

# Articles

## **EVOLVING CONFLICT BETWEEN STANDARDS FOR EMPLOYMENT DISCRIMINATION LIABILITY AND THE DELEGATION OF THAT LIABILITY: DOES EMPLOYMENT PRACTICES LIABILITY INSURANCE OFFER APPROPRIATE RISK TRANSFERENCE?**

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Employment Practices Liability Insurance (EPLI) makes delegable the damage award accompanying an adverse judgment in an employment law case. Modern employment law imposes such damages on employers to compensate victims and encourage compliance. Since *Burlington* and *Ellerth*, the Supreme Court has intensified employer liability to strengthen the incentive to curb discriminatory conduct. This article questions whether transferring the risk of damages for discriminatory acts via EPLI conflicts with the increasingly stringent standards the law is imposing on employers. Upon determining that there is a conflict between some forms

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of EPLI and the newly evolved standard for employer liability, this article then proposes a regulatory framework for resolving the conflict to the mutual benefit of employees, employers and EPLI carriers.

I.	INTRODUCTION .....	2
II.	THE EVOLUTION OF THE STANDARD FOR EMPLOYERS' LIABILITY .....	5
	A. From Title VII to Meritor.....	6
	B. Burlington and Faragher.....	10
	C. Post-Burlington/Faragher Interpretations of Employer Liability .....	18
	1. The Presence of Tangible Adverse Employment Action .....	19
	2. The Absence of Tangible Adverse Employment Action — The Affirmative Defense.....	21
	D. The Most Recent Evolution: Reeves v. Sanderson Plumbing Products, Inc .....	23
	E. The Resulting Standard of Employer Liability .....	25
III.	THE EVOLUTION OF EMPLOYMENT PRACTICES LIABILITY INSURANCE .....	28
IV.	HAS EMPLOYER LIABILITY EVOLVED TO CONFLICT WITH EPLI? ..	30
	A. Does ELPI Undermine Post Burlington /Faragher Employer Liability? .....	31
	B. A Proposed Solution .....	35
V.	CONCLUSION.....	36

“IF DISCRIMINATION COSTS MONEY, PEOPLE WILL STOP DOING IT.”<sup>1</sup>

## I. INTRODUCTION

The insurance industry has introduced a product commonly known as Employment Practices Liability Insurance (hereinafter EPLI)<sup>2</sup> into the arena of employment discrimination liability. This product effectively makes delegable the damage award accompanying an adverse judgment in an employment discrimination case.<sup>3</sup> EPLI now allows employers to pass

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1. H.R. REP. NO. 102-40, pt. 1, at 69 (Feb. 27, 1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 607 (Apr. 24, 1991) (statement of Dr. Heidi Hartmann, Director, Institute for Women's Policy Research, testifying before the U.S. House Committee on Education and Labor in hearings on the Civil Rights and Women's Equity in Employment Act of 1991).

2. *Infra* Part III.

3. Richard R. Winter, *Supreme Court Takes Rare Look at Insurance*, NAT'L L.J., Mar. 20, 2000, at B10.

the risk of discrimination and harassment penalties to insurance companies, who charge a premium to offset their liability.<sup>4</sup> Previously, employers exclusively bore these damages payable to injured employees.<sup>5</sup>

Until relatively recently, employees had only limited ability to protect themselves from various injustices at the hands of their employers,<sup>6</sup> including racial, age and sex-based discrimination. Title VII of the Civil Rights Act of 1964,<sup>7</sup> related anti-discrimination legislation,<sup>8</sup> and case law interpreting such statutes<sup>9</sup> embody the legal response to employees' inherent vulnerability to such discrimination. Modern employment law not only recognizes that employees deserve recourse for discrimination, but that remedies at law are effective tools in deterring such discrimination.<sup>10</sup> Seeking both to facilitate recourse and to encourage deterrence, the law imposes monetary penalties on wrongdoer employers.<sup>11</sup>

The evolution of sexual harassment law evinces the importance of non-delegable employer liability as a means of deterrence, which is reflected in the courts' imposition of an ever-stricter standard of employer liability.<sup>12</sup> The Supreme Court supported this trend toward a stricter standard in its most recent examination of liability for sexual harassment, the 1998 companion cases *Burlington Industries, Inc. v. Ellerth*<sup>13</sup> and

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4. *Infra* notes 187-205 and accompanying text.

5. See Simon J. Nadel, *Employment Practices Liability Insurance Makes Some Headway with Employers*, ANALYSIS & PERSPECTIVE (BNA) No. 18, 66 U.S.L.W. 2275, 2275 (Nov. 11, 1997) (describing infusion of EPLI coverage into previously excluded employment law claims).

6. Sid L. Moller, *The Revolution That Wasn't: On the Business as Usual Aspects of Employment at Will*, 27 U. RICH. L. REV. 441, 448 (1993).

7. 42 U.S.C. § 2000e-2(a) (1994); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 336 (1990).

8. See, e.g., Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 (1994); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12182 (1994).

9. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 72 (1986).

10. *Faragher*, 524 U.S. at 805-07 (noting that Title VII's purpose is to encourage the creation of anti-harassment policies); see also John M. Vande Walle, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 923-24 (1998) (discussing the primarily corrective justice approach of Title VII and the ADEA as opposed to the primarily distributive justice approach of the ADA).

11. *Faragher*, 524 U.S. at 805-06 (relying on *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), which stated that Title VII's primary objective, like all statutes meant to influence behavior, is not to provide recourse, but rather, to avoid harm).

12. *Infra* Part II.E; see *Faragher*, 524 U.S. at 802 (commenting that it "makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority").

13. 524 U.S. 742 (1998).

*Faragher v. City of Boca Raton*.<sup>14</sup> Both cases lowered the threshold for employer liability for their agents' actions by subjecting employers, who are vicariously liable for their supervisors' and managers' sexual harassment, to an affirmative defense.<sup>15</sup>

In June of 2000, the Supreme Court further tightened employer liability beyond that for sexual harassment.<sup>16</sup> In *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>17</sup> the Court moved into employer liability for discrimination when it improved employees' ability to withstand employers' motion for judgment as a matter of law.<sup>18</sup> The Court accomplished this by enhancing employees' ability to demonstrate that employers' defenses are a mere pretext.<sup>19</sup> By limiting employers' defenses, the *Reeves* decision is another evolutionary step toward stricter employer liability as a means of preventing discrimination.

By creating a non-delegable risk of liability for discrimination, the law creates an incentive for employers to exert control over wrongful behavior.<sup>20</sup> This risk incentive is the fundamental motivator in anti-discrimination law.<sup>21</sup> Without this incentive, the government is severely limited in its ability to prevent or deter discriminatory behavior.<sup>22</sup> Despite the need for damages as a deterrent, EPLI has created an avenue to delegate those damages. The ability to delegate has grown both in terms of increased insurance availability<sup>23</sup> and in terms of increased judicial recognition of the insurance coverage.<sup>24</sup> In *Kolstad v. American Dental*

14. 524 U.S. 775 (1998).

15. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

16. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (increasing employer liability in the case of age discrimination). This article addresses a new standard for employer liability that emerged from sexual harassment case law and has evolved into discrimination cases and regulations. *See* 29 C.F.R. §§ 1604.11, 1606.8 (2000) (extending the *Burlington* and *Faragher* holdings to both sexual harassment and national origin regulations). Accordingly, for the purpose of this article, the term discrimination will encompass, *inter alia*, sexual harassment.

17. 530 U.S. 133 (2000).

18. *See id.* at 143 (describing the plaintiff's burden of proof and the resulting limitations on an employer's ability to avoid the trier of fact); *see also* FED. R. CIV. P. 50 (describing the standard for granting a motion for judgment as a matter of law or alternative motion for new trial).

19. *Reeves*, 530 U.S. at 143.

20. Sean W. Gallagher, Note, *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256, 1270 n.60, 1279 (1994).

21. *Id.*

22. *Id.*; Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1002 (1999) (commenting that damages, in particular punitive damages, are useful forms of enforcement).

23. *Infra* notes 187-205 and accompanying text.

24. *See* *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 546 (1999) (evaluating insurance coverage for the first time in over forty years and creating vicarious liability for punitive damages which, thereby, increases the insurability of punitive damages).

*Assoc.*,<sup>25</sup> the Supreme Court held that an employer can be vicariously liable for punitive damages even if the employer was not willful or malicious with regard to the discrimination.<sup>26</sup> The 1999 *Kolstad* decision increases the likelihood that employers with EPLI coverage can delegate even punitive damages to the insurance carrier.

This article questions whether transferring the risk of penalties for discriminatory acts via EPLI conflicts with the increasingly stringent standards the law is imposing on employers for discrimination. In exploring whether EPLI risks removal of the incentive the law has imposed to control wrongful behavior, we first explore the evolving standard courts have set for employers' harassment liability. We then describe how EPLI has emerged and grown in response to increasing employer liability. Next, we analyze the conflict between the law's increasing efforts to hold employers liable and employers' newly created ability to transfer that liability to EPLI carriers. We conclude by proposing regulatory restraints designed to allow EPLI to exist without diluting employers' anti-discrimination incentive.

## II. THE EVOLUTION OF THE STANDARD FOR EMPLOYERS' LIABILITY

Until the advent of modern employment discrimination law, workers suffering employer discrimination rarely sought recourse in the legal system.<sup>27</sup> With its foundation in the Fourteenth Amendment,<sup>28</sup> employment discrimination law has evolved to achieve "equal protection under the laws" for all employees.<sup>29</sup> Employment law's evolution as a tool to limit employers' exercise of power<sup>30</sup> began at the federal level as Congress created labor relations acts to protect the activities of organized employee associations,<sup>31</sup> workers' compensation and safety acts to protect employees

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25. *Id.*

26. *Id.*

27. See generally Dana M. Leonard, Note, *Exclusivity Provisions of Workers' Compensation Statutes: Will the Dual Injury Principle Crack the Wall of Employer Immunity?*, 55 U. CIN. L. REV. 549, 550 (1986) (referring to workers' compensation claims in the overall context of employment claims and explaining that this was the initial forum for employee recourse).

28. U.S. CONST. amend. XIV.

29. See *id.* Although the Fourteenth Amendment did not address employment discrimination per se, by addressing racial inequality as "its crucible, its paradigm, its target, and its subtext," it is the fount of the employment law's continuing evolution. Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991).

30. Burton Brody, *One Potato[e], Two Potato[e], Three Potato[e], Four Power, Power, We Want More: A Thought on "Overlawyering"*, 71 DENV. U. L. REV. 151, 154-56 (1993).

31. See, e.g., Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 141 (1994); Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 (1994); National Labor

from occupational hazards and injuries,<sup>32</sup> and anti-discrimination legislation to protect civil rights in the workplace.<sup>33</sup>

#### A. *From Title VII to Meritor*

In Title VII, the foundational piece of anti-discrimination legislation, Congress turned from the broad guarantees of liberty enshrined in the Fourteenth Amendment to address the specific issue of workplace discrimination suffered by minorities and women.<sup>34</sup> In two landmark cases, *Griggs v. Duke Power Co.*<sup>35</sup> and *Albemarle Paper Co. v. Moody*,<sup>36</sup> the

Relations (Wagner) Act of 1935, 29 U.S.C. § 151 (1994).

32. *See, e.g.*, Federal Employees Compensation Act, 5 U.S.C. § 8101 (1994); Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (1994).

33. *See, e.g.*, Equal Pay Act (EPA) of 1963, 29 U.S.C. § 206(d) (1994); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12182 (1994).

