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## When Women's Silence Is Reasonable: Reforming the Faragher/ Ellerth Defense in the #MeToo Era

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# When Women's Silence Is Reasonable

## REFORMING THE FARAGHER/ELLERTH DEFENSE IN THE #METOO ERA

### INTRODUCTION

In October 2017, hundreds of thousands of women broke their silence<sup>1</sup> following investigations by the *New York Times* and the *New Yorker* into Hollywood producer Harvey Weinstein's decades-long pattern of sexual harassment and assault.<sup>2</sup> Women posted on Twitter and Facebook, telling their long-buried stories of being sexually harassed or assaulted, or simply posting the phrase #MeToo.<sup>3</sup> As the #MeToo movement grew, allegations brought by female employees against powerful and famous men led to their disgrace, resignation, firing, and (sometimes) criminal prosecution, and in December 2017, *Time* magazine honored the Silence Breakers—the women who came forward to accuse their harassers—as its “Person of the Year.”<sup>4</sup> The press shined a spotlight on what many women have always known: sexual harassment in

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<sup>1</sup> Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm\\_term=.1e54556c1ab4](https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm_term=.1e54556c1ab4) [<https://perma.cc/C7CD-EPCS>]. The #MeToo movement was originally launched by Tarana Burke in 2006, with the goal of drawing attention to women of color's experiences of sexual harassment and sexual violence. Tarana Burke, *#MeToo Founder Tarana Burke on the Rigorous Work that Still Lies Ahead*, VARIETY (2018), <https://variety.com/2018/biz/features/tarana-burke-metoo-one-year-later-1202954797/> [<https://perma.cc/T8K7-7Z4P>].

<sup>2</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/5W3M-ZKKF>]; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/MW2K-FBEQ>].

<sup>3</sup> Schmidt, *supra* note 1.

<sup>4</sup> Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/5MPG-Y47G>].

the workplace is incredibly common, and affects women across social classes—from movie stars to fast food workers.<sup>5</sup>

Following #MeToo, official complaints of workplace sexual harassment have increased.<sup>6</sup> But when these claims make their way to courts, victims are confronted with a legal scheme that makes it very difficult for them to hold anyone, including their employers, accountable.<sup>7</sup> While sexual harassment has been recognized since the 1980s as a form of sex discrimination under Title VII of the Civil Rights Act of 1964,<sup>8</sup> subsequent developments in sexual harassment law favor employers.<sup>9</sup> One problematic element of the doctrine is the Faragher/Ellerth defense, established by the U.S. Supreme Court in 1998.<sup>10</sup> The Faragher/Ellerth defense applies in hostile work environment cases when no tangible employment action, such as firing or demotion, has been taken against the complaining employee, and shields employers from liability if: (1) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and (2) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>11</sup>

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<sup>5</sup> See Bryce Covert, *The Radical Boldness of the McDonald's Sexual Harassment Strike*, CUT (Sept. 18, 2018), <https://www.thecut.com/2018/09/mcdonalds-sexual-harassment-strike-takes-place-in-10-cities.html> [<https://perma.cc/SG2F-TV52>].

<sup>6</sup> Suzanne Lucas, *How the #MeToo Movement Is Making an Impact on Workplace Sexual Harassment Policy*, HRACUITY (Mar. 15, 2019), <https://www.hracity.com/blog/metoo-impact-workplace> [<https://perma.cc/Z79H-VBS9>] (noting fifty-three percent of businesses saw an increase in sexual harassment complaints after #MeToo); Alex Press, *Women Are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation*, VOX (May 9, 2019), <https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-ee-oc-complaints> [<https://perma.cc/5TKM-4JAR>] (noting complaints of sexual harassment made to the Equal Employment Opportunity Commission rose by 13.6% in 2018).

<sup>7</sup> Rafia Zakaria, *The Legal System Needs to Catch Up with the #MeToo Movement*, NATION (Apr. 18, 2018), <https://www.thenation.com/article/the-legal-system-needs-to-catch-up-with-the-metoo-movement/> [<https://perma.cc/P76S-6E36>].

<sup>8</sup> See 42 U.S.C. § 2000e-2.

<sup>9</sup> Zakaria, *supra* note 7.

<sup>10</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>11</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The Faragher/Ellerth defense applies only to hostile work environments created by supervisors. When a hostile work environment is created by a plaintiff's coworker, the employer is liable if it was “negligent in failing to prevent harassment from taking place.” *Vance v. Ball State Univ.*, 570 U.S. 421, 432, 448–49 (2013). This requires a showing that the employer “knew or should have known about the conduct and failed to stop it.” *Ellerth*, 524 U.S. at 759. While harassment by coworkers is a significant problem in the workplace, employer liability for such harassment is outside the scope of this note. Although the Faragher/Ellerth defense was formulated in two sexual harassment cases, it can also be raised in cases of hostile work environments based on race or national origin. See, e.g., *Jones v. City of Lakeland*, 318 F. App'x 730, 737 (11th Cir. 2008) (concluding, on the basis of the Faragher/Ellerth defense, that plaintiffs' failure to complain through employer's process was “fatal” to their claims).

Courts have interpreted this two-prong defense in a manner that allows employers to easily escape liability in cases where victims have been silent. Courts find the first prong of the defense—“exercis[ing] reasonable care to prevent and correct” sexual harassment<sup>12</sup>—to be met when employers have policies against sexual harassment and have established internal complaint procedures.<sup>13</sup> Courts find the second prong of the defense—that the plaintiff employee acted “unreasonably”—to be met when the harassed employee has either not reported the harassment through these procedures, or has delayed in doing so.<sup>14</sup> But this interpretation of the defense ignores the realities that many employer antiharassment policies and procedures do not effectively prevent harassment from occurring<sup>15</sup> and the majority of people who experience harassment at work do not report it.<sup>16</sup> Indeed, only six to thirteen percent of those who experience harassment at work make a formal complaint to their employer.<sup>17</sup>

Courts thus reward employers for adopting policies and procedures against sexual harassment that are wholly ineffective, and punish victims of harassment for not reporting promptly through these flawed internal channels, even though this is not a common response to harassment.<sup>18</sup> When a victim does not react in this narrowly prescribed way, the employer escapes liability altogether, leaving the victim without any remedy because Title VII allows for claims to be pursued only against employers, not individual harassers.<sup>19</sup>

The incredible force of the #MeToo movement has created momentum for long-overdue reform of workplace sexual harassment laws. Now, Congress must act to eliminate or reform the Faragher/Ellerth defense. Part I of this note gives the history

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<sup>12</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>13</sup> *See, e.g.*, *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015); *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007).

<sup>14</sup> *See, e.g.*, *Jones*, 796 F.3d at 329; *Pinkerton*, 563 F.3d at 1063; *Baldwin*, 480 F.3d at 1307.

<sup>15</sup> *See, e.g.*, CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf) [<https://perma.cc/8ZWX-9YQH>] (“Much of the training done over the last [thirty] years has not worked as a prevention tool . . .”).

<sup>16</sup> *See id.* (“Roughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.”).

<sup>17</sup> *Id.* at 16.

<sup>18</sup> *See id.* at v (“The least common response of either men or women to harassment is to take some form of formal action—either to report the harassment internally or file a formal legal complaint.”).

<sup>19</sup> *See* 42 U.S.C. § 2000e-2(a)(1) (imposing liability for an unlawful employment practice on “an employer”); 42 U.S.C. § 2000e(b) (defining employer as “a person engaged in an industry affecting commerce who has fifteen or more employees”).

of sexual harassment as a form of sex discrimination, explains the origin of the Faragher/Ellerth defense, and traces the troubling way courts have interpreted the defense in situations in which the employee has not formally complained. Part II discusses a 2018 case from the Third Circuit, *Minarsky v. Susquehanna County*, in which the court responded directly to the #MeToo movement and departed significantly from precedent in applying the Faragher/Ellerth defense.<sup>20</sup> Part III proposes two ways Congress can legislate to reform the Faragher/Ellerth defense: (1) eliminating it so that employers are held strictly liable for sexual harassment by supervisors, or (2) reforming it to raise the bar employers must meet when demonstrating preventive efforts and to widen the range of victim responses considered reasonable. This note concludes by calling on Congress to turn the cultural transformation of attitudes toward sexual harassment into a transformation of the law as well.

