

## Case Study

### ELLERTH AND FARAGHER: TOWARDS STRICT EMPLOYER LIABILITY UNDER TITLE VII FOR SUPERVISORY SEXUAL HARASSMENT

Steven M. Warshawsky†

During the 1997-98 term, the Supreme Court issued two important rulings substantially expanding the scope of an employer's vicarious liability under Title VII<sup>1</sup> for a supervisor's sexual harassment of a subordinate employee. In both *Burlington Industries, Inc. v. Ellerth*<sup>2</sup> and *Faragher v. City of Boca Raton*,<sup>3</sup> the Court held that an employer is liable under Title VII for a sexually hostile work environment created by a supervisor unless the employer proves not only that it exercised reasonable care to prevent and correct the harassing behavior, but also that the victimized employee unreasonably failed to utilize any grievance mechanisms provided by the employer "or to avoid harm otherwise."<sup>4</sup> Since the employer's affirmative defense will be defeated anytime the harassed employee properly reports the supervisor's conduct and does not unreasonably contribute to his or her own victimization, the Court's decisions in *Ellerth* and *Faragher* move far towards adopting a rule of strict employer liability whenever sexual harassment is perpetrated by a supervisor. While strict liability has always been the standard in cases of quid pro quo sexual harassment,<sup>5</sup> it represents a marked departure from the

---

† J.D., Georgetown University Law Center, 1997; M.Ed., Vanderbilt University, 1992; A.B., Princeton University, 1990. I would like to thank the Honorable Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit and the Honorable Catherine C. Blake of the United States District Court for the District of Maryland for giving me the invaluable opportunity these past two years to learn about the law under their expert tutelage.

1. 42 U.S.C. § 2000e (1994).
2. 524 U.S. 742, 118 S. Ct. 2257 (1998).
3. 524 U.S. 775, 118 S. Ct. 2275 (1998).
4. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.
5. See *infra* note 35.

prior law governing cases of hostile work environment sexual harassment, which generally required the employee to prove that the employer had been negligent before liability would be imposed.<sup>6</sup>

This note analyzes the Supreme Court's decisions in *Ellerth* and *Faragher* and sets forth the current law governing claims of supervisory sexual harassment under Title VII. Part I explains the distinction between quid pro quo sexual harassment and hostile work environment sexual harassment, and then describes the rules recently articulated by the Court for holding an employer liable under either theory. Part II then applies these rules to the facts of two representative cases to illustrate the significant changes that the Court has made to existing Title VII principles. The note concludes with a short summary of the main points. I leave it to other commentators to explore more fully the legal and political implications of the Court's decisions.

## I. THE LAW OF SUPERVISORY SEXUAL HARASSMENT

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."<sup>7</sup> This prohibition applies to all businesses with fifteen or more employees that are "engaged in an industry affecting commerce,"<sup>8</sup> and covers the actions of an employer's "agent" as well as those of the employer itself.<sup>9</sup> In *Meritor Savings Bank, FSB v. Vinson*,<sup>10</sup> the Supreme Court's first sexual harassment case, the Court made clear that sexual harassment constitutes discrimination on the basis of sex in violation of Title VII.<sup>11</sup> In identifying the circumstances in which an employer will be held liable for the sexually harassing behavior of its employees, the Court explained that, "Congress wanted courts to look to agency principles for guidance in this area."<sup>12</sup> The *Meritor* Court declined, however, "to issue a definitive rule on employer liability," except to hold that under Title VII employers are not

---

6. See *infra* note 40 and accompanying text.

7. 42 U.S.C. § 2000e-2(a)(1) (1994). The antidiscriminatory provisions of Title VII were originally adopted as part of the Civil Rights Act of 1964, Pub. L. No. 88-352 § 703. The provision relating to sex-based discrimination was added to the statute "at the last minute" and, consequently, there is "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).

8. 42 U.S.C. § 2000e(b) (1994).

9. See *id.*

10. 477 U.S. 57 (1986).

11. *Id.* at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.") (alteration in original).

12. *Id.* at 72.

“automatically liable for sexual harassment by their supervisors.”<sup>13</sup>

### A. *Categories of Sexual Harassment*

Traditionally, two forms of workplace sexual harassment have been held by courts to constitute sex discrimination in violation of Title VII: (1) “quid pro quo” sexual harassment, in which an employee’s supervisor “link[s] tangible job benefits to the acceptance or rejection of sexual advances”;<sup>14</sup> and (2) “hostile work environment” sexual harassment, in which an individual’s fellow employees engage in sexually-oriented conduct that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>15</sup> In *Ellerth*<sup>16</sup> and *Faragher*,<sup>17</sup> the Supreme Court clarified the distinction between these two types of sexual harassment and articulated a new rule governing when an employer will be held liable for a supervisor’s sexual harassment of a subordinate employee. This note will focus primarily upon the Court’s decision in *Ellerth*, which offers a more comprehensive treatment of employer liability under Title VII.