34. Title VII provides:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]

42 U.S.C. § 2000e-2(a).

Although in Title VII, Congress clearly evinces an intent to assure equality for minorities in the workplace, there is some question whether Congress actually intended in passing Title VII to aid women's struggles against abuses of power in the workplace. *See, e.g.*, *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INT'L & COMP. L. REV. 431, 441-42 (1966)) (noting that the sex discrimination prohibition was added as a joke that backfired when it was adopted under the House five-minute rule), *aff'd*, 805 F.2d 611 (6th Cir. 1986). *But see* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) (arguing that it is wrong to conclude that the sex discrimination prohibition was added to Title VII merely as the result of a "joke"). Commentators note that the term "sex" was added to Title VII at the last minute by Representative Howard Smith, who opposed the bill. *Id.* at 150-52. By including sex discrimination within Title VII's scope, Representative Smith attempted only to divide the bill's supporters and ensure its defeat. 110 CONG. REC. 2577-581 (1964) (remarks of Rep. Smith). Aware of the tactic at hand, Representative Emanuel Celler, Chairman of the Judiciary Committee and a staunch civil rights proponent credited with orchestrating the bill's passage, argued against the amendment, asserting that requiring equality for women would create social upheaval. *Id.* (remarks of Rep. Celler). Representative Frances Bolton represented those supporting the inclusion, wondering aloud whether, without such protections "white women will be last at the hiring gate." *Id.* at 2718-21 (remarks of Rep. Bolton).

35. 401 U.S. 424 (1971). In a unanimous opinion by Chief Justice Burger, the Court held that Title VII forbids not only practices adopted with a discriminatory motive, but also practices which, though adopted without discriminatory intent, have a discriminatory effect on minorities and women. *Id.* at 430. *Griggs* has been called "the single most important

Supreme Court noted that the statute's primary objective is prophylactic<sup>37</sup> and that a financial penalty has an obvious connection with this purpose.<sup>38</sup> The Court clearly explained Title VII's role in motivating employers to eliminate workplace discrimination: "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate [discrimination] . . .'"<sup>39</sup>

Employer liability further evolved when Congress passed the Civil Rights Act ("CRA") of 1991.<sup>40</sup> The CRA of 1991 emphasized the deterrent effect of financial liability by providing compensatory and punitive damages for disparate treatment lawsuits brought by private plaintiffs.<sup>41</sup> Among the stated motivations driving the Act's passage was "the need to overturn *Price Waterhouse v. Hopkins*,"<sup>42</sup> which Congress believed had severely undercut Title VII's effectiveness.<sup>43</sup> In *Price Waterhouse*, the Supreme Court held that an employer who made an employment decision that was based on discrimination could escape liability if it could prove that it would have made the same decision in the absence of discrimination.<sup>44</sup> This holding undermined Title VII's intent to completely eliminate intentional discrimination.<sup>45</sup>

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Title VII decision, both for the development of the law and in its impact on the daily lives of American workers." H.R. REP. NO. 102-40, pt. 1, at 23 (1991).

36. 422 U.S. 405 (1975).

37. *Griggs*, 401 U.S. at 429-30 (holding that Title VII's purpose is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"). The Court has also noted that Title VII's second purpose was "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.*, 422 U.S. at 418.

38. *Albemarle Paper Co.*, 422 U.S. at 417-21 (quoting the Conference Committee Report accompanying the 1972 Amendments to Title VII and affirming the right to backpay). Discussing Congress' inclusion of a backpay remedy, the Court noted that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Id.* at 417. The backpay provision of Title VII provides that when the court has found "an unlawful employment practice, [it] may enjoin [the practice] and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ." 42 U.S.C. § 2000e-5(g) (1994).

39. *Albemarle Paper Co.*, 422 U.S. at 417-18 (quoting *United States v. N.L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973)).

40. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e (1994)).

41. *Id.*

42. 490 U.S. 228 (1989).

43. H.R. REP. NO. 102-40, pt. 1, at 45 (1991).

44. *Price Waterhouse*, 490 U.S. at 258.

45. The Justice Department, under President Reagan, argued on behalf of the United States that Title VII was violated whenever a discriminatory motive played a part in an employment decision. See H.R. REP. NO. 102-40, pt. 1, at 46. Proof that an employer would have made the same decision for a nondiscriminatory reason did not erase the violation. See *id.*

Congress, in response, enhanced Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination.<sup>46</sup> "Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens."<sup>47</sup> Congress explained its intent to bolster Title VII's role in creating sufficient deterrence: "Making employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole."<sup>48</sup>

Following Congress's intent to tighten employer liability, cases interpreting Title VII have fashioned a robust and far-reaching discrimination law designed to motivate employers to curb wrongful behavior.<sup>49</sup> Courts quickly recognized that "quid pro quo" sexual harassment, the demanding of sex as a condition for receiving job benefits,

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46. *Id.* at 64.

47. *Id.* at 64-65.

48. *Id.* at 69 (citing *Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contribute significantly to the deterrence of civil rights violations in the future.")). During hearings on the Act, witnesses underscored damages' deterrent effect on employment discrimination. William C. Burns, testifying on behalf of Pacific Gas & Electric Company explained that "the big impact of [adding damages to Title VII would] be what employers do in the way of prevention . . ." *The Civil Rights Act of 1990 Hearings on H.R. 4000, Before the House Comm. on Education and Labor and the House Judiciary Subcomm. on Civil and Constitutional Rights*, 101st Cong. 180 (1990) [hereinafter *1990 Hearings*]. Dr. Freada Klein, described as one of the foremost experts on sexual harassment in the workplace and a consultant to leading corporations, echoed that view: "Allowing full compensatory and punitive damages . . . provide[s] a stronger incentive for employers to implement effective remedies for intervention and prevention, which I think is the real goal. Data suggests that employers do indeed implement measures to interrupt and prevent employment discrimination when they perceive that there is increased liability." H.R. REP. NO. 102-40, pt. 1, at 70.

49. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (noting that Title VII is designed to encourage the creation of anti-harassment policies); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (increasing the chances of employer liability for sexual harassment where the employer does not have proper mechanisms in place to prevent it); *Riverside*, 477 U.S. at 575. In recognizing sexual harassment as Title VII discrimination, the Court has relied, among other principles, on the power theory represented in the writing of Catherine MacKinnon and others. *See, e.g., CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Such theories asserted that women are treated differently as a group because they lack equal power to men, and that sexual harassment perpetuates the power imbalance. *See id.* at 1. MacKinnon therefore defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." *Id.* at 1; *see also* Joanna P. L. Mangum, Note, *Wrightson v. Pizza Hut of America, Inc.: The Fourth Circuit's "Simple Logic" of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306, 320 (1997) (recounting MacKinnon's explanation of the power dynamic that perpetuates sexual harassment).



violated Title VII.<sup>50</sup> Nevertheless, recognition of quid pro quo causes of action represented only a small step in the law's evolution. Employment discrimination's modern-day Concord<sup>51</sup> came in *Meritor Savings Bank, FSB v. Vinson*,<sup>52</sup> where the Supreme Court held that Title VII also encompassed "hostile [work] environment" harassment.<sup>53</sup>

Prior to *Meritor*, every circuit court of appeals held employers strictly liable for quid pro quo sexual harassment by supervisors.<sup>54</sup> The courts, however, did not create a bright-line rule regarding employer liability for hostile work environment claims. The *Meritor* Court instead held that lower courts should use traditional agency principles to determine employer liability for supervisors' hostile environment due to sexual harassment.<sup>55</sup> Such principles are embodied in the Restatement (Second) of Agency, which provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment,"<sup>56</sup>—the textbook vicarious liability standard. However, because of the *Meritor* Court's incorporation of vicarious liability, lower courts developed differing standards for employer liability based on differing interpretations

50. Paul, *supra* note 7, at 333-34.

51. The site of the famed "shot heard round the world." Ralph Waldo Emerson, Concord Hymn (Apr. 19, 1836), in *EARLY POEMS OF RALPH WALDO EMERSON* (Thomas Y. Crowell & Co. 1899).

52. 477 U.S. 57 (1986).

53. *Id.* at 66-67. Hostile work environment harassment occurs when harassing conduct "unreasonably interfere[s] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment." Paul, *supra* note 7, at 334 (quoting Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1980)). The *Meritor* Court held that to establish a hostile working environment claim, harassment must be severe and pervasive. *Meritor*, 477 U.S. at 67.

54. *Meritor*, 477 U.S. at 70-71 (noting the consensus among circuit courts in holding employers liable for discriminatory discharges of employees whether the employer knew, should have known, or approved of the action).

55. *Meritor*, 477 U.S. at 72. The *Meritor* Court relied upon RESTATEMENT (SECOND) OF AGENCY § 219 (1958), which states:

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

56. RESTATEMENT (SECOND) OF AGENCY, § 219.

of agency principles.<sup>57</sup> Inevitably, even courts using similar analyses reached conflicting conclusions.<sup>58</sup>

### B. *Burlington and Faragher*

In *Burlington* and *Faragher*, two cases decided on the same day in 1998,<sup>59</sup> the Supreme Court attempted to resolve some of the disparity over the standard for employer liability that arose following *Meritor*.<sup>60</sup> The Court stated that the terms “quid pro quo” and “hostile environment” were not controlling for purposes of determining employer liability.<sup>61</sup> The Court reasoned that the determinative factor, which those labels encompassed, was whether or not a “tangible employment action” had occurred.<sup>62</sup>

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57. *Faragher*, 524 U.S. at 785-86 (“While following our admonition to find guidance in the common law of agency, as embodied in the Restatement, the Courts of Appeals have adopted different approaches.”). Circuit court decisions prior to *Faragher* provide examples of varying standards for employer liability based on different interpretations of agency principles. See, e.g., *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997), *vacated by* 524 U.S. 947 (1998); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir. 1997) (en banc); *Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1011 (1995); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994).

58. *Compare* *Dinkens v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1267 (M.D. Ala. 2001) (holding the employer liable because the totality of circumstances created an environment that could have led a reasonable employee to think that the supervisor was acting under his authority in harassing her), *and* *Varley v. Superior Chevrolet Auto. Co.*, No. CIV.A. 96-2119-EEO, 1997 U.S. Dist. LEXIS 4510, at \*44 (D. Kan. Mar. 21, 1997) (denying summary judgment for the defendants because the fact that it had an anti-sexual harassment policy was not dispositive), *with* *Gary*, 59 F.3d at 1398 (refusing to impose liability on the employer because it had a policy against sexual harassment that employees should have known about and understood).

59. The Court decided these cases on June 26, 1998. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 742 (1998); *Faragher*, 524 U.S. at 775.

60. *Burlington*, 524 U.S. at 752-53; *Faragher*, 524 U.S. at 780.

61. *Burlington*, 524 U.S. at 754. The Supreme Court stated that, although “[c]ases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.” *Id.* at 751 (emphasis in original). The Court also noted that the terms “quid pro quo” and “hostile work environment” do not appear in Title VII. *Id.* at 752. The Court noted that when used in *Meritor*, the terms served a specific and limited purpose—to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.” *Id.*

62. *Burlington*, 524 U.S. at 753-54; *Faragher*, 524 U.S. at 807. The Court stated:

To the extent . . . [that the terms] illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant . . . . When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable,

Relying on agency principles, the Court held that employers are vicariously liable for a supervisor's sexual harassment.<sup>63</sup> If the harassment did not culminate in a tangible employment action, the employer might have an affirmative defense.<sup>64</sup> If a tangible employment action resulted, the defense would be unavailable.<sup>65</sup>

The question certified in *Burlington* was whether an employee who refuses a supervisor's unwelcome and threatening sexual advances, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer's negligence.<sup>66</sup> In other words, can an employee recover without showing that the employer "knew or should have known" of the harassment?<sup>67</sup> Ellerth, a salesperson in one of Burlington's divisions, claimed she was sexually harassed by her supervisor who repeatedly made offensive sexual remarks and touched her.<sup>68</sup> Moreover, three incidents could have been construed as threats to her tangible job benefits.<sup>69</sup> Although the offensive remarks were continual, the threats were never carried out, and Ellerth received promotions during her

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however, the conduct must be severe or pervasive.