## I. SEXUAL HARASSMENT AND THE FARAGHER/ELLERTH DEFENSE

### A. *Recognition of “Hostile Work Environment” as Sex Discrimination Under Title VII*

The theory of sex discrimination now known as hostile work environment was originally conceived of by Catharine MacKinnon in her landmark 1979 book, *Sexual Harassment of Working Women*.<sup>21</sup> MacKinnon identified two kinds of sexual harassment: “quid pro quo” harassment, in which a benefit of employment is conditioned upon the employee’s submission to sexual advances, and “condition of work” harassment, in which “sexual harassment simply makes the work environment unbearable.”<sup>22</sup> In “condition of work” harassment,

[u]nwanted sexual advances, made simply because she has a woman’s body, can be a daily part of a woman’s work life. She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work—but never promised or denied anything explicitly connected with her job.<sup>23</sup>

In 1980, the Equal Opportunity Employment Commission (EEOC) issued guidelines defining sexual harassment as a form

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<sup>20</sup> See *Minarsky v. Susquehanna County*, 895 F.3d 303, 313–14 (3d Cir. 2018).

<sup>21</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32–33, 40 (1979); GILLIAN THOMAS, *BECAUSE OF SEX* 86–87 (2016).

<sup>22</sup> MACKINNON, *supra* note 21, at 32–33, 40.

<sup>23</sup> *Id.* at 40.

of sex discrimination actionable under Title VII of the Civil Rights Act of 1964, including when “such conduct has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.”<sup>24</sup> Notably, these guidelines imposed strict liability on an employer for acts of “its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”<sup>25</sup>

Six years later, in 1986, the Supreme Court recognized sexual harassment that has created a “hostile or abusive work environment” as a form of sex discrimination prohibited by Title VII in *Meritor Savings Bank, FSB v. Vinson*.<sup>26</sup> But the Court limited employers’ liability for hostile work environments in two key ways. First, it held that a hostile work environment is only actionable when it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>27</sup> Second, the Court declined to adopt the EEOC’s strict-liability rule for harassment by supervisors. Instead of giving a definitive test for when an employer will be vicariously liable for supervisory harassment, the Court directed the lower courts to look to common-law “agency principles for guidance,”<sup>28</sup> instructing lower courts to find a middle ground between strict liability and allowing an employer to escape liability merely because the employer did not have notice of the harassment.<sup>29</sup> Crucially, the Court rejected the employer’s argument that it should be shielded from liability due to the “mere existence of a grievance procedure and a policy against discrimination” and the fact that the plaintiff did not complain

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<sup>24</sup> EEOC, Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11).

<sup>25</sup> *Id.* at 74,676.

<sup>26</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). The Court quoted the Eleventh Circuit case *Henson v. Dundee* to explain why this type of harassment constitutes discrimination:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

*Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

<sup>27</sup> *Id.* (alteration in original) (quoting *Henson*, 682 F.2d at 904).

<sup>28</sup> *Id.* at 72. The Court pointed lower courts to the Restatement (Second) of Agency sections 219 to 237, which concerns when a master or employer is liable for torts committed by its servant or employee. See *id.*; RESTATEMENT (SECOND) OF AGENCY §§ 219–37 (AM. LAW INST. 1958).

<sup>29</sup> See *Vinson*, 477 U.S. at 72.

using the procedure.<sup>30</sup> However, the Court suggested that the employer might have a stronger argument “if its procedures were better calculated to encourage victims of harassment to come forward.”<sup>31</sup> Over the next twelve years, lower courts struggled to apply “agency principles” to determine employer liability, reaching “wildly inconsistent results.”<sup>32</sup>

*B. The Supreme Court Establishes the Faragher/ Ellerth Defense*

In 1998, the Supreme Court revisited the question of vicarious employer liability under Title VII in two cases decided on the same day, *Faragher v. City of Boca Raton*<sup>33</sup> and *Burlington Industries, Inc. v. Ellerth*.<sup>34</sup> While the Court announced a new rule for employer liability jointly in *Faragher* and *Ellerth*, the facts of the two cases took place in very different workplaces.

Beth Ann Faragher worked at a city beach as a part-time ocean lifeguard for the City of Boca Raton in Florida.<sup>35</sup> While working together in the close quarters of the Marine Safety Section, Faragher’s two male supervisors repeatedly touched her and the other female lifeguards without their consent and made lewd and offensive comments about the female lifeguards and other women.<sup>36</sup> While the City of Boca Raton had a sexual harassment policy, it “completely failed to disseminate [it]” to employees in the Marine Safety Section.<sup>37</sup> Faragher did not report her supervisors’ conduct to higher management.<sup>38</sup>

By contrast, Kimberly Ellerth worked in an office, as a salesperson for Burlington Industries, a large company with twenty-two thousand employees in fifty locations around the United States.<sup>39</sup> Ellerth’s supervisor, a midlevel manager, made repeated sexualized comments about her body and clothing and touched her

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 73.

<sup>32</sup> Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 678 (2000) [hereinafter *The First Bite Is Free*].

<sup>33</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>34</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>35</sup> *Faragher*, 524 U.S. at 780.

<sup>36</sup> *Id.* For example, one supervisor repeatedly touched Faragher’s buttocks, and during an interview with a woman applying to be a lifeguard, told her that the female lifeguards had sex with the male lifeguards and asked her if she would do the same. Another supervisor pantomimed an act of oral sex, frequently made vulgar remarks, and told female lifeguards he wanted to have sex with them. *Id.* at 782.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Ellerth*, 524 U.S. at 747.

without her consent.<sup>40</sup> Burlington Industries had a policy against sexual harassment, which Ellerth knew about.<sup>41</sup> Like Faragher, Ellerth did not report her harassment to management through her employer's internal complaint procedure.<sup>42</sup>

In *Faragher* and *Ellerth*, the Supreme Court established a new scheme for determining employer liability for the acts of supervisors in hostile work environment cases.<sup>43</sup> When the supervisor takes a tangible employment action against the employee—including hiring, firing, or failing to promote the employee—the employer is vicariously liable for the supervisor's conduct.<sup>44</sup> However, when a supervisor creates a hostile work environment but does not take a tangible employment action, the employer is vicariously liable but may raise an affirmative defense.<sup>45</sup> This defense has two prongs: (1) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>46</sup>

Immediately following this articulation of the defense, the Court gave some guidance as to what evidence could be shown to satisfy each of its elements, suggesting that proof that the employer “had promulgated an antiharassment policy with complaint procedure” would often meet the first prong of the defense.<sup>47</sup> With regard to the second prong, the Court explicitly addressed an employee's failure to report harassment and said that proof of an “unreasonable failure” to use the employer's complaint procedure would “normally suffice” to meet this prong.<sup>48</sup>

In *Faragher*, the Court reasoned that providing this defense serves the “primary objective” of Title VII, which is “not to provide redress but to avoid harm.”<sup>49</sup> The idea is to give “credit here to

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<sup>40</sup> *Id.* at 748. For example, the supervisor told Ellerth, “I don't have time for you right now, Kim . . . unless you want to tell me what you're wearing,” and said, “are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.” *Id.*

<sup>41</sup> *Id.* at 748.

<sup>42</sup> *Id.* at 748–49.

<sup>43</sup> See *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 761.

<sup>44</sup> *Ellerth*, 524 U.S. at 761–62. A tangible employment action is an action that causes a significant change in employment status. *Questions and Answers for Small Employers on Employment Liability for Harassment by Supervisors*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Apr. 1, 2010), <https://www.eeoc.gov/policy/docs/harassment-facts.html> [<https://perma.cc/YW2A-M9AJ>].