The question presented in *Ellerth* was “[w]hether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances.”<sup>18</sup> The plaintiff in *Ellerth* had worked as a salesperson for Burlington Industries in Chicago. After voluntarily quitting her job, she brought suit under Title VII alleging that during a fourteen-month period she had been subjected to constant sexual harassment by her second-line supervisor.

For purposes of its opinion, the Court assumed that the supervisor’s harassment included “numerous threats to retaliate against [the plaintiff] if she denied some sexual liberties.”<sup>19</sup> Despite the harassment, the plaintiff

---

13. *Id.*

14. *Karibbean v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir. 1994); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987) (“*Quid pro quo* harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits.”).

15. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal punctuation and citation omitted)); *see also* 29 C.F.R. § 1604.11 (1999) (“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”).

16. 118 S. Ct. 2257 (1998).

17. 118 S. Ct. 2275 (1998).

18. *Ellerth*, 118 S. Ct. at 2265.

19. *Id.* at 2264.

received a promotion during her tenure at Burlington and suffered no reductions in her salary, benefits, or job responsibilities as a result of her refusal to submit to her supervisor's advances.<sup>20</sup> Nonetheless, she contended that "[w]here a supervisor makes some form of contingent threat to facilitate an act of sexual harassment, a statutory violation occurs."<sup>21</sup>

Justice Kennedy, writing for the Court in *Ellerth*, began his analysis by distinguishing between quid pro quo sexual harassment and hostile work environment sexual harassment.<sup>22</sup> Although Justice Kennedy considered the labels "quid pro quo" and "hostile work environment" to be "of limited utility" in determining an employer's vicarious liability for a supervisor's sexual harassment of a subordinate employee,<sup>23</sup> he found them "relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII."<sup>24</sup> According to Justice Kennedy, the terms "quid pro quo" and "hostile work environment" "illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general."<sup>25</sup> Thus, quid pro quo sexual harassment occurs only when a supervisor's threats to retaliate against an employee for rejecting the supervisor's sexual advances *are carried out*.<sup>26</sup> On the other

---

20. *See id.* at 2262.

21. Respondent's Brief at 52, *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) (No. 97-569).

22. *See Ellerth*, 118 S. Ct. at 2264.

23. *Id.*

24. *Id.* at 2265. A number of commentators have suggested that the Supreme Court's decisions in *Ellerth* and *Faragher* eliminated the analytical distinction between quid pro quo sexual harassment and hostile work environment sexual harassment. *See, e.g.*, Anita K. Blair, *Harassment Law: More Confused Than Ever*, WALL ST. J., July 8, 1998, at A14; Editorial, *More Harassment*, WASH. POST, June 28, 1998, at C6. This is an inaccurate reading of the Court's opinions. As the Court in *Ellerth* explained, before an employer may be held liable to an employee victimized by sexual harassment, the court must first determine that an actionable Title VII violation occurred. *See Ellerth*, 118 S. Ct. at 2265. Title VII is violated either when a supervisor engages in quid pro quo sexual harassment or when an employee is subjected to a sexually hostile work environment. *See id.* at 2264-65. Moreover, once the court finds an actionable Title VII violation, the type of violation that occurred determines whether any affirmative defense is available to the employer. *See infra* Part II.B-C. Though no defense is available in situations of quid pro quo sexual harassment, a limited defense is available in situations of hostile work environment sexual harassment. *See id.* Thus, the categories "quid pro quo" and "hostile work environment" remain crucial to understanding employer liability under Title VII.

25. *Ellerth*, 118 S. Ct. at 2265.

26. *See id.* at 2264-65. The *Ellerth* Court's definition of quid pro quo sexual harassment, which does not include a supervisor's unfulfilled threats to retaliate against an employee for refusing his sexual advances, represents a sharp departure from the position previously taken by a majority of the federal circuit courts that addressed the issue. *See, e.g.*, *Jansen v. Packaging Corp.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc) ("[L]iability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act."), *aff'd on other grounds sub nom. Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997) (finding that

hand, situations in which such threats are not carried out or are absent altogether, but in which the employee experiences “bothersome attentions or sexual remarks that are sufficiently severe or pervasive,” constitute hostile work environment sexual harassment.<sup>27</sup> Because the plaintiff’s sexual harassment claim in *Ellerth* “involve[d] only unfulfilled threats,” Justice Kennedy concluded that “it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.”<sup>28</sup> *Faragher*, likewise, was a hostile work environment case.<sup>29</sup>