*Burlington*, 524 U.S. at 753-54.

63. *Burlington*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807. The Court noted that even though it made significant amendments to Title VII after *Meritor*, Congress did not alter that case's holding that agency principles should guide employer liability. *Burlington*, 524 U.S. at 764. Examining RESTATEMENT (SECOND) OF AGENCY § 219, the Court noted that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Id.* at 757. The Court concluded that harassment such as that engaged in by the supervisors in *Burlington* should be considered outside the scope of employment. *Id.* Otherwise, such harassment would also be within the scope of co-employees employment, rendering vicarious liability rather than negligence the standard for co-employee harassment. *Faragher*, 524 U.S. at 800.

64. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; *infra* notes 58-62 and accompanying text.

65. *Burlington*, 524 U.S. at 754; *Faragher*, 524 U.S. at 807. Noting that "[e]very Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action," the *Burlington* Court reasoned that this rule "reflects a correct application of the aided in the agency relation standard." *Burlington*, 524 U.S. at 760-61. When a supervisor takes a tangible employment action against the subordinate, according to the Court, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-62. Therefore, "[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-63.

66. *Burlington*, 524 U.S. at 746-47.

67. *See id.*

68. *Id.* at 747-48.

69. *Id.* The three incidents include Ellerth's supervisor remarking "you know, Kim, I could make your life very hard or very easy at Burlington" after she failed to respond to an alleged advance; that Ellerth was not "loose enough" when her supervisor considered her for a promotion and then warned that her future coworkers appreciate "pretty butts/legs"; and that her supervisor later remarked "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." *Id.* at 748.

employment.<sup>70</sup>

The district court granted summary judgment to Burlington.<sup>71</sup> During her tenure at Burlington, Ellerth did not inform anyone in authority about her supervisor's conduct, despite knowing Burlington had a policy against sexual harassment.<sup>72</sup> The court found that, although the supervisor's behavior was severe and pervasive enough to create a hostile work environment, Burlington neither knew nor should have known about the conduct.<sup>73</sup> The court noted that Ellerth's claim was framed as a hostile work environment complaint but had a quid pro quo component.<sup>74</sup> Although the court acknowledged that an employer faces vicarious liability for quid pro quo harassment, it nevertheless applied a negligence standard because the quid pro quo component merely contributed to the overall hostile work environment.<sup>75</sup>

The Seventh Circuit *en banc* reversed, producing eight separate opinions and no controlling rationale concerning employer liability.<sup>76</sup> The majority agreed that Ellerth's claim could be categorized as one of quid pro quo harassment, even though she had received promotions and suffered no other tangible job retaliation.<sup>77</sup> Yet the court could not reach a consensus on the standard of liability for such a claim.

On appeal, the Supreme Court stated that while "[c]ases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment,"<sup>78</sup> the terms "quid pro quo" and "hostile work environment" do not appear in Title VII.<sup>79</sup> The Court noted that when used "[i]n *Meritor*, the terms served a specific and limited purpose . . . to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive."<sup>80</sup> The Court stated that although *Meritor* had not used the terms to establish a standard for employer liability, lower courts following *Meritor* began to use the terms to establish such a standard with employers subject to vicarious liability for

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70. *Id.* at 750.

71. *Ellerth v. Burlington Industries, Inc.*, 912 F. Supp. 1101 (N.D. Ill. 1996), *aff'd in part and rev'd in part, sub nom.*, *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), *aff'd*, 524 U.S. 742 (1998).

72. *Burlington*, 524 U.S. at 748.

73. *Ellerth*, 912 F. Supp. at 1101.

74. *Id.* at 1114.

75. *Id.* at 1117.

76. *Jansen*, 123 F.3d at 490.

77. *Id.* at 494; *Burlington*, 524 U.S. at 750.

78. *Burlington*, 524 U.S. at 751.

79. *Id.* at 752.

80. *Id.*

quid pro quo claims.<sup>81</sup>

The Court concluded:

To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant. . . . When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.<sup>82</sup>

Beyond this distinction, however, the Court held that agency principles "and not the categories quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability."<sup>83</sup>

By examining the issue using the "aided in the agency standard" to determine employer liability, the Court held that the standard required more than the employment relation alone.<sup>84</sup> Otherwise, employers would be subject to vicarious liability not only for all supervisor harassment, but also for co-worker harassment.<sup>85</sup> This result would be contrary to both

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81. *Id.* at 752-53. (citing *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3rd Cir. 1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

82. *Burlington*, 524 U.S. at 753-54.

83. *Id.* at 754. The Court noted that even though it made significant amendments to Title VII after *Meritor*, Congress did not alter that case's holding that agency principles should guide employer liability. *Id.* at 763-64. The Court examined section 219 of the Restatement (Second) of Agency, which is detailed in note 55 *supra*. *Id.* at 759. The Court noted that the negligence standard under section 219(2)(b) of the Restatement—wherein an employer is liable even if he or she knew or should have known about the conduct and failed to stop it—"sets a minimum standard for employer liability under Title VII." *Id.* Because Ellerth argued that employers should be vicariously liable for supervisors' acts, however, the Court examined section 219(2)(d) of the Restatement of Agency. *Id.* at 759. This section imposes "vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent authority standard), or when the employee 'was aided in accomplishing the tort by the existence of the agency relation.'" *Id.* Reasoning that the "apparent authority [standard] is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power," the Court found apparent authority analysis inappropriate unless "it is alleged there is a false impression that the actor was a supervisor, when he in fact was not." *Id.* Therefore, the Court found that the "aided in the agency standard" was the proper analysis when a party seeks to impose vicarious liability based on an agent's misuse of delegated authority. *Id.* at 759-60.

84. *Id.* at 760.

85. *Id.* (noting that the "aided in the agency" standard requires the existence of more than the employment relation itself.)

*Meritor's* holding that employers are not automatically liable for supervisor's sexual harassment and to precedent that establishes a negligence standard for co-worker harassment.<sup>86</sup>

The Court recognized that "[e]very Federal Court of Appeals to have considered the question has found vicarious [employer] liability when a discriminatory act results in a tangible employment action."<sup>87</sup> The *Burlington* Court reasoned that this rule correctly applies agency principles.<sup>88</sup> When a supervisor takes a tangible employment action against the subordinate, "there is assurance the injury could not have been inflicted absent the agency relation."<sup>89</sup> The resulting standard created by the *Burlington* Court's rationale is that employer liability attaches whenever a supervisor takes a tangible employment action against a subordinate.<sup>90</sup>

Where the agency relationship aids in the commission of supervisor harassment which does not culminate in a tangible employment action, however, application of the liability standard is made more difficult. The Court recognized Title VII's goal of encouraging the creation of anti-harassment policies and grievance mechanisms, and reasoned that "[w]ere employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation."<sup>91</sup> The Court, therefore, held that an employer is vicariously liable for a supervisor's sexual harassment that creates a hostile environment.<sup>92</sup> When no tangible employment action is taken, however, an employer may raise an affirmative defense.<sup>93</sup>

The affirmative defense has two 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>94</sup> In *Burlington*, the Court remanded so that "[g]iven [its] explanation that the labels quid pro quo and hostile work environment are not controlling for purposes of establishing

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86. *See id.* (citing *McKenzie v. Ill. Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (sex discrimination); *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) (sex discrimination); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1273 (7th Cir. 1991) (race discrimination); 29 C.F.R. § 1604.11(d) (1997) ("knows or should have known" standard of liability for cases of harassment between "fellow employees")); *see also Fleenor v. Hewitt Soap Co.*, 81 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 519 U.S. 863 (1996).

87. *Id.* at 760.

88. *Id.* at 761.

89. *Id.* at 761-62.

90. *Id.*

91. *Id.* at 764.

92. *Id.* at 765.

93. *Id.*

94. *Id.*

employer liability,” Ellerth would “have an adequate opportunity to prove she has a claim for which Burlington is liable.”<sup>95</sup>

Faced with similar claims, the Court adopted the same holding in *Faragher* as in *Burlington*, and stated 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.”<sup>96</sup>

Beth Ann Faragher, who had been employed as an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton, Florida, brought an action against the city and her immediate supervisors.<sup>97</sup> Faragher claimed that her supervisors created a “sexually hostile atmosphere” by repeatedly subjecting Faragher and other female lifeguards to uninvited and offensive touching, lewd remarks, and offensive terms.<sup>98</sup> Faragher also claimed that one supervisor once said that he would never promote a woman to the rank of lieutenant and that another said, “Date me or clean the toilets for a year.”<sup>99</sup> The district court concluded that the supervisors’ conduct altered the conditions of Faragher’s employment and constituted an abusive working environment.<sup>100</sup> The court ruled that among other bases for liability, the city was liable under traditional agency principles because the supervisors were acting as its

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95. *Id.* at 766 (emphasis in original). Joined by Justice Scalia, Justice Thomas wrote in dissent that the majority’s rule would create different standards for employer liability in sexually and racially hostile work environment cases, and argued that the standard should be the same in both instances: “An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor’s conduct to occur.” *Id.* at 767 (Thomas, J., dissenting). The dissent notes that negligence remains the rule for racially hostile work environment cases and agrees that a supervisor’s creation of a hostile work environment is neither within the scope of his employment, nor part of his apparent authority. *Id.* at 769. Finally, the dissent notes that the majority’s affirmative defense gives little guidance on how employers can avoid vicarious liability and how lower courts should rule on motions for summary judgment. *Id.* at 773. The dissent, therefore, states, “The Court’s holding does guarantee one result: There will be more and more litigation to clarify applicable legal rules. . . .” *Id.* at 774.

The EEOC issued guidelines in an attempt to clarify the conflicting standards between sexual harassment and other hostile environment claims recognized by the dissent. 29 C.F.R. §§ 1604.11, 1606.8 (2000). The EEOC amended its guidelines in response to the *Burlington* and *Faragher* holdings. 29 C.F.R. § app. 1604.11 (2000). Notably, the EEOC did not limit its amendments to the sexual harassment regulation. Instead it extended the *Burlington/Faragher* standard for employer liability into national origin regulations as well. 29 C.F.R. § 1606.8 (2000).