<sup>45</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>46</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>47</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>48</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

<sup>49</sup> *Faragher*, 524 U.S. at 806 (citation omitted).

employers who make reasonable efforts to discharge their duty” to prevent sexual harassment from occurring in the first place.<sup>50</sup> In *Ellerth*, the Court noted that “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms,” and that making employer liability partially hinge on such mechanisms “would effect Congress’s intention to promote conciliation rather than litigation in the Title VII context.”<sup>51</sup> Therefore, the first prong of the defense is meant to incentivize employers to develop and promulgate policies and procedures that will prevent sexual harassment from occurring in their workplaces and to promptly eliminate it if it does.<sup>52</sup>

The second prong of the defense is meant to recognize the duty of victims to avoid or mitigate harm and to encourage victims to report harassment.<sup>53</sup> The Court explained that

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.<sup>54</sup>

This prong is also intended to allow employers to quash harassment before it becomes “severe or pervasive” by encouraging employees to report their harassment before it becomes bad enough to be legally actionable, serving Title VII’s “deterrent purpose.”<sup>55</sup>

After establishing this new framework, in *Ellerth*, the Court affirmed the opinion of the Court of Appeals and reversed the district court’s grant of summary judgment to Burlington Industries.<sup>56</sup> The Court held that Burlington Industries was vicariously liable, but remanded the case to allow Burlington Industries the opportunity to assert the newly established defense.<sup>57</sup> In *Faragher*, the Court found for Faragher outright because the record made clear that the City of Boca Raton could not prove the defense.<sup>58</sup> While the plaintiffs prevailed in each

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<sup>50</sup> *Id.* at 806.

<sup>51</sup> *Ellerth*, 524 U.S. at 764.

<sup>52</sup> *See Faragher*, 524 U.S. at 805.

<sup>53</sup> *See id.* at 806.

<sup>54</sup> *Id.* at 806–07.

<sup>55</sup> *Ellerth*, 524 U.S. at 764.

<sup>56</sup> *Id.* at 766.

<sup>57</sup> *Id.*

<sup>58</sup> *Faragher*, 524 U.S. at 808 (holding that the City of Boca Raton could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct because it failed to disseminate its antiharassment policy and made no attempt to oversee the conduct of the harassers).

case, lower courts quickly interpreted the Faragher/ Ellerth defense to overwhelmingly benefit defendant-employers.

C. *The Development of the Faragher/ Ellerth Defense in Subsequent Case Law*

In *Faragher* and *Ellerth*, the Supreme Court ostensibly held that employers are vicariously liable for hostile work environments created by supervisors, subject to the affirmative defense discussed above. But this apparent victory for victims has not been realized in subsequent cases, in which victims who delayed in making official complaints were denied a remedy.<sup>59</sup> Although the Court purportedly created a standard holding employers vicariously liable, “as a practical matter, the employers won.”<sup>60</sup> The defense has morphed in ways that strongly favor employers, with the result that employers are easily able to escape vicarious liability for sexual harassment at the expense of victims.<sup>61</sup>

Courts regularly find that an employer’s showing that it has an official policy against sexual harassment that was distributed to employees is enough to meet the first prong of the defense.<sup>62</sup> Though it is not always dispositive,<sup>63</sup> courts consider distribution of an antiharassment policy “compelling proof” that the company exercised reasonable care in preventing and promptly correcting sexual harassment.<sup>64</sup> For example, in *Shaw v. Autozone, Inc.*, an early and influential case, the Seventh Circuit held that the employer exercised reasonable care to prevent sexual harassment when it had distributed to employees an anti-sexual harassment policy containing multiple mechanisms for reporting complaints, even when the employee testified that she had never seen this policy.<sup>65</sup> As this case shows, so long as an employer can prove that it has distributed a written policy to its employees, the question of whether any given employee was actually aware of what the policy contained is irrelevant. For example, in *Helm v. Kansas*, the employee argued that her employer, the State of Kansas, had not

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<sup>59</sup> See, e.g., *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1055, 1063 (10th Cir. 2009); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 812–13 (7th Cir. 1999).

<sup>60</sup> *The First Bite Is Free*, *supra* note 32, at 703.

<sup>61</sup> *Id.* at 708–15.

<sup>62</sup> See, e.g., *Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011); *Shaw*, 180 F.3d at 811–12; *Phillips v. Taco Bell*, 156 F.3d 884, 889 (8th Cir. 1998).

<sup>63</sup> See *Weger v. City of Ladue*, 500 F.3d 710, 719 (8th Cir. 2007).

<sup>64</sup> *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (quoting *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998)).

<sup>65</sup> *Shaw*, 180 F.3d at 811–12.

sufficiently disseminated its sexual harassment policy.<sup>66</sup> The policy appeared in the middle of a fifty-page employee handbook, and although the employee had signed a form acknowledging that she had read and understood the handbook, she was completely unaware of the policy, as were numerous other employees.<sup>67</sup> The employer did not provide training on the policy to non-management employees.<sup>68</sup> Nonetheless, the court held that the employee had constructive knowledge of the policy because she had signed the acknowledgment form, so the employer's dissemination of the policy in this way was sufficient to show that it had exercised reasonable care to prevent harassment.<sup>69</sup>

While courts do examine employers' sexual harassment policies to some extent, this evaluation tends to be limited to the contents of the written document. Courts typically require a policy to include: "(i) a description of prohibited conduct; (ii) a list of individuals to whom complaints should be made, with a bypass procedure to ensure that no victim will have to complain to her harasser; and (iii) a grievance procedure calculated to bring out complaints."<sup>70</sup> Courts recognize a range of different policies that meet these parameters.<sup>71</sup>

Notably, the effectiveness of an employer's written policy at preventing harassment is generally not part of the analysis.<sup>72</sup> For instance, in *Weger v. City of Ladue*, the plaintiff-employee argued that the employer's policy was ineffective because the employee's coworkers observed the employee's harassment by her supervisor but did not report it, the employer did not offer sexual harassment training, and the employer did not attempt to monitor the supervisor's behavior.<sup>73</sup> Sidestepping the question of effectiveness, the court held that because the employer's policy "identifie[d] multiple officials to whom harassment may be reported and contain[ed] an antiretaliation provision," it was

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<sup>66</sup> *Helm*, 656 F.3d at 1288. The employee was an administrative assistant who was touched on her rear end, legs, and breasts; forcibly kissed; and manually vaginally penetrated by her supervisor, a state court judge. *Id.* at 1280.

<sup>67</sup> *Id.* at 1288.

<sup>68</sup> *Id.* at 1289.

<sup>69</sup> *Id.* at 1289–90.

<sup>70</sup> Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 11 (2003) [hereinafter *The Culture of Compliance*] (footnotes omitted).

<sup>71</sup> *Id.* at 11.

<sup>72</sup> *But see* *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F. Supp. 2d 1055, 1068 (M.D. Tenn. 2000) (finding it to be a jury question whether an existing policy "was being implemented and, if so, whether it was a reasonable and effective means of meeting the employer's duty to prevent and to correct sexual harassment").

<sup>73</sup> *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007).

“facially valid,” and “as a matter of law,” showed that the employer acted reasonably to prevent harassment.<sup>74</sup>

When an employer has a facially valid policy, but the employee has not complained via the policy’s complaint procedure, courts routinely find the second prong of the Faragher/Ellerth defense to be met because this constitutes an unreasonable failure to take advantage of an opportunity to correct the harassment.<sup>75</sup> In *Faragher* and *Ellerth*, the Supreme Court explained that proof that an employee *unreasonably* failed to complain through the employer’s complaint procedure would “normally suffice” to satisfy this prong of the defense.<sup>76</sup> In subsequent cases, courts have regularly found that the employee acted unreasonably even when the employee did make a complaint through the employer’s procedure, but delayed in doing so.<sup>77</sup> Additionally, courts have declared to be “unreasonable” the very reasons that many women do not report harassment, including a “generalized fear of retaliation”<sup>78</sup> or a feeling that “reports would have fallen on deaf ears.”<sup>79</sup>

Even a short delay in making a formal complaint can create a barrier to justice for a victim of harassment, as illustrated by an Eleventh Circuit case, *Baldwin v. Blue Cross/Blue Shield of Alabama*.<sup>80</sup> Judge Ed Carnes, recounting the facts of the case, repeatedly emphasized that Baldwin “never complained” about her supervisor’s sexually explicit comments and sexual misconduct, which included propositioning her while on a business trip, and, on another occasion, calling her into his office, closing the door, coming up close behind her, and saying, “Hey, Babe, blow me.”<sup>81</sup> Judge Carnes held that the second prong of the Faragher/Ellerth defense was met because, while the employee “finally complained” to the Human Resources Department,<sup>82</sup> she did so three months and two weeks after her supervisor’s first proposition.<sup>83</sup> Calling this “anything but prompt, early, or soon,” Judge Carnes concluded that

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<sup>74</sup> *Id.*

<sup>75</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>76</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>77</sup> *See, e.g.*, *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009).

