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Notes

Is it Sexual Harassment or Not? The Single Incident Exception

*McCurdy v. Arkansas State Police*¹

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace.² In a 2004 case of first impression, the Eighth Circuit Court of Appeals looked at an employer's affirmative defense against a hostile work environment claim involving a single incident of sexual harassment committed by a supervisor.³ The Eighth Circuit modified the test handed down by the Supreme Court in this situation.⁴ After outlining the historical background and rationale for imposing liability on employers for the actions of their supervisors, this Note will explore the logic behind the Eighth Circuit's interpretation of the Supreme Court test and analyze the implications of this interpretation on workplaces in the Eighth Circuit.

II. FACTS AND HOLDING

On August 29, 2002, Jamie McCurdy filed suit against the Arkansas State Police and the State of Arkansas claiming that she was sexually discriminated against in violation of Title VII of the Civil Rights Act of 1964.⁵ McCurdy sought damages against the two public entities for the conduct of an Arkansas State Police ("ASP") employee, Sergeant Darryl Hall.⁶

McCurdy began her employment as a radio dispatcher for the ASP in Little Rock, Arkansas, on April 28, 2002.⁷ The incident giving rise to the lawsuit occurred on July 5, 2002.⁸ McCurdy was working with two others in the ASP Communications Center ("Center")⁹ when Hall arrived and began to

1. 375 F.3d 762 (8th Cir. 2004).

2. See 42 U.S.C. § 2000e-2(a)(1) (2000).

3. *McCurdy*, 375 F.3d 762.

4. See *id.*

5. *McCurdy v. Ark. State Police*, 275 F. Supp. 2d 982, 984 (E.D. Ark. 2003); see 42 U.S.C. § 2000e to e-17.

6. *McCurdy*, 275 F. Supp. 2d at 984.

7. *McCurdy*, 375 F.3d at 764.

8. *Id.*

9. *Id.* McCurdy's co-workers included one female, Jeanne Hill and one male, Tracy Wilson. *Id.*

sexually harass her.¹⁰ In her complaint, McCurdy alleged that Hall walked into the Center, immediately reached under her arm, and grabbed her breast.¹¹ According to McCurdy, she pulled away from Hall, but he proceeded to grab her arm.¹² Hall told her “she had a hole in her shirt” and, when she looked down, Hall commented, “stop looking at your tits.”¹³

The sexual harassment allegedly continued as Hall sat down next to McCurdy and asked her about her attire, which was not her normal uniform since it was a casual dress day at the Center.¹⁴ After she explained her lack of uniform, Hall informed her that if he was the chief, her uniform would consist of “panties and a tank top.”¹⁵ McCurdy continued to do her job and did not respond to Hall’s comments.¹⁶

Hall left shortly, only to return and begin playing with McCurdy’s hair.¹⁷ McCurdy attempted to remove herself from the situation, but Hall ordered her to turn around, and he continued to run his fingers through her hair.¹⁸ McCurdy finally extricated herself from the radio room but, upon her return, Hall was still there.¹⁹ He informed her that she had “a real nice voice on the radio” and that “she turned him on.”²⁰ Finally, as Hall left the radio room that evening, he hugged McCurdy without her consent, pressing his body against hers in a manner that, in her view, “any reasonable person would know a reasonable woman would object to.”²¹

McCurdy wasted little time before taking action; she called Sergeant Shawn Garner that night to report Hall’s behavior.²² McCurdy and Garner met that evening around 9:00 p.m., and after their meeting, Garner called Hall’s direct supervisor, Lieutenant Gloria Weakland.²³ Weakland determined that McCurdy would not work with Hall the rest of that weekend.²⁴ On Monday morning, Weakland continued to report the incident up the chain of

10. *Id.* at 764-65. Sergeant Hall had entered the room to await a trooper who was transporting an inmate from a hospital to a holding cell. *McCurdy*, 275 F. Supp. 2d at 985.

11. *McCurdy*, 275 F. Supp. 2d at 984.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *McCurdy v. Ark. State Police*, 375 F.3d 762, 764 (8th Cir. 2004).

17. *McCurdy*, 275 F. Supp. 2d at 984.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 984-85.

22. *Id.* at 985. Garner was not McCurdy’s direct supervisor but was the highest ranking individual on duty that evening. *Id.*

23. *Id.*

24. *Id.* McCurdy was not scheduled to work again until Tuesday. *Id.*

command, speaking with Captain Carl Kirkland.²⁵ Interviews of the witnesses to the incident also occurred on Monday.²⁶ Additionally, McCurdy was assigned to different radio dispatching shifts to avoid interaction with Hall for that week, and Hall was specifically instructed not to have any contact with McCurdy.²⁷ After Hall spoke with McCurdy through the Communication Center radio about job-related manners on two separate occasions, he was transferred to the Governor Security Detail unit to ensure no further contact, inadvertent or otherwise.²⁸

Throughout this process, the ASP adhered to the written complaint procedures²⁹ and administered the process in a relatively expedient manner.³⁰ After extensive investigations, including polygraph tests on Hall and McCurdy,³¹ the ASP Commission transferred Hall to a Patrol Division in Fort Smith, Arkansas, and demoted him to the rank of corporal.³² Although Hall was originally found to have violated ASP Workplace Harassment and Sexual Harassment policy, review committees subsequently determined (based on the results of Hall's two polygraph tests) that McCurdy's allegations were "unfounded" and that Hall was instead guilty of violating the ASP policy on truthfulness.³³

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 987-88.

29. *See id.* at 985-87. ASP Field Operations Policy and Procedure Manual indicates how a complaint of officer misconduct is investigated. *Id.* at 985. First, a Police/Citizen Complaint Form is completed by the complainant, and then a Special Investigations Unit has thirty days to complete an investigation. *Id.* at 986. The results of the investigation are turned over to the Division Commander with any recommended disciplinary actions. *Id.* If there is a recommended disciplinary action, the Commander then must convene a Disciplinary Review Board ("DRB") for further consideration of the matter. *Id.* Based on majority vote, the DRB recommends disciplinary action to the Assistant Directors for their review to the Director, who renders the final decision. *Id.* An appeal is available for the accused officer if termination or several other enumerated actions are rendered, and the ASP Commission will either approve or revise the Director's decision after a full hearing. *Id.*

30. *See id.* at 993. The entire investigation, which began on July 9, 2002, was completed in two and a half months, and the appeal process lasted another month and a half, with the transfer and demotion occurring on November 15, 2002. *See id.*

31. *Id.* at 988.