### B. *Employer Liability for Quid Pro Quo Sexual Harassment*

The Court in *Ellerth* made clear that an employer will be held vicariously liable under Title VII for both quid pro quo and hostile work environment sexual harassment committed by a supervisor.<sup>30</sup> In order to hold an employer liable for quid pro quo sexual harassment, a plaintiff employee must prove that “a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands.”<sup>31</sup> Justice Kennedy defined “a tangible employment action” as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>32</sup> In addition, a tangible employment action “requires an official act of the enterprise” and generally “is documented in official company records, and may be subject to review by higher level

---

quid pro quo sexual harassment occurs “even if the supervisor does not follow through on his or her threat”); *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994) (“[A] supervisor’s intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment.”); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559-60 (11th Cir. 1987) (finding that quid pro quo sexual harassment occurs when the supervisor “threaten[s] to make decisions affecting the employment status of his subordinates”). *But see Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (holding that the plaintiff failed to state a claim for quid pro quo sexual harassment when the supervisor’s numerous threats “were not carried out”).

27. *Ellerth*, 118 S. Ct. at 2264.

28. *Id.* at 2265 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1002-03 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

29. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2280 (1998). The plaintiff in *Faragher* alleged that she had been subjected to a sexually hostile work environment by her supervisors while working as a life guard for the City of Boca Raton. *See id.* at 2280-81.

30. *See Ellerth*, 118 S. Ct. at 2264.

31. *Id.* at 2265.

32. *Id.* at 2268. As discussed *supra* note 26 and accompanying text, quid pro quo sexual harassment does not occur when a supervisor merely threatens to take a tangible employment action against a subordinate employee who refuses to submit to the supervisor’s sexual demands.

supervisors.”<sup>33</sup> The *Ellerth* Court then found, based on standard agency principles, that “a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.”<sup>34</sup> It necessarily follows that when an employee suffers a tangible employment action in retaliation for his or her refusal to agree to a supervisor’s sexual demands, the employer will be held strictly liable.<sup>35</sup>

The Supreme Court in *Ellerth* broke little new ground in the area of quid pro quo sexual harassment. Strict employer liability for a supervisor’s quid pro quo sexual harassment has been a longstanding principle of Title VII law.<sup>36</sup> The Court in *Ellerth* did, however, somewhat narrow the scope of an employer’s liability for a supervisor’s quid pro quo sexual harassment by emphasizing that threats alone are not a sufficient basis for holding an employer strictly liable for the supervisor’s behavior.

### C. *Employer Liability for Hostile Work Environment Sexual Harassment*

In contrast to the Court’s holdings on quid pro quo harassment, in both *Ellerth* and *Faragher* the Court substantially expanded the circumstances in which an employer will be held liable for a sexually hostile work environment created by a supervisor. The new rule pertaining to a supervisor’s hostile work environment sexual harassment is as follows:

An employer is subject to vicarious liability to a victimized

33. *Id.* at 2269.

34. *Id.*; see also RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957). As Justice Kennedy explained, “[t]angible employment actions fall within the special province of the supervisor . . . [and] are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” *Ellerth*, 118 S. Ct. at 2269.

35. See *Ellerth*, 118 S. Ct. at 2269 (explaining that in such circumstances “it would be implausible to interpret agency principles to allow an employer to escape liability”). The basic rationale for strict liability in the quid pro quo context is that because the employer delegated part of the company’s power to the supervisor, it is appropriate to hold the employer liable for the supervisor’s misuse of this power. See, e.g., *Carerro v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (“[I]n quid pro quo cases the harassing employee acts as and for the company, holding out the employer’s benefits as an inducement to the employee for sexual favors. Accordingly . . . the employer is held strictly liable for its employee’s unlawful acts.”).

One implication of the *Ellerth* Court’s definition of quid pro quo sexual harassment is that if the harassed employee *submits* to the supervisor’s sexual demands and consequently does *not* suffer any tangible employment actions, he or she will not have a claim for quid pro quo sexual harassment. Of course, the employee still may have a claim for hostile work environment sexual harassment. See *infra* note 42 (setting forth applicable standards). Furthermore, although the harassing supervisor cannot be sued directly under Title VII, he or she may be held accountable under state tort law. See generally *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998).

36. See, e.g., *Highlander v. K.F.C. Nat’l Mgt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Horn v. Duke Homes*, 755 F.2d 599, 604-06 (7th Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>37</sup>

Thus, where an employee is subjected to a sexually hostile work environment by his or her immediate or successively higher supervisor,<sup>38</sup> under *Ellerth* and *Faragher* the employer is liable for the supervisor's conduct *unless the employer proves* by a preponderance of the evidence: (1) that the employer took reasonable care to prevent and promptly remedy the abusive situation, *and* (2) that the plaintiff employee unreasonably failed to pursue available disciplinary measures or otherwise avoid the harassment. No such defense to liability is available, however, where the supervisor's harassment culminates in a tangible employment action against the employee.<sup>39</sup>

---

37. *Ellerth*, 118 S. Ct. at 2270.