<sup>78</sup> *Id.*

<sup>79</sup> *Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 985 (8th Cir. 2012).

<sup>80</sup> *See Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007).

<sup>81</sup> *Baldwin*, 480 F.3d at 1292, 1294. Judge Carnes noted the employee’s failure to complain five times: “she never complained about it;” “[s]he did not, however, complain to anyone about it, at least not then;” “she did not report the conversation or her fears to any higher-up or to anyone in the Human Resources Department;” “she did not file a complaint with anyone in the company;” “[s]he made no attempt, however, to report anything to Employee Relations.” *Id.* at 1293–95.

<sup>82</sup> *Id.* at 1297.

<sup>83</sup> *Id.* at 1307.

she “waited too long to complain.”<sup>84</sup> The employee testified that she had delayed reporting because she feared losing her job and that she wanted to “just go along to get along.”<sup>85</sup> Judge Carnes dismissed this reason as invalid because any harassed employee could say that she did not report out of fear of being fired and drew on precedent to explain that “the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims.”<sup>86</sup>

Similarly, in *Pinkerton v. Colorado Department of Transportation*, the court placed the burden of preventing and remedying sexual harassment on the *victims* of sexual harassment.<sup>87</sup> In this case, the employee worked as an administrative assistant for the Colorado Department of Transportation (CDOT).<sup>88</sup> Her immediate supervisor made what Judge Paul Kelly, writing for the Tenth Circuit, characterized as “inappropriate, sexually oriented remarks,” including asking her about her breast size, whether she had sexual urges, and if she masturbated.<sup>89</sup> After enduring these comments for two and a half months, Pinkerton reported them to CDOT’s internal civil rights administrator, and shortly thereafter, she filed a written complaint.<sup>90</sup> Judge Kelly held that this “unexplained” delay was unreasonable, because the employee knew of CDOT’s antiharassment policy and did not take the opportunity to report her harassment sooner.<sup>91</sup> Like in *Baldwin*, the employee said that she did not complain sooner because she feared retaliation from her supervisor.<sup>92</sup> Judge Kelly rejected this reason, saying that because the objective of Title VII is to avoid harm, the employee has a duty to promptly report her harassment so that the employer can correct it.<sup>93</sup> Even if the employee fears retaliation, “a generalized fear of retaliation simply is not sufficient to explain a *long delay* in reporting sexual harassment.”<sup>94</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (alteration in original) (quoting *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003)). Judge Carnes further found the employee’s response to the employer’s remedy unreasonable because, following investigation of her sexual harassment claim, she “refused to cooperate” with the employer’s proposed remedies: undergoing joint counseling with her harasser (while continuing to work with him), or the employee being transferred to work in another city. *Id.* at 1305–06, 1308.

<sup>87</sup> See *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009).

<sup>88</sup> *Id.* at 1055.

<sup>89</sup> *Id.* at 1057.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1063–64.

<sup>92</sup> See *id.* at 1063; *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007).

<sup>93</sup> *Pinkerton*, 563 F.3d at 1063–64.

<sup>94</sup> *Id.* at 1063 (emphasis added). However, courts do find a delay or failure to report to be “reasonable” when the employee testifies to specific facts leading him or her

In dissent, Judge David Ebel argued that a jury could find that the employee's delay in complaining was not unreasonable, and suggested a list of factors to be considered in determining the reasonableness of the employee's behavior, including the length of the delay; the precise nature of the harassment especially in the initial stages; the accessibility and effectiveness of the complaint procedure; and any other efforts the employee took to attempt to stop the harassment or prevent it from worsening.<sup>95</sup>

Not surprisingly, when a mere few months' delay in reporting is deemed unreasonable, courts do not hesitate to conclude that an employee's behavior was unreasonable when she did not report the harassment to her employer at all. For example, in *Jones v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit upheld the district court's grant of summary judgment to the employer, holding that because the employee experienced sexual harassment for ten years and did not report it, the second prong of the defense was met and "no reasonable jury could hold [the employer] liable for such harassment."<sup>96</sup>

Thus, while purporting to hold employers vicariously liable for supervisor-created hostile work environments, the Faragher/Ellerth defense makes it very easy for employers to dodge liability in the extremely common situation in which the victim does not promptly report his or her harassment.<sup>97</sup> A recent Third Circuit case, *Minarsky v. Susquehanna County*,<sup>98</sup> demonstrates how this interpretation of the defense creates barriers to justice for victims of harassment. It also points the way forward for courts to course correct and provide redress to victims who have remained silent.

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to believe that retaliation might occur. *See, e.g.,* Still v. Cummins Power Sys., No. 07-5235, 2009 WL 57021, at \*13 (E.D. Pa. Jan. 8, 2009) (finding employee's failure to use employer's internal complaint procedure potentially reasonable in racially based hostile work environment case when two other employees had been retaliated against after lodging complaints against the same supervisor).

<sup>95</sup> *Pinkerton*, 563 F.3d at 1068 (Ebel, J., dissenting).

<sup>96</sup> *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015); *see also, e.g.,* *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1181–82 (9th Cir. 2001) (holding that employee who did not complain about her harasser's behavior to company's management or human resources had "unreasonably failed to take advantage of [the company's] preventative and corrective opportunities.").

<sup>97</sup> According to a report from the EEOC, approximately seventy percent of employees who suffer workplace harassment never speak with a supervisor or manager about it. FELDBLUM & LIPNIC, *supra* note 15, at 16.

<sup>98</sup> *Minarsky v. Susquehanna County*, 895 F.3d 303 (3d Cir. 2013).

## II. *MINARSKY V. SUSQUEHANNA COUNTY* HIGHLIGHTS THE FLAWS OF THE FARAGHER/ELLERTH DEFENSE

Responding directly to the #MeToo movement, in *Minarsky v. Susquehanna County* the Third Circuit recognized problems with both prongs of the Faragher/Ellerth defense. Writing for the majority, Judge Margaret Rendell raised the bar for what an employer must show to meet the first prong of the defense and recognized that a victim who does not complain is not always acting unreasonably. *Minarsky* represents a significant departure from prior case law and shows how courts can reinterpret the Faragher/Ellerth defense to better align with the realities of workplace harassment and provide a remedy to its victims.

Sheri Minarsky began work as an administrative assistant at the Susquehanna County Department of Veterans Affairs in September 2009.<sup>99</sup> On her first day of work, she signed Susquehanna County's General Harassment Policy, which prohibited harassment based upon sex and directed employees to report such harassment to their supervisor, or, if the supervisor was the harasser, to the Chief County Clerk or a County Commissioner.<sup>100</sup> One day per week, Minarsky worked closely with her supervisor, Thomas Yadlosky, the director of the department.<sup>101</sup> Minarsky testified that soon after she began working with Yadlosky, he started to sexually harass her, mostly in the form of unwanted sexual touching.<sup>102</sup> Yadlosky massaged her shoulders, hugged her from behind, "pull[ed] [her] against him," and attempted to kiss her.<sup>103</sup> Since the two worked in an area separate from the other employees, Yadlosky's behavior was largely unobserved by others.<sup>104</sup> Yadlosky also used his work email address to send Minarsky sexually explicit emails and called her at home on her days off to ask personal questions.<sup>105</sup>

Yadlosky harassed Minarsky over a period of nearly four years.<sup>106</sup> Toward the beginning of her employment, Minarsky asked Yadlosky to stop, to no avail.<sup>107</sup> Minarsky did not follow the complaint procedure detailed in the General Harassment Policy and report Yadlosky's harassment to the Chief County

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<sup>99</sup> *Id.* at 306.

