liability under the second prong is by finding that the employee acted unreasonably by reporting to the wrong party. n168 In *Madray v. Publix Supermarkets, Inc.*, n169 for example, the Eleventh Circuit held that plaintiffs had not acted reasonably where they knew whom they should contact but instead chose to complain informally to managers not authorized to receive complaints under the employer's sexual harassment policy. n170

Not surprisingly, however, the Tenth Circuit has rejected this approach. In *Wilson*, the court held that a plaintiff had reasonably taken advantage of preventative or corrective devices when she notified a low-level supervisor not named in the harassment policy of her supervisor's misconduct. n171 The court reasoned that where plaintiff reasonably believed the alternate supervisor was authorized to receive a complaint, the employer would be charged with notice and thus the employer would have failed the second prong of the affirmative defense. n172

Under the Tenth Circuit's current interpretation, employers already face a high risk of being held vicariously liable. Allowing employees to complain to any management-level supervisor, even if the employee knows that individual is not the proper person to receive a complaint, unreasonably expands an employer's potential vicarious liability. If the Tenth Circuit reverses its current hostility towards allowing employers to effectively raise the affirmative defense and adopts an approach that rewards employers for advancing Title VII policies and eliminating sexual harassment in the workplace, encouraging employees to complain to any management-level supervisor may be appropriate. But unless and until the Tenth Circuit does so, the court should follow the *Madray* approach and remove this additional liability where possible vicarious liability is concerned.

Justice Thomas identified an important principle with regards to employer liability that the Tenth Circuit seems to have forgotten - the aspect of fault or blameworthiness. n173 Even the Supreme Court majority was not entirely ignorant of this aspect. In *Faragher*, the Court spent a good portion of its opinion listing [*673] examples of conduct held to be both within and outside the scope of employment. n174 The Court reasoned that the varying results were the product of different judgments about the desirability of holding an employer liable for its subordinates' wayward behavior. n175 The Court noted that the proper analysis calls "not for a mechanical application of indefinite and malleable factors set forth in the Restatement ... but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment, and the reasons for the opposite view." n176

Although the Court was speaking about liability for a supervisor's actions within the scope of employment, the rationale could also apply when determining whether to relieve employers of vicarious liability under the Ellerth/Faragher affirmative defense. The Tenth Circuit has erroneously ignored this policy consideration in its

application of the affirmative defense, and thus has failed to look at the underlying reasons for and consequences of holding an employer vicariously liable. A more policy-oriented approach examining why an employer should be held liable when applying the two prongs of the defense would allow the Tenth Circuit to more effectively advance Title VII's preventative objectives.

While employers should be responsible for their supervisors' actions under appropriate circumstances, employers should also be encouraged to prevent and correct sexual harassment when it occurs. The Tenth Circuit needs to rethink its mechanical approach to the Supreme Court's "remarkably straightforward" framework and be reminded that whatever approach it decides to take, its primary purpose should be to prevent harm, not merely to redress it. n177 "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." n178 In situations where a supervisor's sexual harassment is not severe, a different result or application of the affirmative defense may be necessary where the employer had a reasonable policy sufficient to meet the requirements of the first prong of the defense, the employee used those reasonable procedures to complain, and the employer then promptly and effectively corrected the problem.

Whether the Tenth Circuit chooses to adopt an ameliorative approach from another jurisdiction or substitutes an entirely new mechanism, a new approach needs to be taken. Otherwise the Tenth Circuit continues to merely compound the sexual harassment and hostile environment problems in the workplace.

[*674]

C. What Employers Should Do To Avoid Vicarious Liability Under the Current Tenth Circuit Application of the Affirmative Defense

Under the Tenth Circuit's current approach, employers are left with little choice for avoiding vicarious liability. Although the following recommendations may appear as if they are designed to undermine sexual harassment policies rather than prevent harassment, all are unfortunate necessities for effectively raising the Ellerth/Faragher affirmative defense.

