NOTES

BURLINGTON INDUSTRIES, INC. V. ELLERTH AND FARAGHER V. CITY OF BOCA RATON: A STEP IN THE WRONG DIRECTION?

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INTRODUCTION

Employer liability for sexual harassment perpetrated by supervisors is a growing problem affecting workplaces and employers across the country.[1] In recent years sexual harassment has become headline news. In 1991, for example, Supreme Court Justice Clarence Thomas's confirmation hearings were marred by allegations of sexual impropriety.[2] Allegations of sexual misconduct in 1995 forced Senator Robert Packwood to resign from Congress.[3] In 1998, Mitsubishi agreed to pay an unprecedented $34 million dollars to settle a class action sexual harassment lawsuit brought by the Equal Employment Opportunity Commission ("EEOC").[4] Paula

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[1] *See* Joshua M. Javits & Francis T. Coleman, *High Court to Revisit Issue of Mandatory Arbitration,* NAT'L L. J., Oct. 5, 1998, at B5 (discussing the circumstances under which an agreement to arbitrate an employment dispute may be binding and noting the rise in sexual harassment suits). *See also infra* n. 6 and accompanying text.

[2] *See* Ruth Marcus, *Allegation Clouds Vote on Thomas; Nominee's Supporters Question Credibility of Former Aide Charging Sexual Harassment,* WASH. POST, Oct. 7, 1991, at A1. Anita Hill, Thomas's assistant at the Education Department and the Equal Employment Opportunity Commission from 1981 to 1983, alleged that Thomas described his sexual preferences and details of pornographic films he had seen with her. *See id.* She also alleged that Thomas repeatedly pressured her to go out with him. *See id.*

[3] *See* Kevin Merida, *Among His Colleagues, Tears, Praise, Mostly Relief: As Packwood's 27-Year Career Ends, a Tortuous Saga for the Senate Draws to a Close,* WASH. POST, Sept. 8, 1995, at A21. *See also* Comment, *Packwood Sent Packing,* ARIZ. DAILY STAR, Sept. 8, 1995, at 12A. Eighteen women made allegations of sexual harassment and misconduct against Packwood. *See id.* The Senate Ethics Committee investigated the complaints and recommended to expel Packwood from the Senate. *See id.* Noting the evidence against him, Packwood tendered his resignation. *See id.*

[4] *See* James P. Miller, *Mitsubishi Will Pay $34 Million in Sexual-Harassment Settlement,*

Jones' lawsuit against President Bill Clinton, perhaps the most infamous example of alleged sexual harassment, served as a basis for the Clinton impeachment proceedings.[5] As sexual harassment is a prominent issue in the national media and public consciousness, it is clear that sexual harassment law is ambiguous and that a national standard must emerge.

Every year, more than 200,000 employment discrimination cases are filed.[6] This number is increasing at a rate of about 23% a year.[7] Each suit costs around $100,000 for each side to litigate.[8] Because sexual harassment law sanctions employers rather than individual harassers,[9] employers join harassment victims in imploring courts to develop a clear rule for employer liability in supervisory sexual harassment actions.[10]

As a result of the Supreme Court's prior failure to define the extent of employer liability for workplace supervisory sexual harassment,[11] lower courts adopted a variety of standards.[12] Faced with increasing pressure by employers and victims of

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WALL ST. J., June 12, 1998, at B4. The EEOC claimed that at least 300 women who worked for Mitsubishi at a plant in Normal, Illinois were subjected to insulting sexual innuendoes and harassment. *See id.* The EEOC stated that the Mitsubishi settlement was the largest sexual harassment settlement ever. *See id.*

[5] *See* Michael Isikoff, *Clinton Hires Lawyer as Sexual Harassment Suit Is Threatened: Bennett Opens an Aggressive Campaign on Public Relations and Legal Fronts*, WASH. POST, May 4, 1994, at A1, A14. Jones alleged that Clinton made an improper sexual advance toward her while she attended a state-sponsored conference at which Clinton spoke. *See id.*

[6] *See* Joshua M. Javits & Francis T. Coleman, *supra* note 1, at B8.

[7] *See id.*

[8] *See id.*

[9] *See, e.g.*, Wathen v. Gen. Elec. Co., 115 F.3d 400 (6th Cir. 1997) (holding that "individual employee/supervisor, who does not otherwise qualify as 'employer,' may not be held personally liable under Title VII"); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995) (holding that "supervisor, in his individual capacity did not fall within Title VII's definition of employer"); Tomka v. Seiler Corp., 66 F.3d 1295 (2nd Cir. 1995) (holding that employer's "agent" may not be held individually liable under Title VII, including individual defendants with supervisory control over a plaintiff).

[10] *See* John A. Farrell, *Rewriting the Rules*, BOSTON GLOBE MAG., Feb. 7, 1999, at 17, 30 (noting the pressure on the Supreme Court to clarify sexual harassment law).

[11] *See* Meritor Sav. Bank, FSB. v. Vinson, 477 U.S. 57, 72 (1986) (declining to decide the appropriate standard for employer liability for supervisory sexual harassment).

[12] Some circuits have adopted a negligence standard. *See, e.g.*, Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 107 (3d Cir. 1994) (noting that the employer is liable for sexual harassment perpetrated by its employees if it "knew or should have known of harassment and failed to take prompt remedial action"); Nash v. Electrospace Sys. Inc., 9 F.3d 401, 404 (5th Cir. 1993) (holding that to establish an actionable claim of sexual harassment in the workplace, the employer must either have known or should have known of the harassment); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 320 (7th Cir. 1992) (holding that an employer is liable for sexual harassment by employees "only 'if the employer knew or should have known about an employee's acts of harassment'" and failed to act); Swentek v. USAir, Inc., 830 F.2d 552, 558 (4th Cir. 1987) (holding that an

harassment to create a national rule, the Supreme Court granted certiorari in February 1998 to two supervisory harassment suits, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton.*[13]

This Note contends that the Court's *Ellerth* and *Faragher* decisions regarding employer liability under Title VII of the Civil Rights Act of 1964 for supervisory sexual harassment are erroneous. Rejecting the vicarious liability standard adopted by the Court, this Note argues for the adoption of a negligence standard for supervisory sexual harassment. Part One of this Note contains a brief discussion of the development of sexual harassment law in the workplace prior to *Ellerth* and *Faragher.* Part Two provides a summary of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, respectively. Part Three analyzes the holdings of the two cases in relation to common-law agency principles, including the merits of adopting an "aided in the agency relation" principle in supervisory sexual harassment actions. Part Four discusses the merits of a negligence standard of liability and demonstrates the strength of that standard. Finally, Part Five provides a guideline to aid employers in insulating themselves from vicarious liability.