<sup>100</sup> *Id.* at 308.

<sup>101</sup> *Id.* at 306.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (second alteration in original).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 307.

<sup>106</sup> *Id.* at 308. The harassment began shortly after Minarsky started her employment in September 2009 and continued until July 2013. *Id.* at 306, 308.

<sup>107</sup> *Id.* at 307.

Clerk or any of the County Commissioners for several reasons.<sup>108</sup> She feared retaliation from Yadlosky himself, because when she had voiced disagreement with him in the past, he had become “nasty.”<sup>109</sup> She did not trust the County Commissioners because Yadlosky had repeatedly told her that she was at risk of being fired by them.<sup>110</sup> She feared losing her job, which she needed to keep so that she could pay the medical bills for her young daughter’s cancer treatment.<sup>111</sup> Moreover, she knew that Yadlosky had previously been reprimanded for inappropriate behavior toward another woman, yet the reprimand had not changed his behavior, and she worried that her complaint against him would likewise be ineffective.<sup>112</sup>

By April 2013, the emotional toll of Yadlosky’s harassment had adversely affected Minarsky’s health and, following a conversation with her physician, she emailed Yadlosky telling him how uncomfortable his behavior made her.<sup>113</sup> Shortly thereafter, she told a coworker about the harassment and, after an investigation by the County, Yadlosky was terminated.<sup>114</sup> In October 2014, Minarsky sued both Yadlosky and the County under Title VII and Pennsylvania law.<sup>115</sup>

When the case reached the Third Circuit, Judge Rendell, in an opinion filed on July 3, 2018, vacated and remanded the trial court’s grant of summary judgment to the County, finding that there was a genuine issue of fact as to whether both elements of the Faragher/Ellerth defense had been met.<sup>116</sup> Judge Rendell acknowledged the #MeToo movement in a footnote, noting that “[t]his appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims,” and drawing out the #MeToo movement’s relevance to the Faragher/Ellerth defense.<sup>117</sup>

With regard to the first prong of the Faragher/Ellerth defense, “that the employer exercised reasonable care to prevent

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<sup>108</sup> *Id.* at 308.

<sup>109</sup> *Id.* at 307.

<sup>110</sup> *Id.* at 308.

<sup>111</sup> *Id.* at 307.

<sup>112</sup> *Id.* at 307–08.

<sup>113</sup> *Id.* at 308.

<sup>114</sup> *Id.* at 308–09.

<sup>115</sup> See Complaint, *Minarsky v. Susquehanna County*, No. 3:14-cv-2021 (M.D. Pa. Oct. 21, 2014). Minarsky’s claims against Yadlosky were eventually withdrawn or dismissed. See *Minarsky*, 895 F.3d at 309.

<sup>116</sup> *Minarsky*, 895 F.3d at 303, 306. On remand, the case settled prior to trial. Order at 1, *Minarsky v. Susquehanna County*, No. 3:14-cv-2021 (M.D. Pa. dismissed Jan. 16, 2019).

<sup>117</sup> *Minarsky*, 895 F.3d at 313 n.12.

and correct promptly any sexually harassing behavior,”<sup>118</sup> Judge Rendell stressed that although the County had a written antiharassment policy, which Minarsky had signed, County officials were also aware that Yadlosky demonstrated a “pattern of inappropriate physical contact,” including having attempted to hug or kiss the County Commissioner herself approximately ten times.<sup>119</sup> And although “County officials were faced with indicators that Yadlosky’s behavior formed a pattern of conduct, as opposed to mere stray incidents, . . . they seemingly turned a blind eye.”<sup>120</sup> Judge Rendell questioned whether the County’s antiharassment policy was really effective, wondering if, since the County had notice of Yadlosky’s pattern of unwanted advances toward female employees, the County should have taken more care to ensure that Minarsky was not being harassed.<sup>121</sup> Accordingly, Judge Rendell held that there was a genuine issue of material fact such that the jury should have decided whether the County had exercised reasonable care to prevent and correct Yadlosky’s harassment of Minarsky.<sup>122</sup>

Judge Rendell’s emphasis on whether the County’s antiharassment policy was generally effective, and particularly effective for Sheri Minarsky, is a surprising departure from prior case law, in which courts rubber-stamp “facially valid” policies disseminated to employees without any examination into whether they actually work.<sup>123</sup> Her treatment of the second prong of the defense constitutes an even bigger and arguably more important departure: contrary to the weight of prior case law,<sup>124</sup> Judge Rendell emphasized that “a mere failure to report one’s harassment is not *per se* unreasonable.”<sup>125</sup>

Calling the reasonableness of the plaintiff’s actions in workplace sexual harassment cases “a paradigmatic question for the jury” because it is “highly circumstance-specific,” Judge Rendell emphasized all of the reasons that a jury could find that Minarsky did not act unreasonably.<sup>126</sup> She did not report because of “her fear of Yadlosky’s hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; and the futility of reporting, since others knew

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<sup>118</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>119</sup> *Minarsky*, 895 F.3d at 312.

<sup>120</sup> *Id.* at 312–13.

<sup>121</sup> *Id.* at 313.

<sup>122</sup> *Id.*

<sup>123</sup> *See supra* Section I.C.

<sup>124</sup> *See supra* Section I.C.

<sup>125</sup> *Minarsky*, 895 F.3d at 314.

<sup>126</sup> *Id.* at 313–14.

of his conduct, yet it continued.”<sup>127</sup> She could not afford to lose her job as she needed to continue paying for her daughter’s cancer treatment.<sup>128</sup> In a lengthy discussion of the underlying evidence that could lead a jury to conclude that Minarsky was not unreasonable for failing to report, Judge Rendell also pointed to the ways in which the harassment physically and emotionally harmed Minarsky and may have contributed to her hesitation to tell anyone about what was happening.<sup>129</sup> A jury could find that Minarsky’s silence was not an “idle delay in reporting,” but rather a reasonable reaction to “prolonged, agonizing harassment.”<sup>130</sup>

Judge Rendell addressed the #MeToo movement in a footnote, noting that, in many cases, #MeToo victims coming forward with stories of harassment by powerful men did not report their harassment for years.<sup>131</sup> Citing news articles and the EEOC’s 2016 Report of the Select Task Force on the Study of Harassment in the Workplace showing that the failure to report workplace harassment is widespread, Judge Rendell observed that the policy behind the Faragher/Ellerth defense—which faults an employee who does not report harassment in the name of preventing future harassment—is out of step with how real people react to harassment:<sup>132</sup>

[T]here may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.<sup>133</sup>

Because a jury might be sympathetic to these reasons for not reporting harassment, “a jury could conclude that the employee’s non-reporting was understandable, perhaps even reasonable.”<sup>134</sup>

The findings of the EEOC in the report cited in *Minarsky* demonstrate that what most judges expect from sexual-harassment victims does not align with how victims actually

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<sup>127</sup> *Id.* at 314.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 316–17.

<sup>130</sup> *Id.* at 316.

<sup>131</sup> *Id.* at 313 n.12.

<sup>132</sup> *Id.* (citing FELDBLUM & LIPNIC, *supra* note 15, at v; ABC News/Washington Post, *Unwanted Sexual Harassment: Not Just a Hollywood Story* (Oct. 17, 2017), <https://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf> [<https://perma.cc/X832-N2UQ>]; Stefanie Johnson et al., *Why We Fail to Report Sexual Harassment*, HARVARD BUS. REV. (Oct. 4, 2016), <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment> [<https://perma.cc/7NLV-JP6L>]).

<sup>133</sup> *Minarsky*, 895 F.3d at 313 n.12.