38. In neither *Ellerth* nor *Faragher* did the Court expressly define what it meant by the term "supervisor." Justice Kennedy's opinion in *Ellerth*, however, suggests that a supervisor is someone who is authorized by the employer to take tangible employment actions against other employees. As Justice Kennedy stated, "Tangible employment actions fall within the special province of the supervisor." *Ellerth*, 118 S. Ct. at 2269. Recall that a "tangible employment action" is any "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." *Id.* at 2268. Thus, under Justice Kennedy's definition, merely being a step higher in the corporate hierarchy or having some limited managerial duties is not enough to transform an employee into a "supervisor" for Title VII purposes. A majority of federal circuit courts have taken a position in accord with Justice Kennedy's view. *See, e.g.,* *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027, 1033-34 & n.1 (7th Cir. 1998) ("[I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.") (citing cases). *But see* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring) ("A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace.").

39. Furthermore, no defense to liability is available if the harassing employee holds a sufficiently high position in the corporate hierarchy. *See Ellerth*, 118 S. Ct. at 2267 (noting that the employer is liable "where the agent's high rank in the company makes him or her the employer's alter ego"); *Faragher*, 118 S. Ct. at 2284 (stating that a company president "was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy" for purposes of Title VII liability); *see also* *Cross v.*

This new hostile work environment liability standard represents a significant change in the existing case law. Prior to *Ellerth* and *Faragher*, a majority of the federal circuit courts imposed liability on an employer for a sexually hostile work environment created by a supervisor only if *the plaintiff employee proved* that the employer had been *negligent* in failing to prevent or remedy the supervisor's unlawful conduct. So long as the employer took prompt and appropriate steps to stop any supervisory harassment of which it was or should have been aware, no Title VII liability would attach.<sup>40</sup> A few circuit courts also imposed liability whenever a supervisor explicitly used his delegated authority to carry out his harassment of a subordinate employee, for example, by threatening to fire or demote an employee who refused to accommodate his harassing behavior.<sup>41</sup> No circuit court went so far, however, as to hold that employers are presumptively liable under Title VII for *all* sexual harassment perpetrated by supervisors, subject only to an affirmative defense that effectively places an employer's fate in the hands of the victimized employee.

Under *Ellerth* and *Faragher*, once the plaintiff employee establishes the existence of an actionable hostile work environment created by a supervisor,<sup>42</sup> the burden shifts to the employer to prove not only that it

---

Cleaver, 142 F.3d 1059, 1074 (8th Cir. 1998) (“[T]he retaliator could be so high in the employer’s hierarchy that . . . the retaliatory conduct would necessarily be imputed to the employer”); Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997) (“[A]n employer will be held liable [if] . . . the supervisor was at a sufficiently high level in the company.”); Andrade v. Mayfair Mgmt., Inc., 88 F.3d 258, 261 (4th Cir. 1996) (“[I]n situations where a proprietor, partner or corporate officer participates personally in the harassing behavior, the illegal conduct will be deemed to be that of the employer.”) (internal punctuation and citation omitted); Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 108 (3d Cir. 1994) (“There is intuitive appeal to imposing liability for the torts of high-level executives because they may speak for the company whenever they open their mouths.”).

40. See, e.g., Todd v. Ortho Biotech, Inc., 138 F.3d 733, 737 (8th Cir. 1998); Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997) (*en banc*) (no majority opinion), *aff’d on other grounds sub nom.* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 437 (1st Cir. 1997); Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996); Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184-85 (6th Cir. 1992); Jones v. Flagship Int’l, 793 F.2d 714, 720 (5th Cir. 1986).

41. See, e.g., Torres v. Pisano, 116 F.3d 625, 635 (2d Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1446 (10th Cir. 1997); Faragher v. City of Boca Raton, 111 F.3d 1530, 1537 (11th Cir. 1997) (*en banc*), *rev’d*, 118 S. Ct. 2275 (1998).