I. HISTORY OF SEXUAL HARASSMENT LAW IN THE WORKPLACE

A. Sexual Harassment Law and Its Relation to Title VII of the Civil Rights Act

Sexual harassment law is an extension of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), which makes discrimination in the workplace illegal.[14] Title VII's initial purpose was to remedy racial discrimination.[15] In a last-

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"employer is liable [for the existence of a hostile sexual work environment] where it has "actual or constructive knowledge of the existence of a sexually hostile working environment'") (quoting Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983)).

Other courts have adopted a vicarious liability standard. *See, e.g.*, Fleming v. Boeing Co., 120 F.3d 242, 246 (11th Cir. 1997) (holding that an "employer is indirectly liable [under Title VII] for hostile environment sexual harassment in two situations: '(1) when a harasser is acting within the scope of his employment in perpetrating harassment; and (2) when harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the [employment] relationship'") (quoting Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997)); Davis v. Sioux City, 115 F.3d 1365, 1367 (8th Cir. 1997) (holding that where supervisory harassment "results in a tangible [job] detriment to the subordinate employee, liability [under Title VII] is imputed to the employer"); Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (holding that "in quid pro quo [cases] the employer is held strictly liable for its employee's unlawful acts").

[13] *See* Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 876 (1998) (issuing Supreme Court grant of certiorari); Faragher v. Boca Raton, 118 S.Ct. 438 (1998) (issuing Supreme Court grant of certiorari).

[14] *See* Title VII 42 U.S.C. §2000e-2(a)(1) (1994). Title VII states in pertinent part: "It shall be unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of

minute attempt to prevent passage of the bill, however, Senator Howard Smith of Virginia proposed the addition of sex as a protected class, believing that this addition would cause the bill's defeat.[16] To prevent the addition's removal from the final draft, Smith convinced allies against making the addition the subject of congressional debate.[17] Despite Smith's ingenious scheme, the bill in its entirety was enacted into law and sexual discrimination became illegal.[18]

Because of the "back door" inclusion of sex as a protected class, little legislative history regarding this aspect of the bill exists.[19] Especially as a result of the absence of legislative history, the judiciary assumed a pivotal role in establishing sexual harassment law.[20]

B. Meritor Savings Bank, F.S.B. v. Vinson

Although the lower courts first recognized sexual harassment as a form of sex discrimination in 1976,[21] the Supreme Court did not hear a sexual harassment case until 1986.[22] In *Meritor Savings Bank, F.S.B. v. Vinson*, the Supreme Court first recognized "hostile work environment"[23] harassment, as well as "quid pro quo"[24]

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employment, because of such individual's race, color, religion, *sex*, or national origin. . . ." (emphasis added).

[15] *See* Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2271 n.1 (1998) (Thomas, J. dissenting) ("[T]he primary goal of the Civil Rights Act of 1964 was to eradicate race discrimination . . . .").

[16] *See* Jeff Bleich & Kelly Klaus, *Sexual Harassment: The Supreme Court May Yet Have Its Biggest Say on the Subject*, 58 OR. ST. B. BULL. 15 (1998) ("Senator Smith . . . proposed adding a sexual discrimination amendment to the then-pending Title VII bill, not because he favored sexual discrimination laws, but because he expected this outlandish amendment would kill Title VII altogether.").

[17] *See id.* ("Senator Smith's amendment received bizarrely bi-partisan support from both women's rights advocates, who recognized this as a great advance, and from opponents of Title VII, who saw it as a great trick.").

[18] *See* 42 U.S.C. §2000e-2.

[19] *See* Bleich & Klaus, *supra* note 16, at 15 ("[I]n fact, [opponents of the amendment] allowed the amendment to proceed without debate from anti-feminist colleagues.").

[20] *See id.* ("Because there is no legislative history surrounding this amendment, courts have had broad latitude in divining the intent of Congress concerning gender discrimination in the workplace.").

[21] *See* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (holding "that retaliatory actions of a male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII of the Civil Rights Act of 1964.").

[22] *See Meritor*, 477 U.S. at 65.

[23] *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.11(a)(3) (1998). The EEOC defines a hostile environment as action that has the purpose or effect of "unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." *Id. See also* Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (stating that hostile environment harassment occurs when an employee is subject to sexual harassment so severe and pervasive as to alter the conditions of

harassment created by supervisors as sex discrimination under Title VII.[25] The Court declined to establish a standard for employer liability, but rather held that employers should not be automatically liable for their supervisor's actions.[26]

When Congress amended the liability provisions of Title VII in 1991, they did not modify the *Meritor* decision–suggesting that the Court's interpretation regarding the inapplicability of automatic liability was correct.[27] Congress's "affirmation" may have been based on the fact that the primary objective of Title VII was not to provide redress for discrimination, but to prevent it.[28] Therefore, the remedial scheme for any Title VII action must provide an incentive for companies to implement harassment policies and grievance procedures.[29] Automatic liability would extinguish any such incentive.

C. Aftermath of the Meritor Decision: Utilizing Agency Standards to Determine Employer Liability

Although the *Meritor* Court failed to create a definitive standard for liability, the Court did suggest that liability should be determined according to common-law agency standards.[30] Title VII defines the term "employer" to include agents of the employer.[31] The *Faragher* Court read this language as an explicit indication of Congress's intent regarding the use of agency standards for determining liability.[32]

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employment and create an abusive working environment).

[24] *See* Diana P. Scott, *Latest Developments in Sexual Discrimination and Harassment*, A.L.I.-A.B.A. 35, 37. "Quid pro quo" harassment occurs when an employee is forced to choose between acquiescing to unwelcome sexual advances or to suffer adverse employment actions. *See id.*

[25] *See Meritor*, 477 U.S. at 65.

[26] *See id.* at 72 ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.").

[27] *See* Faragher v. City of Boca Raton, 118 S.Ct 2275, 2291 n.4 ("[The court has] to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* . . . .").

[28] *See id.* at 2292 (Title VII's "primary objective . . . is not to provide redress but to avoid harm.").

[29] *See Ellerth*, 118 S.Ct. at 2270 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.").

[30] *See id.*

[31] *See id. See also* 42 U.S.C. §2000e-1(b). This section states in pertinent part: "The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current preceding calendar year, *and any agent of such a person.*" (emphasis added) *Id.*

[32] *See Faragher*, 118 S.Ct. at 2285 (1998) (referring to *Meritor's* analysis) ("[T]he very definition of employer in Title VII, as including an 'agent' expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious . . . .").

