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The Changing Burden of Employer Liability for Workplace Discrimintation

Elizabeth M. Brama

Note

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Kimberly Ellerth worked as a salesperson for Burlington Industries before she quit, claiming she had been forced out of her job by workplace sexual harassment.[1] Ellerth alleged that Ted Slowik, a supervisor and vice president of her division, repeatedly propositioned her, made lewd and offensive sexual remarks, and threatened her job when she declined his advances.[2] Ellerth did not inform her superiors about Slowik's behavior, however, and did not suffer any economic detriment because Slowik never followed through on his threats.[3] Ellerth filed EEOC charges following her resignation and later sued Burlington, claiming that Slowik's sexual harassment and her alleged constructive discharge violated Title VII of the Civil Rights Act of 1964.[4] The federal district court granted summary judgment for Burlington on Ellerth's claims, concluding that the company did not know or have reason to know about the harassment.[5] The Seventh Circuit Court of Appeals, sitting en banc, reversed in eight separate opinions.[6] The Supreme Court held that Ellerth may have stated a sexual harassment claim and remanded the case to give her the

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1. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2262 (1998).
2. *See id.*
3. *See id.*
4. *See id.* at 2262-63.
5. *See* Ellerth v. Burlington Indus., 912 F. Supp. 1101, 1118 (N.D. Ill. 1996).
6. *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 494 (7th Cir. 1997) (en banc) (per curiam).

opportunity to state a hostile work environment claim.[7] In remanding the case, the Court also gave Burlington the opportunity to prove (1) that it exercised reasonable care to prevent and correct harassment, and (2) that Ellerth unreasonably failed to take advantage of Burlington's anti-harassment policies.[8]

In a companion case, the Supreme Court also ruled on the claims of Beth Ann Faragher, a female lifeguard for the city of Boca Raton, who experienced similar unwanted sexual advances and offensive comments.[9] Male lifeguards supervising Faragher told her to "[d]ate me or clean toilets for a year"; suggested she should have sex with them because all the female lifeguards had sex with the male lifeguards; simulated sex with another female lifeguard; and made crude, disparaging remarks about the shape of Faragher's body.[10] Faragher did not complain to higher management about this conduct,[11] but brought a claim against the City after she quit, alleging that it had allowed the lifeguard supervisors to create a hostile work environment.[12] The district court held that the city was liable for its employees' conduct because it should have known about the pervasive harassment.[13] An en banc Eleventh Circuit reversed because it found that the lifeguards were not acting within the scope of their employment.[14] The Supreme Court reversed the Eleventh Circuit's decision, holding that the city was vicariously liable because it unreasonably failed to promulgate a sexual harassment prevention policy.[15]

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7. *See Burlington*, 118 S. Ct. at 2271 (noting that Ellerth's arguments in the Court of Appeals had focused on "existing case law which held out the promise of vicarious liability for all quid pro quo claims," and instructing the district court to determine whether to allow Ellerth to amend her complaint in light of the Court's decision in *Burlington*).

8. *See id.* at 2270-71.

9. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2279 (1998).

10. *Id.* at 2280-81.

11. *See id.* at 2281.

12. *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1561 (S.D. Fla. 1994).

13. *See id.* at 1563-64. The court also found that Faragher's supervisors were acting as the city's agents when they harassed Faragher. *See id.* at 1564. The court awarded one dollar in damages to Faragher for her Title VII claims. *See id.* at 1565.

14. *See* Faragher v. City of Boca Raton, 111 F.3d 1530, 1537 (11th Cir. 1997) (en banc).

15. *See Faragher*, 118 S. Ct. at 2293 (holding that the City of Boca Raton did not satisfy its duty to prevent and remedy harassment because the city

In 1998, the United States Supreme Court's decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* changed the landscape of sexual harassment law.[16] These companion cases highlight the lack of uniformity in lower courts regarding the applicable standards for assessing employer liability for workplace sexual harassment.[17] Although the Supreme Court announced a definitive standard in *Burlington* and *Faragher*, it did so by utilizing the old *McDonnell Douglas* burden-shifting scheme[18] and by promulgating a unique affirmative defense for employers seeking to avoid liability.[19] As the *Burlington* decision illustrates, the new affirmative defense so diverges from previous lower court approaches that many appellate courts have remanded sexual harassment cases for more discovery regarding employers' ability to assert the defense.[20]

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did nothing to disseminate its harassment policy, did not check the conduct of beachfront employees, and did not provide a means by which the female lifeguards could report harassment to someone with greater authority than the harassing supervisors).