Under any circumstance, an employer must initially meet the "reasonable care" requirement of the first prong by showing that it exercised reasonable care to prevent and promptly correct any reported or known sexual harassment. n179 While a sexual harassment policy is not mandatory per se to satisfy the first requirement, an effective policy nonetheless goes a long way when trying to establish that an employer has acted reasonably. n180 Therefore, employers in the Tenth Circuit should have antiharassment policies clearly prohibiting all discrimination and harassment in the workplace. These policies should incorporate the following six components. n181 (1) A formal policy should be in writing and explicitly state that offenders who violate the policy will be disciplined up to and including termination. n182 (2) The policy should clearly define "harassment." However, employers in the Tenth Circuit may want to avoid providing examples of what constitutes sexual harassment. Employees who are able to identify specific harassment may be more likely to report the misconduct, thereby taking "reasonable" steps to avoid harm under the second prong and rendering the affirmative defense unavailable to employers. n183 (3) The policy should contain an effective reporting mechanism requiring misconduct to be reported to a particular person or department. In the Tenth Circuit, failure to report to the individual or department designated in the policy does not mean that an employee unreasonably failed to avoid the harm where the employee [*675] reasonably believed the person was authorized to receive and respond to complaints. n184 But designating specific individuals in the formal policy may help to discourage employees from bringing sexual harassment complaints to any other management-level official. Discouraging such complaints to the fullest extent possible maximizes an employer's ability to meet the second prong of the affirmative defense. n185 The policy must also allow an employee to bypass the supervisor and report to an alternate designated person or department. (4) The policy should assure employees that no retaliation will occur for reporting harassment. n186 (5) The policy should provide for prompt investigation of complaints, assuring privacy when possible. (6) The policy must finally be communicated to all employees and periodically redistributed to assure employees of its continued viability.

A number of commentators have recommended that employers take additional steps to protect themselves under the first prong, including providing extensive sexual harassment training for all employees, taking "zero tolerance" attitudes towards discrimination and harassment, investigating promptly and taking immediate corrective action, and requiring mandatory exit interviews for all departing employees. n187 But employers should be cautious and utilize only those procedures which overtly encourage but discreetly discourage employees from bringing complaints, because the key to effectively raising the affirmative defense in the Tenth Circuit revolves around the second prong and the hope that employees will fail to report the misconduct to their employers.

Because employers can be punished when employees become comfortable enough to use the procedures provided, employers should eliminate any "1-800" numbers that give employees an impersonal avenue for reporting supervisor misconduct twenty-four hours a day. n188 The Tenth Circuit has indicated that employers, especially larger employers who employ a workforce operating around the clock, may need procedures that allow employees to report supervisor harassment at any time during the day or night, instead of simply during regular [*676] business hours. n189 However, employers in these situations should designate an appropriate person or department and avoid impersonal or anonymous reporting mechanisms whenever possible, in order to avoid encouraging employee complaints through more comfortable and less personal procedures. n190

Likewise, although employers should provide sexual harassment training to supervisors and require any supervisor who learns of harassment to report the misconduct immediately to the appropriate department, employers may want to reconsider providing sexual harassment training to common-level employees. n191 Educating employees about sexual harassment may show that an employer exercised reasonable care to prevent sexual harassment under the affirmative defense's first prong. However, it may also eliminate the ability to effectively raise the defense because it encourages employees to "reasonably" report the misconduct under the defense's second prong.

Conducting exit interviews prior to an employee's termination may also be unwise. n192 The best scenario for any employer when an employee has been sexually harassed by a supervisor is for the employee to simply leave without giving notice of the supervisor's harassment. An employer may then more likely argue that the employee "unreasonably" failed to avoid the harm. n193

If an employer has an adequate policy and procedures under the first prong of the defense and an employee utilizes the employer's complaint procedure to notify the employer of a supervisor's sexual harassment, the employer should take appropriate steps to immediately remedy the situation, which may include utilizing and enforcing "zero tolerance" policies. It is true that when an employee complains through proper channels, the "damage" to an employer under the second prong has already been done. However, an immediate response that remedies the conduct may sufficiently satisfy a wronged employee and adequately dissuade the employee from filing a Title VII action against the employer. And while the Tenth Circuit has been unsympathetic to postharassment remedial efforts for purposes of vicarious liability, some district courts in the [*677] circuit have been more willing to reward employers who have taken reasonable steps to prevent and promptly correct the situation. n194