42. As explained in *Faragher*, to be actionable under Title VII, a sexually hostile work environment “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Faragher*, 118 S. Ct. at 2283 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993)). While individual plaintiffs may consider a wide range of supervisory comments and conduct “offensive,” the crux of the inquiry is whether a “reasonable” or “objective” person in the plaintiff’s situation would find the behavior offensive. In making this reasonableness



exercised reasonable care to prevent and correct the harassing behavior, but also that the victimized employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>43</sup> Regarding the first prong of the employer’s affirmative defense, the Supreme Court cautioned that “an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law.”<sup>44</sup> Nonetheless, prudent employers will find it in their interest to adopt formal sexual harassment policies that are communicated clearly and frequently to all employees, that inform employees that sexual harassment will not be tolerated, that encourage victims of sexual harassment to come forward but do not require that they complain to the offending supervisor, that provide for an impartial investigation of all sexual harassment complaints, and that impose appropriate sanctions on supervisors found guilty of sexual harassment.<sup>45</sup>

---

determination, courts and juries are to “look[] at all the circumstances.” *Id.* These include: the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* The Court in *Faragher* emphasized that “conduct must be extreme” to constitute hostile work environment sexual harassment in violation of Title VII. *Id.* at 2284. “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” *Id.* at 2283 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1003 (1998)); *see also* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive . . .”).

Additionally, in both *Ellerth* and *Faragher*, the Court clearly endorsed the view that supervisors are in a unique position to harass their subordinates, and that this circumstance justifies greater scrutiny—and stricter employer liability—under Title VII. *See, e.g., Ellerth*, 118 S. Ct. at 2269-70 (“a supervisor’s power and authority invests his or her harassing conduct with particular threatening character”); *Faragher*, 118 S. Ct. at 2289-90 (“supervisors have special authority enhancing their capacity to harass”). As the Court in *Faragher* explained: “When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions *necessarily* draw upon his superior position over the people who report to him, or those under him, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.” *Faragher*, 118 S. Ct. at 2291 (emphasis added). Viewed from this perspective, conduct which would not be perceived as unlawful sexual harassment if engaged in by an ordinary employee is much more likely to be deemed actionable if committed by a supervisor. The Court thus appears to be indicating that the degree of “severity” or “pervasiveness” of misconduct required to find actionable sexual harassment under Title VII is less in cases where a supervisor is involved than where the harassment is committed by a coworker.

43. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

44. *Id.*

45. *See, e.g.,* Claudia Withers, *Preventing Sexual Harassment in the Workplace*, in *AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS* 1997, at 131, 137-41 (PLI, Litig. & Admin. Practice Course Handbook Series No. 567, 1997); John L. Valentino, *An Effective Employer Response to Complaints of Sexual Harassment*, 68 N.Y. St. B.J. 36, 38 (Apr. 1996); Wayne T. McGraw, *Investigating Sexual Harassment: A Practical Primer for the*

Even where an employer implements and enforces such a policy, however, it still will be held liable for a sexually hostile work environment created by a supervisor *so long as the victimized employee properly follows the grievance procedures provided for in the policy and takes reasonable steps to avoid the harassment*. Since part of the employer's obligation is to ensure that victimized employees are aware of their rights and responsibilities under Title VII, few employees who complain about a supervisor's sexual harassment will "unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>46</sup> For just as the Supreme Court's holdings in *Ellerth* and *Faragher* provide an incentive to employers to adopt formal sexual harassment policies to limit their liability exposure, they also provide an incentive to harassed employees to utilize such policies to preclude their employers' affirmative defense to liability. Thus, except in rare cases where the harassed employee completely neglects to fulfill his or her obligations under Title VII, the employer will be held liable for a sexually hostile work environment created by a supervisor, regardless of whether the employer knew about the harassment or acted reasonably under the circumstances. Practically speaking, then, the Court has fashioned a rule of strict employer liability for all supervisory sexual harassment.<sup>47</sup> The Court's holdings in *Ellerth* and *Faragher*, therefore, are in considerable tension with its earlier holding in *Meritor Savings Bank, FSB v. Vinson*<sup>48</sup> that "employers are [not] always automatically liable for

---

*Corporate Lawyer*, 40 LOY. L. REV. 97, 104-10 (1994).

For cases discussing the employer's standard of care under Title VII, see *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673-78 (10th Cir. 1998); *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 26-27 (3d Cir. 1997); *Fleming v. Boeing Co.*, 120 F.3d 242, 246-47 (11th Cir. 1997); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807-08 (5th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-33 (7th Cir. 1995); *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995).

46. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

47. Because the Court's holdings in *Ellerth* and *Faragher* are expressly limited to cases of supervisory hostile work environment sexual harassment, the negligence rule uniformly applied by the federal circuit courts in Title VII cases involving coworker hostile work environment sexual harassment remains in full force. Compare *Ellerth*, 118 S. Ct. at 2267 ("Negligence sets a minimum standard for employer liability under Title VII."), with *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997); *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *Hirras v. National R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995); *Spicer v. Virginia Dep't of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 804 (6th Cir. 1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900-01 (1st Cir. 1988).