<sup>134</sup> *Id.*

react. This 2016 report by the co-chairs of the EEOC, following an eighteen-month examination of workplace harassment by the Select Task Force on the Study of Harassment in the Workplace, surveyed studies of workplace harassment and concluded that “[t]he least common response of either men or women to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint.”<sup>135</sup> In fact, only six to thirteen percent of employees who experience harassment file a formal complaint.<sup>136</sup>

Common reasons that employees do not report harassment are fear that they will not be believed, fear that the employer will not do anything in response to their claim, and fear of social and professional retaliation.<sup>137</sup> Additionally, employees may not report because they experience natural psychological responses to the harassment: shame, self-blame, and denial.<sup>138</sup> But courts regularly do not consider a fear of retaliation or inaction to justify a delay or failure to report, even though these are the very same reasons that the majority of employees do not report harassment.<sup>139</sup> When courts label women who delay in complaining or do not formally complain at all as unreasonable, this “contradicts the available empirical evidence and imposes expectations upon women that experience demonstrates few of them will meet.”<sup>140</sup> As *Minarsky* recognizes, this signals that the case law, which requires victims to respond in one narrowly defined, unrealistic manner and denies them a remedy when they do not, is seriously out of step with the reality of how victims respond to harassment.<sup>141</sup>

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<sup>135</sup> FELDBLUM & LIPNIC, *supra* note 15, at 16 (emphasis omitted).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; see also Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html> [<https://perma.cc/V776-UJ43>] (explaining that victims do not report sexual harassment because they fear retaliation or “fear they will face disbelief, inaction, blame or societal and professional retaliation”).

<sup>138</sup> See Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner> [<https://perma.cc/BC2E-HFY5>]; see also FELDBLUM & LIPNIC, *supra* note 15, at 15 (“Common workplace-based responses by those who experience sex-based harassment are to . . . deny or downplay the gravity of the situation . . .”).

<sup>139</sup> See *supra* Section I.C.

<sup>140</sup> L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 742 (2007). Hebert argues for a “reasonable woman” standard for application of the second prong of the defense, requiring courts to acknowledge the “effect gender has on the reasonableness of responses to being sexually harassed.” *Id.* at 743.

<sup>141</sup> See *The First Bite Is Free*, *supra* note 32, at 728 (“Some of the unfairness inflicted on victims by the affirmative defense could be solved if courts would take a more contextualized approach to determining ‘reasonableness.’”).

Moreover, the Faragher/Ellerth defense rewards an employer's symbolic gestures rather than substantive efforts to actually prevent harassment in that particular workplace.<sup>142</sup> While the Faragher/Ellerth defense was originally intended to advance Title VII's purpose of "encourage[ing] the creation of antiharassment policies and *effective* grievance mechanisms,"<sup>143</sup> the question of whether the employer's policies and procedures are effective has dropped out of the analysis. Employers have responded to the creation of the defense by disseminating written policies against harassment to employees and then pointing to these policies to escape liability when harassment does occur.<sup>144</sup> However, studies suggest that antiharassment policies and grievance procedures may not have much effect on whether harassment will occur in that workplace.<sup>145</sup> Employers have also responded by providing harassment and diversity training, but according to the EEOC's report of the Select Task Force on the Study of Harassment in the Workplace, "[m]uch of the training done over the last [thirty] years has not worked as a prevention tool—it's been too focused on simply avoiding legal liability."<sup>146</sup> As feminist legal scholar Susan Bisom-Rapp has argued, this approach provides a "cosmetic rather than a substantive solution."<sup>147</sup> Therefore, the measures employers take to show that they "exercised reasonable care to prevent and correct"<sup>148</sup> sexual harassment often do not actually prevent harassment at all.

Indeed, as workplace equality scholar Joanna L. Grossman points out, employers are disincentivized to "undertake any employer measures that go beyond the minimum requirements if those additional measures actually *induce* victims to complain" because if the employee promptly complains, the Faragher/Ellerth defense is no longer available to the employer.<sup>149</sup> The defense thus creates perverse incentives for employers to take only the bare

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<sup>142</sup> See *The Culture of Compliance*, *supra* note 70, at 3 (arguing that the Faragher/Ellerth defense allows employers to "insulate themselves from liability entirely without making a dent in the underlying problem" by complying with judicially created rules and adopting "cookie-cutter sexual harassment policies and procedures").

<sup>143</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (emphasis added).

<sup>144</sup> See *supra* Section I.C.

<sup>145</sup> See, e.g., Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Trainings Really Work?*, SCI. AM. (Nov. 10, 2017), <https://blogs.scientificamerican.com/observations/do-sexual-harassment-prevention-trainings-really-work/> [<https://perma.cc/3JG5-Q2SE>].

<sup>146</sup> FELDBLUM & LIPNIC, *supra* note 15, at v.

<sup>147</sup> Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 62 (2018).

<sup>148</sup> *Ellerth*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>149</sup> *The Culture of Compliance*, *supra* note 70, at 14.

minimum steps to gesture at prevention in order to shield against liability.<sup>150</sup> Employers are rewarded for “paying lip service” to preventing harassment, and “[t]hus, the triumph of form over substance in sexual harassment law occurs.”<sup>151</sup>

### III. CONGRESS MUST ACT TO ELIMINATE OR REFORM THE FARAGHER/ELLERTH DEFENSE

The Faragher/Ellerth defense must be either eliminated or reformed to provide more adequate relief to employee-victims. While *Minarsky* points the way for courts to provide a remedy to victims who have not complained by returning to the original spirit and language of *Faragher* and *Ellerth*, reform through modification of the doctrine may be slow to come in some circuits and nonexistent in others. Therefore, to provide full and effective relief nationwide, Congress must act to remove this barrier to justice and provide victims of harassment, including those who did not complain, with a remedy for the harm done to them.<sup>152</sup>

First, this Part will propose legislation to eliminate the Faragher/Ellerth defense and hold employers strictly liable when supervisors create hostile work environments, following a model provided by the New York City Human Rights Law. Second, this Part will propose an alternative legislative reform of the defense that raises the bar for the preventive efforts an employer is required to show and mandates that courts make a contextualized inquiry into the particular circumstances of the complaining employee when considering whether she acted reasonably.

Congress should eliminate or reform the Faragher/Ellerth defense under Title VII. State and local legislatures should also independently enact these reforms so that the defense does not apply, or does not apply in the same way, under state and local antidiscrimination laws. While most state and local antidiscrimination laws are coextensive with Title VII, such that the Faragher/Ellerth defense will apply to claims under these laws as well, state and local legislatures have the power to change

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<sup>150</sup> See Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002) (noting that courts have interpreted the defense to reward only “minimal prevention efforts” by the employer).

<sup>151</sup> *The Culture of Compliance*, *supra* note 70, at 4–5.

<sup>152</sup> By allowing more victims to access remedies, both of these solutions advance the compensatory goal of Title VII as stated in *Albemarle Paper Co. v. Moody*: “It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Furthermore, the threat of being forced to pay damages (such as back pay) when discrimination occurs will incentivize employers to eliminate discrimination in their workplaces. *Id.* at 417–18.

their laws to provide greater protections and more effective relief to victims of harassment.<sup>153</sup>

### A. *Strict Liability for Employers*

Congress can better protect and compensate victims of sexual harassment by eliminating the Faragher/Ellerth defense and holding employers strictly liable for supervisor-created hostile work environments, as is the case under the New York City Human Rights Law (NYCHRL).<sup>154</sup> NYCHRL section 8-107(13) holds employers liable for “an unlawful discriminatory practice based upon the conduct of an employee or agent . . . [who] exercised managerial or supervisory responsibility.”<sup>155</sup> This section was enacted in 1991 as part of the sweeping reform of the NYCHRL meant to strengthen its antidiscrimination protections.<sup>156</sup> Section 8-107(13) was intended to “provide an incentive to establish a policy against discrimination, [and] hold employers to a high level of liability for employment discrimination.”<sup>157</sup> In *Zakrzewska v. New School*, the New York Court of Appeals held that the Faragher/Ellerth defense is not available under the NYCHRL.<sup>158</sup> This case provides a powerful example of how imposing strict liability on employers for harassment by supervisors is more fair to victims of harassment than is the Faragher/Ellerth defense.

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<sup>153</sup> For example, New York state recently adopted legislation eliminating the availability of the Faragher/Ellerth defense under the New York State Human Rights Law and instead providing that “[t]he fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable.” N.Y. EXEC. LAW § 296(1)(h).