V. Conclusion

While employers should be held liable for failing to reasonably prevent or respond to sexual harassment in the workplace when the harassment is severe or pervasive, conscientious employers should not be punished when the very procedures encouraged by Title VII and created for the purpose of eliminating sexual harassment are later used against them. Unless and until the Tenth Circuit reexamines its approach to vicarious liability under the Ellerth/Faragher affirmative defense, the court will continue to undermine the preventative objectives of Title VII. Commendable

employers concerned with avoiding liability, like the fictional Acme, n195 will be forced to devise sexual harassment policies and procedures that outwardly strive to eliminate supervisor harassment while covertly discouraging employees from notifying the very people who are in a position to stop the harassment. This cannot be and is not the result the Supreme Court intended when it created an affirmative defense in Faragher and Ellerth to employer vicarious liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Discrimination Harassment Sexual Harassment Employer Liability Supervisors Labor & Employment Law Discrimination Harassment Sexual Harassment Hostile Work Environment Torts Vicarious Liability Employers General Overview

FOOTNOTES:

n1. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

n2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

n3. 42 U.S.C. 2000a to 2000h-6 (2000).

n4. 29 C.F.R. Parts 1601-10 (2002).

n5. 524 U.S. 742, 765 (1998).

n6. 524 U.S. 775, 807 (1998).

n7. *Id.*; *Ellerth*, 524 U.S. at 765.

n8. See *infra* Part IV.B.

n9. 42 U.S.C. 2000e-2(a)(1) (2000).

n10. See 110 Cong. Rec. 2577-84 (1964) (reporting debate over adding "sex" to Title VII's language); Erin Ardale, Employer Liability for Sexual Harassment in the Wake of Faragher and Ellerth, 9 *Cornell J.L. & Pub. Pol'y* 585, 588 (2000) (same).

n11. See *id.* at 588 (explaining that courts saw supervisor's sexual advances as merely personal conduct rather than employment related harassment).

n12. David Sherwyn et al., 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, 1270 (2001); see also 29 C.F.R. 1604.11(a) (recognizing harassment on basis of sex violates Title VII). Under the new EEOC guidelines, harassment now includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* Harassment occurs when the conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* 1604.11(a)(3).

n13. See Sherwyn et al., *supra* note 12, at 1270; see also *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (acknowledging that plaintiff may recover for "condition of work" sexual harassment under Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (noting that hostile work environment is Title VII violation and sexual harassment "is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality"); *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981) (holding that "discriminatory environment" or hostile work environment violates Title VII).

n14. 477 U.S. 57 (1986).

n15. The Supreme Court later affirmed that sexual harassment that creates a hostile work environment is "actionable" under Title VII when the conduct is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67 (internal quotation marks and citations omitted).

n16. See Ardale, *supra* note 10, at 591.

n17. *Id.*; see, e.g., *Katz*, 709 F.2d at 256 (holding that plaintiff must show employer "knew or should have known of the harassment, and took no effectual action to correct the situation"); *Henson*, 682 F.2d at 905 (adopting nearly identical position).

n18. See *Ardale*, supra note 10, at 591-92 & n.41.

n19. See *id.* at 592; see also *Meritor*, 477 U.S. at 60-61 (discussing plaintiff's claim that she had been subjected to constant sexual harassment by her supervisor for approximately four years but never reported harassment or attempted to use bank's complaint procedures).

n20. See *Meritor*, 477 U.S. at 72 (noting Congress defined "employer" to include any "agent" of an employer) (citing 42 U.S.C. 2000e(b) (1985)); *Ardale*, supra note 10, at 593 nn.52-53.

n21. *Meritor*, 477 U.S. at 72. The Court was careful to note that not all common-law principles are entirely transferrable to Title VII. *Id.*

n22. *Id.*; *Ardale*, supra note 10, at 593.

n23. *Meritor*, 477 U.S. at 72; see generally *Restatement (Second) of Agency* 219, 228-371 (1958) (addressing master's liability for acts of agent).

n24. *Meritor*, 477 U.S. at 73.

n25. See *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994); *Hicks v. Gates Rubber Co.*, 882 F.2d 1406, 1418 (10th Cir. 1987). Section 219 of the Restatement provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

... .