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

97. *Id.*

98. *Id.*

99. *Id.*

100. *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1562 (S.D. Fla. 1994), *aff’d in part and rev’d in part*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *rev’d*, 524 U.S. 775 (1998).

agents when they committed the harassing acts.<sup>101</sup>

A panel of the Eleventh Circuit Court of Appeals reversed the judgment against the city, ruling that the supervisors were not acting within the scope of their employment when they engaged in the harassment, that they were not aided in their actions by the agency relationship, and that the city had no constructive knowledge of the harassment.<sup>102</sup> In a seven to five *en banc* decision, the full court of appeals adopted the panel's conclusion.<sup>103</sup> Relying on *Meritor*, the court held that agency principles determine an employer's liability.<sup>104</sup> Applying these principles, the Eleventh Circuit first classified the supervisors' harassment as outside the scope of their employment.<sup>105</sup> Next, the court determined that the supervisors' agency relationship did not assist them in perpetrating their harassment because "traditional agency law. . . requires something more than a mere combination of the agency relationship and improper conduct by the agent."<sup>106</sup> Because neither supervisor threatened to fire or demote Faragher, the court concluded that their agency relationship did not facilitate their harassment.<sup>107</sup>

The Supreme Court disagreed. Although it adopted the same holding in both *Faragher* and *Burlington*, the Court in *Faragher* began its analysis by relying on *Harris v. Forklift Systems, Inc.*<sup>108</sup> The *Harris* court relied on *Meritor* and held that "a sexually objectionable 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."<sup>109</sup> Courts must determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including 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."<sup>110</sup> Under this rule, the Court held that "conduct must be extreme to amount to a change in the terms and conditions of employment."<sup>111</sup> The Court found it unsurprising that "in many [cases], the issue has been joined over the sufficiency of the abusive conditions, not the

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101. *Id.* at 1564.

102. *Faragher*, 111 F.3d at 1538.

103. *Id.* at 1534-35.

104. *Id.*

105. *Id.* at 1536.

106. *Faragher*, 524 U.S. at 785 (citing *Faragher*, 111 F.3d at 1537).

107. *Faragher*, 111 F.3d at 1530.

108. *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)).

109. *Id.* at 787.

110. *Id.* at 787-88 (citing *Harris*, 510 U.S. at 23).

111. *Id.* at 788.



standards for determining an employer's liability for them."<sup>112</sup>

Reviewing previous holdings, the Court recognized that employers were liable for supervisors' discrimination either directly due to actual knowledge of harassment, which the employer has done nothing to stop, or vicariously for discriminatory employment actions with tangible results. The Court reiterated *Meritor's* dictate that general agency principles determine employer liability.<sup>113</sup> *Meritor's* holding that an employer is not automatically liable for harassment by a supervisor remained intact. The *Faragher* Court, nonetheless, recognized the tension between the new vicarious liability rule and *Meritor*.<sup>114</sup> The Court offered two alternatives to alleviate the tension, "one being to require proof of some affirmative invocation of that authority by the harassing supervisor, and the other being to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment."<sup>115</sup> The Court concluded that the second alternative, which allows for an affirmative defense, best fit within the principle of vicarious liability for harm caused by a supervisor, as well as Title VII's policies of encouraging employer forethought and action on behalf of objecting employees.<sup>116</sup>

The outcome in *Faragher*, as in *Burlington*, is a new rule of liability: An employer is vicariously liable for a supervisor's sexual harassment that creates a hostile environment. When no tangible employment action is taken, an employer may raise a two-pronged affirmative defense that includes the employer's reasonable care to prevent and promptly correct harassment and the employee's unreasonable failure to avoid harm. No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action.<sup>117</sup>

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112. *Id.* at 788-89.

113. *Id.* at 800. The *Faragher* Court concluded that harassment by supervisors should be considered outside the scope of employment because otherwise such harassment would also be within the scope of co-employees employment, rendering vicarious liability rather than negligence the standard for co-employee harassment. *Id.*

114. *Id.* at 794-95.

115. *Id.* at 804.

116. *Id.* at 807.

117. *Id.* In both cases, the Court stated that proof of an employer's anti-harassment policy with complaint procedure suitable to the employment circumstances is not necessary, but may be a factor, in raising the defense. *Id.* Furthermore, showing an unreasonable failure to use any complaint procedure provided by the employer is not the only means of satisfying the second prong, but such a demonstration will normally suffice. *Id.* at 808. Applying the newly established rule, the Court reversed the Eleventh Circuit, finding not only that the supervisors' conduct was actionable harassment by a supervisor, but that the city could not raise the affirmative defense because it "had entirely failed to disseminate its policy against sexual harassment among the beach employees." *Id.* It also noted "the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints." *Id.* The Court thus held that the city did not exercise reasonable care to prevent the supervisors' harassing conduct. *Id.* at 809.

### C. *Post-Burlington/Faragher Interpretations of Employer Liability*

Several circuit courts of appeals have considered employer liability for discrimination since 1998. Every circuit court that has addressed employer liability has acknowledged that the *Burlington/Faragher* vicarious liability rule applies by overruling precedent applying strict liability or negligence standards,<sup>118</sup> thus illustrating courts' increasing efforts to hold employers liable.<sup>119</sup> Although some courts continue to use the quid pro quo and hostile environment labels, most courts have expressly acknowledged that the vicarious liability rule "largely eliminated the distinction between hostile working environment claims and quid pro quo claims, focusing instead on the presence or absence of tangible adverse employment actions."<sup>120</sup> In the absence of tangible employment action, the focus is the affirmative defense.<sup>121</sup> It is, therefore, worthwhile to examine the

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118. *See, e.g.*, *Rubidoux v. Colo. Mental Health Inst.*, 173 F.3d 1291, 1296 (10th Cir. 1999) (reversing summary judgment for plaintiff because strict liability no longer applied, even in quid pro quo cases, and remanding for consideration of employer's affirmative defenses); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 561 (6th Cir. 1999) (acknowledging that plaintiffs need not demonstrate that a supervisor's actions were foreseeable and that "employers now have an affirmative duty to prevent sexual harassment").

119. *See supra* notes 54-59 and accompanying text. The Sixth Circuit in *Gen. Motors Corp.* acknowledged that plaintiffs need not demonstrate a supervisor's actions were foreseeable and that "employers now have an affirmative duty to prevent sexual harassment." *Gen. Motors Corp.*, 187 F.3d at 561. Similarly, the Third Circuit in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95 (3d Cir. 1999), held that the existence of a sexual harassment policy is no longer an absolute defense to liability. *Id.* at 118.

120. *Hurley*, 174 F.3d at 120 (emphasis in original). For example, the Fifth Circuit in *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999), noted that after *Burlington* and *Faragher*, attaching either the quid pro quo or hostile environment label to the claim "in a sense prejudices the result," and reasoned that "it is more accurate to generically describe the claim as one of sexual harassment, and wait until deciding" whether or not a tangible employment action exists before labeling the claim. *Id.* at 509 n.3.

121. *Hurley*, 174 F.3d at 118. Lower courts in post-*Burlington* and *Faragher* cases have also considered issues including the scope of vicarious liability. *See, e.g.*, *Gen. Motors Corp.*, 187 F.3d at 562 (analyzing the plaintiff's claim that her supervisor and co-workers created a hostile environment by engaging in several incidents of inappropriate sexual and anti-female comments and demeaning treatment, and whether the court must "consider harassment by all perpetrators combined when analyzing whether a plaintiff has alleged the existence of a hostile work environment"); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 592-93 (5th Cir. 1998), (extending *Burlington* and *Faragher* reasoning to allow vicarious liability for punitive damages); *see also, e.g.*, *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598-600 (8th Cir. 1999) (where the plaintiff was sexually assaulted, reasoning that portions of the *Burlington* and *Faragher* opinions cast doubt on the presumption that "a single severe act of sexual harassment can, without more, constitute a hostile work environment"). *But see Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 n.8 (11th Cir. 1999) (declining to follow the Fifth Circuit's lead on punitive damages with vicarious liability and noting that "*Faragher*, which is *not* about punitive damages, [should not] overrule . . . pre-*Faragher* punitive damages precedent" requiring that an employer must be

implementation of the new employer liability standard both when tangible employment action is present and when it is not.

### 1. The Presence of Tangible Adverse Employment Action

The first determination courts make is what constitutes a tangible adverse employment action. In *Dedner v. Oklahoma*,<sup>122</sup> the plaintiff brought a quid pro quo sexual harassment claim against the State of Oklahoma. She alleged that she suffered a tangible employment action because her ability to have days off from work on weekends was conditioned on her willingness to have sex with her manager.<sup>123</sup> The federal district court held that although the Supreme Court did not specifically define a “tangible employment action” it did state that such an action “constitutes . . . a significant change in benefits.”<sup>124</sup> The *Dedner* court determined that the refusal to allow an employee to have specified days off from work does not amount to a significant change in employment status and was simply an inconvenience to the employee.<sup>125</sup>

In the Eleventh Circuit, the court assumed the existence of a tangible employment action when a complaint was based on the plaintiff’s termination.<sup>126</sup> The Eleventh Circuit nevertheless found no Title VII violation.<sup>127</sup> The court reasoned that the plaintiff had not established “a causal link between” her harasser’s discriminatory animus and the employment action, concluding that this was not a “cat’s-paw case.”<sup>128</sup> In a “cat’s-paw case” the decisionmaker acts in accordance with the harasser’s decision without independent evaluation.<sup>129</sup> The court reasoned that the vicarious liability rule “meant to limit the [tangible employment action affirmative defense] exception to those cases in which the harasser acts as

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proved to be at fault through notice or knowledge”).

122. 42 F. Supp. 2d 1254 (E.D. Okla. 1999).

123. *Id.* at 1256.

124. *Id.* at 1258 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

125. *See id.* at 1259 (asserting that “Dedner has not suffered a tangible employment action sufficient enough to impose automatic liability on the state”).

126. *Llampallas v. Mini-Circuits Lab*, 163 F.3d 1236 (11th Cir. 1998).

127. *Id.* at 1251.

128. *Id.* at 1249. The plaintiff was a lesbian whose supervisor was her former lover and housemate. *Id.* at 1239-40. After the couple ended their sexual relationship, the supervisor harassed the plaintiff, threatening to have her fired unless they resumed the affair. *Id.* The supervisor called the company president and threatened to quit because she could no longer work with the plaintiff. *Id.* at 1240. The president instead attempted to reassign the plaintiff but ultimately terminated her. *Id.* The court held that framing its analysis in terms of the vicarious liability rule apparently renders inapplicable “disparate treatment” versus “disparate impact.” *Id.* at 1249.

129. *Id.*

the decisionmaker with respect to the action.”<sup>130</sup>

Similarly, in *Montero v. AGCO Corp.*,<sup>131</sup> the plaintiff filed a claim against her employer, alleging that her supervisors and a co-worker had subjected her to unwanted verbal and physical sexual behavior.<sup>132</sup> The plaintiff complained to a human resources manager only four months after the harassment had stopped, and the employer promptly investigated and disciplined the supervisors.<sup>133</sup> The district court granted the employer’s summary judgment motion, finding that it had established an affirmative defense.<sup>134</sup>

On appeal, the plaintiff claimed that, because she was constructively discharged, she suffered a tangible employment action and, therefore, the affirmative defense was unavailable.<sup>135</sup> The Ninth Circuit did not decide whether constructive discharge constituted a tangible employment action; however, it did find that since she resigned after the harassment had ended and the employer disciplined the harassers, she was not constructively discharged.<sup>136</sup> Thus the Eleventh Circuit directly and Ninth Circuit indirectly teach us that termination is an adverse employment action.

Not only did the circuit courts set a standard for when a tangible employment action occurs, they also determined who bears the burden of proof under the *Burlington* and *Faragher* vicarious liability rule.<sup>137</sup> The Fifth Circuit appears to place the burden of proof regarding the existence of a tangible employment action on the employer, stating that an employer “can raise an affirmative defense to liability or damages, so long as it can establish that the supervisor’s harassment did not culminate in a ‘tangible employment action.’”<sup>138</sup>

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130. *Id.* at 1250 n.23.

131. 192 F.3d 856 (9th Cir. 1999).

132. *Id.* at 859.

133. *Id.*

134. *Id.* at 858.

135. *Id.* at 861.