32. *Id.* at 989.

33. *Id.* at 988. On July 10, 2002, Lieutenant Nathaniel Jackson was assigned to investigate the allegations. *Id.* at 986. After Jackson administered and analyzed the first polygraph test on Hall, he determined that Hall had violated policy mandating that all employees should be free from all forms of harassment, which includes unwelcome sexual advances and forms of physical contact. *Id.* Jackson reported his findings to Kirkland. *Id.* at 987. Kirkland concluded that, not only had Hall violated the harassment policies, but he had violated the ASP Rules of Conduct regarding the

Based on Hall's conduct on July 5, 2002, McCurdy sued the ASP, contending that she was subjected to a hostile work environment.³⁴ The federal district court in Arkansas held that "the ASP could not be vicariously liable for Sergeant Hall's conduct" and the court granted summary judgment to the defendants.³⁵ On appeal, McCurdy argued that the district court misapplied the Supreme Court's test for the availability of an affirmative defense.³⁶ The ASP responded that the district court was correct in granting the summary judgment and, even if the district court was wrong, Hall's conduct was not severe or pervasive enough to constitute actionable sexual harassment.³⁷ The Eighth Circuit ruled in favor of the ASP, affirming the lower court's grant of summary judgment.³⁸ The Eighth Circuit held that the Supreme Court, in creating the Title VII affirmative defense, did not intend to hold employers "strictly liable for *single* incidents of supervisor sexual harassment."³⁹ Therefore, the Eighth Circuit held that, in cases of *single* incidents of sexual harassment, employers are entitled to an affirmative defense as long as they can prove they promptly exercised reasonable care to prevent and correct any sexually harassing behavior.⁴⁰

use of "coarse language and gestures, insubordination, and improper conduct." *Id.* Kirkland recommended Hall's sanctions (including probation for one year, counseling, and a demotion in rank) to Major J.R. Howard. *Id.* Howard appointed a DRB to review the recommendation. *Id.* After a second round of polygraph tests and informal depositions (in which Hall admitted to some improper conduct), the DRB determined that McCurdy's allegations were "unfounded" but that Hall had violated the coarse language, gestures, and insubordination-truthfulness provisions. *Id.* at 988. The DRB recommended a transfer, demotion, and a psychological evaluation. *Id.* at 988-89. The DRB's recommendations and findings were transferred to Lieutenant Colonel Steve Dozier, who, on September 16, 2002, recommended termination to Colonel Don Melton for violations of the truthfulness provision. *Id.* at 989. Colonel Melton terminated Hall on September 26, 2002. *Id.* Hall appealed the decision to the ASP Commission and the five person panel unanimously reinstated Hall after a hearing on November 15, 2002. *Id.* at 989.

34. *McCurdy v. Ark. State Police*, 375 F.3d 762, 767 (8th Cir. 2004).

35. *Id.* See generally *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) for the introduction of the two-pronged affirmative defense to Title VII claims.

36. *McCurdy*, 375 F.3d at 767.

37. *Id.*

38. *Id.* at 774.

39. *Id.* at 772 (emphasis added).

40. *Id.*

III. LEGAL BACKGROUND

A. *Statutory Law*

Title VII of the Civil Rights Act of 1964 provides the foundation for sexual harassment claims against companies for incidents that occur in the workplace:⁴¹

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 origin⁴²

The Act was originally intended to fight against racial discrimination in the workplace and did not include sex discrimination as one of the original discriminatory categories.⁴³ Thanks to members of Congress who attempted to kill the bill, sex discrimination was added in an "eleventh-hour amendment."⁴⁴ The scope of that protection has been the subject of important case law ever since.⁴⁵

B. *Supreme Court Precedent*

In 1986, *Meritor Savings Bank, FSB v. Vinson*⁴⁶ laid the groundwork for two landmark decisions the Supreme Court issued on the same day in 1998.⁴⁷ In *Meritor*, the Supreme Court held that a hostile work environment is a viable cause of action under Title VII.⁴⁸ In order to establish a hostile work environment claim created by a supervisor, four requirements must be met: "(1) that [the employee] is a member of a protected group; (2) that [the employee] was subject to unwelcome sexual harassment; (3) that the harassment

41. 42 U.S.C. § 2000e-2(a) (2000); see also Melissa R. Null, Note, *Disrespectful, Offensive, Boorish & Decidedly Immature Behavior is not Sufficient to Meet the Requirements of Title VII*, 69 MO. L. REV. 255, 259-60 (2004).

42. 42 U.S.C. § 2000e-2(a).

43. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767 n.1 (1998) (Thomas, J., dissenting).

44. *Id.*

45. See Null, *supra* note 41.

46. 477 U.S. 57 (1986).

47. See *Ellerth*, 524 U.S. 742; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

48. *Meritor*, 477 U.S. at 66-67; see also 29 C.F.R. § 1604.11(a) (2005).

was based on sex; and (4) that the harassment affected a term, condition, or privilege of employment.”⁴⁹

More importantly, for the first time the Court stated that employers were not “always automatically liable” for sexual harassment by supervisors they employ.⁵⁰ The interpretation and scope of the Court’s rejection of strict liability for employers dealing with hostile work environment claims as a result of their supervisors’ actions is highly relevant to *Ellerth* and *Faragher*, the 1998 decisions, and now to *McCurdy*.