Subsequent to the *Meritor* decision, most lower courts followed the Supreme Court's recommendation to use the Restatement (Second) of Agency ("Restatement") as a guide.[33] Unfortunately, the Restatement suggests several different principles on which to base employer liability.[34] Thus, the Restatement approach gave rise to two competing principles in determining employer liability for supervisory sexual harassment: 1) vicarious, or automatic, liability based on Restatement section 219(2)(d); and 2) negligence based on Restatement section 219(2)(b).[35]

II. RECENT CASE DEVELOPMENT: *BURLINGTON INDUSTRIES, INC. V. ELLERTH* AND *FARAGHER V. BOCA RATON*

A. Burlington Industries, Inc. v. Ellerth

The inconsistent lower court holdings regarding employer liability for supervisory sexual harassment led the Supreme Court to grant certiorari to *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*.[36] Accordingly, the current standard stems, in part, from the decision in *Ellerth*.[37] Kimberly Ellerth, a salesperson at Burlington Industries, Inc., alleged continuous sexual harassment from her supervisor Ted Slowik, including offensive comments regarding her breasts, bottom, legs, and skirt lengths for a period of fifteen months.[38] Ellerth also claimed that Slowik threatened to make her life difficult if she did not comply with

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[33] *See, e.g.*, Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. 1996) ("This court . . . has looked to traditional agency principles . . . to determine employer liability under Title VII when a supervisor harasses a subordinate."); Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994) (using Restatement principles as guidelines for its decision); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 (11th Cir. 1987) ("[I]n determining whether a supervisor was acting as an 'agent' for Title VII purposes, courts must look for guidance to common law agency principles."); Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (acknowledging the *Meritor* mandate that courts look to common law principles of agency for guidance in determining liability from acts arising from supervisors).

[34] *See* Restatement (Second) of Agency § 219(2) (1957). This section states:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

[35] *See* cases cited *supra* note 12.

[36] *See Ellerth*, 118 S.Ct. at 2264 ("We granted certiorari to assist in defining the relevant standards of employer liability.").

[37] *See id.*

[38] *See id.* at 2262.

his sexual demands.[39] Ellerth never informed anyone in authority about Slowik's conduct, although she knew that Burlington Industries, Inc. had an antiharassment policy.[40]

At issue in *Ellerth* was whether Slowik's actions would be defined as quid pro quo harassment or hostile work environment harassment under Title VII.[41] Prior rulings suggested that the scope of employer liability for sexual harassment turned upon this distinction.[42] Vicarious liability attached to quid pro quo harassment, whereas negligence attached to hostile work environment harassment.[43]

The Court explained the reasoning behind the different standards.[44] A Title VII violation occurs when an employer "discriminates against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[45] Consequently, the crux of a Title VII violation is a change in employment status. Hostile environment harassment claims are subject to a negligence standard, because it is less obvious that the employer's behavior has caused a change in working conditions.[46]

The Court found that Ellerth did not suffer a tangible employment action.[47] Although Slowik threatened to make Ellerth's time at Burlington difficult if she did not comply with his sexual demands, he never followed through on his threat when she refused.[48] In finding for Ellerth, however, the Supreme Court eliminated the distinction between quid pro quo and hostile work environment harassment, and held that an employer may be subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee.[49] The Court relied on traditional agency principles, specifically the "aided in the agency relation" principle.[50] Because a supervisor is in a position to wield authority over a subordinate employee, the Court felt that supervisor's actions and the attendant consequences are always aided by the agency relationship in the workplace.[51]

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[39] *See id.*

[40] *See id.*

[41] *See id.* at 2265 ("The question presented on certiorari is whether Ellerth can state a claim of *quid pro quo* harassment," rather than a claim of hostile work environment harassment.).

[42] *See Ellerth*, 118 S.Ct. at 2265.

[43] *See id.*

[44] *See id.*

[45] *Supra* note 14 and accompanying text.

[46] *See Ellerth*, 118 S.Ct. at 2264 ("Less obvious was whether an employer's sexually demeaning behavior altered terms or conditions of employment in violation of Title VII.").

[47] *See id.* at 2271.

[48] *See id.* at 2263.

[49] *See id.* at 2271 ("[T]he labels quid pro quo and hostile work environment are not controlling for purposes of establishing employer liability . . . .").

[50] *See id.* at 2268.

[51] *See id.* at 2269 ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is

The Court further held that in those cases in which an employee has suffered no tangible job consequences as a result of a supervisor's action, the employer may raise an affirmative defense to liability or damages.[52] The affirmative defense requires an employer to show: 1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and 2) that the employee unreasonably failed either to take advantage of any preventive or corrective opportunities provided or to otherwise avoid harm.[53] The affirmative defense reflects an intent to insulate the employer from automatic liability in harassment cases, a notion that *Meritor* explicitly rejected.[54]

B. Faragher v. City of Boca Raton

Faragher v. City of Boca Raton, [55] *Ellerth's* companion case, announces the same general standards of liability for employers in supervisory sexual harassment cases.[56] *Faragher* differed from *Ellerth* in that the plaintiff claimed to be a victim of hostile environment harassment and not quid pro quo harassment.[57] Beth Ann Faragher, a city lifeguard, alleged sexual harassment by two of her three supervisors.[58] She complained that during a five-year period these supervisors commented on and touched the female lifeguards' bodies, simulated sexual acts in front of them, and told them that they would like to have sex with them.[59] Faragher told her third supervisor about the behavior but did not complain to higher management.[60] Her third supervisor believed that Faragher's remarks were not formal complaints, but rather comments shared in confidence with a friend.[61] Therefore, he did not report the other supervisors' conduct to higher management in an attempt to remedy the situation.[62] Although the city had adopted its own antiharassment policies, city officials failed to distribute these policies to city

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aided by the agency relation.").

[52] *See Ellerth*, 118 S.Ct. at 2270.

[53] *See id.*

[54] *See id.* The Court recognized that the vicarious liability standard they were announcing came dangerously close to a rule of automatic liability, which was disallowed under *Meritor*; in order to reconcile the *Ellerth* decision with *Meritor* the Court created the affirmative defenses as exceptions to an automatic liability regime. *See id.*

[55] 118 S.Ct. 2276.

[56] *See id.* at 2280 (holding that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.").

[57] *See id.* ("This case calls for the identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination.").

[58] *See id.*

[59] *See id.* at 2280-81.

[60] *See id.* at 2281.

[61] *See Faragher*, 118 S.Ct. at 2281.

[62] *See id.*

lifeguards.[63] In both *Faragher* and *Ellerth*, the Court held that "[a]n employer is subject to vicarious liability [under Title VII] to a victimized employee for an actionable hostile work environment created by a supervisor," but the employer may raise an affirmative defense.[64]

III. ANALYSIS OF CASES IN RELATION TO AGENCY PRINCIPLES

The Court's decisions in *Ellerth* and *Faragher* announced a national standard of employer liability for sexual harassment by supervisors.[65] Following its own earlier directive in *Meritor* to follow principles of common-law agency standards, the Court first decided what agency principle to apply. Focusing on section 219 of Restatement (Second) of Agency, the Court considered several possible bases of employer liability, including harassment by supervisors acting within the scope of their employment and harassment by supervisors acting with apparent authority.[66] However, in both *Ellerth* and *Faragher*, the Court rejected these grounds in favor of section 219's "aided by agency principle" as the new national standard of employer liability.[67]

A. Scope of Employment

According to Restatement section 219(1), "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[68] To act within the scope of employment, an employee's conduct must be motivated by a purpose to serve the employer.[69] Moreover, for an employer to be held liable for the actions of its employee, the employee must be engaging in conduct that the employer expects of him.[70] While deterring sexually harassing conduct may seem related closely enough to a supervisor's duty of maintaining order in the workplace, the Court has rejected this argument.[71] Instead, the Court has found that sexual harassment by a supervisor is in response to

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[63] *See id.* at 2280.