16. *Burlington* and *Faragher* were both decided on June 26, 1998.

17. *See supra* notes 5, 6, 12-14 and accompanying text. The question of when an employer should be liable for the torts of its employees has been called "[o]ne of the most hotly contested legal questions in sexual harassment litigation today" and "'the most difficult legal question' in a sexual harassment case." SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 23.01 (1997) (citing Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)). This is not surprising because the plaintiff-employee is rarely harassed by the actual employer because the "employer" is usually an institution or corporation. Rather, the harasser is either a co-worker or supervisor. The plaintiff-employee, however, often wants to sue the employer either because the employer has the financial or other means to remedy the situation, or because the employee wants the employer to take responsibility for its workplace environment. The question then arises whether the employer should be liable for its employees' inappropriate actions, and, if so, to what extent.

18. *See infra* notes 35-41 and accompanying text.

19. *See* Dominic Bencivenga, *Looking for Guidance: High Court Rulings Leave Key Terms Undefined*, 220 N.Y. L.J. 5, 8 (1998) (noting that the *Burlington* and *Faragher* decisions "include new guidelines for establishing liability, and for the first time, allow employers a defense against liability").

20. *See supra* note 8 and accompanying text; *see also* Reinhold v. Virginia, 151 F.3d 172, 176 (4th Cir. 1998) (remanding the case to the district court for a determination whether the employer had an anti-harassment policy in place and whether the employee unreasonably failed to take advantage of it); Alverio v. Sam's Warehouse Club, 9 F. Supp. 2d 955 (N.D. Ill. 1998) (denying a motion for summary judgment because the lack of evidence in the record prohibited the court from determining whether Sam's could invoke the vicarious liability affirmative defense).

This Note evaluates the Supreme Court's new affirmative defense for employers and considers its effect on existing tests for Title VII harassment and discrimination.[21] Part I describes employer liability standards as they existed before the Supreme Court decided *Burlington* and *Faragher*. Part II examines *Burlington* and *Faragher*'s place in the search for a reasonable employer liability standard for all Title VII claims. Part II also asserts that harassment and discrimination standards should be streamlined for the benefit of litigants, for the sake of consistency in Title VII adjudication, and to promote judicial economy. This Note concludes that the Court's creation of a valid affirmative defense is a cue that the *McDonnell Douglas* analysis must be subtly altered so that the proper analysis of employer liability for workplace harassment depends only on the ability to prove a tangible or non-tangible job detriment.

21. Harassment is a subset and extension of the original protections against discrimination provided by Title VII. For the purposes of this Note, however, the term "harassment" is used to indicate the kind of bothersome and threatening behavior that occurred in *Burlington* and *Faragher*. Harassment includes, for example, unwanted sexual pestering (hostile work environment) and threats to fire or deny promotion unless an employee cooperates with sexual advances (quid pro quo). In the latter example, it does not matter whether the person threatening the employee carries through with the threat. Thus, "harassment" is simply a broad term covering both quid pro quo and hostile work environment claims.

"Discrimination" encompasses all other Title VII violations except retaliation. It refers to a disparate impact or disparate treatment based on the victim's membership in a protected class and is a separate cause of action from workplace harassment. An example of "discrimination" as it is used here is the failure to hire a woman because of her race or gender.

It is necessary to distinguish between discrimination cases and harassment cases. Before the *Burlington* and *Faragher* decisions, the proper test for employer liability depended significantly on whether the plaintiff brought a discrimination or harassment action. This Note argues that the correct analysis after *Burlington* and *Faragher* is to group all claims based on whether they resulted in a tangible job detriment (as in quid pro quo and discrimination claims), *see infra* note 31, or merely affected the terms and conditions of employment.