In *Meritor*, the plaintiff, Vinson, brought a Title VII action against her bank supervisor and the bank.⁵¹ Vinson claimed that she had “constantly been subjected to sexual harassment” by the bank supervisor and sought injunctive relief and monetary damages.⁵² The testimony at trial indicated that Vinson and her supervisor had sexual intercourse 40 or 50 times over the course of several years and that Vinson was forced into this relationship out of a fear of losing her job.⁵³ Vinson claimed that the supervisor forcibly raped and publicly fondled her on a number of occasions, and that a number of other female employees were subject to similar inappropriate behavior.⁵⁴ Vinson admitted that she never reported this behavior and never utilized the bank’s reporting procedure because she was afraid of the supervisor.⁵⁵ The district court found for the defendants, stating that Vinson was “not the victim of sexual harassment and . . . not the victim of sexual discrimination” at the bank.⁵⁶

The District of Columbia Court of Appeals reversed this decision, finding that there were two types of sexual harassment bases for a Title VII claim.⁵⁷ The appellate court relied heavily on the Equal Employment Opportunity Commission’s (“EEOC”) “Guidelines on Discrimination Because of Sex.”⁵⁸ The guidelines distinguish sexual harassment that involves conditioning an individual’s employment on “[u]nwelcome sexual advances, requests

49. *McCurdy v. Ark. State Police*, 375 F.3d 762, 767-68 (8th Cir. 2004).

50. *Meritor*, 477 U.S. at 72. Although *Meritor* was a unanimous decision, there was a four-justice concurrence, authored by Justice Marshall, arguing against the not “always automatically liable” statement made by Chief Justice Rehnquist in his majority opinion. *Id.* at 74-78. *Meritor*’s importance cannot be overstated, as the *Ellerth/Faragher* affirmative defense stems from the statements of law made in *Meritor*. In fact, the Court in *Faragher* stated that *Meritor* is the “foundation on which we build today” and that the force of stare decisis was “enhanced” because Congress had amended Title VII employer liability provisions since *Meritor* and had not modified its holding, thereby providing implicit legislative approval. *Faragher*, 524 U.S. at 792.

51. *Meritor*, 477 U.S. at 60.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 61.

56. *Id.*

57. *Id.* at 62.

58. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)).

for sexual favors, and other verbal or physical conduct of a sexual nature,” from harassment that creates a hostile working environment.⁵⁹ Because the trial court did not consider the existence and applicability of this latter form of sexual harassment, the court of appeals reversed and remanded.⁶⁰ The appellate court also held that “an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct.”⁶¹

The Supreme Court granted certiorari to clarify the reasoning used by the court of appeals, ultimately affirming the appellate court’s decision but using different rationale.⁶² The Court began by agreeing with the District of Columbia Court of Appeals that a hostile work environment can be enough to establish a Title VII claim.⁶³ The Court, however, pointed out the high threshold for a hostile work environment claim, stating that the harassment “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁶⁴ The Court found that this threshold was clearly met in *Meritor*, not only because of the allegations of forcible rape but also because of the duration of the harassment.⁶⁵

The *Meritor* Court also tackled the issue of employer liability. The EEOC, in its amicus curiae brief, argued that courts should use traditional agency principles as a guide for determining employer liability.⁶⁶ According to the EEOC, in hostile work environment claims, “agency principles lead to ‘a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee’s complaint.’”⁶⁷ The EEOC added that if the victim does not utilize the procedure available to him or her, then the employer should be immune from liability.⁶⁸ In other instances when the procedure is used by the victim, “the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question

59. *Id.*

60. *Meritor*, 477 U.S. at 62.

61. *Id.* at 63.

62. *Id.*

63. *Id.* at 63-64, 66.

64. *Id.* at 67 (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

65. *Id.*; see also Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 445-46 (2002).

66. *Meritor*, 477 U.S. at 70.

67. *Id.* at 71 (quoting Brief for United States and EEOC as Amici Curiae at 26, *Meritor*, 477 U.S. 57 (No. 84-1979)).

68. *Id.* (citing Brief for United States and EEOC as Amici Curiae at 26, *Meritor*, 477 U.S. 57 (No. 84-1979)).

had no reasonably available avenue for making his or her complaint known to appropriate management officials.”⁶⁹

The EEOC’s argument formed the basis of the central disagreement between the majority and the concurrence in *Meritor*. Justice Marshall, arguing for the four-justice concurrence, stated that it is consistent with agency law to set a standard that “an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor.”⁷⁰ Justice Marshall argued that this strict liability standard was used when a tangible employment action arose out of the sexual harassment⁷¹ (“quid pro quo”) and that “[t]here is therefore no justification for a special rule, to be applied only in ‘hostile environment’ cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors.”⁷²

Although the Court agreed with the EEOC that Congressional intent favored agency principles as a guide to courts’ decision-making regarding employer liability standards for hostile work environment cases, the Court ultimately left the issue to be determined another day.⁷³ The Court stated that employers should not be “always automatically liable” for the acts of their supervisors, but the “absence of notice to an employer does not necessarily insulate that employer from liability.”⁷⁴ Similarly, the Court also noted that simply having a procedure for filing a grievance against discrimination that an alleged victim fails to utilize does not insulate the employer from liability.⁷⁵ Although the Court did not agree with the EEOC’s position enough to make a definitive rule on employer liability in *Meritor*, the language of the EEOC’s brief ultimately became the backbone of the Court’s formation of a two-pronged affirmative defense.⁷⁶

Having delayed the issue of employer liability for hostile work environment claims for over a decade, “another day” arrived in 1998. In *Ellerth* and *Faragher*, by a 7-2 decision in each case, the Court ruled that employers were vicariously liable for the actions of their supervisors if the victims suf-

69. *Id.* (quoting Brief for United States and EEOC as Amici Curiae at 26, *Meritor*, 477 U.S. 57 (No. 84-1979)).

70. *Id.* at 75 (Marshall, J., concurring) (citing 45 Fed. Reg. 74,676 (Nov. 10, 1980)).

71. *Id.* at 76. “Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.” *Id.* (citations omitted).

72. *Id.* at 77 (emphasis omitted).

73. *Id.* at 72 (majority opinion).

74. *Id.* (citation omitted). See generally RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).

75. *Meritor*, 477 U.S. at 72.

76. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

ferred a tangible employment action.⁷⁷ If no tangible employment action befell the employee, then an affirmative defense was available to the employer against the hostile work environment allegation.⁷⁸ The Court finally explained the meaning behind *Meritor's* not "always automatically liable" language by laying out this two-pronged affirmative defense for employers in certain hostile work environment claims.