<sup>154</sup> N.Y.C. ADMIN. CODE § 8-107(13)(b). California and Illinois have also eliminated the Faragher/Ellerth defense and hold employers strictly liable. *See* State Dept. of Health Servs. v. Superior Court of Sacramento, 79 P.3d 556, 562 (Cal. 2003) (holding that employers are strictly liable for sexual harassment by supervisors under California’s Fair Employment and Housing Act); Sangamon Cty. Sheriff’s Dep’t v. Ill. Human Rights Comm’n, 908 N.E.2d 39, 45 (Ill. 2009) (holding that employers are strictly liable for sexual harassment by supervisors under the Illinois Human Rights Act).

<sup>155</sup> N.Y.C. ADMIN. CODE § 8-107(13)(b).

<sup>156</sup> N.Y.C. COUNCIL, COMM. ON GEN. WELFARE, REPORT ON PROPOSED INT. NO. 465-A AND PROPOSED INT. NO. 536-A, at 1–3 (1991), <http://www.antibiaslaw.com/sites/default/files/all/LL39CommitteeReport.pdf> [<https://perma.cc/VTS6-SUXK>].

<sup>157</sup> *Id.* at 6. Although the 1991 Amendments were meant to provide greater protection than was available under state and federal laws, courts regularly interpreted NYCHRL provisions to be coextensive with federal laws, and the New York City Council passed the Restoration Act in 2005 to underscore that the NYCHRL should be construed independently from state and federal law. Craig Gurain, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 277 nn.101–02 (2006); *see* N.Y.C. LOCAL LAW NO. 85 OF 2005.

<sup>158</sup> *Zakrzewska v. New Sch. (Zakrzewska II)*, 928 N.E.2d 1035, 1036 (N.Y. 2010).

Plaintiff Domenika Zakrzewska was a student at The New School who worked part-time in the School's Print Output Center and was subjected to "sexually harassing emails and conduct" by her supervisor.<sup>159</sup> Zakrzewska brought suit in federal court in the Southern District of New York, asserting claims of sexual harassment and retaliation under the NYCHRL.<sup>160</sup> District Judge Lewis Kaplan found The New School entitled to the Faragher/Ellerth defense: it had disseminated its anti-sexual harassment policy, and Zakrzewska did not make a formal complaint until two years after the harassment began, which the judge called "a very lengthy period of silence."<sup>161</sup> Moreover, when she was dissatisfied with The New School's subsequent investigation, she "deliberately decided not to" take the next step in The New School's procedure.<sup>162</sup> However, Judge Kaplan questioned whether the Faragher/Ellerth defense was available under the NYCHRL, noting that while state and local anti-discrimination laws are generally considered to be coextensive with Title VII, "the plain language of [the NYCHRL] is inconsistent with the defense crafted by the Supreme Court in *Faragher* and *Ellerth*."<sup>163</sup> Judge Kaplan declined to grant summary judgment to The New School and certified the question of whether the Faragher/Ellerth defense applies under the NYCHRL to the Court of Appeals for the Second Circuit.<sup>164</sup> The Second Circuit in turn certified this question to the New York Court of Appeals, New York's highest court, to make a definitive determination on this significant issue of New York law.<sup>165</sup>

The New York Court of Appeals agreed with Judge Kaplan that under the plain, unambiguous language of the NYCHRL, The New School could not use the Faragher/Ellerth defense to escape liability.<sup>166</sup> Zakrzewska had alleged that the harasser was her immediate supervisor, and section 8-107(13)(b) imposes liability on an employer when the harasser "exercised managerial or supervisory responsibility."<sup>167</sup> Moreover, under section 8-107(13)(e), an employer's antidiscrimination policies and procedures serve to limit the damages recoverable by the

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<sup>159</sup> *Id.*

<sup>160</sup> *Zakrzewska v. New Sch. (Zakrzewska I)*, 598 F. Supp. 2d 426, 429, 431 (S.D.N.Y. 2009). Zakrzewska was domiciled in Florida, giving federal court diversity jurisdiction over the case. See Amended Complaint at 1–2, *Zakrzewska v. New Sch.*, No. 06 Civ. 5463 (LAK) (S.D.N.Y. July 25, 2006).

<sup>161</sup> *Zakrzewska I*, 598 F. Supp. 2d at 433–45.

<sup>162</sup> *Id.* at 433–34.

<sup>163</sup> *Id.* at 435.

<sup>164</sup> *Id.* at 437–38.

<sup>165</sup> *Zakrzewska v. New Sch.*, 574 F.3d 24, 28 (2d Cir. 2009).

<sup>166</sup> *Zakrzewska II*, 928 N.E.2d at 1039.

<sup>167</sup> *Zakrzewska II*, 928 N.E.2d at 1036; N.Y.C. ADMIN. CODE § 8-107(13)(b).

employee, rather than work as a total shield against liability.<sup>168</sup> Therefore, this legislative scheme of section 8-107(13) was inconsistent with the Faragher/Ellerth defense.<sup>169</sup> The court also looked to the legislative history, concluding that the New York City Council intended section 8-107(13)(b) to impose strict liability for employers in cases of workplace discrimination.<sup>170</sup>

After *Zakrzewska*,<sup>171</sup> New York courts find employers liable for supervisor-created hostile work environments under the NYCHRL even when the Faragher/Ellerth defense applies to the employee's claims under Title VII.<sup>172</sup> Strict liability thus grants a remedy to victims of harassment who would not have one under Title VII. Because the Faragher/Ellerth defense leaves plaintiffs who suffer legally actionable harassment without any remedy, it is "inherently unfair."<sup>173</sup> A rule holding employers strictly liable for harassment created by supervisors, managers, and even coworkers, locates responsibility for preventing harassment in the appropriate place. The employer has control over the workplace and has the power to create a culture and implement policies and procedures that prevent harassment and discrimination. The onus should be on the employer to create a harassment-free workplace and be held legally responsible if it fails to do so. If the goal of Title VII is to "avoid harm"<sup>174</sup>—to prevent discrimination from occurring—this will be more appropriately and effectively accomplished by allocating the burden for preventing harassment to the employer, not to the employee.

Some may question whether the loss of the Faragher/Ellerth defense will cause employers to cease adopting antiharassment policies and procedures. However, rather than creating the perverse incentives discussed in Part II, holding employers strictly liable would incentivize them to implement policies and procedures that truly do prevent sexual harassment.

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<sup>168</sup> *Zakrzewska II*, 928 N.E.2d at 1039; see N.Y.C. ADMIN. CODE § 8-107(13)(3).

<sup>169</sup> *Zakrzewska II*, 928 N.E.2d at 1039.

<sup>170</sup> *Id.*

<sup>171</sup> *Zakrzewska* eventually settled her case with The New School. See Order, *Zakrzewska v. New Sch.*, 06 Civ. 5463 (LAK) (S.D.N.Y. Jan. 24, 2011).

<sup>172</sup> See, e.g., *Philip v. Gtech Corp.*, No. 14 Civ. 9261, 2016 WL 3959729, at \*27 (S.D.N.Y. July 20, 2016) (allowing plaintiff's NYCHRL claim for a racial hostile work environment to proceed even if Faragher/Ellerth defense could apply to plaintiff's state and federal claims); *Edrisse v. Marriott Int'l, Inc.*, 757 F. Supp. 2d 381, 388–89 (S.D.N.Y. 2010) (allowing employee's NYCHRL claim to proceed but granting summary judgment to employer on Title VII claim because it had satisfied the Faragher/Ellerth defense by having an antiharassment policy and multiple avenues by which employees could report harassment, and employee had not "pursue[d] these opportunities.").

<sup>173</sup> *The First Bite Is Free*, *supra* note 32, at 735.

<sup>174</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

Employers who face liability for monetary damages whenever sexual harassment occurs in their workplaces will be motivated to do everything possible to prevent it from happening to protect their bottom line.<sup>175</sup> As Susan Bisom-Rapp argues, “[g]reater potential exposure to liability may spur employers to make changes not only to training but to transforming workplace culture.”<sup>176</sup>

Moreover, employer efforts to prevent harassment can be further rewarded if employers are permitted to show evidence of “good-faith efforts to prevent discrimination” to reduce their exposure to damages,<sup>177</sup> as available under the NYCHRL.<sup>178</sup> Employers would still be incentivized to develop and implement harassment-preventing policies and procedures as a way to limit their damages, rather than as a total shield against liability.<sup>179</sup> If an employer, in good faith, takes substantial measures to prevent harassment in its workplace, but harassment by a supervisor still occurs, the extent of the employer’s preventive efforts can be considered as part of the damages calculation.

