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ARTICLE

PREVENTING SEXUAL HARASSMENT: THE FEDERAL COURTS' WAKE-UP CALL FOR WOMEN*

Martha S. West[†]

INTRODUCTION

Sexual harassment remains a serious problem for women at work.¹ The first federal cases recognizing sexual harassment as a violation of Title VII were decided in the mid-1970s.² Over the last twenty-five years, federal law prohibiting sexual harassment in employment has continued to develop, and the Equal Employment Opportunity Commission ("EEOC") receives increasing numbers of sexual harassment complaints.³

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¹ Although sometimes women harass men and sometimes women harass other women, in the great majority of workplace incidents, men harass women. *See, e.g., infra* note 3. Therefore, this paper will use the female pronoun when referring to plaintiffs and the male pronoun when referring to alleged harassers.

² Sexual harassment is regarded as one form of sex discrimination and is, therefore, prohibited in employment by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2000). *See* HERMA HILL KAY & MARTHA S. WEST, *SEX-BASED DISCRIMINATION* 756-57 (5th ed. 2002) for a summary of the early legal history of sexual harassment. The Equal Employment Opportunity Commission ("EEOC") issued guidelines on sexual harassment in 1980. 29 C.F.R. § 1604.11 (1980).

³ Charges of harassment based on sex filed with the EEOC doubled during the 1990s. In fiscal year 1990, the EEOC received 2,217 charges claiming harassment based on sex, representing 3.6% of 1990 charges. EEOC, *Trends in Harassment Charges Filed With the EEOC During the 1980s and 1990s*, at <http://www.eeoc.gov/stats/harassment.html> (last visited Oct. 7, 2002). In fiscal year 1999, the EEOC received 4,783 sexual harassment charges, 6.2% of all 1999 charges. *Id.* When federal EEOC charges are combined with state sexual harassment charges, the totals increase from 10,532 filed in 1992, to 15,836 filed in 2000. The number declined slightly to 15,475 in 2001. EEOC, *Sexual Harassment Charges EEOC & FEPA's Combined: FY*

The United States Supreme Court decided a pair of cases in 1998 that sought to simplify the law of sexual harassment, but which have had mixed results. In *Burlington Industries, Inc. v. Ellerth*,⁴ and *Faragher v. City of Boca Raton*,⁵ the Court relabeled and rearranged the two categories of sexual harassment complaints.

Before 1998, the federal courts labeled as “quid pro quo” cases those situations where a supervisor threatened an employee with some sort of job loss if she did not submit to his sexual demands.⁶ In *Ellerth*, the Court changed both the name and scope of the quid pro quo category. What was previously known as a “quid pro quo” case became a “tangible job detriment” case, limited to those situations where the victimized employee actually lost her job or some other tangible job benefit.⁷ The Court separated from the new category those cases where a supervisor merely threatened a job loss, but never carried out the threat. This type of case was shifted by the Court to the pre-existing “hostile environment” category.⁸

1992 - FY 2001, at <http://www.eeoc.gov/stats/harass.html> (last visited Oct. 7, 2002).

Women are not the only victims of sexual harassment. Men are also sexually harassed at work. According to the EEOC's 2001 data, men's claims account for 13.7% of sexual harassment charges filed with the EEOC or state agencies. *Id.* In 1992, men filed 9.1% of federal and state sexual harassment charges. *Id.* See also Reed Abelson, *Men, Increasingly, Are the Ones Claiming Sex Harassment by Men*, N.Y. TIMES, June 10, 2001, at A1. Most of the men's charges complain about sexual harassment by other men, not sexual harassment of men by women. *Id.* The EEOC does not keep track of the gender of the alleged harasser, only the gender of the complainant.

⁴ 524 U.S. 742 (1998).

⁵ 524 U.S. 775 (1998).

⁶ In its Guidelines on Sexual Harassment, the EEOC described two scenarios that became known as “quid pro quo” cases: “(1) submission to such [sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.” 29 C.F.R. § 1604.11(a) (1980).

⁷ See *Ellerth*, 524 U.S. at 768.

⁸ In *Ellerth*, the Court rejected the prior categories of “quid pro quo” and “hostile environment” sexual harassment. *Id.* Although a trier of fact could find that Kimberly Ellerth's supervisor, Ted Slowik, made numerous threats to retaliate against Ellerth if she denied him sexual liberties, Slowik never carried out his threats. *Id.* at 769. The existence of these threats in the fact pattern, however, caused the courts below to classify the case as a “quid pro quo” case, leading to the possibility of holding the employer strictly liable for the supervisor's actions. The Supreme Court, with Justice Kennedy writing the majority opinion, rejected the “quid pro quo” label and commented that this historical category was “of limited utility.” *Id.* at 751. Instead, the trier of fact should focus on whether the employee suffered a “tangible job detriment” as a result of the sexual harassment:

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that

The Court previously defined a hostile environment case as one in which the sexual harassment by a supervisor or co-worker was severe and pervasive and affected the victim's ability to do her job.⁹

In *Ellerth* and *Faragher*, the Court set different employer liability standards for the two kinds of cases. In a tangible detriment case, the employer is now directly liable for the employee's loss of a job or job benefit caused by a supervisor's harassment, because the supervisor was clearly acting as the employer or on behalf of the employer.¹⁰ In a hostile environment case, however, the employer liability rules are more complicated. If a co-worker's sexual harassment creates the hostile environment, the employer will be liable only if the plaintiff proves that the employer was negligent—that the employer knew, or should have known, about the sexual harassment and failed to take immediate and appropriate corrective action to prevent or stop the harassment.¹¹ If a supervisor created the hostile environment, however, the plaintiff no longer has the burden to prove the employer's negligence. Instead, the employer will be liable

the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. . . . Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.

Id. at 753-54.

⁹ In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court defined a legally actionable hostile environment as one in which the sexual harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court added to its definition by requiring that the sexually harassing conduct be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." *Id.* at 21. In addition, the victim herself must "subjectively perceive the environment to be abusive," otherwise the conduct would not have "actually altered the conditions of the victim's employment." *Id.* at 21-22.

¹⁰ To have a claim classified as a "tangible employment action," a plaintiff must show "economic injury," or denial of a raise or a promotion:

A tangible employment action constitutes 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.

Ellerth, 524 U.S. at 761. When the employee suffers such "direct economic harm," the employer is liable. *Id.* at 762. "[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.* In the absence of a tangible action, however, the plaintiff only has a "hostile environment" sexual harassment case, and the employer may or may not be liable for the supervisor's behavior.

¹¹ See EEOC's Sexual Harassment Guidelines, 29 C.F.R. § 1604.11(d) (1999).

unless the employer proves the new affirmative defense created by the Court in *Ellerth* and *Faragher*.¹²

Under this new affirmative defense for a supervisor-created hostile environment, an employer will not be liable if the employer can prove two elements:

- (1) that the employer "exercised reasonable care" to prevent or promptly correct any sexually harassing behavior; and
- (2) that the complaining employee "unreasonably" failed to take advantage of any sexual harassment policy, or failed "to avoid harm otherwise."¹³

When the Court announced this new affirmative defense in 1998, attorneys for both employees and employers welcomed the new structure for sexual harassment cases. Both sides hoped that the affirmative defense would cause employers to work harder to prevent sexual harassment from occurring and that this would lead to decreased litigation.¹⁴

¹² One study found that most of the reported sexual harassment cases involved harassment by supervisors, not co-workers. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001). In analyzing over 650 cases decided between 1986 and 1995, plaintiffs named supervisors as the sole harassers in 59% of the cases, and both supervisors and co-workers in 20% of the cases. *Id.* at 564. The bulk of the cases involved hostile environment claims. Almost 70% of the cases claimed hostile environment only, while an additional 22.5% combined a hostile environment claim with a quid pro quo claim. *Id.* at 565.

¹³ *Ellerth*, 524 U.S. at 765. The employer has the burden to prove both elements by a preponderance of the evidence. *Id.* The Court indicated that proof of promulgation of an anti-harassment policy with a complaint procedure would normally meet the employer's burden on the first element. Similarly, a plaintiff's "unreasonable failure to use any [promulgated] complaint procedure" would "normally suffice" to meet the second element. *Id.* The Court remanded the case for further litigation under its new structure of a hostile environment claim.

In the companion case of *Faragher v. Boca Raton*, 524 U.S. 775 (1998), the Court found the city government employer liable for a hostile environment resulting from supervisors' sexual harassment, because the city employer could not meet the elements of the newly-created affirmative defense. Although the city adopted a sexual harassment prevention policy six years before the plaintiff filed suit, it never distributed the policy to the supervisors who harassed Faragher. Both the plaintiff and her supervisors were unaware of the policy. *Id.* at 782. In finding that the city failed to meet the first element of the affirmative defense, the Court noted that not only had the city "failed to disseminate its policy against sexual harassment," but "its officials made no attempt to keep track of the conduct of [the] supervisors" involved in the case. *Id.* at 808. With no complaint procedure in place, Faragher had no way to avoid the harm she suffered. Consequently, the Court reinstated the trial court's judgment against the city. *Id.* at 810.

¹⁴ See David G. Savage, *Changing Rules on the Job*, A.B.A. J., Aug. 1998, at 42.

Although created for sexual harassment hostile environment cases, federal courts are applying this new affirmative defense in all types of hostile environment cases, including cases of racial harassment. See, for example, the Seventh Circuit's remarks in *Hill v. American General Finance, Inc.*, 218 F.3d 639, 646 (7th Cir. 2000).

It may be too soon to evaluate the impact of this new affirmative defense on the actual prevention of sexual harassment. Most of the federal court cases decided since 1998 involve fact patterns that arose before the Supreme Court's *Ellerth* and *Faragher* decisions. Enough opinions have been issued under the new structure, however, to raise serious questions about the viability of the affirmative defense in actually preventing hostile environment sexual harassment.

A disturbing trend is developing among the federal courts. They are interpreting "reasonable care" in the first prong of the new affirmative defense to require only minimal prevention efforts by the employer. For example, some courts have held that the mere promulgation of a policy, without any effective enforcement mechanism, is enough to meet the employer's burden of reasonable care under prong one of the affirmative defense.¹⁵ At the same time, federal courts require the victims, under the second prong, to produce hard-to-find evidence of specific facts justifying any failure on their part to complain to employers. Although the burden of persuasion technically remains on the employer to prove both elements of the defense, in reality, victims of sexual harassment now carry a heavy production burden to justify a failure to file an internal complaint. By creating this new affirmative defense for employers, the Supreme Court is, in effect, telling women that they must be willing to come forward and complain to employers about sexual harassment before filing suit. Otherwise, they risk losing their right to obtain any legal redress under federal law.

Most troubling, federal courts are applying the affirmative defense without any examination of women's reluctance to complain because of fear of reprisal. Courts are dismissing women's complaints under prong two of the affirmative defense without examining the facts underlying women's hesitation to file an internal complaint prior to suing in federal court. To encourage women to overcome their fears, instead of allowing employers to escape liability with minimal

See also *Nat'l R.R. Passenger Corp. v. Morgan*, 122 S.Ct. 2061, 2074 n.10 (2002).

As the EEOC has pointed out, harassment is "the only type of discrimination carried out by a supervisor for which the employer can avoid liability." See EEOC, *Guidance on Vicarious Employer Liability For Unlawful Harassment by Supervisors*, 8 LAB. REL. REP. (BNA) § 405, 7,651, 7,660 (1999) [hereinafter *1999 Guidance*]. Consequently, the EEOC has advised employers and the courts that the affirmative defense should be narrowly construed. *Id.*

¹⁵ See discussion *infra* accompanying notes 72-76.

prevention policies, the federal courts should interpret the affirmative defense to require employers to demonstrate that their internal complaint procedures are effective.

Effective harassment prevention policies mandated by *Ellerth* and *Faragher* would materialize if courts required employers to provide employees with information on the resolution of prior incidents of sexual harassment. Such information would communicate to women that their employer takes sexual harassment seriously, and that they should not fear filing an internal complaint.

This Article calls on federal courts to apply the affirmative defense in light of an overriding goal of Title VII: to encourage employers to take effective steps toward preventing sexual harassment in the workplace. The Article begins, in Part I, with a discussion of sexual harassment in the broader context of sex discrimination. It also explains why many women are reluctant to file complaints of sexual harassment. Part II surveys post-*Ellerth/Faragher* cases and analyzes the federal courts' application of the new affirmative defense. Addressing the tendency for federal courts to relieve employers from liability under this defense, Part III offers a proposal to increase the effectiveness of sexual harassment prevention policies. Ultimately, the Article concludes that Title VII plaintiffs, and eventually the courts, must require employers to demonstrate the effectiveness of their prevention policies.

I. PUTTING SEXUAL HARASSMENT CLAIMS IN CONTEXT

Sexual harassment is simply one type of workplace misconduct, but it has assumed a life of its own in employment law. The obvious explanation for this is that it involves allegations of sexual activity. Under the theory of Title VII, sexual harassment is a specific form of discrimination against women, or men, based on their biological sex or gender. Because women, but not men, were traditionally the object of sexually loaded comments and propositions at work, some federal courts agreed with the early sexual harassment plaintiffs that such harassment was a form of sex discrimination under Title VII.¹⁶ The EEOC first defined sexual

¹⁶ See *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D. D.C. 1976), *rev. on other grounds. sub nom. Williams v. Bell*, 587 F.2d 1240 (D. C. Cir. 1978), *remanded to Williams v. Civiletti*, 487 F. Supp. 1387 (D. D.C. 1980); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

harassment in 1980 as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁷ Under this legal definition, women had viable sex discrimination claims if the harassment they experienced contained a sexual component. The federal courts had earlier recognized that harassment of employees based on their race or ethnicity violated Title VII.¹⁸ Similarly, any harassment of women because they were women would violate Title VII. In its sex discrimination guidelines, however, the EEOC only set forth specific guidelines for harassment containing sexual content.

The use of the word “sex” in defining both sex discrimination and sexual harassment causes serious difficulty and confusion for both lawyers and the public because of its dual meaning in the English language. Women can be harassed because they are women, without the harassment containing any sexual content. For example, if a supervisor or co-worker makes comments on a regular basis that women are not capable of doing a good job, such comments would be considered harassment because of one’s sex—what I call gender-based harassment—but would not fall into the subset of cases called sexual harassment. It would, however, violate Title VII as one form of sex discrimination.

Many courts fail to distinguish between the more general harassment of women because they are women and the

¹⁷ EEOC Sexual Harassment Guidelines, 29 C.F.R. § 1604.11(a) (1980). The requirement that the sexual comments or actions be “unwelcome” has been controversial over the years. In some situations at work, however, sexual comments may be “welcome.” One study estimates that approximately one-third of romantic relationships between men and women begin at work. See Danielle Stanfield, *A Defense of Office Romance, ‘Playing with Fire without Getting Burned’*, CHRON. HIGHER EDUC., Aug. 13, 1999, at A12 (discussing Professor Dennis Powers’s study published in his book *THE OFFICE ROMANCE* (1999)). Consequently, many sexual or flirtatious interactions at work are, in fact, welcome.

Employers worry about sorting out the “welcome” sexual interactions at work from the “unwelcome” ones, but this difficulty is highly overrated. Unwelcome sexual comments become sexual harassment in a legal sense only when they become so “severe and pervasive” that they interfere with an employee’s job performance. To meet this legal definition of a hostile environment, a situation involving sexual harassment must go a long way beyond the hypothetical line separating “welcome” from “unwelcome” sexual interactions by the time it is severe enough to provide the basis for a legal claim.

¹⁸ See *Firefighters Inst. for Racial Equal. v. St. Louis*, 549 F.2d 506 (8th Cir. 1977); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). See also EEOC Guidelines on National Origin Discrimination, 29 C.F.R. § 1606.8 (1980). In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court, in its first sexual harassment case, relied on the earlier racial and ethnic harassment cases to find that sexual harassment violated Title VII.

more specific type we now call sexual harassment. For example, in *Harris v. Forklift Systems, Inc.*,¹⁹ the company president harassed Harris because she was a woman, telling her in front of others, "[y]ou're a woman, what do you know," calling her a "dumb ass woman," and saying "[w]e need a man as the rental manager."²⁰ The company president's other comments were sexual: he told Harris that she should go to the Holiday Inn with him to negotiate her raise, and asked her if she made a deal with a customer by "promising the guy . . . some [sex] on Saturday night."²¹ The Supreme Court treated the case as a sexual harassment case, never distinguishing between the elements of harassment that were sexual and the elements that simply indicated a prejudiced view of women.²² The Supreme Court later commented in *Oncale v. Sundowner Offshore Services, Inc.*,²³ that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."²⁴ The Court did not say whether it would label such harassment as gender-based harassment or sexual harassment, but it clearly recognized that all forms of severe and pervasive harassment of either women or men, based on their gender, violate Title VII.²⁵

Despite the Court's condemnation of all forms of gender-based harassment in *Harris* and *Oncale*, some federal courts

¹⁹ 510 U.S. 17 (1993).

²⁰ *Id.* at 19.

²¹ *Id.*

²² Justice Scalia, writing for a unanimous Court, stated: "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Id.* at 21 (citations and internal quotation marks omitted).

²³ 523 U.S. 75 (1998).