Both *Ellerth* and *Faragher* were cases involving prolonged sexual harassment by men in supervisory positions over their accusers.⁷⁹ In neither of these cases did the plaintiff report or complain to higher management about their supervisors before filing suit.⁸⁰ Additionally, in both cases the district court viewed the alleged harassment as meeting the "severe or pervasive" threshold for Title VII hostile work environment claims.⁸¹

In *Ellerth*, the harassment came from a vice president of one of the five business units at Burlington Industries.⁸² Ellerth alleged that this vice president made comments on three separate occasions that could be construed as threats to deny her tangible job benefits.⁸³ After the district court granted summary judgment for Burlington, the court of appeals, en banc, reversed in a severely fractured decision.⁸⁴

In *Faragher*, the plaintiff, a lifeguard for the City of Boca Raton, Florida, alleged that her two male supervisors sexually harassed her during the five years that she worked for them.⁸⁵ The district court held the City liable for the harassment of its supervisory employees but the Eleventh Circuit, relying on *Meritor*, reversed the district court's decision.⁸⁶ The Supreme Court granted certiorari to review and address the appellate courts' diverging perspectives on Title VII.⁸⁷

77. *Ellerth*, 524 U.S. at 765-66; *Faragher*, 524 U.S. at 807. The Court notes, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

78. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

79. *Ellerth*, 524 U.S. at 747-48; *Faragher*, 524 U.S. at 780-82.

80. *Ellerth*, 524 U.S. at 748-49; *Faragher*, 524 U.S. at 782-83.

81. *Ellerth*, 524 U.S. at 749; *Faragher*, 524 U.S. at 783. See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

82. *Ellerth*, 524 U.S. at 747.

83. *Id.* at 747-48. In one such incident, the vice president told Ellerth, "you know, Kim, I could make your life very hard or very easy at Burlington" and told her to "loosen up." *Id.* at 748 (citation omitted).

84. *Id.* at 749. Eight separate opinions arose out of the decision, with judges disagreeing about the type of Title VII sexual harassment claim and the standard of liability to apply to each claim. *Id.* at 749-51.

85. *Faragher*, 524 U.S. at 780-82.

86. *Id.* at 775.

87. *Ellerth*, 524 U.S. at 751; *Faragher*, 524 U.S. at 786.

The Court in *Ellerth* first discussed the importance of terms such as “quid pro quo” and “hostile work environment.”⁸⁸ The Court pointed out that those phrases were not used or mentioned anywhere in the text of Title VII.⁸⁹ Although *Meritor* had stressed that agency principles controlled the employers’ liability, courts’ use of the two terms increased subsequent to that case.⁹⁰ “Quid pro quo” came to mean that the employer was subject to vicarious liability and, therefore, this became the model cause of action for most plaintiffs in Title VII actions.⁹¹ However, the Court stressed that the underlying question was really whether the employer was vicariously liable for its supervisor and not whether the plaintiff could state a “quid pro quo” claim.⁹² “When we assume discrimination can be proved . . . the factors we discuss . . . and not the categories *quid pro quo* and hostile work environment, will be controlling on the issue of vicarious liability.”⁹³

Referring back to *Meritor*, the Court noted that the Restatement (Second) of Agency is the proper starting point for analysis of the agency principles that determine employer liability.⁹⁴ Restatement section 219(2)(d), which deals with vicarious liability for intentional torts, states that a “master” is subject to liability for the torts of “his servants” acting outside the scope of their employment when “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.”⁹⁵ The Court confirmed that whenever a supervisor took a tangible employment action against the subordinate, he or she “was aided in accomplishing the tort by the existence of the agency relation.”⁹⁶ The Court thought it was clear that the injury, for example the denial of a raise or a promotion, could not have occurred without the agency relation.⁹⁷ Thus, the Court concluded that employment actions taken by the supervisor “become[] for Title VII purposes the act of the employer.”⁹⁸ Having determined this, the Court noted that in situations

88. *Ellerth*, 524 U.S. at 751-52.

89. *Id.* at 752; see 42 U.S.C. § 2000e-2(a)(1) (2000).

90. *Ellerth*, 524 U.S. at 752-53. The two terms first appeared in academic literature. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32 (1979).

91. *Ellerth*, 524 U.S. at 753; see *Davis v. Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) (citations omitted).

92. See *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

93. *Ellerth*, 524 U.S. at 754.

94. *Id.* at 755; see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

95. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958) (emphasis added).

96. *Ellerth*, 524 U.S. at 744.

97. *Id.* at 762.

98. *Id.*

where tangible employment actions do not arise, agency principles governing employer liability are less clear.⁹⁹

The *Ellerth* Court referred back to *Meritor* and suggested that there are factors beyond agency principles that are relevant to the discussion of employer liability.¹⁰⁰ These factors include Congress's intention to promote conciliation rather than litigation within Title VII and the complimentary goals of encouraging the creation of anti-harassment policies by employers and the utilization of those reporting mechanisms by the employees.¹⁰¹ Balancing these competing factors, the Court in both *Ellerth* and *Faragher* held that an employer would be "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages."¹⁰² The Court determined that an employer has an affirmative defense if it is shown: "(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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise."¹⁰³

The Court in *Ellerth* remanded the case so that Burlington could attempt to assert and prove the affirmative defense.¹⁰⁴ In *Faragher*, the City of Boca Raton's lack of a disseminated sexual harassment policy precluded it from successfully arguing the first element, and therefore, the Court reversed the court of appeals' decision and reinstated the district court's judgment in favor of the plaintiff.¹⁰⁵

The *Ellerth/Faragher* affirmative defense served to clarify and expound *Meritor's* two conflicting principles, that a hostile work environment was a viable Title VII claim and that employers should not be always "automatically liable" for the acts of their supervisors.¹⁰⁶ The Court finally settled this tension by creating a two-pronged affirmative defense against hostile work environment claims.¹⁰⁷

99. *Id.* at 763.

100. *Id.* at 764.

101. *Id.*

102. *Id.* at 764-65 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)).

103. *Id.* at 765. The majority added that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

104. *See id.* at 766.

105. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808-09 (1998).

106. *Id.* at 804.