[64] *Id.* at 2292-93.

[65] *See id.*

[66] *See* Restatement (Second) of Agency § 219(2)(d).

[67] *See Faragher*, 118 S.Ct. at 2290 ("[T]he aided-by-agency-relation principle embodied in section 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.").

[68] Restatement (Second) of Agency § 219(1).

[69] *See Faragher*, 118 S.Ct. at 2286.

[70] *See id.*

[71] *See id.* at 2288 ("[T]he supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability" (citations omitted)).

individual desires, not employer expectations, and thus falls outside the supervisor's scope of employment.[72]

B. Apparent Authority

According to Restatement section 219(2)(d),[73] "apparent authority," exists where a supervisor purports to exercise a power that he does not actually have in order to force his victim into submission.[74] Unlike the scope of employment rationale, the court does not explicitly reject apparent authority as a basis of employer liability. Instead, because the supervisors in both *Faragher* and *Ellerth*, had actual power over their victims, the apparent authority doctrine was irrelevant.[75] Thus, "apparent authority" presumably remains a viable basis of employer liability for sexual harassment by supervisors.

C. Aided in the Agency Relation

Rejecting the scope of employment rationale and setting aside the apparent authority doctrine, the Court ultimately applies the "aided in the agency relation" principle.[76] According to Restatement subsection 2(d), "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment *unless . . . he was aided in accomplishing the tort by the existence of the agency relation.*"[77] The "aided in the agency relation" principle is distinct from the "apparent authority" doctrine.[78] A supervisor exercises apparent authority when the supervisor "purports to exercise power which he or she does not have."[79] A supervisor is aided in the agency relation when he threatens to misuse actual power.[80] In the latter instance, "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided in the agency relation."[81]

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[72] *See id.* at 2286-87, 2288-2289 ("Harassment . . . is motivated solely by individual desires and serves no purpose of the employer.").

[73] *See* Restatement (Second) of Agency § 219(2)(d). Section 219(2)(d) states in pertinent part: "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority . . . ."

[74] *See Ellerth*, 118 S.Ct. at 2267-68.

[75] *See id.* at 2262; *Faragher*, 118 S.Ct. at 2280. In both of these cases, the alleged harasser was the one who held actual power to make tangible economic decisions regarding the alleged victim.

[76] *See Ellerth*, 118 S.Ct. at 2262; *Faragher*, 118 S.Ct. at 2280.

[77] *See* Restatement (Second) of Agency § 219(2)(d) (emphasis added).

[78] *Ellerth*, 118 S.Ct. at 2267-2268.

[79] *Id.* at 2267.

[80] *See id.*

[81] *Id.* at 2269.

The "aided in the agency relation" principle is not satisfied simply by proximity and regular contact with employees, and thus, avoids automatic inclusion of co-workers.[82] Furthermore, the Court distinguishes supervisors from co-workers based on the different dynamic in a supervisor-employee relationship and in a co-worker relationship.[83] In most instances, a potential victim feels free to walk away from, or complain about, the conduct of a co-worker.[84] Also, because a supervisor has the power to make economic decisions about an employee (firing, promotion, etc.), employees often feel that harassing supervisors may abuse these powers.[85] This implicit threat may inhibit employee complaints and compels submission to harassment.

The aided in agency relation standard was used as a base for employer liability in *Ellerth* and *Faragher*. After finding a reason to hold employers liable for supervisory sexual harassment, the Court then chose the qualified vicarious liability standard. This Note contends that the Court should have applied a negligence standard.

IV. THE MERITS OF A NEGLIGENCE STANDARD IN SUPERVISORY SEXUAL HARASSMENT ACTIONS

Under a negligence standard of liability for sexual harassment actions, an employer is held liable if the employer knew, or in the exercise of reasonable care should have known, about the harassment of an employee and failed to take remedial action.[86] While similarly based on traditional agency standards, the negligence standard is preferable to the vicarious liability standard adopted in *Ellerth* and *Faragher* because: 1) only a negligence standard is consistent with *Meritor's* directive that employers should not be held automatically liable for supervisory sexual harassment; 2) a negligence standard better serves the remedial goals of Title VII actions; and 3) a negligence standard better provides an economic incentive to employers to implement sexual harassment policies.

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[82] *See id.* at 2268 ("Were [proximity and regular contact] to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.").

[83] *See Faragher*, 118 S.Ct. at 2291 ("[A supervisor's] actions necessarily draw upon his superior position over the people who report to him, or those under them [sic], whereas an employee generally cannot check a supervisor's abusive conduct the same way she might deal with abuse from a co-worker.").

[84] *See id.*

[85] *See id.*

[86] *See Ellerth*, 118 S.Ct. at 2272-73.

A. The Negligence Standard is Consistent with Meritor's Direction that Employers Should Not Be Held Automatically Liable for Supervisory Sexual Harassment

The aided in agency basis of employer liability adopted in *Ellerth* and *Faragher* expressly contravenes the Court's earlier directive in *Meritor Savings Bank, F.S.B. v. Vinson*.[87] In *Meritor*, the Court prohibited automatic employer liability for sexual harassment perpetrated by supervisors.[88] The Court reasoned that under Title VII, "Congress's decision to define 'employer' to include any 'agent' of an employer surely evince[d] an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[89]

By imposing liability only in those instances in which the employer knew, or reasonably should have known, of the harassment, a negligence standard avoids automatic liability and is entirely consistent with the Court's earlier directive in *Meritor*.

The standard announced by the Court in *Ellerth* and *Faragher*, on the other hand, is inconsistent with the teachings of *Meritor*. Under the new qualified vicarious liability standard, the risk of liability for employers may be very high.[90] Consequently, employers would be subject to a nearly automatic liability for supervisory sexual harassment. Indeed, both the majority in *Faragher* and the dissent in *Ellerth* observed that the majority holdings were in considerable tension with *Meritor*.[91] Unless the Court had chosen to overrule or distinguish the recent cases from *Meritor*, principles of stare decisis should have compelled the Court to follow its rule.

Instead, the Court claimed to defer to *Meritor* while effectively rewriting *Meritor's* mandate.[92] The majority asserted that the affirmative defense available in actions not involving tangible job consequences made the two holdings consistent with *Meritor* by decreasing the risk of automatic liability in all instances.[93] This

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[87] *See supra* note 26 and accompanying text.