I. THE STATE OF EMPLOYER AND EMPLOYEE AGENCY RELATIONSHIPS BEFORE *BURLINGTON* AND *FARAGHER*

A. THE ESTABLISHMENT OF HARASSMENT CAUSES OF ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 made it unlawful to materially change the job conditions of an employee because of his or her race, color, religion, sex, or national origin.[22] Title VII allowed an employee to sue for sex discrimination in the same way he or she could sue for racial or religious discrimination. Although sex was included in the language of Title VII, it did not initially garner the same respect as other protected classes.[23] Consequently, the first harassment cases resulted from claims of race, rather than sex, discrimination.[24]

Harassment was not immediately recognized as a cause of action under Title VII. It was not until 1980 that the EEOC promulgated guidelines[25] allowing a cause of action for "sexual harassment" as a form of sex discrimination.[26] Sexual harass-

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22. Title VII makes it unlawful "for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

23. Gender protection had an inauspicious beginning; "sex" was added as an amendment to the bill in an attempt to kill it. Despite this attempt, the amendment was approved, and the bill was signed into law on July 2, 1964. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 15, 26 (2d ed. 1995).

24. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 100 (1995). The first employer liability case involved a plaintiff-employee who was discharged for his inability to get along with co-workers who inflicted racial insults upon him. *See id.* (citing EEOC Dec. No. YSF 9-108, 1 Fair Empl. Prac. Cas. (BNA) 922 (1969)). The EEOC held that the plaintiff had an actionable Title VII claim because an "[e]mployer is required to maintain a working environment free of racial intimidation." *Id.*

25. The EEOC guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1614.11(a) (1997).

26. Women began to bring sexual harassment claims even before the EEOC proposed recognizing sexual harassment as a violation of Title VII, but courts were skeptical. They found those claims "ludicrous" and believed that "the only sure way an employer could avoid such charges would be to have employees who were asexual." BARBARA ALLEN BABCOCK ET AL., SEX

ment claims brought pursuant to Title VII have, however, increased dramatically in recent years.[27] In the wake of this explosion of sexual harassment litigation, sexual harassment claims are now commonly understood to fall into one of two categories: "quid pro quo" claims and "hostile work environment" claims.

The courts have established the "quid pro quo" and "hostile work environment" terminology to distinguish between different kinds of harassment.[28] "Quid pro quo" harassment occurs when a supervisor or employer threatens to impose a job detriment on an employee if he or she fails to respond invitingly to the supervisor's sexual advances.[29] A job detriment generally

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DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 580 (2d ed. 1996) (quoting Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975)).

The EEOC's proposed new claim for "sexual harassment" also met with a great deal of opposition during the public commentary period, especially from then-Reagan transition appointee Clarence Thomas. *See* Oppenheimer, *supra* note 24, at 115-16. Thomas was worried that this new claim would result in many frivolous lawsuits and attempts to accomplish the impossible task of ridding the workplace of insult. *See id.* at 116. The regulations were nonetheless adopted in September of 1980, and EEOC director Eleanor Holmes Norton signed them into law in November of that year. *See id.* at 114.

27. The number of sexual harassment charges filed with the EEOC increased from 75 in 1980 to 7,495 in 1991 and has continued to rise. *See* 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 3 (2d ed. 1994). The number of charges filed with the EEOC and with state agencies increased by 150% between 1990 and 1995. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE PROGRAM, SEX DISCRIMINATION ISSUES A-3 (1998). It is for this reason that the background of this Note focuses to such an extent on employer liability for *sexual* harassment. Discussions about employer liability for harassment have focused largely on gender harassment, and this is the area in which harassment analysis is most fully developed.

28. The terms "quid pro quo" and "hostile work environment" were not found in any statute or EEOC guideline. They were instead first used in law reviews, and then adopted by the courts. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979); *see also* Henson v. City of Dundee, 682 F.2d 897, 908 n.18, 909 (11th Cir. 1982).