(b) the master was negligent or reckless, or

... .

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency 219 (1958).

n26. *Hicks*, 833 F.2d at 1417-18 (citation omitted) (explaining that subsection (1) scope of employment liability is rarely used to hold employers liable because "sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997) [hereinafter *Harrison I*] (describing subsection (2)(b) employer negligence as potential base of liability but noting that to establish negligence, plaintiff must prove employer failed to adequately respond after having "actual or constructive knowledge of the hostile work environment").

n27. See *id.* at 1444-45; *Gary*, 59 F.3d at 1397-98; *Bouton*, 29 F.3d at 108-09.

n28. *Harrison I*, 112 F.3d at 1444.

n29. *Id.*

n30. See *id.* at 1445-46 (examining differing approaches among circuits).

n31. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1307 (2d Cir. 1995) (explaining that if finder of fact finds supervisor used apparent or actual authority to harass, then "a sufficient nexus ... would be established for liability"); *Karibian*, 14 F.3d at 780 (holding employer liable if supervisor uses actual or apparent authority to

accomplish harassment).

n32. See *id.* at 779-80.

n33. See *Gary*, 59 *F.3d* at 1398 (ruling that "an employer may not be held liable for a supervisor's hostile work environment harassment if the employer ... adopted policies" and procedures by which employee "knew or should have known that the employer did not tolerate" supervisor's harassment and that employee "could report it ... without fear of adverse consequences"); *Bouton*, 29 *F.3d* at 110 (holding that effective grievance procedure known to employee that can timely stop harassment sufficiently eradicates supervisor's apparent authority and relieves employer of liability).

n34. *Harrison I*, 112 *F.3d* at 1445-46.

n35. *Id.* at 1446 (reasoning that broader approach was more consistent with breadth of employer liability expressed in prior Tenth Circuit opinions).

n36. *Id.*

n37. See *id.* at 1446 (adopting broader rather than narrower view of employer liability).

n38. 524 *U.S.* 742 (1998).

n39. 524 *U.S.* 775 (1998).

n40. See *infra* Part IV.B.

n41. *Ellerth*, 524 U.S. at 747.

n42. *Id.* at 748-49.

n43. *Id.* at 749.

n44. *Id.* (reasoning that although manager's behavior created hostile work environment, Burlington could not be held liable because plaintiff never used internal complaint procedures, and thus employer "neither knew nor should have known about the conduct").

n45. *Id.*

n46. *Id.* at 751.

n47. *Faragher*, 524 U.S. at 780.

n48. *Id.* at 781-82.

n49. *Id.* at 782.

n50. *Id.* at 783.

n51. *Id.* at 780.

n52. *Id.*

n53. *Id. at 783* (noting district court's reasoning that City was liable because it had "knowledge" or "constructive knowledge" of harassment, supervisors were acting as City agents when they engaged in misconduct, and training captain had knowledge but failed to act).

n54. *Id. at 783-84* (holding that neither supervisor was acting within scope of employment, City had no knowledge of harassment, and agency relationship did not assist supervisors in perpetrating harassment).

n55. *Ellerth, 524 U.S. at 759.*

n56. *Faragher, 524 U.S. at 801; Ellerth, 524 U.S. at 760.* The Court acknowledged that this standard requires something more than simply the employment relation itself. *Id. at 760.* "When a supervisor takes tangible employment action against [an employee]," the Court reasoned, he is taking an additional step that justifies his liability under traditional agency principles. *Id.* But when the harassment does not culminate in a tangible employment action and involves a hostile work environment instead, the Court believed a different standard was needed. *Id.*

n57. *Faragher, 524 U.S. at 803.*

n58. *Id. at 804 n.4.*

n59. *Ellerth, 524 U.S. at 763-64.*

n60. *Id. at 764.* "The 'primary objective' ... [of Title VII] is not to provide redress but to avoid harm." *Faragher, 524 U.S. at 805-06* (quoting *Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)*). Thus, Title VII is designed to encourage employers to create effective antiharassment policies and grievance mechanisms. *Ellerth, 524 U.S. at 764.* The Court noted that "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." *Id.*

n61. *Faragher*, 524 U.S. at 806.