48. 477 U.S. 57 (1986).

sexual harassment by their supervisors.”<sup>49</sup>

## II. APPLYING THE *ELLERTH-FARAGHER* PARADIGM

To illustrate the impact of the Supreme Court’s recent sexual harassment decisions on prior Title VII caselaw more clearly, I will apply the *Ellerth-Faragher* paradigm to the facts of *Kauffman v. Allied Signal, Inc.*<sup>50</sup> and *Pfau v. Reed*,<sup>51</sup> two recent cases in which the employer was found not liable for a sexually hostile work environment created by the plaintiff’s supervisor. Under the new rule articulated by the Court in *Ellerth* and *Faragher*, however, if the same employers were sued today under the same set of circumstances, they almost certainly *would* be held liable.

In *Kauffman*, the plaintiff worked as a machine operator at Allied Signal’s Autolite Division plant in Fostoria, Ohio.<sup>52</sup> In early 1988, she took a medical leave of absence to have breast enlargement surgery.<sup>53</sup> The plaintiff “considered this a very private matter and told only a few close friends, including co-workers, about her surgery.”<sup>54</sup> Nonetheless, when the plaintiff returned to work on April 11, 1988, her supervisor touched her left breast and asked her, “Why didn’t you tell me you were getting new tits? When do I get to see them?”<sup>55</sup> The supervisor then tried to look down the plaintiff’s blouse, but the plaintiff pushed him away, telling him, “That’s enough.”<sup>56</sup> The next day, the supervisor reassigned the plaintiff from her regular machine to a manual press that was more difficult to operate.<sup>57</sup> When a coworker asked him why he had done this, the supervisor replied, “I put her on [the manual press] for punishment because she wouldn’t show me her tits.”<sup>58</sup>

---

49. *Id.* at 72; see also *Ellerth*, 118 S. Ct. at 2274 (Thomas, J., dissenting) (rejecting the Court’s holding as “a product of willful policymaking, pure and simple”). Justice Thomas endorsed the position previously taken by a majority of the federal circuit courts that an employer is liable for a sexually hostile work environment created by a supervisor “if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor’s conduct to occur.” *Id.* at 2271. Justice Thomas emphasized that this is the standard applied in cases involving charges of racial harassment, see *id.* at 2272, and argued that an employer’s liability under Title VII should not “depend upon whether a sexually or racially hostile work environment is alleged.” *Id.* at 2271.

50. 970 F.2d 178 (6th Cir. 1992).

51. 125 F.3d 927 (5th Cir. 1997).

52. See *Kauffman*, 970 F.2d at 180.

53. See *id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See *id.*

58. *Kauffman*, 970 F.2d at 180.

The final incidents of harassment occurred on April 13, 1988. While the plaintiff was working at her regular machine, the supervisor threw a spark plug insulator at her, hitting her on her right hip.<sup>59</sup> Later that evening, the supervisor ordered another employee to ask the plaintiff "to show you her tits,"<sup>60</sup> which the employee did. After the incident, the plaintiff "became hysterical and started crying."<sup>61</sup> The plaintiff then reported the supervisor's behavior to her union representative, who brought her complaint to the attention of management.<sup>62</sup> After being confronted with the plaintiff's allegations, the supervisor was terminated on April 14, 1988, for violating Allied Signal's written policy against sexual harassment.<sup>63</sup>

Both at trial and on appeal, Allied Signal did not dispute that the plaintiff had been subjected to a sexually hostile work environment by her supervisor.<sup>64</sup> The only contested issue was whether the company should be held liable for the supervisor's actions.<sup>65</sup> The Sixth Circuit held that it should not.<sup>66</sup> In reaching its decision, the Sixth Circuit applied the now-obsolete rule that an employer is liable for a sexually hostile work environment created by one of its supervisors only if the employer fails to respond promptly and adequately to stop the harassment.<sup>67</sup> Since Allied Signal, upon learning of the harassment, "immediately fired the offending supervisor to correct the hostile working environment which he [had] created," the Sixth Circuit concluded that the company was "protected from liability."<sup>68</sup>

In sharp contrast with the Sixth Circuit's decision under prior case law, application of the new *Ellerth-Faragher* paradigm to the facts of *Kauffman* suggests that in today's Title VII environment, Allied Signal *would* be held liable for the supervisor's conduct. As explained previously, under the Court's holding in *Ellerth* and *Faragher*, an employer is

---

59. *See id.* at 180.

60. *Id.* at 181.

61. *Id.*

62. *See id.*

63. *See id.* Allied Signal first adopted its written policy against sexual harassment in 1981. The policy encourages employees to report complaints of sexual harassment to management through the director of employee relations, thereby permitting the victimized employee to bypass the harassing supervisor or coworker. *Id.*

64. *See Kauffman*, 970 F.2d at 182.

65. *See id.*

66. *See id.* at 184.