136. *Id.*; see also *Phillips v. Taco Bell Corp.*, 156 F.3d 884 (8th Cir. 1998) (failing to reach the merits on plaintiff’s claim that constructive discharge constitutes a tangible employment action because it found that the plaintiff was not constructively discharged). *But see* *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999). The court here held that constructive discharge does not constitute a tangible employment action under *Burlington* and *Faragher* because “co-workers, as well as supervisors, can cause . . . constructive discharge.” *Id.* at 294. Also, in *Burlington*, where the plaintiff claimed constructive discharge, the Supreme Court noted that “‘Ellerth has not alleged she suffered a tangible employment action. . . .’” *Id.* at 295 (quoting *Burlington*, 524 U.S. 742, 766 (1998)).

137. *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999).

138. *Id.* at 509. The Fifth Circuit in *Watts* held that changing the plaintiff’s work schedule, expanding her duties to include mopping the floor and cleaning the toilets, and requiring her to check with her supervisor before taking breaks did not constitute a tangible employment action. *Id.* at 510.

Conversely, although it did not reach the merits of employer liability, the Sixth Circuit<sup>139</sup> indicated that the burden of proof of the existence of a tangible employment action remained with the plaintiff, stating that “[i]f a plaintiff can prove a tangible employment action, liability is automatic; if however, there was [none], employers have an affirmative defense.”<sup>140</sup> Despite the apparent conflict between the Fifth and Sixth Circuit rulings, one factor is clear: If an employer wants to use the affirmative defense, there can be no tangible adverse employment action.

## 2. The Absence of Tangible Adverse Employment Action—The Affirmative Defense

Once employers meet their burden of proof and can avail themselves of the affirmative defense, the courts must then determine whether the defense is satisfied.<sup>141</sup> The lack of precedent and the fact-specific nature of the affirmative defense makes post *Burlington* and *Faragher* case-law illustrative for assessing employer liability. The affirmative defense has two prongs: First, the employer must exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and second, the plaintiff employee must reasonably take advantage of any preventive or corrective opportunities the employer provides.<sup>142</sup>

With regard to the first prong, the employer’s obligation to prevent harassment largely rests on the implementation of an anti-discrimination policy.<sup>143</sup> The first prong of the affirmative defense is often, though not necessarily, satisfied by the implementation of a sexual harassment policy with a complaint procedure.<sup>144</sup> It may also be satisfied by the prompt investigation and remedying of any harassment of which the employer is notified.<sup>145</sup> For example, the Northern District of Georgia<sup>146</sup> found that “an employer is insulated from liability under Title VII for a hostile environment sexual harassment claim premised on constructive knowledge of the harassment . . . [so long as] the employer has adopted an anti-discrimination policy that is comprehensive, well-known to employees,

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139. *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999).

140. *Id.* at 561 n.2.

141. The affirmative defense has its limits. Courts generally have declined to extend the affirmative defense to other circumstances or claims. *See Lintz v. Am. Gen. Fin., Inc.*, 50 F. Supp 2d 1074, 1081 (D. Kan. 1999) (declining to extend the *Burlington* and *Faragher* affirmative defense to a claim attempting to hold an employer liable under a negligence theory); *Laroche v. Denny’s, Inc.*, 62 F. Supp 2d 1375, 1383 (S.D. Fla. 1999) (declining to extend the affirmative defense to public accommodation cases).

142. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

143. *Faragher v. City of Boca Raton*, 524 U.S. 742, 808 (1998).

144. *Id.* at 808-09.

145. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

146. *Morgan v. Fellini’s Pizza, Inc.*, 64 F. Supp. 2d 1304 (N.D. Ga. 1999).

vigorously enforced, and provides alternative avenues of redress.”<sup>147</sup> The court nonetheless imposed liability because the employer’s policy was inadequate.<sup>148</sup> It only consisted of a few sentences within a general employee policy, and managers did not review policies with new hires.<sup>149</sup>

The Fourth Circuit reasoned in a comparable case that after *Burlington* and *Faragher*, “the mere promulgation of . . . a [sexual harassment] policy may well fail to satisfy the employer’s burden.”<sup>150</sup> Absent evidence that a policy was administered in bad faith or was otherwise defective, however, “the existence of such a policy militates strongly in favor of” finding the employer’s actions reasonable.<sup>151</sup>

Similarly, the Third Circuit held that the existence of a sexual harassment policy was no longer an absolute defense to liability.<sup>152</sup> The court rejected the employer’s argument that it was not liable because the plaintiff failed to exhaust departmental mechanisms before suing.<sup>153</sup> The court instead stated that “[a]n employer cannot ‘use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law.’”<sup>154</sup>

The Third Circuit’s ruling, however, should not be construed to give employees absolute discretion in reporting harassment. An employee’s unreasonable failure to use the complaint mechanism will satisfy the second prong of an employer’s affirmative defense. The Seventh Circuit,<sup>155</sup> for example, required a plaintiff to report alleged harassment “to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it.”<sup>156</sup>

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147. *Id.* at 1314 (citing *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997)).

148. *Id.* at 1211.

149. *Id.* at 1315.

150. *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999).

151. *Id.* at 396.

152. *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 118 (3d Cir. 1999). A female police sergeant brought sex discrimination charges against her employer for “longstanding and egregious” conduct by her supervisors and co-workers, including sexual comments, insults, and taunting, and exposure to demeaning and sexually explicit graffiti. *Id.* at 102-05. Defendants appealed from a jury verdict in plaintiff’s favor, and plaintiff appealed the trial court’s grant of summary judgment for one of the co-workers. *Id.* at 96.

153. *Id.* at 118.

154. *Id.* (quoting *Williamson v. City of Houston*, 148 F.3d 462, 467 (5th Cir. 1998)). In dicta, the *Hurley* court also commented that the defense applies only to harassment occurring outside the scope of employment. *Id.* at 119 n.18. The court raised, but declined to address, the issue of whether a jury might decide that “a patently ineffective harassment policy [that] might communicate to male employees that harassment was an acceptable, expected means to interact with female officers” justified holding the employer liable under a scope of employment theory. *Id.*

155. *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1997).

156. *Id.* at 1037 (citing *Young v. Bayer Corp.*, 123 F.3d 672, 675 (7th Cir. 1997)).

Even remoteness will not dilute an employee's obligation to report sexual harassment. The Ninth Circuit rejected a plaintiff's claim that her employer was prohibited from raising the affirmative defense because the facility in which she worked was "isolated" geographically from the company's higher management.<sup>157</sup> The court held in *Faragher* that the plaintiff was not geographically isolated but, rather, that "the defendant's organizational structure prevented the plaintiff from complaining directly to higher management about the sexual harassment."<sup>158</sup> The Court declined to recognize similar difficulties with the present plaintiff's circumstances. Ultimately the second prong of the affirmative defense is often, though not necessarily, met by demonstrating the employee's failure to follow the complaint procedures established.<sup>159</sup>

*D. The Most Recent Evolution: Reeves v. Sanderson Plumbing Products, Inc.*

On June 12, 2000, the Supreme Court expanded employer liability beyond the new vicarious liability rule found in the *Burlington* and *Faragher* sexual harassment cases.<sup>160</sup> The *Reeves* decision, an age discrimination case, gives a new dimension to employers' total discrimination liability.<sup>161</sup> Where *Burlington* and *Faragher* created a new

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157. *Montero v. AGCO Corp.*, 192 F.3d 856, 863 (9th Cir. 1999).

158. *Id.* at 864 n.6.

159. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

160. *Reeves v. Sanderson Plumbing Products, Inc.*, 830 U.S. 133 (2000).

161. Reeves was a 57 year old supervisor who had ongoing disputes with his manager over Reeves' performance, which led to Reeves' termination. *Id.* at 137-38. Management claimed Reeves' failure to maintain accurate attendance records for his department was the basis for his termination. *Id.* The employer presented evidence at trial to that effect. *Id.* Reeves countered that this explanation was pretext for age discrimination, and introduced evidence that he had accurately recorded the attendance of his employees. *Id.* Reeves also introduced evidence of his supervisor's age-based hostility in his dealings with Reeves, including statements made by the manager to Reeves that he was "too damn old to do [his] job." *Id.* at 151. The jury found that the age discrimination was intentional, and awarded him both compensatory and punitive/liquidated damages, plus two years of front pay totaling approximately \$100,000. *Id.*

On appeal, the Court of Appeals for the Fifth Circuit reversed the trial court, finding that, as a matter of law, Reeves had not introduced sufficient evidence to sustain the jury's finding of discrimination. *Id.* Upon further review, the Supreme Court reinstated the trial jury's award. *Id.* at 153-54. The significance of the case is in the newly articulated evidentiary standard that the Supreme Court placed on businesses to produce a legitimate, non-biased reason for termination of the older worker that the jury finds to be credible. See Hyman Lovitz & Sidney L. Gold, *Reeves Decision Limits Summary Judgment, Does Not Require Direct Evidence in ADEA Cases*, LEGAL INTELLIGENCER, July 20, 2000, at 5 (commenting that *Reeves* held an employer's articulated reason for the adverse employment action may no longer be given credence on summary judgment, "if the plaintiff either

standard for employer vicarious liability, *Reeves* creates a new standard for employer pretext.<sup>162</sup> Before *Reeves*, an employee bore the burden of proving, first, that the employer's stated basis for a tangible adverse employment action was false and, second, that the actual basis was discrimination.<sup>163</sup> The precedent before *Reeves* set a standard of employer liability that left room for pretext and mixed motive without damages owed.<sup>164</sup>

The *Reeves* decision, however, changes the standard by holding employers liable even without undisputed proof of additional independent evidence of illegal motive.<sup>165</sup> An employer now virtually loses the ability to make a successful motion for summary judgment because an employee need only establish a *prima facie* case and a jury question in order to survive.<sup>166</sup> While *Reeves* does not address vicarious liability, it does create a new level of employer liability by lowering the plaintiff's burden of proof. The *Reeves* holding, therefore, further evinces how the standard for employer's discrimination liability is continually evolving to stricter and more stringent levels.

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presents evidence that contradicts the decision-maker, or introduces evidence that impeaches the decision-maker").

162. The practical implications of the *Reeves* decision are that it will make it very difficult for corporate defendants to win a contested age discrimination case "as a matter of law" by appealing to the Judge's finding of "no legally sufficient evidentiary basis for a reasonable jury to find" for the plaintiff under Rule 50 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 50. Any case that ends up in the lap of a jury has a reasonable chance for a sympathetic finder of fact to determine intentional discrimination and award punitive damages. As noted by an experienced employment attorney, "Juries will now be able to guess about an employer's motivation for its treatment of its employees. It also means that the federal anti-bias laws have the effect of being civility codes for the workplace". Tony Mauro, *Direct Proof of Intent Not Necessary in Job Discrimination Suits*, LEGAL INTELLIGENCER, June 13, 2000, at 4 (quoting Philip Berkowitz, a partner in the New York office of Salans, Hertzfeld, Heilbronn, Christy & Viener); see also Peter N. Hillman, *Risks of Discrimination Suits Increase for Employers Following Supreme Court Ruling in Reeves*, 14 EMP. LIT. REP. 3 (2000) (commenting that juries will have a much increased role in the resolution of ADEA cases).

163. *Reeves*, 530 U.S. at 148.

164. *Id.*

165. *Id.* The Supreme Court's guidelines as articulated in *Reeves* are:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

*Id.* at 147.