n62. *Id.* at 807; *Ellerth*, 524 U.S. at 765.

n63. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

n64. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Under any circumstance when a "supervisor's harassment culminates in tangible employment action," an employer may not raise the affirmative defense. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

n65. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

n66. *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

n67. *Id.* at 766.

n68. *Faragher*, 524 U.S. at 808-09.

n69. *Id.* In applying the new affirmative defense, the Supreme Court also seemed to imply that large employers may be held to a higher standard than their smaller counterparts. In *Faragher*, the Court reasoned that because the City had many departments in "far-flung locations," the City could not have reasonably believed its precautions against sexual harassment could be effective without a formal policy and a sensible complaint procedure. *Id.* The Court compared this to smaller employers and implied that, in the latter case, sufficient care could be exercised informally. *Id.* at 808.

n70. *Faragher*, 524 U.S. at 810 (Thomas, J., dissenting); *Ellerth*, 524 U.S. at 766 (Thomas, J., dissenting).

n71. *Id.* at 770-71.

n72. *Id.* at 772.

n73. *Id.*

n74. *Id.*

n75. *Id.* at 773.

n76. *Id.* at 774.

n77. See *Kennedy v. Wal-Mart Stores, Inc.*, 15 Fed. Appx. 755, 757-58, 2001 WL 876729, at 3 (10th Cir. Aug. 3, 2001) (unpublished) (holding evidence was sufficient to support finding that employer failed to take reasonable care under first prong where employer failed to fire, demote, move, or keep supervisor away from plaintiff until ten months after her first complaint); *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1206-07 (10th Cir. 2000) (affirming jury verdict that employer failed first prong of affirmative defense where little action was taken against plaintiff's supervisor even after plaintiff complained, and plaintiff was told by higher management that supervisor was too valuable to be fired even if he continued harassment); *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1239-41 (10th Cir. 1999) (affirming jury decision that employer failed to take reasonable action to prevent and correct reported harassment where misconduct continued even after repeated complaints by plaintiff, and supposed investigation into reported harassment could reasonably be regarded as "sham").

A similar approach has also been taken by a district court within the Tenth Circuit. See *Ratts v. Bd. of County Comm'rs*, 141 F. Supp. 2d 1289, 1306 (D. Kan. 2001) (finding issue of material fact remained as to whether employer acted reasonably where it failed to create and disseminate official sexual harassment policy until several years after sexual harassment began).

n78. See *Hollins v. Delta Airlines*, 238 F.3d 1255, 1257-58 (10th Cir. 2001) (finding employer not liable for racially hostile environment where employer had reasonable antiharassment policy and employee failed to use procedure to complain).

Several district courts in the Tenth Circuit have taken a similar approach. See *Slattery v. HCA Wesley Rehab. Hosp., Inc.*, 83 F. Supp. 2d 1224, 1233 (D. Kan. 2000) (finding that employer had reasonable policy and employee only used procedures for general complaints, not allegations of racial harassment); *Papin v. Lotton*, 72 F. Supp. 2d 1264, 1270 (D. Kan. 1999) (finding that employer had reasonable racial harassment policy and plaintiff failed to utilize procedures); *Duran v. Flagstar Corp.*, 17 F. Supp. 2d 1195, 1203 (D. Colo. 1998) (explaining that employer had reasonable sexual harassment policy and employee never complained).

n79. 164 F.3d 534 (10th Cir. 1998).

n80. 152 F.3d 1253 (10th Cir. 1998).

n81. 248 F.3d 1014 (10th Cir. 2001) [hereinafter Harrison II].

n82. 164 F.3d at 540 n.4 (implying that reasoning required for employer negligence for sexual harassment would be relevant to vicarious liability claims). The standard for establishing "reasonable care" remains the same; only the party responsible for the burden changes. Id.

n83. Id. at 537.

n84. Id.

n85. Id.

n86. Id.

n87. Id.