107. *Id.*

C. Eighth Circuit Precedent

The Supreme Court granted certiorari to an Eighth Circuit case, *Todd v. Ortho Biotech, Inc.*,¹⁰⁸ less than a year after *Ellerth and Faragher*. *Todd* involved the sexual assault of an employee by her supervisor during a business trip.¹⁰⁹ At trial, a jury found the employer liable, but on appeal the Eighth Circuit found that the employer took “prompt and effective remedial action” and, therefore, the court reversed.¹¹⁰ After the Supreme Court vacated and remanded in light of *Ellerth and Faragher*,¹¹¹ the Eighth Circuit remanded the case back to the district court to address whether the *Ellerth/Faragher* standard applied.¹¹²

The main issue in *Todd* was whether a single severe act of sexual harassment could rise to the level of a hostile work environment claim.¹¹³ The Eighth Circuit in this case hinted at things to come when it stated, “[n]either the Supreme Court nor this court has squarely addressed this issue, and portions of the opinions in *Ellerth and Faragher* cast doubt on its resolution.”¹¹⁴ The majority of this three judge panel deferred all issues to the district court noting that the district court was better suited to address it.¹¹⁵ Judge Arnold, however, provided some insight into the matter in his concurrence. He stated that, while he supported the decision to remand to allow the employer to argue the newly minted affirmative defense, he had “no doubt that a single severe act of sexual harassment [could] amount to a hostile work environment actionable under Title VII” and saw “nothing in *Ellerth* or *Faragher* to negate this proposition.”¹¹⁶

IV. INSTANT DECISION

A. The Majority Opinion

In *McCurdy v. Arkansas State Police*,¹¹⁷ the Eighth Circuit Court of Appeals considered whether it was appropriate for the district court to have granted summary judgment in favor of the ASP under the United States Su-

108. 525 U.S. 802 (1998).

109. *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 597 (8th Cir. 1999).

110. *Id.*

111. *Id.*

112. *Id.* at 598.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 599 (Arnold, J., concurring).

117. 375 F.3d 762 (8th Cir. 2004), *reh'g en banc denied* (2004), *cert. denied* 125 S. Ct. 1088 (2005).

preme Court affirmative defense test from *Ellerth* and *Faragher*.¹¹⁸ The court began its analysis by categorizing the five or six acts of alleged sexual harassment by Hall on July 5, 2002,¹¹⁹ as a single incident.¹²⁰ Further, the court assumed, for the purposes of the appeal, that the single incident met the “high threshold” requirements for a Title VII hostile work environment claim.¹²¹

Before analyzing the affirmative defense available to the ASP, the *McCurdy* court started with the premise that “Title VII does not hold employers strictly liable for all sexual harassment perpetrated by supervisors.”¹²² Citing *Meritor*,¹²³ the Eighth Circuit stressed the emphasis the Supreme Court put on considering agency principles when determining employer liability under Title VII.¹²⁴ Additionally, the court noted that since *Meritor*, courts of appeals have struggled to create employer liability standards for hostile work environment claims.¹²⁵ Finally, the court distinguished the situation from that in *Ellerth* or *Faragher* by saying that the Supreme Court had never addressed a situation like the one faced in *McCurdy*, where an employer’s liability for a single incident of sexual harassment committed by a supervisor was at issue.¹²⁶

In its analysis of the Supreme Court’s holdings in *Ellerth* and *Faragher*, the Eighth Circuit stated that, for cases of supervisor harassment with no tangible employment action,¹²⁷ agency principles are just one piece to the puzzle.¹²⁸ The court noted that encouraging employers to create anti-harassment

118. *Id.* at 767, 771.

119. *McCurdy v. Ark. State Police*, 275 F. Supp. 2d 982, 984 (E.D. Ark. 2003).

120. *McCurdy*, 375 F.3d at 768.

121. *See id.* at 767-68. “Federal sexual harassment standards are demanding, and *McCurdy* must clear a high threshold to make an actionable claim requiring federal intervention in her workplace in the State of Arkansas.” *Id.* The court commented that some courts may not find a single incident meets this threshold because it lacks severity or pervasiveness. *Id.* at 768 n.6; *see Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003) (holding that a single incident of physical contact where a co-worker grabbed the plaintiff’s buttocks and later made jokes about it was not actionable); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). Because the majority did not believe ASP was liable for Hall’s conduct on the night in question, it declined “to address whether Sergeant Hall’s conduct . . . constitutes actionable sexual harassment.” *McCurdy*, 375 F.3d at 768 n.6.

122. *Id.* at 768.

123. 477 U.S. 57 (1986).

124. *McCurdy*, 375 F.3d at 768.

125. *Id.* at 768-69 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 785 (1985)).

126. *Id.* at 769 n.7.

127. Examples of tangible employment actions include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits” and they are defined as any action that causes “a significant change in employment status.” *Id.* at 769 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

128. *Id.*

policies and reporting procedures and encouraging employees to use those procedures are aims of Title VII in its goal of deterring and eradicating harassment in the workplace.¹²⁹ The court concluded by remarking that cases in which tangible employment actions are taken against the victim were easy to deal with from an agency perspective because “there is assurance the injury could not have been inflicted absent the agency relation.”¹³⁰ The court stated that it was in the cases in which no tangible employment action arose that principles outside of agency law, such as the twin aims of Title VII, came into play.¹³¹ The court summarized the Supreme Court analysis by categorizing hostile work environment claims into two distinct groups, harassment that “culminates in a tangible employment action for which employers are strictly liable” and harassment that occurs without tangible employment action where “employers may assert an affirmative defense.”¹³²

The Eighth Circuit, expressing its disagreement with the affirmative defense created in *Ellerth* and *Faragher*, turned to Justice Thomas’ dissents for guidance.¹³³ The appellate court in *McCurdy* reiterated Justice Thomas’ argument in *Ellerth* that the two-pronged test was not clearly defined and provided little guidance to employers, thereby “ensuring a continuing reign of confusion in this important area of the law.”¹³⁴ The Eighth Circuit remarked that *McCurdy* “fulfills [Justice Thomas’] prophecy.”¹³⁵

Applying the affirmative defense to this case, the court denied *McCurdy*’s argument under the first prong that the ASP failed to exercise reasonable care to prevent and promptly correct the sexually harassing behavior.¹³⁶ The court took a longer look at the second prong, concluding that, in cases of a single incident of harassment without a tangible employment action, requiring the second prong would result in de-facto strict liability for the employer if the employee promptly took advantage of the employer’s reporting procedures.¹³⁷ Therefore, the court modified the Supreme Court’s affirmative defense, proclaiming that the Court’s test did not apply to the situa-

129. *Id.* at 769-70 (citing *Ellerth*, 524 U.S. at 764).