²⁴ *Id.* at 80. The Court continued: "A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*

²⁵ *Id.* at 80-81. *Oncale* involved only harassment of a sexual nature, fitting squarely within the sexual harassment subset. In *Oncale*, the Court held that sexual harassment of a man by other men would violate Title VII if the man could show that he was the target of the harassment because he was a man. The Court remanded the case to give the plaintiff the chance to make such a showing, but the case settled before any further proceedings were held. In a subsequent case, a man did state a claim for sexual harassment directed at him by other men because he did not meet traditional male stereotypes. See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that verbal sexual abuse directed at a man, because he acts too feminine, is discrimination based on his gender and actionable under Title VII, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

have mistakenly denied gender-based harassment claims because the harassment did not contain any sexual content.²⁶ Other judges, and some commentators, however, take the view that the term "sexual harassment" covers all forms of harassment of women, both sexual and non-sexual.²⁷ One prominent scholar, Catharine MacKinnon, a pioneer in developing sexual harassment law, explains: "Distinguishing between sexist abuse that is sexual and sexist abuse that is not sexual is a dubious and, in most if not all real situations, a largely impossible venture. Almost all sexual harassment cases contain both, litigated indistinguishably."²⁸ Yet, some judges continue to overlook gender-based harassment. Adding to the confusion is the original EEOC definition of sexual harassment as based on the presence of sexual content. Therefore, the law retains greater clarity if we continue to distinguish between the subset of sexual harassment and the broader concept of gender-based harassment. Federal courts simply need to follow the Supreme Court's lead and recognize that both types of harassment violate Title VII. Gender-based harassment and sexual harassment often appear together in fact patterns, demonstrating that the wider scope of gender-based harassment reinforces the abusive nature of sexual harassment.²⁹

A few courts have explicitly recognized the difference between sexual harassment and the broader concept of gender-based harassment, noting that both types violate Title VII. In *O'Rourke v. City of Providence*,³⁰ the First Circuit affirmed a jury verdict in the plaintiff's favor and criticized the district court for failing to appreciate that non-sexual gender harassment violated Title VII just as much as sexual harassment:

²⁶ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1716-20 (1998); Cheryl L. Anderson, "Thinking Within the Box": How Proof Models are Used to Limit the Scope of Sexual Harassment, 19 HOFSTRA LAB. & EMP. L.J. 125 (2001).

²⁷ See Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002).

²⁸ *Id.* at 828.

²⁹ For further discussion of the distinction between sexual harassment and other forms of sex discrimination, see David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1708-09 (2002); and Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 735-36 (1999).

³⁰ 235 F.3d 713 (1st Cir. 2001).

[S]ex-based harassment that is not overtly sexual is nonetheless actionable under Title VII, so evidence of that sort may be admissible. . . . [W]here a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim. . . . Courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct. Such an approach defies the *Meritor* Court's directive to consider the totality of circumstances in each case and "rob[s] the incidents of their cumulative effect." . . . Moreover, such an approach not only ignores the reality that incidents of nonsexual conduct—such as workplace sabotage, exclusion, denial of support, and humiliation—can in context contribute to a hostile work environment, it also nullifies the harassing nature of that conduct.³¹

The facts of *O'Rourke* tell the lengthy story of abuse encountered by one of the women, who, in 1992, unsuccessfully tried to integrate the all-male fire department of Providence, Rhode Island. This case perfectly illustrates the close link between gender-based harassment of women, because they are women, and sexual harassment of women.³²

As many commentators and theorists have explained, sexual harassment of women at work is one form of abusive use of power.³³ Rarely is sexual harassment rooted in an individual man's interest in a voluntary, consensual sexual relationship with a specific woman.³⁴ It is primarily a way that men in a mixed-gender workplace make women feel uncomfortable or degraded, sending a clear message to women that men are still

³¹ *Id.* at 729-30.

³² The case details the direct connection between the firefighters' hostility to the presence of any women in the workplace and their use of sexually-oriented conversations, pranks and pornographic materials to force this woman out of her job. Even Julie O'Rourke's two brothers and her brother-in-law, all Providence firefighters as well, could not successfully intervene to protect her from the discriminatory actions of firefighters, fire department officials and the city's Fire Chief. *Id.* at 718-23.

³³ See Schultz, *supra* note 26, at 1756-1762; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 743, 762 (1997); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-13 (1998). David Schwartz offers a valuable critique of these underlying theories in his article, *When is Sex Because of Sex?*, *supra* note 29, at 1748-58.

³⁴ And even then, the sexual interest has often become an obsession on the part of the man, who fails to accept the woman's lack of sexual interest in him. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), where the man's behavior became a form of stalking. The major issue in that case was the employer's failure to take the man's sexual obsession seriously enough and protect the woman from further stalking in the work environment.

in control.³⁵ Unfortunately, the federal courts' current interpretation of the affirmative defense in hostile environment cases ignores these power dynamics of the work environment.

Women are generally afraid to file workplace complaints about sexual harassment, and relatively few do so.³⁶ If there were no other witnesses to the harassment women are sometimes afraid no one will believe them. More often, they are afraid of the consequences of complaining.³⁷ They are

³⁵ See Michele Paludi et al., *Sexual Harassment in Education and the Workplace: A View from the Field of Psychology*, in *THE PSYCHOLOGY OF SEXUAL VICTIMIZATION* 132-33 (Michele Paludi ed., 1999). "Men who harass hold attitudes toward women that are traditional, not egalitarian." *Id.* at 132. See also GWENDOLYN MINK, *HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN* 24, 27-28 (2000).

³⁶ Sexual harassment is a seriously underreported problem at work. Some workplace surveys have shown that between 42% and 44% of working women experience behaviors regarded as legally actionable, but only 7% file formal charges with their employers. Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 *LAW & SOC'Y REV.* 67, 68 (1999). A study at the National Institutes of Health in 1995 found that although 38% of women employees experienced some form of unwanted or uninvited sexual attention, only 4% took some type of formal action such as notifying their employer, 45% ignored the incident or did nothing and 40% simply avoided the offender. Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 *YALE J.L. & FEMINISM* 75, 82, 87 (1999). See also Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 *U. PITT. L. REV.* 671, 723-26 (2000). Some women do not report harassment, not out of fear, but because they do not recognize the behavior as harassment. See Theresa Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 *U. ARK. LITTLE ROCK L. REV.* 117, 138 (2001). For example, in the female-dominated occupation of nursing, harassment by doctors or patients is so prevalent that women regard it as the norm, as just part of the job, not as sexual harassment. *Id.* When women do realize they are being harassed, they generally go into "avoidance mode," to avoid the entire situation, modifying their behavior at work, changing where they go and what they do, to avoid confronting the harasser. *Id.* at 139.

Sexually harassed women are not the only employees afraid to complain or take action at work to confront management. One reason so many American employees are reluctant to vote for union representation at work is the high level of fear of retaliation and of losing their jobs if their employer became aware of any union organizing activity. See PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 114, 117 n.25 (1990) (stating that a 1984 Lou Harris poll found 43% of nonunion employees thought their employer would fire or demote employees who supported a union; a 1988 Gallup poll found that 69% of employees agreed with the statement that employers harass, intimidate or fire employees who speak out in favor of unions).

³⁷ See Theresa M. Beiner, *Sex, Science, and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 *WM. & MARY J. WOMEN & L.* 273, 314-15 (2001) [hereinafter *Sex, Science and Social Knowledge*]. The 1994 study of sexual harassment in federal employment conducted by the Merit Systems Protection Board found that women who did not report sexual harassment to their employer had many reasons: 29% thought such a report would make their work situation "unpleasant," 17% thought it would affect their career, 19% thought the situation would not be kept confidential and 20% thought nothing would be done. *Id.* at 315.

particularly afraid if the harasser is their supervisor, but they are also hesitant to complain about harassment by co-workers.³⁸ They are afraid other employees may shun them because they complained.³⁹ Even though retaliation for complaining is illegal,⁴⁰ women most often are afraid they will lose their jobs if they report harassment to their employer.⁴¹

Federal courts overlook the well-documented reasons why women often fail to complain about workplace harassment. This oversight is significant because it causes federal courts to use the employer's affirmative defense established in *Ellerth* and *Faragher* to sharply limit women's ability to recover under Title VII for workplace harassment. The following analysis of cases applying the two prongs of the affirmative defense demonstrates the need for courts to reinterpret the affirmative defense and require stronger employer action to prevent sexual harassment.

³⁸ Underreporting is a serious problem even though much of the harassment comes from co-workers, not supervisors. In surveys of federal employment done by the Merit Systems Protection Board, among the women experiencing harassment, between 69% and 77% said they had been harassed by a co-worker; only 29% reported harassment by a supervisor. Lawton, *supra* note 36, at 81 n.32. Although women report high levels of harassment by co-workers, they appear more likely to sue when a supervisor has harassed them. *See supra* note 12.

³⁹ This is what happened to Christina Matvia after her supervisor was fired for sexually harassing her. *See Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261 (4th Cir. 2001), discussed *infra*, notes 106-112 and accompanying text.

⁴⁰ See section 704(a) of Title VII, which prohibits retaliation against an employee "opposing" discrimination or "participating" in proceedings under the statute. 42 U.S.C. § 2000e-3(a) (1996).

⁴¹ In confidential surveys of employees at major U.S. corporations, more than half of the employees who experienced harassment said that fear of reprisal kept them from reporting the harassment. Lawton, *supra* note 36, at 128. In *Montero v. AGCO Corp.*, 192 F.3d 856, 859 (9th Cir. 1999), the plaintiff's fear of losing her job prevented her from making any complaint about her supervisors for many months. *Montero*, is discussed *infra* notes 329-37 and accompanying text.

Women's fears of retaliation for reporting sexual harassment appear to be justified. Those who report harassment are more likely to quit a job, be fired from a job or be transferred. Lawton, *supra* note 36, at 126. Employees who use internal grievance procedures and file appeals within the company have significantly lower rates of promotion, and higher rates of lay-off and termination. *Id.* at 127.

II. APPLICATION OF THE EMPLOYER'S AFFIRMATIVE DEFENSE

A. *Prong One of the Affirmative Defense: What Must an Employer Do to Demonstrate "Reasonable Care" to Prevent Harassment?*

In creating the affirmative defense in *Faragher v. City of Boca Raton*,⁴² Justice Souter, on behalf of the majority, explained that employers should not necessarily be liable for a hostile environment created by a supervisor's sexual harassment if the employer has "provided a *proven, effective mechanism* for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense."⁴³ Unfortunately, the federal courts have not followed the Court's suggestion that employers demonstrate that they have proven and effective policies to prevent and correct sexual harassment. Instead, the courts are granting employers summary judgment on the affirmative defense based upon evidence of minimal policies with questionable effectiveness.

The Supreme Court and the EEOC have articulated conflicting standards on what "reasonable care to prevent or correct harassment" means. The *Faragher* Court held that "reasonable care" required an employer to promulgate a policy explaining what sexual harassment is and telling employees whom to contact to complain if sexual harassment occurs. The employer was also required to distribute the policy to employees. In *Faragher*, the Court found that the employer had not exercised "reasonable care" because, even though the city had adopted a policy against sexual harassment several years earlier, it never distributed this policy to the Marine Safety Headquarters on the city beach where the harassing supervisors and the plaintiff worked as lifeguards.⁴⁴ Furthermore, the Court found the city would be unable to meet the affirmative defense because the policy did not include any assurance that an employee could bypass the harassing supervisors and register a complaint with someone else.⁴⁵

⁴² 524 U.S. 775 (1998).

⁴³ *Id.* at 806 (emphasis added).

⁴⁴ *Id.* at 782. In support of its determination that the city did not show "reasonable care" to prevent harassment, the Court also mentioned that the city had made no attempt to keep track of the conduct of these supervisors, who were stationed at a remote location. *Id.* at 808.

⁴⁵ *Id.* at 808.

Consequently, since the *Faragher* decision, well-advised employers distribute anti-harassment policies to employees and include provisions making it clear that employees can complain about harassment to someone other than their supervisor.

In the companion case, *Burlington Industries, Inc. v. Ellerth*,⁴⁶ Justice Kennedy, writing for the majority, outlined the new affirmative defense but did not specifically discuss an employer's duties as Justice Souter did in *Faragher*. Justice Kennedy introduced the Court's affirmative defense by stating: "Title VII is designed to encourage the creation of antiharassment policies and *effective* grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation"⁴⁷ After setting forth the two prongs of the affirmative defense, Justice Kennedy commented:

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.⁴⁸

Several courts have picked up on Justice Kennedy's general statement in *Ellerth*, and have ruled that actual promulgation or distribution of a policy is not necessary for the employer to prove the affirmative defense.⁴⁹

In June 1999, the EEOC issued a policy statement on employer liability for unlawful harassment by supervisors, expanding on both *Ellerth* and *Faragher*.⁵⁰ In addition to recommending that every employer establish, publicize and enforce adequate policies and complaint procedures, the EEOC recommends training for all employees to ensure that they understand their rights and responsibilities.⁵¹ In the EEOC's view, at a minimum an adequate policy should contain a clear explanation of the prohibited conduct, assure employees that they will be protected from retaliation if they file a complaint

⁴⁶ 524 U.S. 742 (1998).

⁴⁷ *Id.* at 764 (emphasis added).

⁴⁸ *Id.* at 765 (emphasis added).

⁴⁹ See discussion *infra*, notes 57-71 and accompanying text.

⁵⁰ 1999 Guidance, *supra* note 14, § 405, at 7,651-68.

⁵¹ *Id.* at 7,661.

and set forth an accessible complaint procedure that provides for a prompt, thorough and impartial investigation, resulting in appropriate corrective action if harassment is found.⁵² The EEOC's guidance memorandum assists employers by giving examples of questions to ask during an investigation and makes helpful suggestions for assessing the various participants' credibility when employees give conflicting accounts of events.⁵³

The EEOC cautions employers, however, that there are no "safe harbors" based solely on written policies and procedures: "Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively."⁵⁴ For example, if management ignored previous complaints by other employees about the same harasser, then the employer has not shown reasonable care in preventing subsequent harassment.⁵⁵ The EEOC acknowledges, however, that its instructions are not mandatory, and the lack of a formal policy may not defeat the affirmative defense if the employer, particularly smaller employers, can point to other facts demonstrating an exercise of reasonable care through other means.⁵⁶

The federal courts have not followed the EEOC's advice on the degree of prevention necessary for an employer to demonstrate reasonable care. Instead, federal courts are advancing Justice Kennedy's suggestion that reasonable care can be shown even in the absence of a detailed policy distributed to employees. At least one federal circuit court ruled that an employer satisfies the "reasonable care" requirement by simply having general policies in a notebook available to employees. In *Hill v. American General Finance, Inc.*,⁵⁷ plaintiff Louise Hill, the only African-American in the employer's Alton, Illinois one-room office, sued for severe racial

⁵² *Id.* at 7,661-62.

⁵³ *Id.* at 7,665-66.

⁵⁴ *Id.* at 7,660-61.

⁵⁵ 1999 Guidance, *supra* note 14, § 405, at 7,661. See, e.g., *Dees v. Johnson Controls, World Servs., Inc.*, 168 F.3d 417 (11th Cir.1999) (stating that complaints of sexual harassment had been filed in 1991, but no corrections were made before plaintiff's complaint in 1994).

⁵⁶ 1999 Guidance, *supra* note 14, § 405, at 7,660-61. "Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms." *Id.* at 7,660.

⁵⁷ 218 F.3d 639 (7th Cir. 2000).

and sexual harassment by her supervisor.⁵⁸ The employer kept its policies addressing "Equal Employment Opportunity" and "Sexual Harassment in the Workplace," plus a non-specific complaint procedure, in a set of notebooks in a "public access type place."⁵⁹ Although Hill testified that she did not receive copies of these policies, she said she knew there was a human resource group within the company to which she could complain about racial or sexual harassment.⁶⁰

Hill's supervisor began harassing her in September 1994 during her first month on the job as a loan agent. On February 2, 1995, she sent an anonymous letter to the company's CEO pretending to be a customer and complaining about the supervisor's offensive and vulgar comments to customers. On February 6, she wrote another letter and signed it "a very worried and frighten[ed] employee."⁶¹ When the company investigated these complaints, she did not tell them she authored the letters. Finally, in April 1995, she wrote a letter to the director of operations, specifying the many racist, vulgar, offensive remarks and touchings by her supervisor that she had endured since her first month on the job.⁶² Three weeks later, her supervisor was transferred to a different office, given a warning and penalized by a \$10,000 reduction in pay. At the same time, the company transferred Hill to an office in St. Louis, across the river from Alton, in order "to prevent retaliation from her co-workers."⁶³ She objected to the transfer, claiming that the office was in a high crime area, and quit in July 1995. The federal district court ruled against Hill and granted the company's motion for summary judgment before the 1998 decisions in *Ellerth* and *Faragher*.⁶⁴

Although the district court granted summary judgment under pre-existing law, two members of the Seventh Circuit panel evaluated the lower court's decision under the Supreme Court's new structure for sexual harassment cases. The panel affirmed the district court's decision in light of the employer's affirmative defense created in *Ellerth* and *Faragher*. In regard to the first prong of the affirmative defense, the panel found

⁵⁸ *Id.* at 641.

⁵⁹ *Id.* at 643-44.

⁶⁰ *Id.* at 644.

⁶¹ *Id.* at 641.

⁶² *Hill*, 218 F.3d at 642.

⁶³ *Id.*

⁶⁴ *Id.* at 641.

that while the employer's promulgation of its policies against racial or sexual harassment might "leave room for improvement, the policies get the job done."⁶⁵ More importantly, the court found that the employer took "reasonable care to prevent and correct promptly" the harassment because it transferred the supervisor as quickly as it could after receiving Hill's written complaint: "by Hill's own account, she and [her supervisor] were in the Alton office together for only 5 or 6 days" after Hill's notification.⁶⁶ The majority simply looked at what actions the employer took once it found out about the harassment, saw that it "promptly corrected" the situation, and did not seriously evaluate whether the employer had any mechanisms in place to prevent the harassment from occurring.