166. *Id.*



*E. The Resulting Standard of Employer Liability*

In the aftermath of *Burlington* and *Faragher* and *Reeves*, several standards exist for employer liability. First, employers remain strictly liable in cases where the discrimination can be attributed directly to the employer.<sup>167</sup>

Additionally, a new standard for employer liability now holds employers strictly vicariously liable for sexual harassment by supervisors, subject to the affirmative defense.<sup>168</sup> To determine whether employers are liable, the fundamental question is whether the harassment has resulted in a tangible employment action.<sup>169</sup> If a tangible employment action has resulted, the employer cannot assert the affirmative defense, thereby creating strict liability.<sup>170</sup> If the discrimination does not culminate in a tangible employment action, but the discrimination is severe and pervasive, then the employer is vicariously liable, subject to the affirmative defense.<sup>171</sup>

Within this new standard come new implications for damages. In *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*,<sup>172</sup> the Fifth Circuit extended the vicarious liability reasoning to allow vicarious liability for punitive damages.<sup>173</sup> The Eleventh Circuit<sup>174</sup> declined to follow the trend, noting that “*Faragher*, which was not about punitive damages, . . . [should not] overrule our pre-*Faragher*, punitive damages precedent” requiring that an employer must be proved to be at fault through notice or knowledge.<sup>175</sup> In the 1999 case of *Kolstad v. American Dental Assoc.*,<sup>176</sup> the Supreme Court addressed employers’ punitive damage liability in discrimination cases. The *Kolstad* Court held that an employer may be vicariously liable

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167. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986). There is also a standard for co-worker sexual harassment. It is used when an employer is only liable for its negligence in allowing the harassment—if it knew or should have known of a co-worker’s harassment, yet allowed it to occur. 29 C.F.R. §§ 1604.11(c), 1606.8(c)(2000). Co-worker harassment is beyond the scope of this paper and is therefore not addressed.

168. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); 29 C.F.R. §§ 1604.11(c), 1606.8(c) (stating that in sexual harassment and national origin cases, employers are liable regardless of whether the discriminatory acts were “authorized or even forbidden by the employer and regardless of whether the employer knew or should have known” of their existence).

169. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

170. *Burlington*, 524 U.S. at 753, 765; *Faragher*, 524 U.S. at 807-08.

171. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

172. 156 F.3d 581 (5th Cir. 1998).

173. *Id.* at 592-93.

174. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317 (11th Cir. 1999).

175. *Id.* at 1323 n.8.

176. *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526 (1999); *see also Dick v. NY Life Ins. Co.*, 359 U.S. 437 (1959); Winter, *supra* note 3, at B10 (discussing the vicarious liability standard’s effect, which has increased punitive damages awards and thus expanded EPLI insurance coverage).

for punitive damages even in the absence of egregious conduct on the employer's part.<sup>177</sup> *Kolstad* significantly increases the financial incentive on employers to control discriminatory behavior. By inflicting punitive damages on employers who are merely vicariously liable, the Court is telling employers that their oversight responsibilities are paramount.

The increased risk *Kolstad* created is offset by a safe harbor.<sup>178</sup> The safe harbor prevents the imposition of vicarious liability for punitive damages if the employer demonstrates a good faith attempt to comply with Title VII.<sup>179</sup> Relying on the *Kolstad* safe harbor, the Northern District of Illinois rejected a plaintiff's prayer for punitive damages.<sup>180</sup> It determined that the employer had a non-discrimination and anti-harassment policy in effect during the plaintiff's employment, under which it was a violation to sexually harass or discriminate against another employee.<sup>181</sup> The policy designated the proper steps an employee could take to report harassment and discrimination.<sup>182</sup> The plaintiff received a copy of the policy, attended a training session where the policy was covered and yet never complained about sexual harassment to management or to the human resources department.<sup>183</sup>

While *Kolstad's* safe harbor may not be an actual affirmative defense, it may still result in increased coverage under EPLI policies.<sup>184</sup> So long as punitive damages are only imposed vicariously, they are insurable in most states.<sup>185</sup> Eighteen states do not allow coverage for punitive damages,

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177. *Kolstad*, 527 U.S. at 538.

178. *Id.* at 544-46.

179. *Id.* While agency principles may allow for the imposition of punitive damages for even those employers who make every effort to comply with Title VII, only those employers who have not made such a good faith effort should bear liability. *Id.* Otherwise, employers would have the "perverse incentive" to avoid implementation of anti-discrimination programs, thereby undermining Title VII's goal of preventing workplace discrimination. *Id.* at 545.

180. *Hull v. APCOA/Standard Parking Corp.*, 82 Fair Emp. Prac. Cas. (BNA) 247, 257 (N.D. Ill. 2000), available at No. 99 C 2832, 2000 WL 198881 (N.D. Ill. Feb. 14, 2000).

181. *Id.*

182. *Id.*

183. *Id.*

184. Winter, *supra* note 3, at B12.

185. The following jurisdictions have determined that vicarious liability for punitive damages are insurable: HAW. REV. STAT. § 431:10-240 (West Supp. 2000); KAN. STAT. ANN. § 40-2 (West Supp. 1999); VA. CODE ANN. § 38.2-227 (West Supp. 2000); *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978); *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934); *In re Celotex Corp.*, 152 B.R. 652 (Bankr. M.D. Fla. 1993); *United States Fid. & Guar. Co. v. Open Sesame Child Care Ctr.*, 819 F. Supp. 756 (N.D. Ill. 1993); *Pennbank v. St. Paul Fire & Marine Ins. Co.*, 669 F. Supp. 122 (W.D. Pa. 1987); *Grant v. N. River Ins. Co.*, 453 F. Supp. 1361 (N.D. Ind. 1978); *S. Farm Bureau Cas. Ins. Co., v. Daniel*, 440 S.W.2d 582 (Ark. 1969); *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522 (Ariz. 1972); *City Prods. Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31 (Cal. Ct. App. 1979); *Salus Corp. v. Cont'l Cas. Co.*, 478 A.2d 1067 (D.C. App. 1984); *Greenwood Cemetery*,

generally but eleven of those eighteen states allow coverage for punitive damages if the underlying liability is vicarious.<sup>186</sup> It follows that over forty states permit employers to insure against some form of punitive damages.

Employer liability for discrimination has evolved and increased greatly in recent years.<sup>187</sup> *Meritor* exploded the boundaries of what constitutes sexual harassment by recognizing hostile work environment claims.<sup>188</sup> *Burlington* and *Faragher* dramatically lowered the threshold for employer liability by holding employers vicariously liable for sexual harassment by supervisors, absent an affirmative defense.<sup>189</sup> *Kolstad* allowed the imposition of punitive damages when an employer is merely vicariously liable for sexual harassment. Finally, *Reeves* greatly hinders an employer's ability to escape a claim based on pretext. This evolution reflects both judicial and Congressional efforts to create an increasingly strict standard that employers must meet to avoid damages.

The evolution toward a stricter liability standard is designed to increase employers' financial incentive to curb discriminatory behavior. While the courts have not expressly stated that this incentive is non-delegable, it is a reasonable inference that transferring the risk of damages dilutes the incentive. Employers are, not surprisingly, hesitant to bear the financial liability alone. The desire to offset that liability has created an entirely new market of risk transference despite the courts' efforts to financially motivate employers' behavior.

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*Inc. v. Travelers Indem. Co.*, 232 S.E.2d 910 (Ga. 1977); *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 511 P.2d 783 (Idaho 1973); *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106 (Iowa 1983); *Cont. Ins. Cos. v. Hancock*, 507 S.W.2d 146 (Ky. 1973); *Owens v. Anderson*, 631 So.2d 1313 (La. Ct. App. 1994); *First Nat'l Bank v. Fid. & Deposit Co.*, 389 A.2d 359 (Md. 1978); *Anthony v. Frith*, 394 So.2d 867 (Miss. 1981); *Fitzgerald v. W. Fire Ins. Co.*, 679 P.2d 790 (Mont. 1984); *Am. Home Assurance Co. v. Fish*, 451 A.2d 358 (N.H. 1982); *LoRocco v. N.J. Mfrs. Indem. Ins. Co.*, 197 A.2d 591 (N.J. Super. Ct. App. Div. 1980); *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980); *Baker v. Armstrong*, 744 P.2d 170 (N.M. 1987); *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013 (Or. 1977); *Lazenby v. Universal Underwriters Inc. Co.*, 383 S.W.2d 1 (Tenn. 1964); *State v. Glens Falls Ins. Co.*, 404 A.2d 101 (Vt. 1979); *Hensely v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981); *see also Ostrerage & Newman, INS. COVERAGE DISPUTES*, § 14.06 (10th ed. 1999).

186. *See* KAN. STAT. ANN. § 40-2; VA. CODE ANN. § 38.2-227; *Ohio Cas. Ins. Co.*, 75 F.2d 58; *Celotex*, 152 B.R. 652; *Open Sesame Child Care Ctr.*, 819 F. Supp. 756; *Pennbank*, 669 F. Supp. 122; *Grant*, 453 F. Supp. 1361; *City Prods. Corp.*, 88 Cal. App. 3d 31; *Cont'l Ins. Cos.*, 507 S.W.2d 146; *LoRocco*, 197 A.2d 591; *Dayton Hudson Corp.*, 621 P.2d 1155.

187. *See supra* notes 148-52 and accompanying text.

188. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

189. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

## III. THE EVOLUTION OF EMPLOYMENT PRACTICES LIABILITY INSURANCE

Employment Practices Liability Insurance developed as a byproduct of commercial general liability (“CGL”) and Directors and Officers (“D&O”) insurance.<sup>190</sup> CGL and D&O insurance policies strictly excluded most employment lawsuits.<sup>191</sup> Insurers, however, designed EPLI to be a gap-filler that would specifically cover employment claims.<sup>192</sup> EPLI is a relatively young product, dating only to the early 1980s when NAS Insurance Services, through Lloyd’s of London, introduced an Employer’s Legal Expense Reimbursement Policy.<sup>193</sup> In the early 1990s, carriers began introducing their own EPLI products in increasing numbers.<sup>194</sup> As recently as 1994, only three insurance companies offered EPLI policies, whereas current estimates suggest that more than seventy companies market EPLI.<sup>195</sup> Industry analysts report that currently EPLI sales are growing by approximately ten percent per month.<sup>196</sup> It is estimated that more than half of Fortune 500 companies have purchased EPLI coverage.<sup>197</sup>

Insurers’ initial offerings shared significant similarities, with most providing coverage for employment law judgments, bonds, and post-judgment interest.<sup>198</sup> All carriers also covered back pay, but coverage was narrow.<sup>199</sup> Typical policies excluded coverage for fines and penalties, with all but one carrier excluding punitive damages.<sup>200</sup> Virtually all carriers excluded intentional acts, rendering moot any debate over whether insurance coverage should exist for employment claims involving punitive

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190. Nadel, *supra* note 5, at 2275.

191. Rosemary A. Macero & Lucy Halatyn, *Employer Beware: Do You Have Insurance Coverage for Employment Claims?*, 602 PRACTICING L. INST. LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES 399, 421 (1999); Nadel, *supra* note 5, at 2275.

192. Macero & Halatyn, *supra* note 191, at 421; Winter, *supra* note 3, at B10.

193. See Sandra Jane Meindersma, *Employers Under Fire: Managing Employment Practice Liability*, RISK MGMT., Jan. 1, 1996, at 25.

194. Robert A. Machson & Joseph P. Monteleone, *Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies*, 49 BUS. LAW 689 (Feb. 1999).

195. Brenda Paik Sunoo, *After Everything Else—Buy Insurance*, PERSONNEL J., Oct. 1, 1998, at 45; *Insurers Offer Harassment Coverage*, AOL NEWS, Mar. 23, 1999 (quoting the Associated Press).