29. Quid pro quo is a unique form of gender discrimination resulting in a tangible job detriment. By definition, the supervisor uses his or her power over the employee to request a sexual favor. *See* BABCOCK ET AL., *supra* note 26, at 581.

> The early cases all dealt with a form of sexual harassment that has come to be known as "quid pro quo" harassment . . . . In these situations, supervisors fired women or denied them promotions or took other action that adversely affected their employment status because the women had rejected the supervisor's sexual advances.

Id.; *see also* Martha F. Davis, *Court Clarifies Sexual Harassment Tests:*

involves a threatened demotion, termination, transfer, or decrease in responsibility and must be more serious than a mere inconvenience to be actionable.[30] These kinds of detriments are known as "tangible job detriments."[31]

Conversely, a hostile work environment claim does not involve a tangible job detriment. Rather, in this type of case, the co-worker or supervisor badgers the employee with unwanted attention that significantly interferes with the employee's work.[32] The Supreme Court first recognized this kind of harassment claim in *Meritor Savings Bank, FSB v. Vinson*.[33] In *Meritor*, the Court determined that a hostile work environment claim is not actionable unless the plaintiff-employee could show that the harassment was both abusive and serious enough to alter the conditions of employment.[34] The Court

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Same-Sex Harassment Is Deemed Actionable; Employers May Be Vicariously Liable, but Not Schools, NAT'L L.J., Aug. 10, 1998, at B10 ("The classic example of quid pro quo harassment is the threat, uttered by someone with actual or apparent authority, of 'sleep with me or you're fired.'"). Because the proposition (accompanied by a threat) is usually sexual in nature, it tends to depend on the sex of the victim. This common dependence makes quid pro quo a uniquely gender-related cause of action; it is one claim that is extremely unlikely to be available for victims suffering from racial, ethnic, or religious discrimination.

30. *See* BABCOCK ET AL., *supra* note 26, at 581.

31. In *Burlington* and *Faragher*, the Supreme Court required courts to focus on the impact on the employee rather than on the acts of the employers. *See infra* note 92 and accompanying text. Thus, the employee must prove either a tangible job detriment or a non-tangible job detriment that negatively affects the terms and conditions of employment. A "tangible job detriment" occurs when an employee suffers an outright harm as a result of discrimination or harassment. Examples of tangible job detriments include termination, failure to hire, demotion, unfavorable transfer, and other such negative impacts on the employee. Courts used the tangible job detriment terminology before *Burlington* and *Faragher*, but determined the nature of the plaintiff's case according to the actions of the employer, not the impact on the employee.

32. According to the EEOC guidelines, a hostile work environment claim arises whether or not there is a tangible job detriment if the harasser's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1997). Such conduct might include suggestive comments, lewd or racially-insulting jokes, offensive pictures, and the like.

33. 477 U.S. 57, 64-65 (1986).

34. *Id.* at 67. "For sexual harassment to be actionable, it must be sufficiently *severe* or *pervasive* 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (emphasis added and citation omitted). However, the test to determine whether an employee suffered from a hostile work environment is not exact; rather, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the cir-

thereby made the hostile work environment cause of action a viable claim for employees, while concurrently limiting the situations in which the cause of action could be brought.

B. EMPLOYER LIABILITY FOR DISCRIMINATION UNDER *MCDONNELL DOUGLAS*

In 1973, the Supreme Court established in *McDonnell Douglas Corp. v. Green*[35] a three-part burden-shifting analysis to determine whether an employer had an improper motive for imposing a job detriment on an employee and whether the employer should therefore be liable for discrimination. Percy Green, an employee of McDonnell Douglas, sued the company, claiming he had been fired for racially discriminatory reasons.[36] McDonnell Douglas maintained that Green was fired for his participation in illegal protest activities.[37] Justice Powell, writing for the Court, announced a three-part test to determine McDonnell Douglas's liability.[38] As this test stands today, the plaintiff must first establish a prima facie case of employment discrimination.[39] If the plaintiff establishes a prima facie case, the burden then shifts to the employer to prove that it had a legitimate business purpose for rejecting the plaintiff.[40] If the employer sustains this burden, the bur-

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cumstances." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

35. 411 U.S. 792 (1973).