Judge Diane Wood dissented from the panel's opinion in *Hill*. Noting that the case arose before *Ellerth* and *Faragher* were decided, she found the record insufficient to support the new affirmative defense.⁶⁷ She concluded that the employer's policies were inadequate under prong one. The "Equal Opportunity" and "Sexual Harassment" policies only stated that the employer would comply with the law: "This policy accomplishes nothing, unless we are giving employers credit for stating the obvious and for giving a telephone number for further inquiries."⁶⁸ Judge Wood found the policies particularly unsatisfactory in light of the trend, both before and after the Supreme Court's 1998 decisions, of employers adopting much more careful antiharassment policies:

Those policies take care . . . to underscore the fact that even supervisory employees must treat everyone with respect, to set forth alternate ways to voice complaints (in case one route is effectively blocked because the harassing supervisor would get in the way), and to stress the importance of preventive measures. Careful policies describe the disciplinary measures the company might use in a harassment case, encourage employees to make complaints, state unequivocally that retaliation will not be tolerated, and explain that complaints will be examined in a confidential manner.⁶⁹

According to Judge Wood, the employer was even more vulnerable under prong one of the affirmative defense because

⁶⁵ *Id.* at 643.

⁶⁶ *Id.*

⁶⁷ *Hill*, 218 F.3d at 646.

⁶⁸ *Id.*

⁶⁹ *Id.*

Hill never received copies of these policies, nor was there evidence that the company distributed the policies to employees. Inadequate policies, "buried in some notebooks," did not show reasonable care to prevent harassment: "Employees cannot be expected to go around opening up all sorts of unmarked binders, to see if by any chance they might contain the company's harassment policy."⁷⁰ Judge Wood would have reversed the summary judgment under prong one of the new affirmative defense.⁷¹

Other circuits similarly require only minimal efforts on the employer's part to satisfy prong one of the affirmative defense. In *Barrett v. Applied Radiant Energy Corp.*,⁷² the Fourth Circuit indicated that under the "law of the circuit," the mere distribution of a sexual harassment prevention policy to employees is "compelling proof" that the company exercised reasonable care in preventing and promptly correcting harassment.⁷³ The policy in *Barrett* was vague, telling potential

⁷⁰ *Id.* at 647.

⁷¹ *Id.* On the other hand, both the majority and the dissent rejected Hill's retaliation claim, finding that Hill's transfer to St. Louis was not an "adverse employment action" and, therefore, she suffered no retaliation. *Id.* at 645, 647. In the Seventh Circuit's view, an "adverse employment action" necessary for a retaliation claim under § 704 of Title VII occurs "when an employee is fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job." *Id.* at 645. In their minds, not every bad thing that happens at work can be considered sufficiently adverse to trigger the protection of the statute: "Not every unwelcome employment action qualifies as an adverse action. Negative reviews, a change in job title, an increased distance to travel to work, or a lateral transfer do not, by themselves, qualify." *Id.* Other circuits do not take such a narrow view of the retaliation protections of Title VII. See *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *Torres v. Pisano*, 116 F.3d 625, 639-40 (2d Cir. 1997).

⁷² 240 F.3d 262 (4th Cir. 2001). For analysis of the Fourth Circuit's holdings under prong two of the affirmative defense, see *infra* notes 94-112 and accompanying text.

⁷³ *Id.* at 266. The cases cited by the *Barrett* court for the "law of the circuit" do not actually support its holding. In one of them, *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177 (4th Cir. 1998), the Fourth Circuit remanded the case for further proceedings because *Ellerth* and *Faragher* had been decided while the case was pending on appeal. In reversing summary judgment for the employer, the appellate court "express[ed] no view" on the proper disposition of a renewed summary judgment motion based on the new affirmative defense. *Id.* at 182. In commenting on the possible use of the defense, however, the court stated: "evidence that Southern had disseminated an effective anti-harassment policy provides compelling proof of its efforts to prevent workplace harassment" (citing *Faragher* and *Ellerth*). *Id.* (emphasis added). No determination was made because no facts had been presented on this issue during the lower court proceedings.

In the second case, *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999), the Fourth Circuit commented that under *Ellerth*'s holding, an employer may be able to prove the first prong without any policy in place, or, on the other hand, "mere promulgation of such a policy may well fail to satisfy the employer's burden" of proving reasonable care. *Id.* at 396. It all depends on the facts of the case. In *Brown*, the Fourth

complainants that if they did not feel they could discuss the matter with their supervisor, "you should contact any member of the management team, male or female, with whom you feel comfortable discussing the situation."⁷⁴ The Fourth Circuit found that this general statement provided "clear direction" to employees.⁷⁵ In addition, the court commended the policy because it included a statement that an employee's complaint would be kept "as confidential as possible" and included an anti-retaliation provision.⁷⁶

As time goes by, however, mere distribution of a policy may not be enough to meet the requirement of "reasonable care." In *Harrison v. Eddy Potash, Inc.*,⁷⁷ the employer promulgated a policy in 1989, distributed it to its supervisors, asked them to read it to their crews and post it on employee bulletin boards.⁷⁸ After its initial implementation in 1989, the policy was ignored. When plaintiff Harrison began work for the company in 1992, she did not receive a copy of the policy, and it was not posted on the bulletin board in the changing room used by the women miners. The supervisor, who sexually assaulted Harrison on at least five occasions in May and June of 1993, admitted at trial that he heard no mention of the sexual harassment policy after 1989, and that the company never held seminars on sexual harassment.⁷⁹ Accordingly, the Tenth Circuit affirmed the jury verdict against the company under the first prong of the affirmative defense, finding that the

Circuit found not only that the employer, the U.S. Department of Defense, had an effective anti-harassment policy in place, but that the actions the employer took after plaintiff's two reports of sexual harassment demonstrated reasonable care. *See id.* The resolution of the case, however, did not rest on prong one of the affirmative defense, but on prong two. The Fourth Circuit ruled against the plaintiff because she "failed to avoid harm otherwise." *Id.* at 397. The plaintiff was sexually assaulted in a hotel room at a conference by a regional director from a distant location; she complained about the assault but told her supervisor she only wanted the harasser to apologize to her. *Id.* at 390-91. Six months later she encountered the harasser again at another conference, went out drinking alone with him and went back with him to his hotel room at midnight. *Id.* at 391. Again, he grabbed her, kissing and groping her. *Id.* The plaintiff complained a second time and the employer disciplined the harasser. *Id.* at 392. By her voluntary actions, the Fourth Circuit held that the plaintiff "utterly" and "unreasonably" failed to avoid harm. *Id.* at 397.

⁷⁴ *Barrett*, 240 F.3d at 265.

⁷⁵ *Id.* at 266.

⁷⁶ *Id.*

⁷⁷ 248 F.3d 1014 (10th Cir. 2001).

⁷⁸ *Id.* at 1027.

⁷⁹ *Id.* at 1027-28.

company had not exercised reasonable care in preventing sexual harassment.⁸⁰

A few courts have reversed or denied summary judgments for employers because questions of fact remained on prong one of the affirmative defense, necessitating a trial on the merits. In *Frederick v. Sprint/United Management Co.*,⁸¹ the employer issued several policies over a four-year period, with different directions on where employees should file harassment complaints.⁸² The plaintiff had actually complained to two different supervisors about her supervisor's harassment, but they took no responsibility for forwarding her complaint to the proper company office. A year later, the person responsible for enforcing the anti-harassment policy learned about the harassment, investigated the situation and terminated the harassing supervisor.⁸³ The Eleventh Circuit found that, under these facts, significant questions remained about whether the employer exercised reasonable care in preventing further harassment.⁸⁴ A key factor in the court's decision was the alleged one-year delay between the plaintiff's first attempts to notify her employer and the employer's eventual response.

In *Simon v. City of Naperville*,⁸⁵ the plaintiff was a new police officer being trained by a ranking officer, who immediately began harassing her. The district court denied summary judgment for the employing police department, finding that questions of fact remained regarding the employer's exercise of reasonable care in preventing further harassment from occurring.⁸⁶ Even though the city suspended the harassing supervisor for ten days after the police department investigated the harassment, the plaintiff had heard rumors of retaliation, that other officers would not back her up when she was on duty, and the department made it clear she might be assigned to work with the harasser in the future.⁸⁷

⁸⁰ *Id.* at 1028.

⁸¹ 246 F.3d 1305 (11th Cir. 2001).

⁸² *Id.* at 1314-15.

⁸³ *Id.* at 1310.

⁸⁴ *Id.* at 1315.

⁸⁵ 88 F. Supp. 2d 872 (N.D. Ill. 2000).

⁸⁶ *Id.* at 877.

⁸⁷ *Id.* See also *Robles v. Cox & Co.*, 154 F. Supp. 2d 795 (S.D.N.Y. 2001) (finding employer's "open door" policy, encouraging employees to complain to management, with no specific reference to sexual harassment, is not adequate to meet the standard of reasonable care).

The few decisions denying or reversing summary judgment for employers under prong one of the affirmative defense stand in stark contrast to the many decisions in the employer's favor. Despite language in *Ellerth* and *Faragher* about the need for employers to have effective prevention policies, federal courts have demonstrated little concern since 1998 for employers' efforts to prevent harassment. Instead of focusing on prevention—an employer's policies and actions taken before harassment occurs—the courts focus only on what an employer does after it learns of the harassment. Indeed, a recent study analyzed seventy-two hostile environment sexual harassment cases where employers moved for summary judgment based on the affirmative defense.⁸⁸ The study found that the judicial opinions were largely result-oriented, and employers won summary judgment in over 50% of the cases.⁸⁹ More importantly, the study shows that judges primarily focused on the employer's response to the sexual harassment allegations, shielding employers from liability if the judge believed the employer did as good a job as it could once it found out about the alleged harassment.⁹⁰

⁸⁸ 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, 1268-69, 1280 (2001). The authors studied all reported cases granting or denying summary judgment motions between June 1998 and January 2000.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1285-86, 1294. "Where employers assert an affirmative defense and seek a favorable summary judgment, courts appear to allow employers either to make or break their own cases." *Id.* at 1285.

As the authors point out, in both *Ellerth* and *Faragher*, the plaintiffs never complained to the employer about the harassment; they simply filed with the EEOC and sued in federal court. Consequently, the Supreme Court designed the affirmative defense to deal with cases where women never complained before suing. *Id.* at 1302. Therefore, the employers never took any action to deal with the harassment. So, no questions were raised about whether the employers' actions in those cases were prompt and appropriate in stopping the harassment. In the cases since 1998, the courts are basically collapsing the two-pronged affirmative defense into one basic question—did the employer act appropriately once it learned of the harassment?

One perceptive scholar has pointed out that the federal courts should not be using the affirmative defense at all in situations where the employer has learned about the harassment, whether from the victim or from other employees. See 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 (2001). When the employer learns about the supervisor's harassment, the employer should be directly liable for any harm that occurs resulting from the employer's negligence in responding to the harassment. *Id.* at 142. The affirmative defense should be used only in those cases where the harassment is unknown to the employer, and where the employer would only be vicariously liable for any harm to the plaintiff. The author acknowledges, however, that the federal courts are applying the affirmative defense to all supervisor hostile environment cases, regardless of whether the employer knows or does not know

Contrary to observers' expectations of the impact of *Ellerth* and *Faragher*, the authors of the study conclude that the existence of the affirmative defense in hostile environment cases changed the law very little from what it was before 1998. Courts are holding that the mere creation and dissemination of a policy is sufficient to meet an employer's duty of reasonable care.⁹¹ If the reasonable care requirement of prong one remains relatively easy for an employer to prove, what about prong two?

B. *Prong Two of the Affirmative Defense: What Reasons Justify a Woman's Failure to Complain?*

Through prong two of the affirmative defense, the Supreme Court imposed on women who suffer sexual harassment at work what amounts to a new "exhaustion" requirement. If an employer has a sexual harassment prevention policy, the target of harassment must now file a timely claim under that policy. Otherwise, her employer will likely escape liability in a subsequent lawsuit. Unless women become aware of this new requirement, many will lose their right to legal relief.⁹² In theory, the second prong gives a woman the chance to produce evidence that her fear of complaining was reasonable. In reality, however, under current federal court interpretations, women are losing their sexual harassment cases when they fail to complain to the employer before filing suit, or if they delay too long in telling the

about the harassment. *Id.* at 143, 145.

⁹¹ Sherwyn et al., *supra* note 88, at 1289-90. The statistical analysis of these seventy-two cases showed that more than 90% of employers had adopted a workplace harassment policy, but less than 70% had disseminated it to employees. *Id.* at 1280. Only 40% offered employees an alternative channel apart from their supervisor to report harassment. *Id.*

Commentators optimistically predicted that after *Ellerth* and *Farragher* employers would not prevail in summary judgment motions, that mere promulgation of a sexual harassment policy would not meet the standard of reasonable care and that plaintiffs who did not report harassment to the employer would survive summary judgment. *Id.* at 1268. See Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1548-58, 1588-89 (1999).

⁹² See Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 *WM. & MARY BILL RTS. J.* 755 (1999).

The average sexual harassment victim probably is not going to read *Ellerth* and *Faragher*, so she will never know that, if she wants to file a lawsuit later, she had better register a complaint with her employer first. By the time she consults a lawyer, she probably no longer will be working for the employer, and it will be too late.

Id. at 787.

employer about the harassment.⁹³ The federal courts are giving inadequate consideration to the reasons why many women fail to complain about sexual harassment in the workplace.

1. Vague and Subjective Fears Do Not Justify a Failure to Complain

It has been very difficult for women to justify to federal judges any failure to report sexual harassment to their employers. The federal courts have repeatedly held that vague and subjective fears of retaliation, including fear of losing her job, are not sufficient to make a woman's failure to complain reasonable. In *Barrett v. Applied Radiant Energy Corp.*,⁹⁴ plaintiff Barrett testified that she did not report her supervisor's harassment to any of the managers because she feared retaliation and doubted that her complaint would be taken seriously.⁹⁵ Barrett testified that her harassing supervisor was a good friend of the company's president, leading her to conclude that the company would not take measures against him. The Fourth Circuit, affirming a district court judgment overturning a jury verdict in the plaintiff's favor, ruled that a "generalized fear of retaliation" is not a

⁹³ Sherwyn, Heise and Eigen found that among the seventy-two cases they analyzed, 42% of the plaintiffs did not report the harassment to their employers before filing suit. Sherwyn et al., *supra* note 88, at 1280. In all of these cases, if the employer was able to prove prong one of the defense, the employer was also able to prove prong two. The authors concluded: "failure to report is tantamount to per se 'unreasonable' behavior in the federal courts' opinions." *Id.* at 1290. See also John 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 (2002). Professor Marks finds a third prong in the *Ellerth/Faragher* affirmative defense: "[I]f the plaintiff unreasonably failed to avoid harm, is the employer entitled to complete liability avoidance or just reduced damages? . . . would the reasonable [plaintiff] have [been able to] avoid[] all harm or just some [of the] harm?" *Id.* at 1421. He criticizes the federal courts for completely dismissing plaintiff cases on summary judgment without evaluating what portion of the harm the plaintiff could have avoided and what portion was unavoidable. Under *Ellerth/Faragher*, and tort principles of "avoidable consequences," employers should remain vicariously liable for any unavoidable harm to plaintiff. *Id.* at 1420-23, 1431-32, 1436-37.

⁹⁴ 240 F.3d 262 (4th Cir. 2001). For a discussion of the Fourth Circuit's first prong analysis in *Barrett*, see *supra* notes 72-76 and accompanying text.

⁹⁵ *Barrett*, 240 F.3d at 267. Barrett was severely harassed by her supervisor from June to November 1997. She first complained to the EEOC in October 1997. Once the company learned of the harassment in November of 1997, it investigated and then fired her supervisor within a week's time. *Id.* at 265. All of these events occurred prior to the Supreme Court's creation of the affirmative defense. Consequently, neither Barrett nor her attorney would have known that she had an obligation to complain to the company before she filed a charge with the EEOC.

reasonable basis for a plaintiff's failure to complain to management.⁹⁶ After pointing out that Title VII protects plaintiffs from retaliation for reporting harassment, the Fourth Circuit noted that Barrett presented no evidence that her employer had ever taken any adverse action against employees who had previously complained.⁹⁷

In addition, the court would not accept her argument that reporting sexual harassment would be futile because members of the company's management happened to be friends.⁹⁸ In the court's view, this would place an impermissible burden on small businesses, many of which are organized around existing friendships.⁹⁹ Addressing Barrett's plight, the court stated:

We acknowledge that discussing such matters as sexual harassment with company managers often puts the harassed employee in an awkward and uncomfortable situation. Nevertheless, this "inevitable unpleasantness" cannot excuse an employee from taking advantage of her employer's complaint procedure.¹⁰⁰

Barrett also argued that she failed to complain to management because she believed senior managers themselves had engaged in sexual harassment and had never been disciplined for it; therefore, management would likely ignore her complaints.¹⁰¹ The company denied the allegations of prior sexual harassment, but pointed out that, regardless of their merit, these rumors related to events that occurred five years before Barrett started working for the company and two years before the company adopted its sexual harassment policy.¹⁰² The Fourth Circuit agreed that these allegations were insufficient to relieve Barrett from her obligation to use the company's policy.¹⁰³

Given the facts of her case, however, Barrett stood little chance of convincing any court to take her fears seriously. As soon as the company learned of the harassment from a third party, it fired Barrett's harasser within a week.¹⁰⁴ Because the

⁹⁶ *Id.*

⁹⁷ *Id.* at 268.