67. *See id.*

68. *Id.* at 185. As for whether Allied Signal was liable for the supervisor's actions under a theory of quid pro quo sexual harassment, the Sixth Circuit reversed the district court's award of summary judgment in favor of Allied Signal and remanded for further proceedings to determine if the supervisor's act of reassigning the plaintiff to the manual press was a sufficient job detriment to trigger quid pro quo liability. *See id.* at 187.

automatically liable to an employee subjected to a sexually hostile work environment by a supervisor unless the employer can prove by a preponderance of the evidence *both* that the employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” *and* 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>69</sup> In this case, it is clear that Allied Signal responded promptly and reasonably to the plaintiff’s allegations of sexual harassment by her supervisor. It is equally clear, however, that the plaintiff reported the supervisor’s behavior to the appropriate authorities within a reasonable period of time and that she in no way contributed to her own victimization. In these circumstances, the new *Ellerth-Faragher* paradigm would require that Allied Signal be held liable for the supervisor’s conduct.

Another example in which applying the *Ellerth-Faragher* paradigm results in a different outcome is *Pfau v. Reed*.<sup>70</sup> In *Pfau*, the plaintiff worked for the Defense Contract Audit Agency.<sup>71</sup> In October 1992, after eight years with the Agency, she transferred into a new work group.<sup>72</sup> The plaintiff’s new supervisor “immediately began making ‘lewd and suggestive comments’ to her and ‘request[ing] sexually provocative behavior from’ her.”<sup>73</sup> The plaintiff steadfastly rejected the supervisor’s advances and refused to comply with his demands that they become intimate.<sup>74</sup> In December 1992, she filed charges of sexual harassment against the supervisor with the Agency. Upon receiving the plaintiff’s complaint, the Agency conducted a full investigation.<sup>75</sup> As part of the investigation, the supervisor was counseled by the Agency’s local branch manager who admonished him against “engag[ing] in any activity which

---

69. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93. Recall that no affirmative defense is available to the employer where the supervisor’s harassment culminates in a “tangible employment action.” *Id.* In *Kauffman*, it was disputed whether the supervisor’s act of reassigning the plaintiff to the manual press constituted such an action (referred to in *Kauffman* as a “tangible job detriment”). See *Kauffman*, 970 F.2d at 186-87. If reassigning the plaintiff to the manual press were considered a tangible employment action within the meaning of *Ellerth* and *Faragher*, then Allied Signal would be strictly liable for the supervisor’s behavior.

70. 125 F.3d 927 (5th Cir. 1997).

71. See *id.* at 930.

72. See *id.*

73. *Id.*

74. See *id.* at 930-31. The plaintiff did not suffer any tangible employment actions as a result of her refusal to submit to her supervisor’s advances. Consequently, this was not a case of quid pro quo sexual harassment subjecting the Agency to strict liability for the supervisor’s conduct. See discussion *supra*, Part II.B.

75. See *Pfau*, 125 F.3d at 940-41.

might in any way be considered unwelcome sexual harassment.”<sup>76</sup> The plaintiff acknowledged in her deposition that no further acts of harassment involving the supervisor thereafter occurred.

Based on these facts, the district court granted summary judgment in favor of the Agency on the plaintiff’s Title VII claims.<sup>77</sup> The Fifth Circuit affirmed on the grounds that the plaintiff had failed to prove that the Agency should have known about the supervisor’s harassment prior to the filing of her complaint and that no genuine issue of material fact existed as to the sufficiency of the Agency’s remedial efforts.<sup>78</sup> Under the new rule set forth in *Ellerth* and *Faragher*, however, this is only the first step in the employer’s affirmative defense to liability for a supervisor’s sexual harassment of a subordinate employee. The second step involves demonstrating 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>79</sup> As in *Kauffman*, the plaintiff in *Pfau* properly reported the supervisor’s behavior in accordance with the Agency’s grievance procedures and in no way encouraged his unwanted attentions. Unless a factfinder were to decide that the two-month interval between the initial episodes of harassment and the filing of the plaintiff’s complaint represented an unreasonable delay on the part of the plaintiff in reporting the supervisor’s behavior, under the new *Ellerth-Faragher* paradigm the Agency would be held liable for the supervisor’s conduct.

As these examples demonstrate, the Court’s holdings in *Ellerth* and *Faragher* have made it much easier to hold an employer liable under Title VII for a supervisor’s sexual harassment of a subordinate employee.<sup>80</sup> One consequence is that there may be greater numbers of sexual harassment

---

76. *Id.* at 941.

77. *See id.* at 932.

78. *See id.* at 938-41.

79. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93. This prong of the employer’s affirmative defense is certain to be controversial because it raises the specter of judges and juries “blaming the victim” for a supervisor’s sexual harassment. This is so because, even where an employee is sexually harassed by his or her supervisor, the employer can escape liability under Title VII so long as it takes reasonable steps to prevent or stop the harassment *and* it proves that the employee failed to report the harassment in a timely manner or otherwise contributed to his or her own victimization, for example, by voluntarily socializing with the harasser. *See generally* Brown v. Perry, No. 97-1501, 1999 WL 504814 (4th Cir. July 14, 1999) (holding that the plaintiff acted unreasonably when she did not attempt to avoid her harasser); Perry v. Harris Chernin, 126 F.3d 1010, 1014 (7th Cir. 1997) (affirming directed verdict in favor of the defendant where the plaintiff “failed to do her[]” part by reporting supervisor’s harassment before quitting her job).

80. The plaintiff’s attorney in *Ellerth* described the Court’s ruling as “stunningly favorable to the employee.” Lynn Sweet, *Landmark Ruling on Sex Harassment*, CHI. SUN-TIMES, June 27, 1998, at 1; *see also* Kimberly Blanton & Chana Schoenberger, *Jump in Sex-Bias Cases Expected After Decision*, BOSTON GLOBE, June 27, 1998, at F1 (noting the “increased ease of making—and winning a sexual harassment case”).

cases in the future.<sup>81</sup> Not only may more sexual harassment lawsuits be filed, but winning on summary judgment “will become virtually impossible.”<sup>82</sup> Moreover “companies will be under more pressure to settle weak claims simply to avoid the overall cost of litigation or the risk of bringing the case to a jury.”<sup>83</sup> Another consequence is that employers may become overly zealous in their efforts to stop sexual harassment before it starts, since the only sure-fire method of avoiding Title VII liability is to prevent the harassment from ever occurring.<sup>84</sup>

### III. CONCLUSION

In summary, the Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth*<sup>85</sup> and *Faragher v. City of Boca Raton*<sup>86</sup> have wrought significant changes in the law governing claims of supervisory sexual harassment under Title VII. In particular, the Court has made it much easier to hold an employer liable for a sexually hostile work environment created by a supervisor. Henceforth, so long as the harassed employee timely reports the offending supervisor and takes reasonable steps to stop or otherwise avoid the harassment, the employer will be held liable for the supervisor’s actions, regardless of the level of care exercised by the

---

81. See Edward Felsenthal, *Rulings Open Way for Sex-Harass Cases*, WALL ST. J., June 29, 1998, at A3; David G. Savage, *High Court Holds Employers to Strict Harassment Rules*, L.A. TIMES, June 27, 1998, at A1. Currently, more than 15,000 sexual harassment lawsuits are filed each year. See *Clinton’s Crisis*, TIME, Mar. 23, 1998, at 48.

82. Dominic Bencivenga, *Looking for Guidance: High Court Rulings Leave Key Terms Undefined*, N.Y.L.J., July 2, 1998, at 5. See generally, *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888-89 (8th Cir. 1998) (reversing summary judgment in favor of defendant in part on grounds that whether defendant took prompt and appropriate remedial action and whether plaintiff’s conduct was reasonable were questions best left to factfinder).

83. Bencivenga, *supra* note 82 at 5; see also *Supreme Court Rulings to Affect Harassment Covers*, BEST’S INS. NEWS, July 2, 1998.

84. See, e.g., Anita K. Blair, *Harassment Law: More Confused Than Ever*, WALL ST. J., July 8, 1999, at A14 (“Employers trying to fulfill their duty to prevent harassment will find they must either institute totalitarian measures—attempting to monitor and control every encounter between employees within (and even outside) the workplace—or else give up and buy various forms of insurance.”); Marcia Coyle, *Sex Harassment Redefined*, NAT’L L.J., July 6, 1998, at A1 (“Employers, more than ever, are going to have to have as vigorous anti-harassment training and policies as they possibly can.”) (attribution omitted); Editorial, *More Harassment*, WASH. POST, June 28, 1998, at C6 (“there is reason to fear that employers will interpret ‘reasonable care’ to include practices that are at odds with civil liberties and free—if sometimes unpleasant—speech”). See also *Supreme Court Rulings to Affect Harassment Covers*, *supra* note 83 (claiming that the rulings “essentially require that companies have zero-tolerance antiharassment policies”); Edward Felsenthal, *Rulings Open Way for Sex-Harass Cases*, WALL ST. J., June 29, 1998, at A3 (stating that the “rulings will create a huge incentive for companies to establish tough antiharassment programs”).

85. 118 S. Ct. 2257 (1998).

86. 118 S. Ct. 2275 (1998).

employer. As I have argued, the Court has thus moved quite far towards adopting a rule of strict employer liability whenever a supervisor sexually harasses a subordinate. While the precise impact this will have on the day-to-day world of Title VII litigation remains to be seen, it appears likely that both the number of cases filed, as well as the cost to employers in terms of settlements and verdicts, will increase substantially.