130. *Id.* at 769 (quoting *Ellerth*, 524 U.S. at 761-62).

131. *See id.* at 770.

132. *Id.* at 770 (citing *Ellerth*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998)).

133. *Id.*

134. *Id.* (quoting *Ellerth*, 524 U.S. at 771). Thomas predicted “more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have been begging for guidance.” *Id.* (quoting *Ellerth*, 524 U.S. at 774).

135. *Id.*

136. *Id.* at 770-71. The court looked to the fact that she suffered no harassment after she complained of it. *Id.* The ASP took all necessary steps to promptly investigate the matter and protect the victim. *Id.* at 771.

137. *See id.* at 772. The court proclaimed that “[s]trict adherence to the Supreme Court’s two-prong affirmative defense in this case is like trying to fit a square peg into a round hole. We will not tire ourselves with such an exercise.” *Id.* at 771.

tion in *McCurdy* and that, as long as the ASP met the first prong's requirement, it had an affirmative defense.¹³⁸ The *McCurdy* court admitted that shifting the responsibility onto the "innocent employee" was not fair, but it felt that the Supreme Court had rejected the kind of vicarious liability that the test would impose on employers for single incidents of sexual harassment.¹³⁹ The court decided that expanding strict liability was better left to the highest court, not to the Eighth Circuit.¹⁴⁰ Thus, the majority of this three-judge panel held that the ASP was not liable for the actions of Hall because it swiftly and effectively responded to McCurdy's report of the single incident of sexual harassment.¹⁴¹

B. The Dissent

In dissent, Judge Melloy argued that, because the ASP could not establish the second prong of the *Ellerth/Faragher* affirmative defense, the ASP remained liable assuming that Hall's actions rose to the level of a hostile work environment claim.¹⁴² His disagreement with the majority was based on its modification of what he believed was a "remarkably clear" rule set forth by the Supreme Court.¹⁴³ Judge Melloy referenced the exact language of the two-prong test, noting the use of the word "and" between the two prongs: "I cannot read anything in *Ellerth/Faragher* that creates an exception to the two prong affirmative defense for those cases of single incident harassment that do rise to the level of actionable sexual harassment."¹⁴⁴ He dismissed the majority's fears that denying the use of the affirmative defense for single incidents of sexual harassment would create a strict liability standard for employers.¹⁴⁵ He emphasized that most single incidents of alleged sexual harassment would not meet the high threshold standards for an actionable Title VII claim.¹⁴⁶

The dissent pointed out another circuit's interpretations of this issue as well as prior Eighth Circuit case law which supported his contention.¹⁴⁷ Judge Melloy also noted that the EEOC supported the notion that the *Ellerth/Faragher* defense required both prongs to be met even if the situation

138. *Id.* at 772.

139. *Id.*

140. *Id.*

141. *Id.* at 774.

142. *Id.* at 775 (Melloy, J., dissenting).

143. *Id.* (quoting *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999) (Weiner, J., concurring)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*; see *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir. 1999); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1030 (8th Cir. 2002); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999).

seemed “harsh to a law-abiding employer.”¹⁴⁸ In conclusion, Melloy stated that, while satisfying the first prong of the test might mitigate damages, it alone will not create a complete defense to employer liability.¹⁴⁹

V. COMMENT

Title VII was designed to eradicate discrimination from the workplace. The Supreme Court correctly posited, however, that the Civil Rights Act of 1964 was not a “general civility code” and was not intended to prohibit “genuine but innocuous differences in the ways men and women routinely interact” with one another.¹⁵⁰ The Eighth Circuit in *McCurdy v. Arkansas State Police* failed to keep the purpose of Title VII in mind when it mistakenly read between the lines and distinguished the facts to modify the Supreme Court’s two-pronged affirmative defense against vicarious liability for employers.

Contrary to the Supreme Court’s holding in *Meritor*, the Eighth Circuit’s primary concern in *McCurdy* was to avoid expanding strict liability for employers in situations where there has been only a single incident of sexual harassment.¹⁵¹ This concern is exaggerated however, as most single incident cases will not rise to the level of actionable sexual harassment.¹⁵² Title VII was designed to address conduct so extreme as to “amount to a change in the

148. *Id.* at 776.

149. *Id.*

150. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

151. *McCurdy*, 375 F.3d at 772.

152. For a list of cases where the incidents were not severe or pervasive enough to meet the high threshold claim of hostile work environment see Null, *supra* note 41, at 273 n.114. The footnote references *Duncan v. General Motors Co.*, 300 F.3d 928, 934-35 (8th Cir. 2002), which cites all of these cases. Examples include: *Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding that when employee made jokes aimed at the plaintiff, told her not to wave at police officers “because people would think she was a prostitute,” commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions the behavior in the aggregate was not sufficient to support the hostile work environment claim); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24, 826 (6th Cir. 1997) (when employee reached across plaintiff, stating “[n]othing I like more in the morning than sticky buns” while staring at her suggestively; suggested to her that the land be named “Hootersville,” “Titsville,” or “Twin Peaks”; and asked “weren’t you there Saturday night dancing on the tables?” while discussing property near a biker bar, the court held the behavior to be offensive but not sufficient to support a hostile environment claim); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (holding no hostile work environment when plaintiff’s supervisor asked her for dates, asked her about her personal life, called her a “dumb blonde,” put his hand on her shoulder several times, placed “I love you” notes on her work station, and attempted to kiss her three times).

terms and conditions of employment.”¹⁵³ In fact, *Meritor* limited actionable hostile work environment claims to only those that met a very high threshold, “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule and insult,’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ . . . Title VII is violated.”¹⁵⁴ The Supreme Court in *Clark County School District v. Breeden*, facing a case involving a single incident of sexual harassment, reversed the Ninth Circuit’s decision because the employee failed to state an actionable hostile work environment claim.¹⁵⁵ The Court stressed that a “recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment’”¹⁵⁶ The central issue for the Eighth Circuit in *McCurdy* should not have been how to distinguish and modify the Supreme Court’s two-pronged approach but rather whether *McCurdy*’s claim was actually an actionable hostile work environment claim.