⁹⁸ *Id.*

⁹⁹ *Barrett*, 240 F.3d at 268.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Barrett*, 240 F.3d at 267.

company acted so decisively and swiftly in investigating and ending the harassment, the Fourth Circuit affirmed the district court's ruling that the employer met its burden under the affirmative defense.¹⁰⁵

The Fourth Circuit similarly affirmed a summary judgment for the employer in *Matvia v. Bald Head Island Management, Inc.*,¹⁰⁶ dismissing all of plaintiff Matvia's reasons for failing to complain as inadequate.¹⁰⁷ The court seemed particularly impatient with Matvia's fears of retaliation from co-workers, even though those fears turned out to be accurate. Matvia's evidence detailed the ostracism and hostile comments from her co-workers that continued for two months after the company terminated her harassing supervisor, until Matvia eventually quit.¹⁰⁸ The court acknowledged that "[n]ot only is it embarrassing to discuss such matters with company officials, but after the harassed employee overcomes this hurdle she may have to deal with a negative reaction from co-workers."¹⁰⁹ Nevertheless, the Fourth Circuit held that an employee's duty to report harassment under Title VII "is so essential . . . that we 'have refused to recognize a nebulous fear of retaliation as a basis for remaining silent.'"¹¹⁰ If a woman harassed at work worries about retaliation for complaining, then the court concluded that she should simply bring a subsequent retaliation claim if her fears are realized: "The bringing of a retaliation claim [under Title VII], rather than failing to report sexual harassment, is the proper method for dealing with retaliatory acts."¹¹¹ The Fourth Circuit's suggestion is cold comfort for both plaintiffs and their attorneys who understand the difficulty of winning any type of Title VII claim in federal court.

Again, however, the Fourth Circuit's failure to take Matvia's fears seriously can be explained by the employer's swift action in terminating the harassing supervisor as soon as it learned of the harassment. The harasser himself told the

¹⁰⁵ *Barrett* is a good example of how the two prongs of the affirmative defense have been collapsed into a single issue. The court was primarily concerned with the question of whether the employer took prompt and appropriate corrective action as soon as it learned of the harassment.

¹⁰⁶ 259 F.3d 261 (4th Cir. 2001).

¹⁰⁷ *Id.* at 270.

¹⁰⁸ *Id.* at 266.

¹⁰⁹ *Id.* at 270.

¹¹⁰ *Id.* (quoting *Barrett*, 240 F.3d at 267).

¹¹¹ *Matvia*, 259 F.3d at 270.

employer about his unsuccessful attempts to kiss Matvia. He was immediately suspended without pay for four days and then terminated twelve days later.¹¹² Once an employer has taken such decisive action against a harasser, a plaintiff will have a very hard time bringing a successful Title VII sexual harassment suit.

Similar to these Fourth Circuit cases, the plaintiff in *Leopold v. Baccarat, Inc.*¹¹³ did not meet her burden of producing evidence that her subjective fears of complaining were based on anything other than her own belief.¹¹⁴ The Second Circuit defined a “credible fear” as a fear that is “based on more than the employee’s subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.”¹¹⁵ The court emphasized that plaintiffs bear only the burden of production, not the burden of persuasion, on the second prong of the affirmative defense.¹¹⁶ It held, however, that plaintiff Leopold failed to produce sufficient evidence:

Here, Leopold did not come forward with any such evidence, but instead simply asserted her apprehension that she would be fired for speaking up, and claimed generally that a co-worker’s vague and ambiguous complaint was not taken seriously. Such conclusory assertions fail as a matter of law to constitute sufficient evidence to establish that her fear was “credible”—that “her complaint would not be taken seriously or that she would suffer some adverse employment action.”¹¹⁷

Leopold alleged that her harassing supervisor made sexist comments toward her and the other saleswomen, and threatened to fire all of them and “replace them with ‘young and sexy’ hires.”¹¹⁸ Evidently, in the Second Circuit’s view,

¹¹² *Id.* at 268.

¹¹³ 239 F.3d 243 (2d Cir. 2001).

¹¹⁴ *Id.* at 246.

¹¹⁵ *Id.*

¹¹⁶ The Second Circuit explained:

Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

Id. at 246.

¹¹⁷ *Id.*

¹¹⁸ *Leopold*, 239 F.3d at 244.

threats to fire women because they are not young and sexually attractive do not translate into threats to fire someone for complaining about such harassment. Furthermore, the court did not deem these earlier threats sufficient to create an issue of material fact that would allow Leopold to survive summary judgment.

One court went so far as to hold that an actual threat by a harassing supervisor—a threat that he would terminate the woman if she complained—was not enough to justify her failure to complain. In *Sconce v. Tandy Corp.*,¹¹⁹ the federal district judge explained his decision as follows:

Of course, when a supervisor threatens termination an employee may reasonably fear retaliation. To be sure, harassing supervisors often threaten termination in order to intimidate and manipulate their victims. Effective complaint procedures are designed to protect against precisely such retaliatory conduct. They are intended to divest a harassing supervisor of any power he has over the victimized employee. It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection. . . . Evidence that procedures are administered fairly and that an employee is not required to report the misconduct to her harasser demonstrates the unreasonableness of the employee's conduct.¹²⁰

In *Sconce*, the employer had a sexual harassment prevention policy. The court simply assumed the policy was effective because it was published in the employee handbook and directed employees to submit complaints to one of three offices, including the director of employee relations.¹²¹ In a footnote, the court indicated that plaintiffs remain free to produce evidence of "particular circumstances" indicating that they behaved reasonably in failing to complain.¹²² In this case, however, Ms. Sconce produced no such evidence.¹²³ Consequently, the court granted her employer's motion for summary judgment.¹²⁴

In a handful of cases, federal courts ruled against employers on prong two of the affirmative defense when women were able to produce evidence of a "reasonable" fear, based on "objective" facts, justifying their failure to complain. In

¹¹⁹ 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 778 n.8.

¹²³ *Id.*

¹²⁴ *Sconce*, 9 F. Supp. 2d at 778 n.8.

Johnson v. West,¹²⁵ the Seventh Circuit reversed a lower court's bench trial judgment for the employer on the basis that the employer had not proven prong two of the affirmative defense.¹²⁶ Michelle Johnson was the secretary for Karl Williams, chief of police at a Veterans Administration hospital. Shortly after she began work for Williams, he began his campaign of sexual harassment, including unwelcome sexual intercourse, sexual touching and later, after Johnson began dating another man, verbal abuse.¹²⁷ During her first year of probationary employment, she did not report any of this abuse.¹²⁸ Toward the end of that year, she told a co-worker about the harassment, and this co-worker encouraged her to report it to one of the employer's Equal Employment Opportunity officers.¹²⁹

Eventually, a year-and-a-half after Johnson began working for Williams, she reported the harassment to the director of the hospital.¹³⁰ Four months later, the hospital transferred Johnson out of Williams's office. At the end of another five months, the hospital removed Williams as chief of police, and restored Johnson to her original job.¹³¹ The trial court ruled in favor of the hospital on the hostile environment affirmative defense, finding that it had a sexual harassment prevention policy in place, and investigated and responded adequately to Johnson's complaint once she filed it, thereby exercising "reasonable care" to prevent or correct sexual harassment.¹³²

The Seventh Circuit reversed, however, because the district court made no finding on whether Johnson's failure to complain was reasonable. There was evidence at trial that Williams had threatened and intimidated Johnson, convincing her that because she was a probationary employee, she would lose her job if she took any action against him.¹³³ Johnson also presented evidence at trial that she was under severe emotional and psychological stress as a result of the

¹²⁵ 218 F.3d 725 (7th Cir. 2000).

¹²⁶ *Id.* at 727-28, 732.

¹²⁷ *Id.* at 728.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Johnson*, 218 F.3d at 728.

¹³¹ *Id.* at 729.

¹³² *Id.* at 731.

¹³³ *Id.* at 732.

harassment.¹³⁴ Her co-workers testified that she appeared fearful and introverted while she was working for Williams.¹³⁵ The Seventh Circuit held that these factual issues raised the possibility that Johnson's failure to complain at an earlier point in time was reasonable, which would defeat the VA's affirmative defense to the hostile environment claim.¹³⁶ Consequently, the case was remanded for further proceedings.¹³⁷

Testimony from co-workers in support of a plaintiff's fears seems to be critical to survive summary judgment. In another case, a federal district court denied an employer's motion for summary judgment under prong two of the affirmative defense, despite the plaintiff's failure to complain in a timely way. The plaintiff testified that co-workers told her, based on their own experiences, that the company's human resources department would fail to act on any sexual harassment complaint she filed and that she would be subjected to retaliation.¹³⁸ The plaintiff supported her statement with an affidavit from a co-worker. In addition, the record contained evidence that the harassing supervisor expressly threatened the plaintiff's job when she rejected his sexual advances.¹³⁹ The court held that, under these circumstances, the plaintiff's fear of reporting the harassment may have been "objectively" reasonable, and that the issue of reasonableness under prong two was one for the jury to decide.¹⁴⁰

In a third case, *Frank v. Plaza Construction Corp.*,¹⁴¹ plaintiff Frank was sexually harassed by the company's CEO. Frank testified that she failed to report the CEO's conduct because she felt there was no one in the company to whom she could turn, and that "[she] would be fired if [she] reported his

¹³⁴ *Id.*

¹³⁵ *Johnson*, 218 F.3d at 732.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Maple v. Publ'ns Int'l, Ltd.*, No. 99-C-6936, 2000 WL 1029112, at *5 (N.D. Ill., July 25, 2000).

¹³⁹ *Id.*

¹⁴⁰ *Id.* See also *Anderson v. Deluxe Homes, Inc.*, 131 F. Supp. 2d 637, 651 (M.D. Pa. 2001). Plaintiff may have had a reasonable fear of retaliation that prevented her from complaining; other employees had informed her that she would lose her job if she complained. This is an issue for a jury and cannot be decided on summary judgment.

¹⁴¹ 186 F. Supp. 2d 420 (S.D.N.Y. 2002).

conduct."¹⁴² In addition, Frank alleged that she complained to three managers at the company about other executives' inappropriate sexual remarks, and they not only ignored her complaints, but became more hostile to her.¹⁴³ In response to the employer's motion for summary judgment, the district court suggested that the harasser's high-ranking status in the company may be enough by itself to create a jury question on whether plaintiff's fear of complaining was reasonable.¹⁴⁴ The harasser's position of authority, combined with the lack of support Frank received from the other managers when she complained about other incidents of harassment, was sufficient evidence for the court to deny the employer's summary judgment motion on the affirmative defense.¹⁴⁵

Despite these few cases where courts considered a woman's failure to complain in a timely fashion justifiable, the federal courts are generally giving short shift to plaintiffs' claims. In analyzing all reported federal decisions on summary judgment from 1998 to 2000, commentators Sherwyn, Heise and Eigen found that women lost on summary judgment in every case where they failed to report the harassment and the employer had met the first prong of the affirmative defense.¹⁴⁶ A high percentage of the cases studied involved plaintiffs who feared complaining to their employers, but the plaintiffs were unable to convince the courts to take their fears of retaliation seriously.¹⁴⁷ The authors concluded, as many courts have since held, that plaintiffs will have to produce "objective" evidence, not just "subjective" fears of reprisal, to justify a failure to complain.¹⁴⁸ Otherwise, plaintiffs will lose on summary judgment.

¹⁴² *Id.* at 430.

¹⁴³ *Id.* at 431.

¹⁴⁴ *Id.* at 430.

¹⁴⁵ *Id.* at 431.

¹⁴⁶ Sherwyn et al., *supra* note 88, at 1286.

¹⁴⁷ Employees failed to report the harassment to the employer in twenty-eight (39%) of the seventy-two cases studied. Employers won on summary judgment in twenty of those cases. In the remaining eight cases, the employer had not met the requirements of prong one of the affirmative defense. *Id.*

¹⁴⁸ *Id.* at 1291.

2. Courts Mistakenly Deem a Request for Confidentiality as a Failure to Complain

Under the holdings of recent cases, plaintiffs will also be in danger of having their cases dismissed on summary judgment if they complain, but request confidentiality. Federal judges are likely to hold that "confidential" reports are the same as no report at all. Some courts have equated a request for confidentiality with an "unreasonable" failure to complain. This is ironic because courts often mention the promise of confidentiality in an employer's policy as a positive factor in demonstrating the employer's reasonable care.¹⁴⁹

Requests for, and promises of, confidentiality are common in sexual harassment prevention practice, no doubt due to the sexual nature of the workplace misconduct. Talking about sexual activity in a professional or other type of workplace environment is very difficult for most people, because we regard sexual issues as intensely private.¹⁵⁰ When the sexual harasser is one's supervisor, it becomes even more difficult to complain given the inherent power imbalance. Women often ask that their complaint be kept confidential out of fear or embarrassment.¹⁵¹ They somehow think that a

¹⁴⁹ See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001); *Hill v. Am. Gen. Fin. Inc.*, 218 F.3d 639, 646 (7th Cir. 2000) (Wood, J., dissenting in part).

A request for confidentiality should be distinguished from an anonymous complaint. If an employer maintains an anonymous "hot line," women can call the hot line and get advice about their situation without identifying themselves or where they work in the organization. If the complaint is anonymous and the caller does not identify the alleged harasser, the employer is under no obligation to respond to that particular situation. If the caller identifies the harasser, however, the employer is on notice of possible harassment and may be required to investigate or take some other action.

Many plaintiffs complain in person; their complaints are not anonymous. Yet, they are afraid and want to limit the consequences of coming forward. The plaintiff requested confidentiality for this reason in *Hooker v. Wentz*, 77 F. Supp. 2d 753, 758 (S.D.W.Va. 1999). The plaintiff's request, and the employer's willingness to honor her request, became an important factor in her failure to prove hostile environment sexual harassment under the Supreme Court's new affirmative defense. *Id.* at 758. See discussion *infra* notes 179-90 and accompanying text.

¹⁵⁰ See Sally Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 44 (2000). "Traditionally, anything to do with sexuality has been seen as belonging to the private, domestic sphere because it concerns intimate, personal relationships." *Id.* at 44. Establishing sexual harassment as a recognizable employment discrimination claim was a groundbreaking event because it transferred these issues of sexuality from the private sphere into the public sphere of the economic marketplace. *Id.* at 44-45.

¹⁵¹ See *supra* notes 36-41, and accompanying text.

request for confidentiality will help protect them from retaliation or further harassment.

In drafting sexual harassment prevention policies, employers often promise confidentiality, in part, to encourage women to come forward with complaints. In addition, both complainants and employers rely on the strong tradition in American employment of attaching confidential status to personnel issues.¹⁵² Furthermore, employers have every incentive to keep sexual harassment complaints as confidential as possible, to avoid "disruption" of the work force, the normal distraction from work that occurs when serious or out-of-the-ordinary events happen and employees find out about them.

Despite employers' interests in minimizing workplace knowledge of sexual harassment incidents, complete confidentiality has not been possible under the law since 1980. In its initial 1980 Guidelines on sexual harassment, the EEOC directed employers to take "immediate and appropriate corrective action" to stop sexual harassment between employees.¹⁵³ This means that employers are obligated to act as

¹⁵² This tradition, however, may be breaking down. Recent cases demonstrate the difficulty and risks employers face when trying to impose confidentiality rules on employees. In a wrongful discharge case, the California Court of Appeals held that an employer violated public policy when it discharged a marketing director for discussing bonus payments with other employees. In *Grant-Burton v. Covenant Care, Inc.*, 122 Cal. Rptr. 2d 204 (Cal. Ct. App. 2002), the court cited a California statute prohibiting discharge because an employee "discloses the amount of his or her wages." *Id.* at 213. Other sources of public policy relied on by the court to find the discharge wrongful were federal and state labor laws protecting employees from discrimination because of their concerted activities in discussing terms and conditions of employment with each other. *Id.* at 214-16.

In several sexual harassment cases, courts have criticized employers and found retaliation when employers took adverse action against victims of harassment after the victim violated the employer's request not to discuss the harassment with anyone else. See *Maple v. Publ'ns Int'l, Ltd.*, No. 99-C-6936, 2000 WL 1029112, at *9 (N.D. Ill., July 25, 2000). See also *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 133, 136 (2d Cir. 2001) (finding employer negligence in failing to prevent the rape of flight attendant by another flight attendant; the finding was predicated, in part, on management's warning to an earlier rape victim not to tell any other flight attendants about her rape by the same male employee).

¹⁵³ See EEOC Sexual Harassment Guidelines, 11 C.F.R. § 1604.11(d) (1980). This Guideline was written as an affirmative defense for employers to avoid liability for sexual harassment between co-workers:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Id.

This language requiring "immediate and appropriate corrective action" was repeated in subsection (e) covering possible employer liability for acts of non-employee third parties, such as customers or clients.

soon as they learn about the harassment.¹⁵⁴ If employers must do something, obviously employees are going to notice whatever action is taken. The Supreme Court's new affirmative defense reinforces the 1980 EEOC Guidelines by putting the burden of persuasion on the employer to prove that it has "exercised reasonable care to . . . correct promptly any sexually harassing behavior" of which it has notice.¹⁵⁵

This creates a difficult dilemma for employers. One court acknowledged this "catch-22 situation," noting that the employer would be risking a finding of liability if it honored a complainant's request for confidentiality: "If an alleged victim of sexual harassment asks a person of authority . . . to keep it confidential, and the employer attempts to reduce the emotional trauma on the victim by honoring her request, it risks liability for not quickly and effectively remedying the situation."¹⁵⁶

Other courts, however, have not held employers to the EEOC's announced standard for taking prompt and effective action to end harassment, and some have even allowed a plaintiff's request for confidentiality to eliminate the employer's liability. In a case decided before the Supreme Court created the new affirmative defense in 1998, the Second Circuit upheld summary judgment for the employer, based upon the woman's request for confidentiality, despite the fact that the employer learned of the harassment from other employees.