n88. *Id.*

n89. *Id. at 537-38.*

n90. *Id. at 538.*

n91. *Id. at 539.*

n92. *Id.*

n93. *Id.*

n94. *Id.*

n95. *Id.*

n96. *Id. at 540.*

n97. *Id.*

n98. *Id. at 540-41.* The dissent argued the antiharassment policy was adequate. *Id. at 544* (Ebel, J., dissenting). Many other courts have found similar policies to be reasonable. See, e.g., *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1553 (11th Cir. 1997) (upholding well-disseminated policy providing several alternatives by which complainant could lodge grievances, sexual harassment training classes, and serious response if plaintiff's complaint was reasonable); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 402, 407 (6th Cir. 1997) (finding that policy posted on company bulletin boards gave alternative avenues by which complainant

could bypass supervisor to report grievance, provided training to employees demonstrating how complaints could be filed, and effectively responded to complaints).

n99. *Wilson*, 164 F.3d at 541.

n100. *Id.*

n101. See *Faragher*, 524 U.S. at 808-09 (suggesting that unlike larger employer such as City of Boca Raton, employers of smaller work forces may be held to lesser standard with regard to formal policy and may exercise sufficient degree of reasonable care to prevent tortious behavior through informal policy).

n102. *Ellerth*, 524 U.S. at 770 (Thomas, J., dissenting).

n103. 238 F.3d 1255 (10th Cir. 2001).

n104. *Id.* at 1258.

n105. *Id.*

n106. See *id.*

n107. *Id.*

n108. See *Ellerth*, 524 U.S. at 770 (Thomas, J., dissenting).

n109. See *Hollins*, 238 F.3d at 1258.

N110. See *Gunnell*, 152 F.3d at 1261 (finding that employer still may be liable even if employer effectively stopped harassment upon notice by employee); see also *Harrison II*, 248 F.3d at 1024 (upholding district court's refusal to give jury instruction relieving employer of liability even if employer "promptly responded, disciplined appropriately, and stopped the harassment" after employee complained).

It is important for employers to remember that raising the affirmative defense before the Tenth Circuit is not only difficult, but rarely successful. The one notable case involved allegations of racial harassment in a situation where, after the employer adequately addressed minor complaints, the employee failed to complain of the supervisor harassment. See *Hollins*, 238 F.3d at 1258.

n111. 152 F.3d at 1257.

n112. *Id.*

n113. *Id.* at 1256-57.

n114. *Id.* at 1259.

n115. *Id.* at 1260.

n116. *Id.* at 1261 (emphasis added).

n117. *Id.*

n118. 248 F.3d at 1026.

n119. *112 F.3d 1437, 1440 (10th Cir. 1997)*.

n120. *Id. at 1442*.

n121. *Id.* (noting that plaintiff herself learned of policy after seeing it posted on shop bulletin board).

n122. *Id. at 1440*.

n123. *Id. at 1440-41* (including communicating suggestive comments to plaintiff, attempting to kiss plaintiff, attempting to touch plaintiff's breasts, placing plaintiff's hand on supervisor's exposed penis while he ejaculated, and forcing plaintiff to masturbate him).

n124. *Id. at 1441*.

n125. *Id. at 1441-42*.

n126. *Id. at 1442*.

n127. *Id.*

n128. *Id. at 1439, 1442*.

n129. *Harrison II, 248 F.3d at 1024, 1026*.

n130. *Id. at 1026*; see *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-67 (5th Cir. 1999). For further discussion of *Indest*, see *infra* notes 141-48 and accompanying text.

n131. *Harrison II*, 248 F.3d at 1026.

n132. *Id. at 1025-26* (reasoning that *Indest* standard was deficient because (1) it only expressed one judge's view; (2) Tenth Circuit had already rejected this position in *Gunnell*; and (3) there was no need to avoid application of "'remarkably straightforward'" framework provided in *Ellerth* and *Faragher*).

n133. See *Faragher*, 524 U.S. at 782-83; *Ellerth*, 524 U.S. at 748-49.

n134. *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765 ("Proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer.").

n135. See *Faragher*, 524 U.S. at 803-04 (recognizing employer's greater opportunity to guard against misconduct by supervisors as opposed to misconduct by common workers, and that heightened incentive to screen, train, and monitor supervisor performance provides "good reasons" for vicarious liability for misuse of supervisory authority); see also Joy Sabino Mullane, Casenote, Employer Liability for Hostile Environment Sexual Harassment Created by Supervisors Under Title VII: Towards a Clearer Standard?, 51 Fla. L. Rev. 559, 586 (1999) (advancing similar position).