[88] *See Meritor*, 477 U.S. at 73 ("As to employer liability, we conclude that the Court of Appeals was wrong to . . . impose absolute liability on employers for the acts of their supervisors . . . .").

[89] *Id.* at 72.

[90] *See Faragher* 118 S.Ct. at 2292-93.

[91] *Compare id.* at 2291 ("[T]here is obviously some tension between [*Meritor's*] holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously") *with Ellerth*, 118 S.Ct. at 2274 (Thomas, J. dissenting) ("The Court's decision is also in considerable tension with our holding in *Meritor* that employers are not strictly liable for a supervisor's sexual harassment.").

[92] *See Faragher*, 118 S.Ct. at 2286 ("*Meritor's* statement of the law is the foundation on which we build today."); *see id.* at 2291 ("We are not entitled to recognize this theory under Title VII unless we can square it with *Meritor's* holding that an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination . . . .").

[93] *See id.* at 2291

> [T]he risk of automatic liability is high. To counter it, we think there are two basic

assertion is inaccurate. Although the affirmative defense will guarantee that some employers will not be held vicariously liable, the fact that the employer bears the burden of persuasion ensures that a vast number of employers will be held liable.[94] This result is inconsistent with *Meritor's* holding. In essence, the *Meritor* Court limited the extent to which employers could be held liable for the actions of their supervisors, and *Ellerth* and *Faragher* have not just redefined this limit, they have eliminated it.

B. The Negligence Standard of Liability Furthers the Remedial Goals of Title VII Actions

A negligence standard for sexual harassment actions is consistent with the practical intentions of Title VII. Because the primary objective of Title VII is to prevent discrimination, the remedial scheme must provide an incentive for the employer to implement policy and establish grievance procedures.[95] A negligence standard helps prevent discrimination, because it encourages victims to report harassing behavior. It also provides incentives for employers to implement harassment policies and grievance procedures, because an employer is held accountable if it could have reasonably prevented the harassment. Finally, a negligence standard creates a more effective system to fight harassment, because it allows collaboration between employers and employees.

1. The Negligence Standard Helps Prevent Harassment Because It Encourages Victims to Come Forward

A negligence standard may encourage the victim to report the harassment[96] because he or she will not be able to recover unless he or she can prove the employer had constructive knowledge of the harassment. This may further the remedial goals of Title VII for two reasons. First, the most effective way for an employer to find out about and prevent harassment is if the victim reports it, because the victim is in the best position to know about and attempt to prevent the

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alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.

Id.

[94] *See* John D. Canoni, *Sexual Harassment: The New Liability*, 46 RISK MGMT. 12, Jan. 1999, at 12-13. Under *Ellerth* and *Faragher*, the employer now has the burden or proving an affirmative defense. *See id.* Because "the party with the burden of proof usually loses a close case, this shift of the burden from the employee to the employer is a key legal victory for employees." *Id.*

[95] *See supra* notes 28 and 29.

[96] *See* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 455-456 (1997) ("This standard will not only encourage the employer to establish remedial procedures . . . it will also encourage the victimized employee to report the harassment.").

misconduct. Second, by reporting the harassment, the victim forcefully puts the harasser on notice that the attention is unwanted.[97] Evidence suggests that in many cases, "the best way to stop harassment is simply to ask the harasser to stop."[98]

Vicarious liability, on the other hand, may encourage victims to remain silent. Employees who are aware of the law have an incentive not to complain about harassing behavior until their claim is actionable.[99] If the employee complains too quickly, she will not be able to recover because her supervisor's behavior may not rise to the level of a legal action.[100] Yet, if the employee waits until after she has suffered a tangible job consequence to complain, the employer will be subject to vicarious liability.[101]

In cases that do not involve tangible job consequences, the affirmative defense also encourages the victim to remain silent for as long as possible. The longer the victim remains silent before filing a lawsuit, the less time the company has to redress any harm done by the offending supervisor.[102] In both instances, if courts find that employees delay filing complaints to increase benefits, then a general loss of credibility among victims of harassment may result.

Under a negligence theory, the victim is compelled to report her supervisor's behavior because she is not able to recover otherwise.[103] Furthermore, if the victim reports her supervisor's harassing behavior, the company may be able to prevent further harassment.[104]

2. The Negligence Standard Provides an Incentive to Implement Policy Because an Employer Is Held Accountable When Blameworthy

Under a negligence regime, the employer is only held accountable if it fails to implement reasonable measures to prevent harassment.[105] Because the employer is liable for failure to act reasonably, it has an incentive to implement sexual harassment policies and grievance procedures,[106] furthering the remedial goals of Title VII.[107]

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[97] *See id.*

[98] Comment, *Anti-Expressionism*, THE NEW REPUBLIC, July 20 & 27, 1998, at 8.

[99] *See id.* "[B]ecause liability is almost automatic as soon as a complaint is filed, employees who seek generous settlements have an incentive not to complain until *after* the offensive conduct becomes severe and pervasive enough to be actionable." *Id.*

[100] *See id.*

[101] *See id.*

[102] *See* Sims v. Brown & Root Indus. Servs., Inc., 889 F. Supp. 920, 930 (W.D. La. 1995). "[T]he victim's silence would be beneficial to her Title VII claim because it would severely limit the employer's opportunity to take *prompt* remedial action." *Id.*

[103] *See* Dansky *supra* note 96, at 453.

[104] *See id.* at 457.

[105] *See id.* at 453.

[106] *See id.* at 455 ("If an employer is subject to a knew-or-should-have-known standard, it will not have the incentive to ignore the harassment; rather, it will be sure to establish preventative and remedial programs to insulate itself from liability.").

[107] *See supra* notes 28 and 29.

Some critics believe that a negligence standard will remove the incentive for the employer to create effective harassment programs and will allow the employer to ignore the problem;[108] however, doing so would be detrimental to the employer. An employer is put on "constructive notice" when the harassment is severe or pervasive or a complaint is filed.[109] The employer cannot ignore the problem because it will be held liable if it fails to take corrective action. Furthermore, an employer cannot limit its liability by restricting the ways to hear complaints.[110] Under the negligence standard, a court will compare an accused employer's actions to that of other reasonable employers, and it will find the accused employer liable if the employer should have known of the harassment.[111]

Vicarious liability, alternatively, places blame where none should be placed. It is illogical to think that an employer should be held responsible for an employee's actions (even a supervisor) when the employer did not condone or know of the employee's actions. The blame for a supervisor's conduct should fall on the supervisor and the responsibility for reporting the conduct should fall on the victim. Employers should not be forced into the role of surrogate parents, monitoring workplace communications to ensure that no "children" misbehave. Even the majority in *Faragher* agreed that "a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute."[112] Vicarious liability places this responsibility entirely on the employer.