¹⁵⁴ In *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000), as part of its ruling against an employee's claim that he was improperly investigated for possible sexual harassment, the Second Circuit stated:

[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer. . . . Nor is the company's duty to investigate subordinated to the victim's desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at the victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.

Id. at 105-06. See further discussion of *Malik* *infra*, notes 305-326 and accompanying text.

¹⁵⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). See also HAROLD S. LEWIS & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 70-71 (2001).

¹⁵⁶ *Gallagher v. Delaney*, 139 F.3d 338, 348 (2d Cir. 1998). In *Gallagher*, the court of appeals reversed summary judgment for the employer, ruling that a factual dispute over the plaintiff's alleged request for confidentiality and employer's failure to talk to the alleged harasser about the plaintiff's complaint was a matter for the jury in deciding liability.

In *Torres v. Pisano*,¹⁵⁷ plaintiff Torres, a Puerto Rican woman employed by New York University, suffered silently for three years in a hostile environment created by her supervisor Coe's derogatory ethnic and sexual remarks.¹⁵⁸ Torres's co-workers told Mr. Pisano, a higher level supervisor, about the harassment.¹⁵⁹ Pisano called Torres into his office and suggested that she file a written complaint.¹⁶⁰ Torres did nothing. Three or four months later, Pisano asked her again to file a written complaint.¹⁶¹ One month later, Torres finally wrote to Pisano, apologizing for not writing sooner: "It has taken me quite a while to gather courage and strength to begin this letter. . . . I have never felt so intimidated by anyone until I started working for Mr. Eugene Coe."¹⁶² After describing only a few specific allegations, and a few general ones, she ended the letter by requesting confidentiality: "Len, I hope and ask you to please keep this confidential until we both speak about this matter."¹⁶³ She sent a second letter three days later with more details, and then met with Pisano one or two weeks later, again requesting him "to keep this confidential."¹⁶⁴ Three months later, after further meetings with management, Torres was transferred to another position while Coe was on vacation.¹⁶⁵ The university eventually investigated the situation, and terminated Coe one year after Torres's initial meeting with Pisano.¹⁶⁶

In Torres's subsequent lawsuit, the trial court granted NYU's summary judgment motion, finding that it could not be held liable for Coe's harassment of Torres. The Second Circuit upheld the trial court's decision on the ground that NYU's and Pisano's failure to act immediately upon learning of the harassment was reasonable given Torres's request for confidentiality.¹⁶⁷ Judge Calabresi described the issue as follows:

¹⁵⁷ 116 F.3d 625 (2d Cir. 1997).

¹⁵⁸ *Id.* at 628.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Torres*, 116 F.3d at 628.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 629.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Torres*, 116 F.3d at 638-39.

We . . . have before us a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she had been enduring, but specifically asked the supervisor to whom she complained to keep the matter confidential and to refrain from taking action until a later date. Does a supervisor breach his duty to remedy the harassment by honoring the employee's request? That is not a question that we can answer categorically. Its resolution will vary from case to case.¹⁶⁸

According to Judge Calabresi, in some circumstances, the supervisor would be required to act, despite a complainant's request for confidentiality, but not in this case.¹⁶⁹ Here, according to the judge, there were no allegations that Torres suffered any physical or psychological harm.¹⁷⁰ There were no allegations that other employees were being subjected to the same hostile environment.¹⁷¹ The Second Circuit concluded that Pisano behaved reasonably in honoring Torres' request for confidentiality. Therefore, even though Pisano did nothing for months, NYU was not liable for the breach of any duty to protect Torres from further harassment.¹⁷²

The Second Circuit issued its opinion in *Torres* one year before *Ellerth* and *Faragher*, at a time when liability issues were in great flux among the federal courts of appeal.¹⁷³ If the Second Circuit decided *Torres* under the Supreme Court's new affirmative defense, perhaps it would have reached a different result.¹⁷⁴ The first issue would have been whether or not the

¹⁶⁸ *Id.* at 639.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The court failed to note that Torres was the only woman working for Coe, making it most unlikely that any other employees working under Coe would have complained. The other twenty-nine employees he supervised were all men, and presumably, not of Puerto Rican ancestry. *Id.* at 628, 639. The court seemed oblivious to this fact, and never took it into account in analyzing the impact of the harassment on Torres. *See, e.g., id.* at 632-33.

¹⁷² *Torres*, 116 F.3d at 639.

¹⁷³ See the Court's discussion in *Ellerth* of the eight separate opinions produced by the Seventh Circuit en banc in discussing the *Ellerth* situation on appeal. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 749-51 (1998). *See also* HERMA HILL KAY & MARTHA S. WEST, *SEX-BASED DISCRIMINATION* 837-838 (4th ed. 1996).

¹⁷⁴ One scholar argues that the *Ellerth/Faragher* affirmative defense should not apply at all to this type of case. *See* George, *supra* note 90. George divides supervisor hostile environment cases into two kinds: (1) where the employer knew about the harassment and, therefore, would be directly liable for the harassment; and (2) where the harassment was unknown to the employer, and, therefore, the employer would be vicariously liable for the harassment. The *Ellerth/Faragher* affirmative defense should be used only for the second category of cases. *Id.* at 142. As the author acknowledges, however, the federal courts are erroneously applying the affirmative

employer "exercised reasonable care" to end promptly the sexually harassing behavior. In *Ellerth* and *Faragher*, the Court emphasized the importance of an employer's promulgation of a complaint procedure with guidance to employees on filing complaints with someone other than their own supervisor.¹⁷⁶ The purpose of the affirmative defense was to encourage employees to complain, so that employers would have notice of the harassment. In *Torres*, the employer received notice from one of Torres's co-workers; the employer knew the harassment was occurring before Pisano asked Torres to file a written complaint.¹⁷⁶ The Court's opinions in *Ellerth* and *Faragher* created an inference that the employer must act as soon as it learns that an employee is being harassed. The employer cannot wait for a plaintiff's permission to correct the problem if a manager already knows it is serious. Even before 1998, however, a better application of the legal obligation to stop sexual harassment would have been for the *Torres* court to recognize that NYU's duty to stop the harassment arose before Torres requested confidentiality.

Under the post-1998 framework, the second issue in *Torres* would be whether Torres's fear of her supervisor, coupled with the lack of adequate protection from retaliation for complaining, made her request for confidentiality "reasonable" or "unreasonable." It is particularly disturbing that the Second Circuit considered the fear and intimidation experienced by Torres to be grounds for rejecting the liability of her employer, who failed to act for over nine months.¹⁷⁷ The Second Circuit found that Torres did not suffer from psychological harm, but the facts seem otherwise. Torres wrote letters to Pisano describing how distressed she was and how difficult it was to find the "courage" to complain.¹⁷⁸ When a plaintiff like Torres is clearly intimidated and afraid, the employer should be required to take stronger and more effective steps to end the harassment immediately. In situations like this, an employer should not be absolved of responsibility. Torres's own fears, expressed in her request for

defense to both types of supervisor hostile environment cases. *Id.* at 143, 145.

¹⁷⁶ *Ellerth*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 806, 808-09 (1998).

¹⁷⁶ *Torres*, 116 F.3d at 628.

¹⁷⁷ Although Pisano heard about the harassment from co-workers in the fall of 1993, NYU did not move the plaintiff away from the harasser until July of 1994. *Id.* at 629.

¹⁷⁸ *Id.* at 628.

confidentiality, should not have been a bar to the employer's liability.

Since 1998, courts continue to rely on the Second Circuit's holding in *Torres*, allowing employers to honor a plaintiff's request for confidentiality, and then using a confidentiality request to justify an employer's failure to take prompt and effective measures to end the harassment. Other courts penalize plaintiffs for requesting confidentiality by viewing the request as a failure to complain.

In *Hooker v. Wentz*,¹⁷⁹ plaintiff Hooker never filed a written complaint about her supervisor's harassment under the company's sexual harassment policy, which was contained in its Policy Book and posted in all employee work and break areas.¹⁸⁰ According to the district court, Hooker's employer, United Parcel Service ("UPS"), first learned about the harassment when she filed her federal court complaint.¹⁸¹ Although Hooker never filed a formal internal company complaint under the UPS policy, she did speak to part-time supervisor Bryant about "certain comments" Wentz had made to her.¹⁸² At the same time, Hooker asked Bryant "to keep their conversations private."¹⁸³ The trial judge commented, "[she] did not ask him to report it to higher authorities," implying that this supervisor had no obligation to report Hooker's information to the proper human resources office unless she specifically requested this action. Citing *Torres*, the judge concluded that "in maintaining Hooker's confidence, Bryant did not breach his duty to remedy the harassment."¹⁸⁴ Bryant was unaware that Wentz was harassing any other employees, and Hooker told Bryant only about some of Wentz's comments, not about the physical sexual touching and explicit propositions.¹⁸⁵ Therefore, the court concluded, "the law will not presume that persons protected by Title VII cannot make reasonable

¹⁷⁹ 77 F. Supp. 2d 753 (S.D.W.Va. 1999).

¹⁸⁰ *Id.* at 757.

¹⁸¹ *Id.* at 757, 758. Actually, the employer would have received notice of the plaintiff's claim when she filed with the EEOC, a prerequisite for filing a federal court complaint under Title VII. 42 U.S.C. § 2000e-5(f) (2000). Section 2000e-5(b) requires the EEOC to notify the employer within ten days that plaintiff has filed a discrimination charge with the agency.

¹⁸² *Hooker*, 77 F. Supp. 2d at 757.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 758.

¹⁸⁵ *Id.*

decisions for themselves about how best to proceed with their harassment claims.”¹⁸⁶

The court found that UPS “exercised reasonable care” by promptly correcting any sexually harassing behavior, and that the plaintiff “unreasonably failed to take advantage of” the employer’s corrective opportunities.¹⁸⁷ Hooker testified that she did not ask Bryant to report the harassment because Wentz “had a bad temper” and she was afraid of losing her job.¹⁸⁸ The court did not take her reasons for requesting confidentiality seriously: “A plaintiff’s subjective fears of confrontation or retaliation do not, however, alleviate the duty to take advantage of an effective anti-discrimination complaint procedure provided by the employer. . . . Allowing Hooker to circumvent the reasonable complaint requirements would eviscerate the affirmative defense crafted by the Supreme Court.”¹⁸⁹ Again, the court ignored the fact that Hooker gave notice to her employer of her harassment by Wentz when she talked to supervisor Bryant. The court discounted this notice because she requested that Bryant “keep it private.” Thus, the court used Hooker’s request for confidentiality based on her fear of retaliation as a reason to defeat her entire legal claim. Notably, the court found no obligation on the part of Bryant to do his own investigation and determine if any other employees were being harassed.¹⁹⁰ Significantly, the court decided *Hooker* on summary judgment, where the constrained nature of the proceedings make it very difficult for a federal judge to have any sense of the level of fear a plaintiff might have in requesting confidentiality.

Based on the results in *Torres*, *Hooker* and other cases finding plaintiffs unreasonable for failing to complain, it is clear that federal judges need substantial education about the difficulty women face in reporting sexual harassment and why they request confidentiality. Only if federal judges become aware of the many studies documenting the high degree of underreporting, and the realistic fear of retaliation and adverse consequences limiting a complainant’s future job prospects,¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ *Hooker*, 77 F. Supp. 2d at 758.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ The issue of whether the employer had “knowledge” of the harassment is crucial. See George, *supra* note 90, at 150-54.

¹⁹¹ See *supra* notes 36-41 and accompanying text.

will these judges be able to apply correctly the standard of "reasonableness" when a plaintiff requests confidentiality. Since 1980, the law has required employers to take prompt corrective action as soon as they learn about sexual harassment.¹⁹² Therefore, courts should not regard a plaintiff's request for confidentiality as a failure to complain, or as an excuse for an employer's failure to act.

The EEOC offered employers advice on how to deal with confidentiality requests in its 1999 Guidance on Vicarious Employer Liability.¹⁹³ The EEOC suggests that employers offer confidentiality "to the extent possible," but reminds employers that they cannot guarantee complete confidentiality given their obligation to conduct an effective investigation. Information about the allegation of harassment "should be shared only with those who need to know about it."¹⁹⁴ Noting the conflict between an employee's request for confidentiality and the employer's duty to act, the EEOC recommends employer action, because the employer has a duty to prevent and correct harassment.¹⁹⁵ Inaction by a supervisor who learns of harassment, therefore, exposes the employer to liability. The EEOC also advises employers to instruct their supervisors to report any harassment to appropriate company officials, regardless of whether a proper complaint has been filed under the company's anti-harassment policy.¹⁹⁶ Contrary to the reasoning in *Torres* and *Hooker*, in the EEOC's view, a plaintiff's request for confidentiality should provide no basis for limiting the employer's liability.

Recognizing an employer's obligation to investigate, the Ninth Circuit approved an employer policy that promises complainants only limited confidentiality.¹⁹⁷ Limited-

¹⁹² See EEOC Sexual Harassment Guidelines, § 1604.11(d) & (e) (1980).

¹⁹³ 1999 Guidance, *supra* note 14.

¹⁹⁴ *Id.* at 7,664.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 7,667-68. "[D]ue care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome." *Id.* at 7,668. Employers should not wait for an internal complaint to be filed.

¹⁹⁷ Such a limited confidentiality provision was included in a sexual harassment prevention policy accorded deference by the court in upholding an employer's successful defense of a sexual harassment claim in *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999). AGCO's policy provided that "all information regarding any specific incident will be kept confidential within the necessary boundaries of the fact-finding process." *Id.* at 862 n.5. *Montero* is discussed *infra* notes 329-37 and accompanying text.

In administering the sexual harassment prevention program at the

confidentiality anti-harassment policies are particularly sound when coupled with effective policies that also reassure complainants that they are protected from retaliation for telling the employer about the harassment.¹⁹⁸ As several practitioners point out, it may be impossible for employers to maintain strict confidentiality while also conducting a proper investigation into harassment claims.

In stressing the need for immediate and thorough investigations, one management attorney commented that it is difficult to maintain a balance between doing a fair and complete investigation and keeping information confidential: "when you start asking questions, people are going to obviously figure out what's going on."¹⁹⁹ Another management attorney agrees that during an investigation, co-workers will become aware that something out of the ordinary is taking place, but she warned that employers must not allow the investigation "to consume the entire workplace . . . employers [should] warn all involved parties that the matter is not 'a public event.'"²⁰⁰ Acknowledging that employers cannot "gag" employees, a third management representative urges investigators to minimize

University of California, Davis, the sexual harassment education advisor tells a potential complainant that once the advisor receives information identifying a possible harasser, the campus may be obligated to take action. Therefore, confidentiality is possible only if discussion is nonspecific and information sufficient to identify the alleged harasser is not disclosed. UNIV. CAL. DAVIS POLICY & PROCEDURE MANUAL § 380-12, VII (2001), available at <http://www.mrak.ucdavis.edu/web-mans/manuals.htm> (last visited Sept. 13, 2002). The university seeks to reassure complainants that once a possible harasser is identified:

[confidentiality and privacy] cannot be guaranteed, but will be protected to as great a degree as is legally possible. While the expressed wishes of the complainant regarding confidentiality will be considered, they must be weighed against the responsibility of the University to act upon the information and the right of the charged party to receive information about the allegations.

Id.

The University of California, Davis is a public employer. Consequently, any employee accused of sexual harassment at work has constitutional due process rights requiring notice and an opportunity to defend against any allegations of misconduct before discipline may occur. The university's policy, therefore, specifies that even during an informal resolution process, the "charged party" has a right to the name of the complainant and the charge. *Id.* If a formal complaint or grievance is filed against a harasser, more elaborate procedures are followed.

¹⁹⁸ See 42 U.S.C. § 2000e-3(a) (1996), also known as § 704(a) of Title VII. AGCO's policy assured potential complainants that "no reprisals against the employee reporting the allegation of sexual harassment will be tolerated." *Montero*, 192 F.3d at 862 n.5.

¹⁹⁹ See Simon Nadel, *Thorough Examination of Complaints Is Not Without Pitfalls, Experts Warn*, 162 LAB. REL. REP. (BNA) 329, 331 (Nov. 15, 1999) (remarks of John M. Husband).

²⁰⁰ See *id.* (remarks of Barbara Berish Brown).

the intrusiveness of any investigation and emphasize to each witness interviewed the need to be discreet: "Instead of threatening witnesses into keeping the matter quiet, investigators should inform them that it is in everyone's interest to keep the information as confidential as possible."²⁰¹

The federal courts must begin to apply the Supreme Court's affirmative defense in an even-handed way, without denying plaintiffs their rights to recovery because they request confidentiality when complaining to employers. A confidential complaint is still a complaint, putting the employer on notice and triggering the employer's obligation to take action. An employer should not be able to insulate itself from liability by an over-generous promise of confidentiality to a frightened victim of harassment.

As the foregoing analysis of recent cases reveals, federal courts are allowing employers to easily escape liability for workplace sexual harassment. At the root of this problem is the courts' reluctance to require evidence that employers' anti-harassment policies are actually effective. The next section offers a proposal to increase the effectiveness of prevention policies.

III. A PROPOSAL TO INCREASE THE EFFECTIVENESS OF AN EMPLOYER'S PREVENTION POLICY

To effectively prevent sexual harassment, the federal courts must reinterpret the affirmative defense to require stronger action from employers to address women's fears of retaliation for filing complaints. Telling women they have the right to file retaliation claims once their fears are realized and they lose their jobs does nothing to encourage women to trust their employers. Employers must take concrete action and demonstrate effective results before women will take the risk of complaining about harassment.