A similar conclusion is echoed by a concurring judge in a Fifth Circuit case that the *McCurdy* court principally relied on to support its unique modification of the *Ellerth/Faragher* test.¹⁵⁷ In *Indest v. Freeman Decorating, Inc.*, the panel of circuit judges affirmed the district court’s dismissal of a hostile work environment claim against a supervisor.¹⁵⁸ All three judges concurred separately and, thus, as Judge Wiener pointed out in his “special concurrence,” none of the writings expressed precedent in the Fifth Circuit.¹⁵⁹ Despite this, the Eighth Circuit relied on Judge Jones’ *Indest* opinion as a basis for holding that employers need only satisfy the first prong of the *Ellerth/Faragher* defense to be free from liability in single incidents of sexual harassment.¹⁶⁰

The Eighth Circuit should have instead followed the logic of Judge Wiener’s concurring opinion, in which he specifically rejected the notion that only one of two prongs is needed to avoid strict liability.¹⁶¹ Judge Wiener

153. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

154. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

155. *Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001).

156. *Id.* (quoting *Faragher*, 524 U.S. at 788 (1998)) (alteration in original).

157. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999).

158. *Id.* at 267.

159. *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (hereinafter *Indest II*).

160. *McCurdy v. Ark. State Police*, 375 F.3d 762, 775 (8th Cir. 2004) (Melloy, J., dissenting).

161. *Indest II*, 168 F.3d at 796-97 (Weiner, J., concurring). “Judge Jones’s exoneration of Freeman’s vicarious liability on but one element of the Court’s new and exclusive two-element, conjunctive defense cannot survive scrutiny under *Ellerth/Faragher*.” *Id.* at 797.

pointed out that the Supreme Court's twin decisions in *Ellerth* and *Faragher* were "remarkably straightforward and perfectly consistent" and that together formed a "comprehensive framework for determining when an employer can be held vicariously liable."¹⁶² The Supreme Court did not make exceptions or limit its holding in *Ellerth* and *Faragher*; in fact, Judge Wiener explained, the Court did not even apply the specific facts of the cases to its holding.¹⁶³ Thus, Judge Wiener' concluded that the Court's rule was meant to be broadly applied, and the Court clearly meant to include both prongs of the test for any actionable hostile work environment claim.¹⁶⁴

Judge Wiener concurred in the opinion because he believed that the supervisor's conduct was neither severe nor pervasive, and therefore, the victim could not recover from the employer in agency.¹⁶⁵ Similar to the *McCurdy* majority, Judge Jones assumed that the harassment had met the threshold for an actionable claim.¹⁶⁶ Judge Jones, again like the Eighth Circuit, distinguished her opinion from the holding of *Ellerth* and *Faragher* by arguing that the Supreme Court test applied only to *longstanding* misconduct by supervisors, not single incidents.¹⁶⁷ Judge Wiener, however, believed that distinguishing the straightforward language of the Supreme Court as Judge Jones did, was "as neat an illusion as any sleight-of-hand artist ever created."¹⁶⁸ He disagreed completely with the concept that the Court somehow meant to limit the breadth of its holding, stating:

[N]owhere does the Court imply, much less express, that short-lived harassment such as the conduct alleged by *Indest* – in which, soon after the onset of the harassment, the plaintiff reports the inappropriate behavior and the employer rapidly and appropriately responds to that report – somehow falls outside the ambit of the Court's mandate.¹⁶⁹

162. *Id.* at 796.

163. *Id.* at 800. "Markedly absent from this entire discussion is any reference – much less any restriction – to the particular facts of *Ellerth*'s case. The Court's focus is squarely on the big picture." *Id.*

164. *Id.*

165. *Id.* at 796. The facts involve a supervisor who allegedly made five sexual comments or gestures over the course of a weeklong business convention. *Id.* at 797. No tangible employment action arose from the harassment. *Id.* The behavior was reported to the company almost immediately, even before the convention ended. *Id.*

166. *Id.* at 797.

167. *Id.* at 797-98.

168. *Id.* at 798.

169. *Id.*

The *Ellerth-Faragher* affirmative defense was meant to cover all potential acts of a supervisor that fall under an employer's vicarious liability under Title VII.¹⁷⁰

The Eighth Circuit jumped ahead of itself in *McCurdy* by bypassing the initial threshold questions that need to be addressed in any Title VII case. Judge Wiener correctly focused his attention as to whether the supervisor's misconduct was actionable.¹⁷¹ The first question is whether a tangible employment action was taken against the victim. The facts in both *McCurdy* and *Indest* indicate that no tangible employment action was taken against the employee. The next inquiry is whether the action of the supervisor meets the *Meritor* requirements of an actionable hostile work environment claim.¹⁷² Judge Wiener stressed a "totality of the circumstances" approach to this threshold question.¹⁷³ In his analysis of *Indest*, he found that neither the conduct nor the work environment that was created was actionable under the law.¹⁷⁴

This second layer of analysis eliminates the unfounded fears of expanded strict liability that were used to justify the Eighth Circuit and Judge Jones's modification of Supreme Court precedent. If a claim is severe enough to cause a hostile work environment, whether it is longstanding or a single incident, then the Supreme Court has clearly said that an employer is liable unless they can meet both prongs of the affirmative defense.¹⁷⁵ However, in most cases of a single incident that is promptly corrected and remedied by the employer as in both *Indest* and *McCurdy*, the quick response prevents the misconduct from rising to the level of an actionable claim.¹⁷⁶ This is what the Supreme Court had in mind when it allowed an employer to be vicariously liable regardless of the duration. As Judge Wiener pointed out, when an em-

170. *See id.* at 801. Judge Wiener commented, "[t]his cherry-picking of but one of two conjoint elements of the defense files directly in the face of identical statements to the contrary in each of the two Supreme Court opinions." *Id.*

171. *Id.* at 802.

172. *Id.*

173. *Id.* at 802-03. The factors that make up the totality of circumstances include: frequency of the conduct, its severity, whether it was physically threatening or merely offensive utterance, and to what degree it interfered with the employee's ability to work. *Id.* (citation omitted).

174. *Id.* at 806.