3. The Negligence Standard Creates a More Effective System to Fight Harassment Because It Allows for Collaboration Between the Employer and the Employee

The negligence standard is also preferable to vicarious liability in furthering the remedial goals of Title VII because it allows for collaboration between the

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[108] *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1462 (1984) ("If an employer must be aware of a supervisor's wrongdoing in order to be held accountable for it, then the employer has an incentive to remain ignorant of how supervisors exercise their delegated authority.").

[109] *See id.* This standard works because it places the employer on constructive notice when the harassment is blatant, so that ignorance will not insulate the employer from liability. *See id.* at 1462-63. In addition, filing a grievance through a committee structure also places the employer on constructive notice. *See id.* at 1462.

[110] *See* Stanford E. Purser, Note, *Young v. Bayer Corp.: When Is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 B.Y.U. L. REV. 909, 925-26 (1998). The employer cannot escape liability by eliminating or restricting avenues for receiving notice. *See id.* The employer that tries to do so (by limiting the number of "management" employees or obfuscating lines of communication) will only find that the question of which of his employees' knowledge can be imputed to him is taken out of his control and placed in the hands of the "reasonable" employee, as determined by the court. *See id.*

[111] *See id.*

[112] *Faragher*, 118 S.Ct. at 2292 (citations omitted).

employer and its employees. Sexual harassment policies and procedures can only succeed if the employer implements effective policies and the employees feel comfortable in taking advantage of them.

The most effective system of reducing sexual harassment claims, therefore, requires cooperation between the employer and the employee.[113] It is in the employer's interest to eradicate harassment so that its employees fulfill their duties to the best of their ability, unencumbered by fears of harassment.[114] An employer wants to prevent workplace harassment just as much as the employees do. The best way to eliminate workplace harassment, therefore, is for the employer and the victim to work together to further their mutual goals, not to become alienated from one another because of a strict remedial scheme.

C. The Negligence Standard Provides Economic Incentive to Employers to Implement Sexual Harassment Policies

The negligence standard provides an economic incentive to employers because the benefit of implementing reasonable policies and procedures outweighs the costs. The costs to an employer of implementing sexual harassment programs can include employee training and/or seminars, creation and dissemination of a sexual harassment policy, employment of people to effectuate the policy, and more selective hiring practices.[115] The benefits to an employer include decreased instances of liability, decreased litigation and damages costs, and a more productive workforce.[116] Economics tells us that if the cost of providing harassment programs outweighs its benefits, the practical employer will opt against providing such programs.[117]

It is impossible for employers to impede all cases of sexual harassment. There are, however, certain standards of conduct that an employer should be required to follow. An employer should remedy the problem if the victim complains to someone in authority, if a co-worker who notices the harassment complains to someone in authority, or the harassment is so severe and pervasive that the employer should know about the problem.[118] The employer should, additionally, create a sexual harassment policy to educate its workforce about the illegality of sexual harassment and the employee's avenues of redressability.[119] These are reasonable standards of conduct to impose on an employer in order for the benefits

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[113] *See* Jansen v. Packaging Corp. of America, 123 F.3d 490, 516 (7th Cir. 1997), *aff'g sub nom.* Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (Posner, J. concurring and dissenting) ("[T]he optimal system of liability for minimizing sexual harassment requires cooperation by both [the employer and the employee].").

[114] *See id.*

[115] *See* Purser, *supra* note 110, at 924.

[116] *See id.*

[117] *See id.* at 924-5 ("As long as the benefits outweigh the costs, the employer will be motivated to prevent sexual harassment.").

[118] *See Jansen*, 123 F. 3d at 511 (Posner, J. concurring and dissenting).

[119] *See infra* pp. 118-121.

to outweigh the costs. Furthermore, these are the suggested standards of conduct for a negligence theory of liability.[120]

On the other hand, requiring an employer to take more action than is reasonable will impose costs without creating equivalent benefits.[121] *Ellerth* and *Faragher* hold an employer vicariously liable for any sexually motivated tangible employment action taken by a supervisor.[122] An employer may be able to monitor the activities of its employees by, for example, placing video cameras throughout the workplace to watch the employees, or hiring people simply to observe interactions between members of the workforce.[123] Yet, placing video cameras throughout the workplace and hiring a secret harassment watch force are both costly and impractical options.[124] When the law imposes liability for actions that would be prohibitively expensive to monitor, the deterrent effects of vicarious liability break down.[125] Employers in this situation will have limited incentive to take preventive measures. Instead, these employers will set aside the money that may have been used for prevention programs and earmark it for liability costs.[126]

Furthermore, the employer may pass its liability costs on to its consumers or employees, either by raising the cost of its products and services or by lowering employee salaries.[127] A large number of consumers and employees are women.[128] Therefore, the potential victims of sexual harassment will be indirectly paying for the damage awards of such harassment cases.[129]

D. The Negligence Standard Lacks the Communication Restrictions Associated with Vicarious Liability

Vicarious liability also forces employers to place increasing restrictions on workplace interactions. Employers fearing liability are encouraged to take a "zero-

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[120] *See Jansen*, 123 F.3d at 511 ("These are the responsibilities that a negligence standard imposes.").

[121] *See id.*

[122] *See Ellerth*, 118 S.Ct. at 2270; *Faragher*, 118 S.Ct. at 2280.

[123] *See* Jeffrey Rosen, *In Defense of Gender-Blindness*, THE NEW REPUBLIC, June 29, 1998, at 30 (discussing video surveillance of employees).

[124] *See Jansen*, 123 F.3d at 530 ("It is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment.").

[125] *See id.* at 511 ("In these circumstances, vicarious liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile.").

[126] *See id.* ("Employers will prefer paying the occasional judgment to incurring costs . . . that exceed the employer's foreseeable liability . . . .").

[127] *See id.* ("In the long run, these costs will be borne largely by consumers, in the form of higher prices for the employer's product, and workers, in the form of lower wages (because the higher costs are labor costs).").

[128] *See id.* ("Many consumers and workers are women . . . .").

[129] *See id.* ("[T]he principal victims of sexual harassment will pay a big part of the costs that employers incur as a consequence of excessively harsh principles of employers' liability.").

tolerance policy for sexual expression."[130] The Fair Measures Management Law Consulting Group suggests to employers that, "[y]our policy should go beyond [what the law forbids]. If you set your standards too low, one mistake by one supervisor could make you the next landmark case."[131] Antiharassment policies may outlaw innocent comments and jokes or even physical contact such as patting a co-worker on the back.[132] The Supreme Court has expressly denied that these actions alone result in an actionable sexual harassment claim.[133] However, the EEOC accepts harassment cases that deal with these issues even though they may not rise to the legal level of harassment.[134] Company interests dictate that antiharassment policies be written to encompass all forms of sexual expression in an attempt to avoid any harassment suit, since even meritless claims are costly to defend.[135] The implication of such zealous action taken on the part of employers will transform the workplace into an environment where employees and employers alike are afraid to engage in casual conversation. This type of "managerial scheme" will be inconsistent with the needs of many businesses.[136]

V. MEASURES FOR EMPLOYERS TO TAKE IN PREVENTION OF SUPERVISORY HARASSMENT AND VICARIOUS LIABILITY[137]

Despite the merits of a negligence standard, the Supreme Court has opted to implement a vicarious liability standard subject to an affirmative defense.[138] Although employers bear the burden of persuasion under this regime, there may

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[130] *See* Comment, *supra* note 98, at 7.