196. Nadel, *supra* note 5, at 2276; see also Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 323 (1999) (stating EPLI “has become the hottest selling, most talked about insurance product today”).

197. Louis Pechman, *Employment Practices Insurance Proliferates*, N.Y. L. J., May 26, 1998, at 1.

198. Gordon M. Park & Michele F. Lyerly, *Employment Practices Liability Policy: Real Cure or Costly Placebo*, 29 BRIEF 38, 38 (1999).

199. *Id.*

200. See Klenk, *supra* note 196, at 325 (stating that the insurance industry did not develop a comprehensive and saleable EPLI product until 1996).

damages.<sup>201</sup>

Increased market competition in recent years resulted in significant product differentiation.<sup>202</sup> “Enhanced” EPLI policies emerged covering various forms of discrimination, sexual harassment, wrongful discharge, defamation, and negligent hiring.<sup>203</sup> EPLI carriers offered catastrophic coverage, higher coverage limits, and coverage for punitive damages where state law allowed.<sup>204</sup> The buyer’s market has also led to less stringent underwriting requirements.<sup>205</sup> The expansion in EPLI coverage has been driven primarily by anxious employers seeking new ways to cover their ever-increasing risk of employment-related liability.<sup>206</sup>

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201. Meindersma, *supra* note 193, at 25.

202. See Gary Griffin & Rachel McKinney, *Employment Practices Liability Insurance: Building a Three-Legged Stool of Protection* (Aug. 27, 1999), available at <http://www.imms.com/consultant/IMS6370.htm> (noting both that “the number of insurers offering such coverage has increased dramatically” and “there is much variation in the degree of protection offered” by “the wide variation in EPLI policy forms”). See generally Seth B. Schafler, *Sea of EPLI Confusion* (Aug. 27, 1999), available at <http://www.proskauer.com/pubs/articles.epli.html> (reprinted with permission of RISK & INS. MAG., Apr. 1, 1999) (asserting that “[t]he profusion and vagueness of many EPLI policy forms create a serious risk” for those considering coverage).

203. See, e.g., *Executive Risk Enhances EPLI Coverage*, PR NEWSWIRE, Jan. 14, 1999 (quoting one insurer’s director of product management: “Traditional EPLI policies do not respond to these claims [of sexual harassment], but ours will.”); *Hartford Expands EPLI Coverage*, BEST’S INS. NEWS, Nov. 12, 1999 (“Hartford . . . has expanded its . . . [EPLI] to cover several new areas, such as intentional acts and emotional distress. . . . Highlights of Hartford’s revamped EPLI coverage include coverage for damages, such as judgments, settlements, awards, and compensatory damages, as well as claim expenses such as defense costs and related expenses.”).

204. See *ISO Introduces First Standardized Insurance Program for Employment Practices Liability* (Mar. 23, 2001), available at <http://www.iso.com/docs/pres046.htm>. The Insurance Services Office, Inc. (“ISO”), the country’s largest provider of property/casualty information services, introduced the first standardized insurance program for employee lawsuits for discrimination. ISO filed its Employment-Related Practices Liability Program with state insurance regulators for approval. *Id.* The ISO policy covers employers’ liability for claims arising out of an injury to an employee because of an employment-related offense, as well as providing legal defense for the insured. *Id.* Injury may result from discrimination that results in refusal to hire; failure to promote; termination; demotion; discipline or defamation. *Id.* Injury also can include coercion of an employee to perform an unlawful act; work-related sexual harassment; or verbal, physical, mental or emotion abuse. *Id.*

The ISO program excludes: (1) criminal, fraudulent or malicious acts; (2) violations of the accommodations requirement of the Americans with Disabilities Act; (3) liability of the perpetrator of sexual harassment; and (4) injury arising out of strikes and lock-outs, employment termination from specified business decisions and retaliatory actions taken against “whistle blowers.” *Id.*; see also David M. Katz, *\$100 Suits Fuel Market for Bias, Harassment Coverage*, NAT’L UNDERWRITER, PROP. & CAS.-RISK & BENEFITS MGMT., Apr. 8, 1996, 1:11 (discussing EPLI programs or various carriers).

205. *More EPLI Options Help Cut Law Firms HR-Related Risks*, COMP. & BENEFITS FOR L. OFFICES, May 1999, at 2.

206. *Id.*; Griffin & McKinney, *supra*, note 202 (asserting that “over the last twenty years,

Fearing exploding liability for employment claims,<sup>207</sup> employers justify this greater transfer of risk to third-party insurers by noting that employment law has made them more and more liable for acts less and less within their direct control.<sup>208</sup> Amidst these changes in the EPLI market, the question arises whether the growing liability for employment discrimination claims should be managed by allowing employers simply to shift the risk of their liability to an insurance carrier. Even ignoring the increasing standards of employer liability, the question remains significant because by offsetting the risk, employers are offsetting the primary financial incentive to control discriminatory conduct.<sup>209</sup> If met with widespread adoption, the emerging trend toward removal of exclusions from EPLI coverage<sup>210</sup> would reduce, if not eliminate, the law's primary purpose: To "provide the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate [discrimination]."<sup>211</sup>

#### IV. HAS EMPLOYER LIABILITY EVOLVED TO CONFLICT WITH EPLI?

Congress enacted an antidiscrimination scheme that is more complex than the simple division between compensatory and punitive damages. Discrimination law has evolved to include damage awards with the expressed goal that potential liability for damages would encourage

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wrongful employment practice claims have risen at a rate eighteen times faster than the proliferation of the [f]ederal [c]ourt docket").

207. Employers cite the doubling of sexual harassment cases filed with the EEOC between 1991 and 1996. See U.S. Equal Employment Opportunity Commission, STRATEGIC PLAN, 1997-2002 (1997), available at <http://www.eeoc.gov/plan/plan.html>. They also predict that race, sex, disability or age discrimination claims will number over 26,000 per year by the end of the century. See U.S. Equal Opportunity Employment Commission, NAT'L ENFORCEMENT PLAN (1997), available at <http://www.eeoc.gov/nep.html>; see also Griffin & McKinney, *supra* note 202.

208. See *infra* Part I.C.1 & 2.

209. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998)(stating that "[s]exual harassment under Title VII presupposes intentional conduct"); Michael Sirignano, *Though Courts Often Deny Coverage of Sexual Harassment Claims, Insurers Face Many Challenges* (Aug. 27, 1999), available at <http://www.rivkinradler.com/ms120398.html> (noting that "[t]ypically, the underlying causes of action asserted against an individual harasser include allegations grounded in intentional conduct" and that some courts have placed sexual harassment into a category of wrongs that they find "to be intentional acts as a matter of law, regardless of whether the insured subjectively intended to cause harm"); see also Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 14 Cal. App. 4th 1595, 1614 (Cal. Ct. App. 1993) ("[Sexual harassment] is always intentional, it is always wrongful, and it is always harmful.") (citing J.C. Penney Casualty Ins. Co. v. K.K., 52 Cal.3d. 1009, 1025 (1991) (emphasis omitted).

210. Klenk, *supra* note 196, at 333-35.

211. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

employers to deter discriminatory conduct.<sup>212</sup> The courts interpreting the legislative scheme have lowered the threshold of employer liability to maximize the deterrent effect.<sup>213</sup> By allowing employers to transfer liability for discrimination, EPLI dilutes the deterrent goals of employment discrimination law<sup>214</sup> and weakens the newly evolved standard of employer liability for harassment and discrimination.<sup>215</sup> This section examines the possible effect of EPLI on employment law by analyzing whether employers who obtain EPLI coverage are, in effect, able to avoid the post *Burlington/Faragher* liability standard. We then propose a preventive program designed to allow appropriate risk-shifting in a manner that retains the positive impacts of EPLI while minimizing effects that belie the liability standard courts have imposed.

#### A. Does EPLI Undermine Post *Burlington/Faragher* Employer Liability?

Employers who intentionally discriminate against a particular employee or employees are assessed damages not only to compensate victims, but also to punish, and thereby deter future instances of such conduct.<sup>216</sup> Although the scope of EPLI coverage varies with the insurer and includes some coverage for intentional acts, EPLI typically does not cover truly intentional discrimination.<sup>217</sup> When an employer engages in conduct evincing specific intent, “[the conduct] . . . would be intentional, illegal, and hence, not insurable.”<sup>218</sup>

On the other end of the spectrum are cases of truly unintentional

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212. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998); *Gallagher*, *supra* note 20, at 1273.

213. *Faragher*, 524 U.S. at 805-06; *Burlington*, 524 U.S. at 765.

214. *Gallagher*, *supra* note 20, at 1266-74, 1270 n.60 (quoting Steven L. Willborn, *Insurance, Public Policy, and Employment Discrimination*, 66 MINN. L. REV. 1003, 1009 (1982)) (“Insurance [for intentional discrimination] would undermine the deterrent effect of damages. Hence, to preserve the deterrent effect, [public policy] prohibits insurance for such liability.”).

215. *Gallagher*, *supra* note 20, at 1266-74; *Macero & Halatyn*, *supra* note 191, at 425 (noting that “public policy goals seem to conflict with the scope of available coverage under EPLI which, by its terms, defines actions which have previously [been] determined by various courts to constitute intentional conduct”); *see also* *Indep. Sch. Dist. No. 697, Eveleth v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 576 (Minn. 1994) (discussing coverage for intentional discrimination).

216. *Faragher*, 524 U.S. at 805-06.

217. *Macero & Halatyn*, *supra* note 191, at 421-22, 424.

218. Steven R. Goldstein & Amy R. Stein, *Is Employment Policy Liability Insurance Against Public Policy?*, C.P.C.U. J., Oct. 1, 1998 (“Since there have been few, if any, judicial decisions interpreting the terms and conditions of EPLI policies, it is unclear whether or not the courts will find certain provisions . . . against public policy.”); *see also* *Lorelie S. Masters, Protection from the Storm: Insurance Coverage for Employment Liability*, 53 BUS. LAW. 1249, 1263 (1998).

discrimination.<sup>219</sup> The essence of such a claim is a statistically recognized negative effect upon one particular protected class of people—an effect that is not satisfactorily explained by the employer.<sup>220</sup> Unintentional discrimination is analogous to negligence, which is covered by EPLI.<sup>221</sup> EPLI coverage of unintentional and unknowing acts of discrimination is not problematic. Retaining EPLI coverage would not be a primary (or even secondary) motivator for employers' behavior because unintentional discrimination occurs, by definition, without any active involvement of management.<sup>222</sup>

In the middle of the spectrum lies EPLI coverage for vicarious liability claims. Vicarious liability claims do not involve the creation of statistical imbalances in treatment of a class, but rather involve a tangible employment action or a hostile working environment.<sup>223</sup> The Supreme Court's most recent decisions make employers vicariously liable for harassment or discrimination, subject only to an affirmative defense or safe harbor.<sup>224</sup> In June of 2000, the Supreme Court further enhanced employer liability by making it easier for a plaintiff to meet his or her burden in a mixed motive case.<sup>225</sup> EPLI coverage may undermine the Supreme Court's standard for employer liability in all such harassment and discrimination cases.

For example, in sexual harassment cases, the Supreme Court has iterated a standard that imposes liability when a company's employees or agents sexually harass other employees. In such harassment cases, employers are accorded "imputed" or "vicarious" liability.<sup>226</sup> Courts have imputed liability to employers in cases of sexual harassment by supervisors on longstanding principles of agency law: Employers bear responsibility for their agents' intentional torts because the law presumes that employers are in the best position to control their agents.<sup>227</sup> Therefore, from a preventive standpoint, the law seeks to ensure through monetary motivation that employers take affirmative steps to deter sexual harassment.<sup>228</sup>

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219. Macero & Halatyn, *supra* note 191, at 404-05, 409.