Under Title VII, courts should require an employer to demonstrate the effectiveness of its prevention policy by documenting for employees the actions it took in addressing prior sexual harassment complaints. Furthermore, the employer should provide information about the resolution of prior complaints to employees on a regular basis. These steps would communicate to women that their fears are, in fact,

²⁰¹ See *id.* (remarks of Jan Duffy).

unreasonable, and that they should be willing to report harassment in a timely fashion. If employers do not voluntarily release information to employees about the resolution of prior complaints, plaintiffs' attorneys should seek such information in future cases in order to evaluate the effectiveness of employer procedures and to challenge an employer's claim of reasonable care under the affirmative defense.

A. *Require an Employer to Release Aggregate Data to Employees About the Resolution of Prior Sexual Harassment Complaints*

Currently, few employers release any information to employees about the existence or resolution of workplace complaints, including sexual harassment complaints. Since the affirmative defense obligates women to complain, however, information about the fate of prior complaints is crucial. To give women confidence in the employer's complaint procedures, employers should be required to publish, on a regular basis, an aggregate listing of prior sexual harassment complaints and what remedial action the employer took to resolve the complaints. Providing data on an annual basis would demonstrate an employer's willingness to "promptly correct" any sexual harassment problems. In turn, this information would increase women's courage and would assist them in overcoming their fears of complaining. It would also help prevent future sexual harassment, deterring would-be harassers by informing them that such behavior could result in discipline or discharge. This annual report should delete any identifying information, to protect both the complainant's and any alleged harasser's identities.²⁰² To give employees sufficient information to evaluate the report, however, it should describe the type of harassment that occurred and the steps the employer took to end the harassment.

Language in both *Ellerth* and *Faragher* supports such a policy. In creating the affirmative defense in *Ellerth*, the Court relied on Title VII policy to encourage the creation of anti-harassment policies and "effective grievance mechanisms."²⁰³ In

²⁰² Obviously, such an aggregate report would be possible only by large employers. If the workplace is small, with less than fifty employees, even with an "aggregate" report, the identities of complainants and alleged harassers would probably become known.

²⁰³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

Faragher, Justice Souter justified limiting employer liability where the employer has provided a “proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense.”²⁰⁴

On what basis is a court to decide if an employer’s anti-harassment policy is “effective,” or has “proven” to be effective? As time goes by, employers will be obligated to produce some past history on how they handled previous sexual harassment claims, particularly if women testify about facts that undermine the alleged effectiveness of employer policies. Although few such fact patterns have appeared in federal cases, in time more plaintiffs will testify that they “reasonably” failed to complain because other women complained and either nothing was done to stop the harassment, or they suffered adverse employment consequences. If employers want to continue benefiting from the affirmative defense, they will need to show more than the simple existence of an anti-harassment policy and occasional employee training. They will need concrete data on the resolution of prior complaints.

Despite the Supreme Court’s current reliance on published anti-harassment procedures, women need stronger assurances to come forward and complain about sexual harassment at work. Many employers conduct training programs for supervisors and employees on the prevention of sexual harassment. Studies indicate, however, that employee training and education programs are not effective in changing employee/supervisor attitudes.²⁰⁵ In the area of sexual harassment training, in particular, studies found mixed results, offering only weak support for the theory that trainees will translate what they learn in a training program into the actual work environment.²⁰⁶ More alarming, some studies demonstrated that training programs that raise controversial issues, such as sexual harassment, can actually increase employee hostility, misunderstandings and backlash against presumably protected groups.²⁰⁷ Over time, employers will not

²⁰⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

²⁰⁵ Professor Susan Bisom-Rapp, in *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 (2001), documents at length the inadequacy of employee training programs in reducing discriminatory attitudes of supervisors and other employees.

²⁰⁶ *Id.* at 35, 37-38.

²⁰⁷ *Id.* at 40-41.

be able to rely on the simple existence of harassment prevention and training programs; they will have to demonstrate results.

Both management attorneys and the EEOC advise employers to keep detailed records of their responses to harassment complaints.²⁰⁸ The purpose of such records is to help employers prove they have taken the steps necessary to mount a successful affirmative defense in case an employee sues for sexual harassment. An important benefit of this record-keeping system is that this information could be used to foster employees' trust in the employer by demonstrating that the employer is serious about enforcing its policy against sexual harassment. Assuming employers act on the advice given to them by their attorneys and the EEOC, employers currently have the information from which to craft meaningful reports to employees on the actual enforcement of sexual harassment prevention programs. Assuming most large employers already track such information, courts would not be placing an undue burden on employers by requiring the collation and dissemination of this information to employees.

An annual report on the number, type and resolution of sexual harassment complaints would assist the employer in changing workplace norms to reduce the number and severity of sexual harassment incidents as well as other forms of discrimination against women.²⁰⁹ When internal dispute resolution processes remain highly individualized and private, they provide no opportunity for learning, or for change within a private company or public institution.²¹⁰ Internal systems that remain confidential frustrate "the development of shared understandings of public norms and knowledge of effective remedial responses."²¹¹ Professor Susan Sturm suggests that to

²⁰⁸ See, e.g., Steven D. Baderian et al., *Managing Employment Risks in Light of the New Rulings in Sexual Harassment Law*, 21 W. NEW ENG. L. REV. 343 (1999). "An employer should keep a complete record of its preventive programs, . . . all complaints received and investigated, and any remediation efforts taken." *Id.* at 367.

The EEOC in its Guidance on sexual harassment liability advises employers to keep records of all harassment complaints: "Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures." 1999 Guidance, *supra* note 14, at 7,668.

²⁰⁹ Workplace norms are significant in predicting whether sexual harassment will occur. See Beiner, *Sex, Science and Social Knowledge*, *supra* note 37, at 294-300.

²¹⁰ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 545 (2001).

²¹¹ *Id.* at 545.

address the entrenched nature of workplace bias, courts should encourage employers "to develop the capacity to evaluate their own systems, rewarding employers who do so."²¹² Employers have been on notice since 1998, and arguably since *Meritor Savings v. Vinson*²¹³ in 1986, that they should have sexual harassment prevention programs in place. It is time that the federal courts require some proof from employers that their prevention programs are "effective" in fact, not just in theory. Some commentators suggest that under the *Ellerth/Faragher* affirmative defense, employers should be required to make an actual factual showing of what they have done to prevent harassment.²¹⁴ Release of aggregate data to employees on the resolution of past complaints would help demonstrate actual effectiveness.

Large employers, particularly those in the public sector, have considerable experience with extensive sexual harassment prevention programs. One example is the City of Chicago, which set up a sexual harassment office as an independent division of city government in 1994.²¹⁵ That office found that in training employees to prevent sexual harassment from occurring, it was particularly effective to tell employees about previous disciplinary action taken against harassers.²¹⁶ Potential harassers need real data from their employers regarding the type of discipline they may expect, just as potential complainants need real data to convince them that it makes more sense to report harassment than to endure it.

Universities are another group of employers with a long record of handling sexual harassment complaints. Universities deal with sexual harassment issues not only in the context of employment, but also in the educational context, where Title IX also prohibits sexual harassment.²¹⁷ In 1981, the University of California adopted a system-wide policy prohibiting sexual

²¹² *Id.* at 559.

²¹³ 477 U.S. 57 (1986).

²¹⁴ See, e.g., Beiner, *Sex, Science and Social Knowledge*, *supra* note 37, at 327. In addition to proving it has an effective prevention program in place, the employer should also be required to present evidence on the local norms in the workplace. *Id.*

²¹⁵ Andra Gombert, *Beyond Politics as Usual: the City of Chicago Sexual Harassment Office*, 34 WAKE FOREST L. REV. 27 (1999).

²¹⁶ *Id.* at 51. Chicago's Sexual Harassment Officer comments: "While some employees may be sensitized to the issue through training, other employees are more likely to be deterred from engaging in sexual harassment by learning about disciplinary action that has actually been imposed by the employer." *Id.*

²¹⁷ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994).

harassment and establishing prevention procedures.²¹⁸ My campus, the University of California, Davis, adopted a local policy in 1984 and began designating campus officials to serve as sexual harassment advisors in the early 1980s. Despite their long experience, however, universities have not been all that successful in preventing sexual harassment on campus.²¹⁹ Furthermore, few universities make public any information about how many sexual harassment complaints are filed by faculty, staff or students.²²⁰

After an in-depth study of university sexual harassment procedures, one scholar concludes: "[T]he persistence of harassment on campus, notwithstanding almost two decades of anti-harassment policies . . . strongly suggests that policies and procedures alone do not work."²²¹ What matters is the response of the university to the internal complaint. A perception that the university will take the complaint seriously and will actually punish the harasser significantly affects a woman's willingness to use university procedures.²²² Unless information is available to employees or students about what happens to sexual harassment complaints, the percentage of harassed women willing to use university sexual harassment procedures will remain low. If a university wants to take advantage of the affirmative defense created in *Ellerth* and *Faragher*, then a court should require the university to provide empirical data on the effectiveness of its prevention and reporting procedures. A university should be required to provide data on what percent of harassed women actually report harassment and why the remaining women do not report, what percent of claims are

²¹⁸ UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT, UNIVERSITY POLICY ON SEXUAL HARASSMENT (Aug. 11, 1981).

²¹⁹ See Lawton, *supra* note 36, at 75 (stating that incidence of sexual harassment has not declined over twenty years; internal reporting procedures discourage the filing of internal complaints). In a campus study conducted at the University of Arizona between 1993 and 1994, 30% of women faculty and staff reported sexually insulting comments from men, 18% reported inappropriate sexual touching, and 2% said they had left a job at the university because of sexual harassment. *Id.* at 91. Among students, 13% reported that faculty members had made seductive remarks about the person's appearance or sexual activity, 7% reported unwanted sexual attention from faculty, and 4% reported faculty had made sexual advances a "few times or more." *Id.* Despite the results of this anonymous survey, only 0.6% of women students at Arizona annually file a report of harassment with the university. *Id.* at 90.

²²⁰ *Id.* at 87. Lawton requested data from ten universities. She received some information on the number of complaints filed from five of them. *Id.* at 88-89, 150-51.

²²¹ *Id.* at 109.

²²² *Id.* at 140.

found to merit a remedial response and what the response has been.²²³

University efforts to deal with sexual harassment illustrate the dilemma encountered by most employers in this area. On the one hand, a university implements procedures to help end sexual harassment and make the work (and educational) environment comfortable for women. In a broader context, sexual harassment prevention programs are an effort to eliminate one source of discrimination against women. On the other hand, as an employer, a university is interested in limiting its liability. These two contradictory purposes underlie most employers' efforts to eliminate any type of discrimination in employment. The offices and individuals responsible for carrying out university sexual harassment prevention programs experience these conflicting goals throughout their work.²²⁴ Within a large public university system, the conflict between prevention and avoidance of liability expresses itself in disagreements over whether to publish annual reports with non-identifying aggregate data on the incidence and resolution of sexual harassment complaints.²²⁵

In a recent study of the sexual harassment prevention programs at eight public university campuses, only one publishes an annual report, even though those working on sexual harassment prevention efforts at all the campuses agree that such an annual report would be very valuable: "[It] would be effective in serving three very important yet diverse functions: building trust in the dispute process by demonstrating to the campus community that once a complaint was made it was taken seriously; educating the campus community about sexual harassment; and deterring potential harassers."²²⁶

Universities do not report even summary information because they fear such a report would hurt their reputation, create an "image problem," be used against them in future litigation or actually encourage more complaints.²²⁷ The study's author concluded, "the university's competing goal of protecting

²²³ *Id.* at 144.

²²⁴ See Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 70, 80 (2000).

²²⁵ *Id.* at 81.

²²⁶ *Id.*

²²⁷ *Id.* at 82.

the institution outweighs the benefits” of producing such a report.²²⁸ If universities realized, however, that reporting data on the resolution of complaints would both help prevent further harassment and assist them in proving the effectiveness of their complaint procedures, they might be willing to release aggregate data on a voluntary basis. If not, the courts may be called upon to require them and all other employers to produce such actual data during litigation.

Publishing aggregate data on internal resolution of sexual harassment complaints would go a long way in destroying some of the myths that surround sexual harassment in employment. It would show employees, both men and women, that sexual harassment is not an isolated issue limited to personal misunderstandings between employees about a possible sexual relationship. Concrete data on sexual harassment at work will demonstrate that most incidents are not just “personal frolics” of a few boorish men, as the courts like to believe,²²⁹ but that harassment is a systemic problem that infects many women’s daily work lives. Annual reports will destroy much of the secrecy that infects sexual harassment issues and will help educate women that they do not need to request confidentiality when they file a complaint. Release of data will help women overcome their own personal embarrassment and fear that somehow they brought the harassment on themselves; that somehow they “asked for it.” Additionally, it will help both management and employees treat sexual harassment as just one more type of workplace misconduct that must be dealt with in a open and decisive way.

²²⁸ *Id.* at 83.

²²⁹ In *Ellerth*, Justice Kennedy commented: “As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. . . . The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756-57 (1998). Thus, he concluded: “the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.” *Id.* at 757. In *Faragher*, Justice Souter commented: “[T]he courts have emphasized that harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer. For this reason, courts have likened hostile environment sexual harassment to the classic ‘frolic and detour’ for which an employer has no vicarious liability.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

B. *Require an Employer to Release Information About Prior Incidents to Other Employees Who Must Continue to Work With a Known Harasser*

Large employers, primarily public employers, face the problem of repeat harassers. These employers may need to take an additional step to prevent further sexual harassment after retaining a known harasser. If an employer is relatively small, with less than fifty employees, word circulates rather quickly through the workforce when a supervisor or other employee is suspended or terminated for sexual harassment. If an employer is large, however, only isolated groups of employees may become aware of an employee's suspension.²³⁰ Among private sector employers, once they determine that a supervisor harassed an employee, they often terminate the harasser.²³¹ Among public sector employers, however, harassers are less likely to be terminated because of the greater protections such employees enjoy under civil service systems and constitutionally-mandated due process procedural requirements.²³² When an employer properly investigates a

²³⁰ If discipline takes the form of a formal warning or a letter in the harasser's personnel file, other employees may not know that anything happened.

²³¹ For example, in *Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261 (4th Cir. 2001) the employer immediately suspended and then terminated the harasser twelve days later after investigation. In *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001) the employer terminated the harasser one week after the employer learned of the harassment and as soon as the investigation was completed. In *Hill v. American General Finance, Inc.*, 218 F.3d 639, 642 (7th Cir. 2000), the harasser was not terminated but was transferred to another office, given a written warning, and his pay was reduced by \$10,000. *Id.* at 642.

If the harasser works under a collective bargaining agreement, the harasser will have the opportunity to contest his termination through a grievance procedure, and if his union representative agrees, through arbitration. Arbitrators have occasionally reinstated terminated harassers when they have determined the employer did not have sufficient "just cause" to terminate him. See, e.g., *Westvaco v. United Paperworkers*, 171 F.3d 971 (4th Cir. 1999). See also Franklin, *supra*, note 91, for comprehensive data on the reinstatement of harassers by labor arbitrators.

²³² If employment is in the public sector, any employee disciplined for misconduct will have certain due process rights, including the right to notice of any charges filed against him and the right to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1984). See also Kihnley, *supra* note 224, at 79 (citing a public university's policy on sexual harassment). These due process rights, however, do not restrict the public employer's ability to conduct a thorough investigation, interview anyone who would have relevant information and discipline or discharge the harasser after an evidentiary hearing.

For an example of a decision to retain a harasser in public employment, see *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999). The harasser was chief of safety and security for the eastern region of the Army and Air Force Exchange Service of the U.S. Department of Defense, stationed in Texas. After his superiors became aware of his alleged harassment of the plaintiff, stationed in Maryland, the Department of Defense

sexual harassment complaint and determines that harassment occurred, but does not discharge the harasser, what steps should be required to protect other women from further harassment?

In this situation, aggregate reports on the resolution of prior incidents are not sufficient. If an employer continues to employ a harassing supervisor or other employee, employers should be obligated to inform employees who must work with the harasser about the resolution of the prior complaint and any discipline taken. Otherwise, if the person harasses another employee, the employer should be liable for greater damages for the subsequent harassment.²³³

Employers have long stressed the confidentiality of personnel matters, but employers voluntarily assume such confidentiality to protect their interests.²³⁴ As previously

issued a restraining order against him, prohibiting him from having any direct or indirect contact with the plaintiff or anyone assigned to her office in Maryland. Eight months later, after an investigation, the harasser received a thirty-day suspension for his two sexual assaults of plaintiff. *Id.* at 392. Plaintiff Brown's complaints against this high-ranking officer in the Exchange Service were the second set of multiple complaints lodged against him, but he was still not terminated. *Id.*

See also *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). In *Johnson*, the harasser was chief of police for a Veterans Administration hospital. The director of the hospital learned of the alleged harassment in January 1992. An investigation was completed in November 1992, and at that time the harasser was removed as chief of police and transferred to another area. *Id.* at 729. However, in May 1993, the harasser was reinstated as chief of police as the result of an investigative review board's findings. *Id.*

²³³ Since 1991, employers can be held liable for punitive damages under Title VII. See 42 U.S.C. § 1981a (1991). The Eleventh Amendment, however, bars punitive damage awards against state agencies. See JOEL FRIEDMAN & GEORGE STRICKLER, *THE LAW OF EMPLOYMENT DISCRIMINATION* 735 (5th ed. 2001).