175. *See id.* at 802. Judge Wiener explained:

It is, of course, theoretically possible for a supervisor to engage in sufficiently severe conduct (e.g., raping, "flashing," or forcibly groping or disrobing the subordinate employee) in such a short period of time that, even though (1) the employee reports the conduct immediately, (2) the employer takes swift and decisive remedial action, and (3) no tangible employment action ensues, the employer could still be held vicariously liable under the *Ellerth/Faragher* 'severe or pervasive' test.

Id. at 804 n.52.

176. *See id.* at 804.

ployer meets the *Ellerth-Faragher* first prong, it “will likely forestall its own vicarious liability for a supervisor’s discriminatory conduct by nipping such behavior in the bud. . . . because the employer will have prevented the supervisor’s behavior from rising to the severe or pervasive level required to be actionable under Title VII.”¹⁷⁷

Other circuits have applied the *Ellerth-Faragher* affirmative defense to actionable hostile work environment claims in a manner similar to Judge Wiener, without question as to whether the harassment was a single incident. The Fourth Circuit, in *Smith v. First Union National Bank*, reversed the lower court’s grant of summary judgment for the employer.¹⁷⁸ The Fourth Circuit explicitly stated that the employer “must prove both elements of the affirmative defense to avoid vicarious liability.”¹⁷⁹ Since the bank failed to satisfy the first element, the court ruled in favor of the employee.¹⁸⁰

The Fifth Circuit was split after the conflicting opinions in *Indest*, but the split was resolved by *Watts v. Kroger Co.*, in which Judge Wiener’s analysis was validated as controlling precedent in that circuit.¹⁸¹ The court in *Watts* said that the *Ellerth/Faragher* opinion superseded the previous Fifth Circuit test, and in order for the employer to avoid vicarious liability, both prongs of the affirmative defense must be fulfilled.¹⁸² In this case, the Fifth Circuit found that the first prong was satisfied, but still held the employer vicariously liable because the employer failed to satisfy the second prong.¹⁸³

Finally, the Tenth Circuit also held that both prongs were necessary in order to meet the Supreme Court’s test.¹⁸⁴ In *Harrison v. Eddy Potash, Inc.*, the court agreed with Judge Wiener and thoroughly dissected the reasoning of Judge Jones.¹⁸⁵ The court stated, “we effectively rejected the position advanced in *Indest*, i.e., that an employer’s prompt corrective action can be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee.”¹⁸⁶ The court found that nothing suggested that *Faragher* or *Ellerth* should be modified or that both prongs do not apply in all cases of hostile work environments created by a supervisor.¹⁸⁷

Whether it is the Supreme Court’s own language or the subsequent precedent set forth by the Fourth, Fifth and Tenth Circuits, the Eighth Circuit conflicts with other courts on this issue and is isolated by its analysis. Assuming *arguendo* that Jamie McCurdy’s allegations of sexual harassment were in

177. *Id.*

178. 202 F.3d 234, 246-47 (4th Cir. 2000).

179. *Id.* at 244.

180. *Id.* at 246.

181. 170 F.3d 505 (5th Cir. 1999).

182. *See id.* at 509-10 (citations omitted).

183. *See id.* at 510.

184. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (10th Cir. 2001).

185. *See id.* at 1025-26.

186. *Id.* at 1026.

187. *Id.*

fact actionable, then the burden of responsibility for those actions should fall on the employer and not on the innocent employee. The Eighth Circuit found that putting the responsibility on the employer would expand strict liability beyond what was authorized under Title VII case law.¹⁸⁸ This is incorrect analysis of Supreme Court precedent.

The distinction between co-worker harassment and supervisor harassment is how the Court has rationalized placing the burden on the employer. In dicta, Justice Marshall pointed out that “a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. . . . [I]t is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.”¹⁸⁹ While liability for co-worker sexual harassment requires notice by the employee, agency principles influence the balancing of the burden onto the side of the employer in cases of supervisor harassment so that vicarious liability is the norm.¹⁹⁰ Since the supervisor is acting on behalf of the employer and he possesses authority given to him by the employer, it warrants the burden shift. Because of the policy justifications for conciliation rather than litigation, and the goal of promoting employer anti-harassment policies, however, the Court was willing to relax agency principles and allow an affirmative defense in certain circumstances.

The Eighth Circuit flipped these principles on their heads in *McCurdy*. Aggressive policies of liability are necessary to continue to fight the problem of sexual harassment in the workplace. While employers cannot be expected to monitor every employee throughout the day, they can be expected to screen their supervisor applicants closely, have a rigid anti-harassment policy in place, and create a workplace culture that encourages reporting and use of those policies. Allowing the employer to simply act reasonably and promptly when an allegation of hostile work environment is made does not go far enough. Supervisors are in a unique position of power over their subordinates, and therefore, employers have the responsibility to ensure that their supervisors will not abuse that power. The Eighth Circuit, in an effort to limit that responsibility and maintain what it felt was the proper liability balance, contrived a modified *Ellerth-Faragher* affirmative defense that applies to situations like that in *McCurdy*. This was an erroneous interpretation of Supreme Court precedent based on misguided fears and puts the Eighth Circuit in direct conflict with every other circuit that has dealt with the issue. Although the outcome in *McCurdy* may have been the proper one, the law that was created was a misapplication of Title VII precedent and is incompatible with the Supreme Court’s affirmative defense in *Ellerth* and *Faragher*.

188. *McCurdy v. Ark. State Police*, 375 F.3d 762, 772 (8th Cir. 2004).

189. *Meritor v. Sav. Bank*, *FSB v. Vinson*, 477 U.S. 57, 76-77 (Marshall, J., concurring)

190. *Id.* at 77.

VI. CONCLUSION

The Supreme Court provided a clear and straightforward affirmative test that was meant to cover all hostile work environment claims. In an attempt to interpret self-proclaimed ambiguity, the Eighth Circuit inappropriately modified the requirements for an affirmative defense, making it easier for employers to avoid liability for the actions of their supervisors. The ramifications of this decision have yet to be seen, but the relaxation of the Supreme Court's standards create a slippery slope that will render thousands of Americans without actionable claims for the harassment and discrimination thrust upon them by their supervisors.

JOHN C. AYRES