[131] Rosen, *supra* note 123, at 26.

[132] *See id.*

[133] *See Faragher*, 118 S.Ct. at 2283 ("Simple teasing . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'")

[134] *See* Rosen, *supra* note 123, at 26 ("[T]he EEOC accepts claims for conduct that clearly is not illegal."). One reason for this may be that the EEOC is interested in redefining laws they feel do not conform with the spirit of Title VII. Another reason may be that the EEOC wants to obtain express guidance from courts regarding issues that are not clearly explained.

[135] *See id.*

[136] *See id.* at 27 ("[T]he range of workplaces regulated by modern harassment law . . . is too diverse to be captured by the managerial model."); *but cf. id.* ("[T]he corporate workplace is a 'managerial' sphere in which social relations are organized around principles of efficiency. For this reason . . . citizens should be willing to accept greater restrictions on their autonomy and their expression in the workplace than they would tolerate in the public sphere . . . .").

[137] This section mainly applies to those employers with a large work force. Although smaller employers still need to take precautions, the size of their businesses make it much easier to monitor employee behavior and, thus, less important for them to implement all the procedures listed below.

[138] *See supra* note 64 and accompanying text.

still be some cost effective ways in which employers can prevent harassment and, in the process, insulate themselves from liability.[139]

An employer will be subject to vicarious liability for supervisory sexual harassment in those cases in which an employee has suffered tangible job consequences as a result of the supervisor's actions.[140] In *Ellerth*, the Court states "[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."[141] Relying on this language, an employer can deter harassment and harassment suits in the following ways: 1) by implementing a widely publicized harassment policy; 2) by requiring more than one supervisor to review all significant decisions; and 3) in the alternative, by swiftly remedying any adverse actions by a supervisor.

A. Implement a Widely Publicized Harassment Policy

A widely publicized harassment policy is important in two respects: it may help prevent harassment and it may insulate an employer from liability. Because harassment actions are so expensive for employers, the best preventive measure would be to ensure that harassment does not occur at all. An effective harassment policy can help achieve this goal. Unfortunately, the policy may not always eliminate harassment. In those cases, the policy can be used as a shield by the employer, as well as by the victim, to minimize the deleterious effects of the harassment.

1. The Constitution of an Effective Harassment Policy

An effective harassment policy should contain the following provisions: 1) a definition of harassment and the attendant consequences of such action; and 2) a system for complaints and investigations.

A policy should include, in clear language, a definition of harassment and examples thereof.[142] The policy should also emphasize the illegality of harassment, as well as the illegality of retaliatory actions against sexual harassment

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[139] *See* Canoni, *supra* note 94, at 12 (explaining that the employer has the burden of proving the affirmative defense).

[140] *See Ellerth*, 118 S.Ct. at 2270 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor . . . .").

[141] *Id.* at 2268.

[142] *See* CAL. GOV'T CODE § 12950 (West 1999). This section states in pertinent part:

> Each employer shall distribute this information sheet to its employees . . . that contains, at a minimum, components of the following: 1) the illegality of sexual harassment. 2) the definition of sexual harassment under applicable state and federal law. 3) a description of sexual harassment, utilizing examples . . . . [and] 6) directions on how to contact the department and the commission . . . .

complainants.[143] Additionally, the policy should include the consequences of harassing behavior (e.g. warning, reprimand, and termination).[144]

The harassment policy should also include an effective system for complaints and investigations. The employer should make sure that complaints are investigated in a precise and timely manner.[145] An employer should appoint at least two people to hear harassment complaints[146] and the policy should include the office and phone number of those persons. By doing this, employers avoid situations in which the sole person appointed to hear harassment complaints is the one doing the harassing.[147] The policy should also tell the employee how to contact outside agencies such as the EEOC and the Fair Employment Housing Commission should the employee be too intimidated to take advantage of in-house procedures.[148]

2. Distribution of the Policy

The employer must widely distribute the policy to make the antiharassment policy effective. Every employee must be aware of the policy.[149] California imposes on all employers a duty to educate, including prominently displaying a sexual harassment poster.[150] The California rule is an excellent way to ensure that employees know of the policy.

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[143] *See* Peter Aronson, *Justices Sex Harassment Decision Sparks Fear: Companies Review Policies to Avoid 'Ellerth' Liability,* NAT'L L.J., Nov. 9, 1998, at A14 ("[C]ompanies must have a clearly written policy prohibiting and condemning sexual harassment . . . ."). *See also* Edward T. Ellis & Tara L. Eyer, *Racial Harassment and How Employers Try to Prevent It,* 6 A.L.I.-A.B.A. 695, 712 (1998) (noting that antiharassment policies should include provisions stating that no employee will be retaliated against for reporting harassing behavior).

[144] *See* Samuel D. Walker & David S. Fortney, *Sexual Harassment: The New Rules of the Road*, METRO. CORP. COUNS., Dec. 1998, at 12, (suggesting that antiharassment policies describe the consequences for sexual harassment).

[145] *See* Aronson, *supra* note 143, at A14 (Each policy should include "a system for investigating complaints promptly and thoroughly.").

[146] *See id.* The policy should "allow employees to report incidents to a variety of people within the company." *Id.*

[147] *See* David Sherwyn & J. Bruce Tracey, *Sexual Harassment Liability in 1998: Good News or Bad News for Employers and Employees?,* 39 CORNELL HOTEL & RESTAURANT ADMIN. Q. 5, Oct. 27, 1998, at 17 n.19.

[148] *See* Walker & Fortney *supra* note 144 and accompanying text.

[149] *See* Ellis & Eyer, *supra* note 143, at 712 ("Once the policy and procedure has been written, it should be clearly communicated to all employees . . . .").

[150] *See* CAL. GOV'T CODE § 12950 (West 1999) ("[E]very employer shall act to ensure a workplace free of sexual harassment by implementing the following minimum requirements: . . . [e]ach employer shall post the amended poster in a prominent and accessible location in the workplace.").