²³⁴ In California, both public and private sector employees can claim some privacy rights under the state constitution. CAL. CONST. art. I, § 1 (amended 1972). California's explicit privacy clause applies to both public and private sector employment. See *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (holding that privacy clause applies to both public and private entities). It protects employees from disclosure of private information, such as medical information, to third parties. It does not, however, protect employees from the disclosure of employment-related information to others at the place of employment who have a legitimate reason to receive the information. See *Valley Presbyterian Hosp. v. Superior Court*, 94 Cal. Rptr. 2d 137 (Cal. Ct. App. 2000) (ordering the hospital to disclose names and addresses of employees to a third party suing the hospital for wrongful death; because of compelling need, such disclosure to an outside party is only a minimal intrusion on an employees' right to privacy). Compare *Bd. of Trs. of Stanford Univ. v. Superior Court*, 174 Cal. Rptr. 160 (1st Dist. 1981) (denying one employee suing the university access to another employee's complete personnel file and holding that any invasion of another's privacy rights must be narrowly drawn), with *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997) (holding a former employer liable for negligent misrepresentation in giving new employers positive reference for employee without disclosing the employee's prior sexual misconduct with female students).

discussed, employers cannot keep sexual harassment complaints strictly confidential because of their obligation to investigate and correct any harassment that has occurred.²³⁵ Men who have been disciplined for harassment obviously share the employer's interest in confidentiality. Their interest in secrecy, however, is outweighed by the employer's obligation to correct the harassment and prevent future harassment from occurring.²³⁶ Once an employer conducts an adequate investigation, determines that harassment has occurred and disciplines the harasser, the harasser has no viable claim against an employer for releasing relevant information to other employees about the incident and its resolution.²³⁷

Currently, employers are reluctant to release any information about identifiable harassers. Employers appear fearful that such harassers will file defamation or other civil claims against them for releasing information about the harassment determination. Such fears are misplaced.

Men who have been terminated for sexual harassment have little protection from disclosure of information about workplace complaints filed against them. These limited confidentiality rights are illustrated by the unsuccessful lawsuits filed by terminated employees asserting a variety of state law claims, such as defamation, negligent infliction of emotional distress or wrongful discharge. Claims filed by terminated harassers were generally unsuccessful before the Supreme Court's 1998 sexual harassment decisions.²³⁸ Courts are even more likely to reject such claims under current law because of the affirmative defense's renewed emphasis on employer procedures to promptly correct sexual harassment.²³⁹

²³⁵ See discussion, *supra* notes 153-155, 193-196 and accompanying text.

²³⁶ See *Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000) ("As with any investigation into potentially embarrassing personal interactions, confidentiality is difficult or impossible to maintain if all pertinent information is to be acquired from all possible sources.").

²³⁷ See *1999 Guidance*, *supra* note 14, at 7,666 n.69.

²³⁸ See KAY & WEST, *supra* note 173, at 835-36.

²³⁹ Employers have met the requirement to take "prompt and effective" corrective action by beginning an investigation within thirty-six hours of a complainant's report, and by terminating the accused harasser within six to ten days. See Allan H. Weitzman, *Employer Defenses to Sexual Harassment Claims*, 6 DUKE J. GENDER L. & POL. 27, 55 (1999).

1. Defamation Claims by Harassers are Generally Unsuccessful

Men who have claimed defamation after being terminated for sexual harassment have had little success proving such a claim. A "qualified privilege" protects workplace communications among supervisors and employees in defamation actions.²⁴⁰ Regardless of whether employment-related communications are true or false, communications made in the normal course of business are "privileged," shielding the employer from liability for defamation.²⁴¹ To overcome the privilege, an employee claiming defamation must prove "abuse" of the privilege by the employer, usually requiring the defamed employee to prove some form of "malice."²⁴² Employees terminated for sexual harassment have

²⁴⁰ See DAN DOBBS, *THE LAW OF TORTS* 1159-61 (2000) (stating that because of a shared interest, an employer has a privilege to explain to employees why other employees were discharged).

²⁴¹ Truth is an absolute defense to a defamation claim, but, first, the parties litigate whether the work place communications are "privileged." If "privileged," then a jury will never have the opportunity to decide an underlying issue of whether the sexual harassment complaint was true or false.

Only a few cases have gone to a jury, resulting in a decision on the truth or falsity of the sexual harassment charges. In one defamation case, the jury decided the harassment charges were false and awarded damages to the terminated supervisor. See *Hines v. Arkansas Louisiana Gas Co.*, 613 So. 2d 646 (La. App. 1993). The court of appeal, however, reversed the jury verdict as not supported by the evidence; many women employees had testified, describing Hines's repeated sexually harassing behavior. The appellate court further found that the employer had the right to rely on the outcome of its investigation in disciplining and then terminating Hines, and found that the employer's communications regarding Hines's discharge were privileged.

In a wrongful discharge case, *Cotran v. Rollins Hudig Hall International, Inc.*, 948 P.2d 412 (Cal. 1998), the California Supreme Court found that the alleged harasser had not been wrongfully discharged, even though the jury found that no sexual harassment had occurred because the sexual relationships at issue were consensual. In reversing the jury verdict, the court held that the employer had conducted a fair investigation, reaching a "reasoned conclusion" that harassment had occurred. The employer was justified in relying on its internal review and resolution. The jury's \$1.7 million verdict for the alleged harasser was reversed.

²⁴² Defamation claims normally arise under state law and the states apply a variety of standards on what constitutes abuse of a qualified or conditional privilege. In many states, defamation plaintiffs must prove common law malice—that the published communication was made with ill will, spite and for the express purpose of harming the employee. See DOBBS, *supra* note 240, at 1165-67. In *Rudebeck v. Paulson*, 612 N.W.2d 450 (Minn. App. 2000), the court explained, "Statements made 'in the course of investigating or punishing employee misconduct' are generally privileged, based on the employer's interest in protecting against harmful employees. . . . Once it has been shown that a conditional privilege applies, the plaintiff must prove actual malice to recover." *Id.* at 453 (citations omitted). The court defined actual malice as "actual ill will, or a design causelessly and wantonly to injure plaintiff." *Id.* at 454 (citations omitted). Because the employer conducted a reasonable and thorough investigation of the sexual harassment complaint filed by another employee, the plaintiff was unable to

generally not been able to prove abuse of the employer's privilege to communicate work-related information to other employees.

In *Duffy v. Leading Edge Products, Inc.*,²⁴³ the Fifth Circuit affirmed summary judgment for the employer based on Texas defamation law. The court found that both internal accusations made by an employer about an employee's misconduct, and subsequent references given by an employer to someone with "a common interest" in this employment-related information, were protected by a "qualified or conditional" privilege.²⁴⁴ The Fifth Circuit agreed that Duffy presented no evidence of malice. The employer conducted a reasonable investigation and the human resource manager believed that Duffy made unwelcome sexual advances to two women employees, discrediting Duffy's version of events.²⁴⁵ Duffy had no evidence that the human resource manager "had a high degree of awareness that the underlying facts as reported to her were probably false," or that the sexual harassment complaints were probably fabricated.²⁴⁶ Under this standard of actual malice, the Fifth Circuit commented that, even if an employer's actions in terminating an employee demonstrated "[n]egligence, lack of investigation, or failure to act as a reasonably prudent person," this would be insufficient proof for a plaintiff to prove malice under defamation law.²⁴⁷

prove malice. *Id.*

In other jurisdictions, defamation plaintiffs must prove a form of constitutional malice, based on the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Under this standard, a plaintiff must prove that the employer knew the accusation was probably false or acted recklessly without regard to the truth or falsity of the accusation. See DOBBS, *supra* note 240, at 1167.

In a few states, a showing of negligence on the employer's part may be sufficient for a plaintiff to prove abuse of the privilege. See *Davis v. Res. of Human Dev., Inc.*, 770 A.2d 353, 359 (Pa. Super. 2001); DOBBS, *supra* note 240, at 1166 n.6.

²⁴³ 44 F.3d 308 (5th Cir. 1995).

²⁴⁴ *Id.* at 312. Duffy was suing for defamation under federal diversity jurisdiction, claiming that the sexual harassment allegations against him were false and that he would be compelled to republish these false allegations in telling a prospective employer why he had been terminated. *Id.* at 310. Because any future publication of the reasons for his termination would be privileged, the issue in the case was whether he could prove "malice" on the part of the employer. *Id.* at 312.

²⁴⁵ *Id.* at 311.

²⁴⁶ *Id.* at 314.

²⁴⁷ *Id.* at 313, 315, 316 (footnote omitted). The court also found that Duffy could not prove actual malice even if the incidents for which he was terminated did not actually rise to the level of sexual harassment as required by current U.S. Supreme Court interpretations of Title VII. The court commented that sexual harassment "has a vernacular meaning that encompasses a far broader range of misconduct than would be actionable under Title VII. There is no basis to conclude that Leading Edge did not

Another possible way for a terminated employee to prove abuse of the privilege protecting an employer's workplace communications is to prove "excessive publication"—that the employer distributed the allegedly defamatory information outside the workplace. In *Garziano v. E.I. Du Pont De Nemours & Co.*,²⁴⁸ the company distributed a memo to all its supervisors four days after plaintiff Garziano's termination for sexual harassment. Once the company learned about the sexual harassment, through an exit interview of a woman who quit because of Garziano's harassment, it conducted a thorough and prompt investigation.²⁴⁹ On the day Garziano was terminated, rumors began to circulate in the plant among the approximately 400 rank-and-file employees.²⁵⁰ In response to the rumors, three days later Du Pont issued a "management information bulletin" to its 140 supervisors.²⁵¹ The "Sexual Harassment" bulletin advised supervisors that the "recent sexual harassment incident" resulting in an employee's termination "was determined to be a serious act of employee misconduct . . . [and] deliberate, repeated and unsolicited physical contact as well as significant verbal abuse [were] involved in this case."²⁵² The bulletin further quoted at length from the EEOC Guidelines defining sexual harassment, advising employees about their rights to complain and discussing the obligation of the company to eliminate any harassment.²⁵³ Supervisors were told to discuss the key points with their employees.²⁵⁴ Some read the bulletin to employees, but the bulletin was not posted or distributed to employees.²⁵⁵ The company's regular practice was to keep matters of employee discipline confidential as long as the person

believe that Duffy had engaged in sexual harassment in this vernacular sense." *Id.* at 315-16.

²⁴⁸ 818 F.2d 380 (5th Cir. 1987).

²⁴⁹ As in so many cases, when the woman quit and the employment relations supervisor conducted the exit interview, he learned for the first time about prior harassment incidents that the woman never reported to the employment relations office. Her supervisor, who knew about the earlier harassment, had also not reported it to employment relations. At trial, this supervisor testified that the harassed woman had asked him not to do anything about the prior incidents because "her job would be in jeopardy and she would have a harder time than she was having now." *Id.* at 383 n.3.

²⁵⁰ *Id.* at 383, 393.

²⁵¹ *Id.* at 384, 396.

²⁵² *Id.* at 383-84.

²⁵³ *Garziano*, 818 F.2d at 396.

²⁵⁴ *Id.* at 384.

²⁵⁵ *Id.*

continued to be employed at the plant.²⁵⁶ Once an employee was terminated, however, the company communicated the basic reason for the termination to supervisors so they could relay the information to employees.²⁵⁷ Garziano subsequently sued for libel and slander under principles of Mississippi law.

Although Du Pont moved for a directed verdict on the grounds that the communication was privileged and Garziano had not proven malice, the trial court reserved ruling on Du Pont's motion and sent the case to the jury. The jury awarded Garziano \$93,000 in compensatory damages, but denied punitive damages, finding Du Pont "exhibited no malice, recklessness, or wanton disregard" in publishing the bulletin.²⁵⁸ On appeal, the Fifth Circuit reversed Garziano's judgment for damages and remanded on a narrow issue.

The Fifth Circuit found that Du Pont's bulletin was a privileged communication: "[c]o-workers have a legitimate interest in the reasons a fellow employee was discharged."²⁵⁹ Furthermore, under Title VII the employer is obligated to take strong measures to eradicate hostile or offensive work environments. Consequently, the Fifth Circuit found the trial court erred in not instructing the jury that Du Pont's bulletin was a privileged communication. Once an employment communication is privileged, a presumption of good faith arises, which can be rebutted by proof of malice, bad faith or abuse of the privilege by excessive publication.²⁶⁰ The Fifth Circuit found the evidence did not support a finding of Du Pont's bad faith or malice.²⁶¹ The company's motivation for sending the communication to supervisors was to meet its affirmative duty to eliminate any possible intimidating or hostile work environments caused by sexual harassment and to defend its termination of Garziano.²⁶² These were both justifiable reasons for the privileged communication and the court concluded that "an employer's publication to its employees of the reasons for discharge of a co-worker is not

²⁵⁶ *Id.* 384 n.6.

²⁵⁷ *Id.*

²⁵⁸ *Garziano*, 818 F.2d at 384. Garziano had evidently succeeded in convincing the jury that the sexual harassment charges filed against him were false.

²⁵⁹ *Id.* at 387.

²⁶⁰ *Id.* at 388. To prove malice, it is not enough for the plaintiff to prove the allegations contained in the communication were false. The plaintiff must also prove that the employer knew the allegations were false when it published them. *Id.* at 389.

²⁶¹ *Id.* at 391.

²⁶² *Id.*

only a proper purpose, but is one of the most fitting occasions for application of a qualified privilege."²⁶³

One issue remained. The Fifth Circuit explained that an employer could abuse the qualified privilege by "excessive publication" if the scope of the communication exceeded what was necessary, or if it was published "to persons not within the 'circle' of those people who have a legitimate and direct interest in the subject matter."²⁶⁴ There were employees of a subcontractor working on the premises, who would not have a legitimate interest in the discharge of a Du Pont employee.²⁶⁵ Also, rumors spread to the nearest town twenty miles away.²⁶⁶ The Fifth Circuit remanded the case to determine if Du Pont abused its privilege by excessive publication. On remand, the jury would consider the following questions: Did Du Pont supervisors pass the information to the subcontractor's employees also working on the premises? Did Du Pont supervisors communicate to others in the town twenty miles away? Or did the rumors in town begin circulating before the company issued its bulletin?²⁶⁷ Based on the evidence presented, it appeared unlikely Garziano would be able to sustain his burden of proof on these issues on remand.

The employers' investigations in these defamation cases were ordinary and sensible: the employers interviewed all relevant parties before deciding that harassment had occurred. Even when an employer conducts an abusive investigation, however, resulting in wide-spread, but false, accusations of sexual misconduct against plaintiffs, plaintiffs have been unable to recover. In *McDonnell v. Cisneros*,²⁶⁸ the employer was the Department of Housing and Urban Development ("HUD"), a federal employer. Someone sent HUD anonymous allegations of a "lurid" sexual relationship between the male manager and female assistant manager of one of HUD's Offices of Inspector General.²⁶⁹ Because the Inspector General's Office usually investigates such accusations, HUD asked investigators from the Department of Defense to conduct the investigation. The investigation was hostile and

²⁶³ *Garziano*, 818 F.2d at 392.

²⁶⁴ *Id.* at 391-92.

²⁶⁵ *Id.* at 392.

²⁶⁶ *Id.* at 393.

²⁶⁷ *Id.* at 394-95.

²⁶⁸ 84 F.3d 256 (7th Cir. 1996).

²⁶⁹ *Id.* at 257.

unprofessional. The investigators revealed to the employees they interviewed their belief that the plaintiffs were guilty of the alleged sexual misconduct, resulting in even more exaggerated rumors circulating among co-workers about the plaintiffs' sexually deviant behavior.²⁷⁰ Four months later, when the investigation was completed, however, plaintiffs were entirely exonerated and the accusations were found to be totally false.²⁷¹ By this time, employees had ostracized the manager and assistant manager. The company advised them not to meet to discuss business behind closed doors, not to travel together and reassigned the male manager to another HUD office for ninety days to blunt the rumors generated by the abusive investigation.²⁷² The plaintiffs asked HUD to find and discipline the disgruntled employee who filed the anonymous complaint, but HUD did nothing.²⁷³ Both plaintiffs filed separate sexual harassment complaints, alleging that the investigation itself, and its resulting adverse effects, constituted sexual harassment.²⁷⁴

The Seventh Circuit framed the issue as: "whether an investigation of sexual harassment that exceeds the proper limits is itself a form of actionable sexual harassment."²⁷⁵ The court said "no." Title VII obligates employers to investigate anonymous charges: "employers who disregard charges of sex-related misconduct by their employees run a considerable risk of being sanctioned for having tolerated sexual harassment."²⁷⁶ Under the plaintiffs' theory, if the employer "wants to demonstrate how seriously he takes such charges," and "the investigation oversteps the proper bounds, causing humiliation to the targets," the employer would also be guilty of sexual harassment for its over-zealous actions.²⁷⁷ The Seventh Circuit declined to put the employer in this predicament, advising

²⁷⁰ *Id.* at 258.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *McDonnell*, 84 F.3d at 258.

²⁷⁴ *Id.* The plaintiffs did not file defamation actions because federal law does not allow for such claims by federal employees against the government. *Id.* at 261. Consequently, the plaintiffs tried to sue HUD under Title VII for sexual harassment and retaliation, but both the district court and the Seventh Circuit found that they failed to state a claim.