Imposing strict liability on employers for hostile work environments created by supervisors will motivate employers to combat harassment and “reward them only if their actions work.”<sup>180</sup> If an employer’s efforts to prevent sexual harassment succeed, harassment will not occur and the employer will not be exposed to liability. Strict liability thus incentivizes substantive, successful prevention of sexual harassment. If employer efforts are not successful, however, victim-employees are still afforded a remedy.

### *B. Legislative Reform of the Faragher / Ellerth Defense*

An alternative solution to imposing a strict-liability rule is legislation that retains the defense but reforms it to hold employers to a higher standard in preventing harassment and to more accurately reflect how real victims reasonably respond to harassment. Congress or state and local legislatures can reform the defense by requiring a list of factors to be considered by judges in its application.

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<sup>175</sup> See Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1332 (1989) (“The most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable.”).

<sup>176</sup> Bisom-Rapp, *supra* note 147, at 74.

<sup>177</sup> *Id.*

<sup>178</sup> N.Y.C. ADMIN. CODE § 8-107(13)(d)–(e) (allowing an employer to mitigate penalties or damages by showing it had “[e]stablished and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices” including an antiharassment policy, investigations procedures, or antiharassment trainings).

<sup>179</sup> *The First Bite Is Free*, *supra* note 32, at 735–36.

<sup>180</sup> *The Culture of Compliance*, *supra* note 70, at 71.

This legislation should mandate that employers wishing to invoke the defense have the burden of showing that their efforts to prevent and correct sexually harassing behavior are effective. Employers must show that their policies are not merely symbolic attempts to avoid liability, but part of a sincere, holistic, and substantive effort to eradicate harassment.

Courts should be required to consider the following factors when evaluating the first prong of the defense: the existence of an antiharassment policy detailing a multifaceted complaint procedure, and the dissemination of this policy such that employees have actual notice of their rights; the existence of sexual harassment trainings or other educational efforts of types which independent research has found to be effective;<sup>181</sup> the extent to which the employer's leadership and management actively promote a respectful, harassment-free workplace;<sup>182</sup> the particular circumstances in which the harassment occurred, and the extent to which the employer took adequate steps to prevent harassment in that employee's particular case;<sup>183</sup> the occurrence of other incidents of harassment both in that particular workplace and across the employer's locations; and the employer's response to past complaints of harassment.<sup>184</sup> Judges and juries will be able to make a better determination of whether an employer took reasonable care to prevent harassment by considering this broad range of factors rather than simply facing the narrow question of whether the employer had an antiharassment policy with a complaint procedure of which the employee had constructive notice. Raising the bar for this prong of the defense would

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<sup>181</sup> According to the EEOC, “[m]uch of the training done over the last [thirty] years has not worked as a prevention tool.” FELDBLUM & LIPNIC, *supra* note 15, at v. More research is needed to show what types of trainings effectively prevent harassment. *See id.* at 49. Therefore, at this time, it will be difficult for employers to show that their trainings are effective. If future research indicates that certain types of trainings are effective at reducing or preventing harassment, employers may have an easier time showing this—moreover, employers who adopt these types of trainings will actually prevent harassment from occurring in the first place. *See Bisom-Rapp, supra* note 147, at 74 (“If training is an ineffective prophylactic, why should it be legally relevant?”).

<sup>182</sup> The EEOC's Select Task Force on the Study of Harassment in the Workplace found that workplace culture is crucial in preventing harassment. FELDBLUM & LIPNIC, *supra* note 15, at 31. Workplace culture inhospitable to harassment requires (1) senior leadership commitment to a “diverse, inclusive, and respectful workplace in which harassment is simply not acceptable”; and (2) systems to hold employees at all levels accountable for creating this kind of workplace. *Id.* Less harassment occurs in workplaces in which senior leaders take a holistic approach to preventing harassment. *Id.* at 31, 36.

<sup>183</sup> For example, in *Minarsky*, the employee and her supervisor worked in an isolated area. *Minarsky v. Susquehanna County*, 895 F.3d 303, 306 (3d Cir. 2018). Employers should take extra steps to protect employees who work alone with one other employee. Another scenario in which a female employee might be particularly at risk is when she works in a male-dominated industry or workplace. Again, employers should take extra preventive measures in these cases.

<sup>184</sup> *See West, supra* note 150, at 497.

incentivize employers to actually work to prevent harassment, as merely having an antiharassment policy on the books would no longer be enough to shield them from liability.

Regarding the second prong of the defense, legislation should mandate that, following *Minarsky*, “a mere failure to report one’s harassment is not *per se* unreasonable.”<sup>185</sup> Legislation should instruct courts to consider the reasons a victim did not report harassment, or delayed in doing so, and evaluate whether those reasons were genuinely held. The following reasons for not reporting harassment, if genuinely held, should not be considered unreasonable for the purposes of application of the defense: fear of retaliation, fear of not being believed, fear that the employer will take no action, or the victim’s feeling of shame, self-blame, or denial. Judges and juries should also consider the psychological impact the harassment had on the victim that may have contributed to a reluctance to report.<sup>186</sup> A legal judgment of whether the plaintiff’s behavior was “reasonable” should track with how victims really respond to harassment, and not prevent a plaintiff from accessing a remedy simply because she responded to being harassed in an extremely common and understandable way.

In addition to examining the reason for the failure or delay in reporting, judges and juries should also be required to consider the nature of the harassment itself, paying particular attention to the early stages of that harassment.<sup>187</sup> If the harassment began at a low level and rose to a legally actionable level over time, it is not realistic or fair to require victims to immediately report the first instance. It is also important that judges and juries consider any steps, other than filing an official complaint, that the employee took to attempt to stop the harassment.<sup>188</sup> The second prong of the defense requires the employee to reasonably “take advantage of any preventive or corrective opportunities provided by the employer or to *avoid harm otherwise*.”<sup>189</sup> Victims often respond to harassment by avoiding the harasser, and this response should be considered an effort to avoid harm. Confronting the harasser, saying no to the harasser, or telling the harasser to stop the offensive

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<sup>185</sup> *Minarsky*, 895 F.3d at 314.

<sup>186</sup> See Engel, *supra* note 138 (explaining that some victims respond to harassment by developing feelings of low self-esteem, hopelessness, and helplessness, making them less likely to seek help).

<sup>187</sup> See *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1068 (10th Cir. 2009) (J. Ebel, dissenting).

<sup>188</sup> See *id.*

<sup>189</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (emphasis added); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (emphasis added).

behavior are also efforts to avoid further harm that must be considered when evaluating the second prong of the defense.

Legislation as described above would not only serve to compensate more sexual harassment victims. Requiring employers to do more to combat harassment in their workplaces would reduce the harassment that occurs there. This is an important step toward eradicating sexual harassment and discrimination in the workplace.

## CONCLUSION

In the wake of the #MeToo movement, we are at a moment of great cultural shift regarding attitudes toward sexual harassment.<sup>190</sup> As momentum toward combating workplace harassment peaks, reform of the Faragher/Ellerth defense is urgent. Employers should no longer be permitted to evade liability for legally actionable hostile work environments created by their own supervisors in workplaces over which they had complete control. The onus should be on the employers, *not* the victims of harassment, to prevent harassment in the workplace. The Faragher/Ellerth defense should either be eliminated to hold employers strictly liable for supervisor-created hostile work environments, or reformed to require employers to show that they have truly engaged in preventive efforts and jettison the mandate that the employee-victim promptly respond to harassment in particular, employer-dictated ways. Both reforms have two positive outcomes. First, they would incentivize employers to actually do the work necessary to eradicate harassment in the workplace. Second, they would afford remedies to the victims of harassment, including those victims who have long kept silent.

*Elizabeth C. Potter*<sup>†</sup>

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<sup>190</sup> See Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/9F3D-BDXY>].

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