n136. See *Ardale*, *supra* note 10, at 596 (suggesting that it is only worthwhile to allocate costs of sexual harassment to employers when costs of doing so do not outweigh benefits).

n137. *Faragher*, 524 U.S. at 806.

n138. *Id.* (emphasis added).

n139. *Id.*

n140. See Sherwyn et al., *supra* note 12, at 1294.

n141. *164 F.3d 258 (5th Cir. 1999)*.

n142. The court distinguished "incipient" hostile environment harassment from protracted or severe supervisor sexual harassment. *Id.* at 265.

n143. *Id.*; see also *Whitaker v. Mercer County*, 65 F. Supp. 2d 230, 245 (D.N.J. 1999) (ignoring affirmative defense entirely where hostile environment was created after one incident of sexual harassment, focusing instead on whether employer had knowledge of supervisor's proclivity towards sexual assault, and whether employer took reasonable steps to protect plaintiff from harm).

n144. *Indest*, 164 F.3d at 265.

n145. *Id.* at 266.

n146. *Id.*

n147. *Id.*; see also *Ellerth*, 524 U.S. at 769 (Thomas, J., dissenting) (noting that supervisor's creation of hostile work environment is not part of his apparent authority).

n148. *Indest*, 164 F.3d at 266.

n149. *248 F.3d at 1025-26*.

n150. *Id.*

n151. *Id. at 1026* (quoting *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) (Wiener, J., specially concurring)).

n152. See, e.g., Ardale, *supra* note 10, at 596 (recognizing that implications of two decisions are not clear); Jeannine Novak, "Let's Be Reasonable" - Resolving the Ambiguities of the Faragher-Ellerth Affirmative Defense, 68 *Def. Couns. J.* 211, 211 (2001) (stating that neither Faragher nor Ellerth "resounds with clarity" regarding what employers must do to escape liability for supervisor's sexual harassment); Sherwyn et al., *supra* note 12, at 1268 (explaining that "almost all commentators agreed that the [Ellerth and Faragher] holdings were ambiguous because neither ... defined "reasonable care").

n153. See *Faragher*, 524 U.S. at 782-83; *Ellerth*, 524 U.S. at 748-49.

n154. See *Faragher*, 524 U.S. at 780, 782 (noting duration of harassment as approximately five years); *Ellerth*, 524 U.S. at 747 (noting duration of harassment as over one year).

n155. See *supra* Part I.

n156. *Ellerth*, 524 U.S. at 774 (Thomas, J., dissenting).

n157. *Id. at 770* (Thomas, J., dissenting).

n158. One commentator similarly noted that the affirmative defense actually works against employers who make an extra effort to prevent harassment when the procedures more easily facilitate an employee's complaint. Sherwyn et al., *supra* note 12, at 1293-94 (suggesting that to avoid liability employers should adopt more restrictive reporting procedures over more impersonal procedures that allow employees to feel more comfortable when complaining).

n159. See Sherwyn et al., *supra* note 12, at 1297-98.

n160. *Id.* at 1297; see, e.g., *Savino v. C.P. Hall Co.*, 199 F.3d 925, 933 (7th Cir. 1999) (finding four-month delay unreasonable); *Guerra v. Editorial Televisa-USA, Inc.*, No. 97-3670-CIV-UNGARO-BENAGES, 1999 U.S. Dist. LEXIS 10082, at 12, 32, 36 (S.D. Fla. June 2, 1999) (finding one-week delay unreasonable); *Mirakhorli v. DFW Mgmt. Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344, at 24 n.16 (N.D. Tex. May 24, 1999) (finding two-month delay would have been unreasonable).