220. *See, e.g., Griggs v Duke Power Co*, 401 U.S. 424, 431 (1971); Macero & Halatyn, *supra* note 191, at 404-05, 409.

221. Nadel, *supra* note 5, at 2276.

222. *Griggs*, 401 U.S. at 431.

223. *California Supreme Court Limits Job Discrimination Liability*, UNDERWRITER'S WIRE (Aug. 27, 1999), available at <http://www.uwreport.com/wire/news/0798/0723job.htm> [hereinafter UW WIRE]. "Harassment claims are legitimately distinguished from discrimination claims because they are based on different types of conduct." *Id.*

224. *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

225. *Reeves v. Sanderson Plumbing Prod.'s, Inc.*, 530 U.S. 133 (2000).

226. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

227. *Burlington*, 524 U.S. at 752-64.

228. *Faragher*, 524 U.S. at 805-06.



In 1999, the Supreme Court went beyond sexual harassment issues when it decided the *Kolstad* case. The *Kolstad* Court found that an employer could be vicariously liable for punitive damages for discrimination in general.<sup>229</sup> Appellate and district courts interpreting *Kolstad* have supported the holding by awarding punitive damages based on vicarious liability even in the absence of egregious conduct.<sup>230</sup>

Employers are troubled by the vicarious liability standard. They fear the risk of money damages and the substantial investigative burden mandated in order to benefit from the affirmative defense. Employers are turning to EPLI carriers for coverage and risk transference.<sup>231</sup> Unfortunately, the financial incentive to control negative conduct is fragile and easily weakened. EPLI may undermine the deterrence incentive because coverage for imputed liability is permissible in most states.<sup>232</sup> When the transfer of liability to an EPLI carrier lessens the incentive to control discrimination, the existence of EPLI coverage contravenes the newly evolved employer liability standard. Where employers can shift the risk of financial loss to a third-party insurer, insured employers might ignore the burden imposed by the Supreme Court, thereby allowing sexual harassment to continue.<sup>233</sup> EPLI insurers have no legal obligation to deny coverage to employers at risk for discrimination.<sup>234</sup> The premiums charged to high risk employers may not create enough positive incentive to deter discrimination as effectively as damages would.<sup>235</sup> Therefore, absent exclusions for imputed liability claims, EPLI coverage dilutes the courts' effort to use the liability standard as an incentive to purge workplace

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229. *Kolstad*, 527 U.S. at 537.

230. Winter, *supra* note 3, at B10; see *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999); *Smith v. Peppersack*, 194 F.3d 1305 (4th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998); *EEOC v. Orkin Exterminating Co.*, 63 F. Supp. 2d. 684 (D. Md. 1999); *Hipp v. Liberty Nat'l Life Ins. Co.*, 65 F. Supp. 1314 (M.D. Fla. 1999); *Greenbaum v. Handelsbanken*, 67 F. Supp. 228 (S.D.N.Y. 1999); *Woods v. Am. Eagle Outfitters*, No. 98-71731, 1999 U.S. Dist. LEXIS 14455 (E.D. Mich. Aug. 31, 1999). But see *Iacobucci v. Bouleter*, 193 F.3d 14 (1st Cir. 1999); *Olsen v. Marriott Int'l*, 75 F. Supp. 2d. 1052 (D. Ariz. Nov. 22, 1999) (finding no liability for punitive damages under *Kolstad*).

231. Nadel, *supra* note 5, at 2275.

232. Winter, *supra* note 3, at B10.

233. See *UW WIRE*, *supra* note 223. Discussing the ramifications for the state insurance industry of the California Supreme Court's decision in *Reno v. Baird*, 957 P.2d 1333 (1998), which ruled that workers cannot sue supervisors individually for workplace discrimination, one attorney noted that "[i]f managers are aware that they have no personal risk from discriminating, they are going to do it more." *UW WIRE*, *supra* note 223. This rather logical conclusion is analogous to the argument that if employers bear no financial responsibility for their agents' sexual harassment (because they can transfer the risk to a third-party insurer), they will be less diligent in policing their agents' conduct.

234. See *id.*

235. *Id.*

discrimination.

The question then arises whether such contravention of the employer standard should be allowed. EPLI carriers suggest that their products have a positive impact.<sup>236</sup> Many EPLI carriers encourage preventive measures in line with those the Supreme Court outlined by engaging in rigorous underwriting procedures before granting coverage.<sup>237</sup> Because many insurers lack historical data with which to determine premiums in the EPLI arena, they rely instead on the application process to determine the level of risk presented by potential insureds.<sup>238</sup> Insurers require applicants to examine their anti-discrimination policies and procedures, and often insist on a full-scale audit of the company's human resources practices.<sup>239</sup> Some insurers offering EPLI have denied coverage to applicants who do not have in place adequate anti-discrimination preventive procedures.<sup>240</sup>

John Kuhn, Vice President at Chubb & Sons, Inc., one of the first major carriers to enter the EPLI market and currently one of the largest sellers of EPLI,<sup>241</sup> maintains that the rigorous application process benefits companies seeking coverage because it requires human resources departments to "[take care of] those things they knew they had to do but hadn't gotten around to."<sup>242</sup> Proponents assert that EPLI furthers the goal of employment discrimination laws because the underwriting procedures force employers to be in legal compliance to obtain coverage.<sup>243</sup> Although the EPLI market remains too new to offer hard data, carriers present anecdotal evidence that those employers who pass the examination process and obtain coverage have fewer claims of discrimination than those who do

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236. Nadel, *supra* note 5, at 2276 (quoting John Kuhn).

237. Masters, *supra* note 218, at 1275-76; Joseph P. Monteleone, *Insuring the Uninsurable: Policies to Cover Workplace Discrimination and Sexual Harassment Liabilities*, METRO. CORP. COUNS., May 1999, at 62.

238. Monteleone, *supra* note 237, at 62.

239. Masters, *supra* note 218, at 1275-76. A full scale audit includes an assessment of prior claims, employment documentation including evaluations, interviews of officers, composition of work force, human resources manuals, sexual harassment policies and procedures, termination procedures, post termination procedures, testing, training and overall practices and procedures. *Id.*

240. Nadel, *supra* note 5, at 2276.

241. *Id.*; Dorothy Elizabeth Brooks, *Employers Insuring Against Employees' Lawsuits*, ATLANTA BUS. CHRON. (Mar. 13-19, 1998), at 13B, available at <http://atlanta.bcentral.com/atlanta/stories/1998/03/16/focus8.html>.

242. Nadel, *supra* note 5, at 2276 (quoting John Kuhn).

243. See, e.g., Griffin & McKinney, *supra* note 202. "Employment practices liability insurance (EPLI) can augment [the] traditional preventive tactics [of 'communication of the employer's rules, policies, and procedures to the employees, as well as early intervention in employment disputes or complaints']. Combined with insurance, loss prevention [and] post-incident investigation and thorough follow-up can act to form a three-legged stool of protection against employment-related claims." *Id.*

not.<sup>244</sup> But can EPLI retain positive legal and economic effects while only allowing an appropriate level of risk?

### B. *A Proposed Solution*

When the Supreme Court affirmed in its *Burlington/Faragher* decisions that employers are vicariously liable for supervisor sexual harassment, it also established an affirmative defense that insulates employers from imputed liability.<sup>245</sup> To establish an effective affirmative defense, employers must exercise reasonable care to prevent and promptly correct discrimination, take no job-related action against victims of discrimination, and include safeguards for employees reporting discriminatory behavior.<sup>246</sup>

The affirmative defense elements outlined by the Supreme Court are instructive in addressing the proper scope of EPLI coverage. Incorporation of the affirmative defense elements into EPLI carriers' underwriting guidelines begets a solution to EPLI's contravention of the newly evolved employer standard. Currently, insurers' incorporation of these elements into their underwriting guidelines is merely an economically sound business practice. However, an economic motivation absent the force of law is tenuous and easily diluted. Nothing would prevent insurers from forgoing stringent underwriting requirements completely if a cost-benefit analysis indicated that such requirements are no longer economically necessary.

State insurance regulators or state legislators could respond by requiring EPLI carriers to institute anti-discriminatory practices as a pre-condition to coverage. Requiring carriers to include in their underwriting guidelines the preventive measures embodied by the Court's affirmative defense would transform a mere business practice into a legal duty. In this way, state lawmakers make insurers, to whom EPLI shifts the risk of financial liability for harassment and discrimination, also accept responsibility to ensure that employers are encouraged to prevent wrongful behavior. Allowing employers to shift the financial risk of liability to a third-party insurer weakens the incentive to prevent discrimination, thus contravening the intent of the vicarious liability standard. But requiring insurers to determine that employers do, in fact, take affirmative steps to prevent discrimination strengthens the law's aim of deterring

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244. Monteleone, *supra* note 237, at 62.

245. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

246. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08; Marc R. Engel, *Millenium Resolution: Reduce Your Risk of Employment-Related Litigation*, 4 EMP. L. STRATEGIST 1 (Aug. 1999).

discriminatory conduct.<sup>247</sup> Thus, allowing EPLI coverage for employers' "imputed liability" based on the actions of their agents does not threaten the standard, as long as an appropriate preventive program as outlined above is in force.

## V. CONCLUSION

Most employers consider it in their interest to eliminate discrimination from the workplace, if only because this type of misconduct leads to unhappy and less productive workers.<sup>248</sup> As Congress and the courts have recognized, employers are driven primarily by economic motives.<sup>249</sup> Thus, the law has evolved to focus on deterring discrimination via the increased risk of liability.<sup>250</sup> Indeed, "because vigilant efforts to stamp out all discriminatory conduct can be costly, the additional financial incentive of avoiding liability . . . motivate[s] employers to take even greater steps to ensure that they are not found negligent in their efforts to prevent [discrimination] if the liability avoided is greater than the added expense."<sup>251</sup> By providing a less-expensive means of avoiding liability than assuming the cost of establishing and ensuring nondiscriminatory practices, EPLI may remove the financial incentive of avoiding liability and thus may limit employers' motivation to behave in a nondiscriminatory manner. State lawmakers could relieve the conflict between a strong financial incentive for employers and EPLI's ability to weaken that incentive. Regulators could require underwriting guidelines on par with the affirmative defense as a pre-condition for coverage. A regulatory prescription retains the newly evolved employer liability standard, salvages the economic motivation for employers to affirmatively deter sexual harassment discrimination and casts EPLI in the positive role of assisting the law's goal rather than undermining it.

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247. Leon E. Wynter, *Business & Race: Insurers Join the Effort to Tackle Discrimination*, WALL ST. J., Mar. 5, 1997, at B1 (reporting that the spread of EPLI policies "may place insurers in the role of watchdog for corporate behavior").

248. Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823, 893 (1999).

249. Faragher, 524 U.S. at 807-08; *Burlington*, 524 U.S. at 765; H.R. REP. NO. 102-40, pt. 1, at § XI (1991)(Minority views of Reps. Bill Goodling, E. Thomas Coleman, Steve Gunderson, Harris W. Fawell, Cass Ballenger, Susan Molinari, Bill Barrett, John A. Boehner).

250. Faragher, 524 U.S. at 805-06.

251. Brief of Amicus Curiae Chamber of Commerce of the United States of America, 1998 WL 93296, at \*17, *Burlington*, 524 U.S. at 742 (No. 97-569).