²⁷⁵ *Id.* at 260.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 261.

humiliated and falsely accused employees to look elsewhere for redress, not under Title VII.²⁷⁸

In one rare case, *Meloff v. New York Life Insurance Co.*,²⁷⁹ an employee succeeded in winning a new trial on her defamation claim, but this case involved a termination for fraud, not sexual harassment.²⁸⁰ The facts differ significantly from those found in the cases of terminated or disciplined harassers. Phyllis Meloff commuted to work from Philadelphia to New York by train.²⁸¹ Beginning in January 1991, Meloff charged her monthly Amtrak train pass on her New York Life corporate credit card.²⁸² In March or April 1991, Meloff reimbursed New York Life for her travel through March 1991.²⁸³ She continued charging these costs to her corporate card, but made no further reimbursements through December 1991.²⁸⁴ In December 1991, New York Life denied Ms. Meloff a promotion.²⁸⁵ She complained about it, alleging sex discrimination.²⁸⁶ When she returned to work in January 1992, after a holiday vacation, she attempted to reimburse the company for the \$3,600 she owed for her commuter train expenses since March 1991.²⁸⁷ Instead, she was terminated for making these personal charges on a company card.²⁸⁸

On the day Meloff was terminated, her supervisor sent an e-mail to seven managers, with the subject heading "FRAUD" and a message that said Meloff, a valued twenty-seven-year employee, had been terminated for using her company credit card "in a way in which the company was defrauded. . . . This action reflects our commitment to 'adhere to the highest ethical standards in all our business dealings.'"²⁸⁹ After receiving the e-mail, various managers forwarded it to more company employees, and a total of sixteen employees

²⁷⁸ *McDonnell*, 84 F.3d at 261. The Seventh Circuit sustained only one part of the male manager's claim, a claim for retaliation under Title VII, based on his allegation that HUD transferred him because he was unable to convince his female colleague to withdraw her sexual harassment complaint. *Id.* at 263.

²⁷⁹ 240 F.3d 138 (2d Cir. 2001).

²⁸⁰ *Id.* at 141, 148.

²⁸¹ *Id.* at 142.

²⁸² *Id.* at 143.

²⁸³ *Id.*

²⁸⁴ *Meloff*, 240 F.3d at 143.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 143-44.

²⁸⁹ *Meloff*, 240 F.3d at 144.

received it.²⁹⁰ About twenty employees called Meloff about her termination and her use of the company credit card.²⁹¹ Meloff produced evidence that other employees had charged personal expenses on company credit cards, but the company took no action against them.²⁹²

Meloff sued for sex discrimination, retaliation and defamation, but the federal district court granted the employer's motion for summary judgment on her sex discrimination claim.²⁹³ The district court allowed her retaliation and defamation claims to go to the jury.²⁹⁴ The jury found no retaliation against her for complaining to the company about sex discrimination in promotions, but awarded her \$250,000 in compensatory damages and \$1 million in punitive damages on her defamation claim.²⁹⁵ The district court then overturned the jury verdict, granting judgment for New York Life as a matter of law.²⁹⁶

The Second Circuit reversed the trial court's judgment.²⁹⁷ The Court of Appeals agreed that New York Life enjoyed a qualified privilege to communicate information of common interest to its employees: "the termination of a fellow employee may be considered a matter in which co-workers share a common interest."²⁹⁸ To rebut the presumption of good faith created by this qualified privilege, Meloff first had to prove that the company's statement was false, and second that New York Life abused its privilege by acting with malice.²⁹⁹ She had to prove that New York Life "acted with knowledge that the statement was false or with reckless disregard as to its truth."³⁰⁰ Applying this standard, the Second Circuit held that the district court erred in overturning the jury's verdict.³⁰¹ The Second Circuit found sufficient evidence in the record to support the jury's finding that the fraud accusation was "not substantially true" and that New York Life's actions reached

²⁹⁰ *Id.* at 141, 144.

²⁹¹ *Id.* at 144.

²⁹² *Id.*

²⁹³ *Id.* at 142.

²⁹⁴ *Meloff*, 240 F.3d at 142.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 146.

²⁹⁹ *Meloff*, 240 F.3d at 146.

³⁰⁰ *Id.*

³⁰¹ *Id.*

the level of "actual malice."³⁰² The court remanded the case for a new trial on Meloff's defamation claim.³⁰³

Despite Meloff's success on appeal, employees terminated for sexual harassment have not successfully challenged under defamation law the release of information about their terminations by their employers to company employees or to prospective employers.³⁰⁴ Consequently, some employees (and their lawyers) have used other theories to prevent employers from circulating information about their sexually harassing behavior among employees at work.

2. Negligent Infliction of Emotional Distress Claims by Harassers Have Been Unsuccessful

A few harassers have attempted to sue employers on a theory of negligent infliction of emotional distress for the emotional harm they suffered from a sexual harassment investigation. This theory of recovery has been no more successful than defamation claims.

In *Malik v. Carrier Corp.*,³⁰⁵ a terminated employee sued for negligent infliction of emotional distress, in addition to defamation, negligent misrepresentation and tortious interference with contract. Mr. Malik, a recent business school graduate, entered the company's executive training program in August 1992.³⁰⁶ During the initial orientation program, one woman complained about Malik's "highly arrogant and disrespectful behavior" towards her.³⁰⁷ Malik's performance received mixed reviews as he rotated through different divisions of the company during the following year and a half.³⁰⁸ In March 1994, the recruitment manager in charge of the training program began investigating a second complaint that Malik made inappropriate sexual comments to a woman

³⁰² *Id.* at 147.

³⁰³ *Id.*

³⁰⁴ See also *Malik v. Carrier Corp.*, 202 F.3d 97, 109 (2d Cir. 2000) (affirming trial court's dismissal of defamation claim; communication about an employee's sexually harassing behavior was probably true, and no evidence existed of malice); *Deutsch v. Chesapeake Ctr.*, 27 F. Supp. 2d 642 (D. Md. 1998). In *Deutsch*, the court commented: "Even a failure to investigate fully does not constitute malice" in a defamation claim. *Id.* at 645.

³⁰⁵ 202 F.3d 97 (2d Cir. 2000).

³⁰⁶ *Id.* at 100.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

employee on several occasions.³⁰⁹ During the investigation, the complaining woman wanted to drop her complaint, but the company discovered that another woman had also complained about Malik's sexual remarks.³¹⁰ The supervisor involved had not forwarded this additional complaint to the recruitment manager.³¹¹ When the recruitment manager met with Malik, he admitted one remark, but denied all other allegations.³¹² Four days later, the company informed Malik that it would not discipline him, but would place a letter in his personnel file.³¹³ The letter stated that, although there was evidence of discussions of a sexual nature between him and one of the women, there was not enough evidence "to substantiate the claim of sexual harassment."³¹⁴ Nevertheless, the letter told Malik that his behavior "was unacceptable."³¹⁵ In August 1994, the company terminated Malik from the training program because none of the company divisions offered him a job.³¹⁶

Malik sued in federal court based on diversity jurisdiction over his state law tort claims. The trial court dismissed the defamation and contract interference claims, but allowed the negligent infliction of emotional distress and negligent misrepresentation claims to go to the jury. The jury found for the employer on the misrepresentation claim, but found for the employee on the emotional distress claim, awarding Malik \$400,000 in damages, which the trial court subsequently reduced to \$120,000.³¹⁷

The Second Circuit reversed Malik's verdict for negligent infliction of emotional distress, ruling that the trial court should have granted judgment for the company as a matter of law.³¹⁸ The Second Circuit found that even if Connecticut law allowed such a claim, uncertain under state law, Connecticut law must conform to federal law, which required the employer to investigate the sexual harassment complaint.³¹⁹ Under Title VII and the *Ellerth* and *Faragher*

³⁰⁹ *Id.*

³¹⁰ *Malik*, 202 F.3d at 101.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 101-02.

³¹⁵ *Malik*, 202 F.3d at 101-02.

³¹⁶ *Id.* at 102.

³¹⁷ *Id.* at 103.

³¹⁸ *Id.* at 108.

³¹⁹ *Id.* at 105.

decisions, "an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking."³²⁰ Furthermore, even if the woman who complained wanted to drop the investigation, the company's duty to investigate remains: "Prudent employers will compel harassing employees to cease all such conduct and will not, even at the victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment."³²¹ Federal policies cannot be undermined by damage actions under state law that would reduce an employer's incentive "to take reasonable corrective action" required by federal law.³²² Under the jury instructions on emotional distress given in this case, the court found that

virtually any employer investigation into allegations of sexual harassment would expose the employer to liability. Such investigations foreseeably produce emotional distress—often in copious amounts—in alleged harassers, whether guilty or innocent. As with any investigation into potentially embarrassing personal interactions, confidentiality is difficult or impossible to maintain if all pertinent information is to be acquired from all possible sources.³²³

The court also commented on the difficulty employers face when investigators encounter resistance from complainants or lower-level supervisors, stemming from their desire to resolve the matter informally to preserve workplace harmony. Despite such resistance, management must "press the investigation, . . . even at the risk of misunderstandings that cause great emotional distress . . . because once higher management has notice of the problem, it may later face civil liability if it fails . . . to act to prevent recurrence or expansion."³²⁴ The court held that Malik failed to state a claim for negligent infliction of emotional distress as a matter of law; the events he relied on would be common to any investigation of sexual harassment required by federal law. In the court's view, this case involved "ordinary, garden-variety personnel actions."³²⁵ The Second Circuit refused to speculate about what

³²⁰ *Malik*, 202 F.3d at 105.

³²¹ *Id.* at 106.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Malik*, 202 F.3d at 110.

type of "egregious or outrageous acts" might legitimately support such a state law claim.³²⁶

Despite terminated employees' notable lack of success in challenging the harassment charges leveled against them, employers continue to worry about defamation actions or other possible lawsuits disciplined or terminated harassers could file. One wonders if such employer fears are simply a smokescreen for an unwillingness to take charge of the workplace environment and make it more hospitable for women employees. Perhaps the Supreme Court's emphasis on prompt corrective action will encourage employers to take more aggressive action to eliminate sexual harassment.

C. *Require Employers to Release Information to Complainants and Co-workers About the Results of Sexual Harassment Investigations*

If employers want to convince employees that they have effective sexual harassment prevention programs in place, they must provide information to employees about actions taken in resolving prior complaints. It is particularly important that women who complain about sexual harassment be given the results of the employer's investigation and told about any discipline taken against the harasser.³²⁷ Otherwise, employees will have no basis for encouraging other women to complain.

Just as employers are not liable for the release of information at work about employees terminated for harassment, they will not be liable for informing employees that another employee or a supervisor assigned to their work area was found to have harassed in the past, but is being given a chance to improve. The employer should assure a known harasser's co-workers that it will carefully monitor his working relationships, and if any further incidents arise, any employee should immediately alert management. Retaining a person found to have sexually harassed other employees should not be treated any differently than retaining an employee found to

³²⁶ *Id.* at 108.

³²⁷ One attorney advises managers to communicate the results of the investigation to the complainant and at that time, once again, assure her that no retaliatory conduct will be tolerated. See Javier Van Oordt, *Thorough Sexual Harassment Investigation Can Limit Liability*, L.A. DAILY J., July 29, 2002, at 7. He also advises employers to follow up with complainants every few weeks for several months to ensure that the problem has been resolved and no retaliation has occurred. *Id.*

have stolen tools from work. Extra precaution must be taken to ensure the employee does not steal tools again. Similarly, extra precaution must be taken to make sure the person does not harass employees again.

Whether the harasser is terminated or remains at work, women who were harassed deserve to know how the company disciplined their harasser. If the company terminates him, fellow employees will generally be aware of this disposition, as departure is usually a public event. If the discipline falls short of termination, however, then the employer must inform employees who continue to work with the disciplined employee of the action taken to resolve the victim's complaint. If victims and other potential targets of harassment are not informed, serious harassment could recur, an employer's liability will increase, and women will have little basis for trusting the employer's prevention policy.³²⁸

Furthermore, if employers leave women in the dark about the actions taken to resolve sexual harassment complaints, women will be unable to evaluate accurately the possibility of remaining in that place of employment without further incidents of harassment. In one case, *Montero v. AGCO Corp.*,³²⁹ the employer granted plaintiff Montero's request for

³²⁸ One victim of harassment by a repeat harasser attempted to convince a federal court that her public employer should be held liable for negligence in not preventing one incident of sexual harassment, because another woman had previously filed a sexual harassment complaint against the same man. See *Longstreet v. Illinois Dept. of Corr.*, 276 F.3d 379 (7th Cir. 2002). The court found that the only prior incident reported to the employer was a minor one and the offending employee had been immediately reassigned to another job, so the first complaining woman did not have to work with him again. *Id.* at 382. The only other option, in the court's view, would have been for the employer to fire the harasser, and the first incident was too minor to justify termination. *Id.* at 383. The court did not discuss any other possible actions the employer could have taken, such as informing any women who would have to work with the harasser in the future about the prior complaint. When the man harassed the second woman in a much more serious way, he was terminated. The court upheld the lower court's grant of the employer's summary judgment motion, finding that this employer was not negligent, and therefore, not liable for the co-worker's harassment. *Id.* at 381. In commenting on the need for employers to prevent harassment from occurring, the court said:

We have recognized that deterrence is an objective in imposing liability on employers for the creation of a hostile environment by a plaintiff's co-workers. An employer's response to allegations of harassment "must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made." . . .

What is a reasonable response depends on the gravity of the harassment.

Id. at 382. A reasonable response from an employer could include informing other employees who need to know, because they work with the harasser, about the discipline imposed on the harasser for his earlier workplace misconduct.

³²⁹ 192 F.3d 856 (9th Cir. 1999).

paid administrative leave as soon as she told the employer about the harassment. The employer then took swift action in terminating the harassing supervisor and disciplining Montero's two harassing co-workers.³³⁰ Montero was the only woman among the eight employees working at the employer's warehouse.³³¹ When Montero called the employer one week after she went out on leave, to find out if her harassing supervisor still worked there, the employer refused to tell her that he had been terminated, saying only that appropriate disciplinary measures had been taken and all employees had been warned that the company would not tolerate any retaliation.³³² Montero remained off work for four months, and then resigned after several visits to a psychologist.³³³ Only when Montero's attorney contacted the employer about her resignation did Montero, through her attorney, learn that the harassing supervisor was terminated during her first week on leave.³³⁴ Obviously, Montero had not contacted any of her male co-workers while she was on leave. Had Montero known that the supervisor was terminated, she might have been willing to come back to work weeks earlier, instead of attempting unsuccessfully to find the courage to go back into what she presumed would be a continuing hostile environment.

Montero eventually lost her lawsuit under the affirmative defense. The Ninth Circuit affirmed a summary judgment for the employer, agreeing with the court below that the employer had taken prompt corrective action.³³⁵ From the time that Montero complained, it took the employer only eleven days to investigate and take "decisive and meaningful" action against the harassers.³³⁶ Montero lost under the second prong of the employer's affirmative defense because she could not produce any facts justifying her two-year delay in informing the employer about the harassment.³³⁷ Although the court attached no significance to the employer's refusal to tell Montero about its termination of the harassing supervisor at a

³³⁰ The harassing supervisor was fired eleven days after Montero first notified the company of the harassment. *Id.* at 859.

³³¹ *Id.* at 858.

³³² *Id.* at 859-60.

³³³ *Id.* at 860.

³³⁴ *Montero*, 192 F.3d at 860.

³³⁵ *Id.* at 863.

³³⁶ *Id.*

³³⁷ *Id.*

meaningful time, had the employer done so, Montero may have been willing to come back to work instead of eventually resigning and hiring a lawyer.

This fact pattern illustrates the importance of providing harassed women as much information as possible about any actions the employer has taken to eliminate harassment in the workplace. If Carrie Montero's employer had given her the information she needed, that her supervisor had been terminated and the other two employees disciplined, instead of hiding behind a claim of confidentiality, Montero might have come back to work immediately. Instead, Montero was left in the dark, spent four months in counseling while on leave and then decided to quit instead of coming back to work. Adequate and timely information likely would have eliminated the lawsuit altogether.

Information is vital to employees in deciding how to handle such a difficult situation as workplace harassment. In *Montero*, an employee would have gone back to work and the employer would have demonstrated to its own employees that it took sexual harassment seriously and that its prevention policies were effective. The employer's release of information about disciplinary actions taken was particularly important in *Montero* because Montero was the only woman working in the warehouse. She had no women colleagues to confide in and no women colleagues to call her at home and tell her what had happened. Her only source of information was the company. If employers learned how to use information about the resolution of sexual harassment complaints constructively, employers themselves would benefit from increased productivity, significantly less turnover of employees and fewer expensive lawsuits. By using information to create a better work environment for women, all would benefit.

CONCLUSION

The moral of this story is that women must be brave. The federal courts are not going to protect women who are afraid. Somehow, women must overcome all the traditional reasons that keep many quiet and afraid to speak up at work. Public education is necessary to tell women about the federal courts' new legal requirement that women must complain before filing suit. At a minimum, plaintiffs' attorneys must educate women clients about the need to tell the employer about the harassment before filing suit, unless there is specific

factual information about the employer's failure to stop prior known harassment. An attorney can assist a woman in communicating with her employer about sexual harassment and can help protect her while she remains on the job. If the woman has already left her job because of the harassment, however, she may no longer have a viable federal claim. If the employer did not know of the harassment, or if the employer learned about the harassment and took swift and meaningful action to end it, then any chance of winning a federal lawsuit is slim.

To assist women in finding the courage to complain, federal courts must re-examine the hostile environment affirmative defense and require employers to take significant action to demonstrate to women employees that sexual harassment prevention policies are effective. Release of information about the resolution of past complaints is key. Only with accurate information can women realistically assess the likelihood that complaining about harassment will make it stop. Employers must cease covering up the problems of harassment at work. They must bring the issue out into the open.

Eventually, plaintiffs' lawyers will learn to develop the fact patterns necessary to defeat the affirmative defense. Through discovery, attorneys should be able to obtain information about the employer's resolution of past complaints in litigating the issue of reasonable care under prong one of the affirmative defense. In addition, women at work need to collect such information from each other in preparation for filing a complaint at work or later filing suit.

The Supreme Court's affirmative defense to hostile environment sexual harassment has the potential to create meaningful dispute resolution procedures at work. If women discover the possibilities inherent in the affirmative defense, they will be able to assist themselves and each other in eliminating sexual harassment in their working environments. If women remain afraid and reluctant to complain, employers will continue to escape their obligation to provide a place to work where both women and men enjoy an equal opportunity to succeed.