n161. Unfortunately, some district courts within the Tenth Circuit have applied the court of appeals' more mechanical approach and refused to allow employers to raise the affirmative defense simply because an employee complained, regardless of the time lapse before reporting and despite an employer's attempt to reasonably prevent and correct any harassment once the harassment was brought to its attention. See *Morton v. Steven Ford-Mercury of Augusta, Inc.*, 162 F. Supp. 2d 1228, 1245-46 (D. Kan. 2001) (finding that as soon as employee reported harassment to employer through employer's policy, plaintiff created factual issue as to whether she reasonably took advantage of corrective opportunities provided); cf. *Hysten v. Burlington N. & Santa Fe R.R. Co.*, 167 F. Supp. 2d 1239, 1250 (D. Kan. 2001) (finding that employer could not establish affirmative defense against supervisor-created racially hostile work environment, even though employer had workplace antiharassment policy and made immediate investigation into plaintiff's reported harassment, because employee complained of harassment to his employer).

n162. 64 F. Supp. 2d 1067 (D. Kan. 1999).

n163. *Id.* at 1080.

n164. *Id.* (quoting *Faragher*, 524 U.S. at 807).

n165. 42 F. Supp. 2d 1254 (E.D. Okla. 1999).

n166. *Id.* at 1260.

n167. See Novak, *supra* note 152, at 221-23.

n168. See Sherwyn et al., *supra* note 12, at 1298.

n169. 208 F.3d 1290 (11th Cir. 2000).

n170. *Id.* at 1301.

n171. 164 F.3d at 542.

n172. See *id.*

n173. See *Ellerth*, 524 U.S. at 770 (Thomas, J., dissenting).

n174. See *Faragher*, 524 U.S. at 793-97.

n175. *Id.* at 796.

n176. *Id.* at 797.

n177. See *id.* at 806.

n178. *Ellerth*, 524 U.S. at 764.

n179. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

n180. In both *Ellerth* and *Faragher*, the Supreme Court noted that

while proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. In *Faragher*, the Court suggested that policies are less vital for smaller employers than for larger ones. 524 U.S. at 808-09.

n181. The elements listed here are described in *Ardale*, supra note 10, at 604-05 (citing Michael F. Kleine, Practical Advice for Employers in Anticipation of *Faragher*'s Outcome, *Emp. L. Strategist*, June 1998, at 1,1).

n182. See Misty L. Gill, The Changed Face of Liability for Hostile Work Environment Sexual Harassment: The Supreme Court Imposes Strict Liability in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, 32 *Creighton L. Rev.* 1651, 1718 (1999).

n183. See *Sherwyn et al.*, supra note 12, at 1294.

n184. See *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 542 (10th Cir. 1998).

n185. Of those employers attempting to raise the *Ellerth/Faragher* affirmative defense before the Tenth Circuit, the only successful case involved an employee who failed to use the complaint procedures provided to notify his employer of the harassment. See *Hollins*, 238 F.3d at 1258-59.

n186. Again, employers want their policy to appear just reasonable enough to meet the first prong of the

defense without actually encouraging employees to complain. While a statement that employees will not be retaliated against should be included in the official policy, employers would be wise to discreetly minimize this aspect to the extent possible when communicating the harassment policy to their employees.

n187. See Ardale, *supra* note 10, at 605; Gill, *supra* note 182, at 1719; Novak, *supra* note 152, at 216.

n188. See Sherwyn et al., *supra* note 12, at 1294 (noting that employers who provide "1-800" numbers are worse off than employers who provide more restrictive but adequately "reasonable" means for reporting harassment).

n189. See *Wilson*, 164 F.3d at 541. But see *Hollins*, 238 F.3d at 1258 (suggesting that strict requirements may no longer be necessary).

n190. See Sherwyn et al., *supra* note 12, at 1293-94.

n191. See *id.* at 1294 (noting that sexual harassment training for common level employees may lead to greater propensity to report).

n192. Remember that in the Tenth Circuit, an employee who reports to someone other than the policy's designated individual or department does not unreasonably fail to avoid the harm where the employee reasonably believed the person (i.e., the individual conducting the exit interview) was authorized to receive and respond to complaints. See *Wilson*, 164 F.3d at 542.

n193. See *Ellerth*, 524 U.S. at 765 (finding that employee's failure to use her employer's procedures to file grievance generally suffices to establish employee's unreasonable failure to avoid harm under second prong of affirmative defense).

n194. See *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067, 1079-80 (D. Kan. 1999); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254, 1259-60 (E.D. Okla. 1999).

n195. See supra Part I.