Employers should also give each new employee a copy of the policy[151] and distribute a new copy to every employee annually.[152] A cautious employer may want to post the policy, or an abbreviated version, on bulletin boards around the office or in the restrooms.[153]

3. Training of Employees and Supervisors

Employers should conduct training sessions for employees and supervisors on the harassment policy.[154] For example, employers should have a mandatory training program on harassment for new employees.[155] The training programs act as a contingency plan against those employees who do not read the harassment policy. Supervisor training should include the ins-and-outs of the policy and how to treat employees and their complaints.[156]

Employers should ensure that supervisors: 1) file appropriate documentation upon receipt of a complaint; and 2) conduct appropriate follow up after an investigation of the complaint. Supervisors must document every complaint and the measures taken to investigate and/or remedy the problem.[157] This step is essential in defending against a complaint at trial.[158]

Supervisors should be sensitive to post investigative issues that may arise. To follow-up the complaint, supervisors should distribute a memorandum to all parties indicating the course and result of the investigation.[159] A memorandum should be distributed reasserting the employer's commitment to its policy and the illegality of harassment and retaliation for all complaints regardless of merit.[160]

B. Require Multiple Supervisors to Approve All "Tangible Employment Actions"

Supervisory review of all significant employment decisions may be another effective way to prevent harassment and avoid vicarious liability. Employment lawyer Elizabeth DuFresne advises that "[tangible actions] against an employee should never be taken without a second manager–either a peer or a higher-level

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[151] *See* Sherwyn & Tracey, *supra* note 147, at 17.

[152] *See id.*

[153] *See id.*

[154] *See* Ellis & Eyer, *supra* note 143, at 711.

[155] *See id.* at 14.

[156] *See* Walker & Fortney, *supra* note 144, at 14, col. 1.

[157] *See id.*

[158] *See id.* The interviews, investigation report and final decisions will ultimately be useful as evidence in the company's defense if litigation ensues. *See id.* The company will rely on these documents to show: 1) a proper investigation took place; and 2) either no evidence of harassment was uncovered, or evidence of a policy violation existed and appropriate disciplinary response ensued. *See id.*

[159] *See id.* at 15.

[160] *See id.*

manager–being involved in the decision . . . ."[161] This type of policy helps to ensure that supervisors do not succeed in making discriminatory tangible employment decisions. Recent cases suggest that if the alleged harasser does not make the tangible employment decision, a plaintiff will not be able to prevail under a vicarious liability theory.[162] The plaintiff will not be able to demonstrate an adequate chain of causation from the harassment to the tangible employment action.[163] In *Corcoran v. Shoney's Colonial, Inc.*, the court found against the plaintiff stating, "Though the Supreme Court does not explicitly state that the tangible employment action required to disable the affirmative defense must be taken by the harassing supervisor, that is the most logical interpretation . . . ."[164] The rationale for these cases is that an employee not party to the harassment would not approve a tangible employment action unless there was a nondiscriminatory basis. Thus, the requirement of multiple sign-offs on tangible employment decisions may prevent victims from suffering adverse economic effects due to harassment and save an employer from vicarious liability.

C. Promptly Remedy Any Adverse Action by a Supervisor

If an employer fails to establish a multiple sign-off system, he can avoid vicarious liability for tangible employment actions by promptly remedying any adverse action by a supervisor. The logic behind this is simple. If there is no adverse consequence, the employee cannot allege a tangible employment action. An employer can do this by evaluating all negative employment actions.[165] If the evaluator believes that an action is suspect, the evaluator should restore the affected employee to the status before the negative action. The EEOC condones this approach by stating, "Employers should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, *make the victim whole by restoring lost employment benefits or opportunities*, and prevent misconduct from occurring."[166] At least one court has held that there is no tangible employment action when an adverse consequence is swiftly remedied.[167]

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[161] Marcia Heroux, *Small Businesses Need Clear Policies on Sex Harassment*, PITT. POST-GAZETTE, Oct. 27, 1998, at H2.

[162] *See, e.g.* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1239 (11th Cir. 1998) (holding that plaintiff failed to establish a causal link between the harassment and the tangible employment action because she was not fired by a harassing supervisor); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998) (noting that tangible employment actions, if not taken for discriminatory reasons, do not vitiate the affirmative defense).

[163] *See supra* note 162.

[164] 24 F. Supp.2d 601, 606 (W.D. Va. 1998).

[165] *See* Heroux, *supra* note 161, at H2.

[166] Cynthia L. Remmers, *Sexual Harassment: A Guide to an Employer's Obligations, Liability, and Prevention*, 1997 A.B.A. SEC. LAB. AND EMPL. L. REP. 7, at 161.

[167] *See* Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268 (5th Cir. 1998) (holding that plaintiff-teachers grade reassignments were not tangible job consequences in part because

This alternative is less effective than multiple sign-off for two reasons. First, this alternative does not help prevent harassment. Second, this alternative is an after-the-fact remedy and an employee may still have a viable hostile environment claim.

Nevertheless, it is important to note that when an employer successfully avoids vicarious liability because of the absence of tangible economic action, this does not mean that the employee does not have a sexual harassment claim. Instead, it means the employer can assert affirmative defenses against that action.[168] It is much more difficult for a plaintiff to prevail when the employer has established an antiharassment policy. It appears that most excuses offered by plaintiffs for why they do not take advantage of a harassment policy and its protections are unreasonable.[169] If, therefore, the employer has a widely publicized harassment policy that the plaintiff unreasonably fails to take advantage of, the employer may be insulated from liability.

VI. CONCLUSION

Although the imposition of vicarious liability on employers may appear a victory for victims of harassment, an analysis of long-term effects actually suggests a defeat. The imposition of vicarious liability on employers may lead to a panoply of deleterious effects: encouraging victims to remain silent until they have an actionable claim, which in turn leads to the loss of credibility in all harassment victims; placing blame for harassment where none should be; fostering resentment between employers and their employees; a marked decrease in spending on implementation of antiharassment policies and grievance procedures; and the passing off of liability costs to all potential victims of sexual harassment, i.e., women.

A negligence standard of liability positively resolves all of these issues. Furthermore, a negligence standard of liability is consistent with judicial precedent and legislative history. A negligence standard of liability, moreover, gives an employer an incentive to prevent sexual harassment.

Title VII attempts to discourage sexual discrimination. The current Supreme Court, faced with the formidable task of defining a national standard for employer liability in supervisory sexual harassment cases, lost sight of this primary goal. Congress should respond to the *Ellerth* and *Faragher* cases by pressing forward legislation that seeks to prevent discrimination instead of offering an inadequate remedy that fails to provide any meaningful solution.

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they were ultimately reversed).

[168] *See Ellerth*, 118 S.Ct. at 2270.

[169] *See, e.g.* Jones v. USA Petroleum, Corp., 20 F. Supp.2d 1379, 1386 (S.D. Ga. 1998) (holding that conclusory assertions that plaintiffs would get into trouble were not reasonable enough to prevent employer's assertion of affirmative defense); Fierro v. Saks Fifth Ave., 13 F. Supp.2d 481, 491 (S.D.N.Y. 1998) (holding that victim unreasonably failed to use Sak's antiharassment policy although the victim feared repercussions).