36. *See id.* at 794.

37. *See id.* at 796.

38. *See id.* at 802-04.

39. *See id.* at 802. Plaintiffs originally had to prove four elements to establish a prima facie case. A complainant had to show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. The Court further noted that "[t]he facts will vary necessarily in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

40. *See id.* at 802. The Supreme Court later noted the significance of this shift. The burden remains on the plaintiff to adequately establish a prima facie case to the jury even if the defendant fails to show a legitimate business motivation for its actions. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509-10 (1993). If, however, the defendant succeeds in proving a legitimate business reason, summary judgment will be granted to the defendant despite the showing of a prima facie case. *See id.* at 510-11. The cause of action is only resurrected if the plaintiff succeeds in proving pretext. *See id.* at 511.

den again shifts to give the plaintiff the opportunity to prove that the employer's stated reason was pretext.[41] This test has been adopted and applied to most Title VII claims,[42] including retaliation,[43] quid pro quo,[44] and hostile work environment[45] claims. After the Court recognized harassment as a valid Title VII claim, however, it became clear that the *McDonnell Douglas* test was not an appropriate standard upon which to base employer liability in all situations.[46] The reason it was inap-

41. *See McDonnell Douglas*, 411 U.S. at 804.

42. *See* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 713 (7th Cir. 1998) ("Although the *McDonnell Douglas* standard originated and evolved in cases involving racial discrimination in employment, it has been extended to all sorts of other discrimination not even limited to the employment setting.").

43. A prima facie case of retaliation requires the employee-complainant to show three things: (1) he or she filed a charge of discrimination; (2) the employer took adverse action against the employee; and (3) the adverse action was linked to the filing of discrimination charges. *See* Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995); *see also* Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 442 (4th Cir. 1998) (reiterating that the *McDonnell Douglas* proof and burden-shifting rules apply to retaliation and noting the above requirements for a prima facie case).

44. Currently, there are four elements of a prima facie case of quid pro quo harassment. The employee must show the following: (1) he or she was a member of a protected class; (2) he or she was subjected to unwelcome sexual advances; (3) the request was based on gender; and (4) submission to the request was a condition for receiving job benefits or avoiding job detriments. *See, e.g.*, Cram v. Lamson & Sessions Co., 49 F.3d at 473; Kauffman v. Allied Signal Inc., 970 F.2d 178, 186 (6th Cir. 1991). For situations in which a job applicant was denied a particular position or promotion, a variation of this test has been adopted. The complainant must prove: (1) that she is a member of a protected class; (2) that she was subjected to unwelcome sexual advances to which members of the opposite sex were not subjected; (3) that she applied for the position and was qualified for and the employer was accepting applications for that position; (4) that she was rejected despite these qualifications; and (5) that after the rejection, the positions remained open, and other applicants with like qualifications were considered. *See* Henson v. City of Dundee, 682 F.2d 897, 911 n.22 (11th Cir. 1982). *See generally* Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998).

45. A plaintiff established a prima facie case of hostile work environment by proving the following: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment was based on gender; (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known about the harassment and failed to take appropriate remedial action. *See* Henson v. City of Dundee, 682 F.2d at 903-05. *See generally* Catherine M. Maraist, Note, Faragher v. City of Boca Raton: *An Analysis of the Subjective Perception Test Required* by Harris v. Forklift Systems, Inc., 57 LA. L. REV. 1343 (1997).

46. Courts might have recognized this whether or not harassment became such a confused issue. *See Latimore*, 151 F.3d at 714 (noting, in a situation in

propriate for harassment situations is fairly clear—there is never a legitimate reason for harassing an employee, regardless of the employer's motives. Thus, courts needed a different standard to determine the extent of employer liability for workplace harassment.

C. SUPERVISOR LIABILITY STANDARDS FOR WORKPLACE HARASSMENT LEADING UP TO *BURLINGTON* AND *FARAGHER*

Prior to *Burlington* and *Faragher*, the extent to which employers were held liable for workplace harassment was primarily dependent on the particular Title VII cause of action the plaintiff-employee chose to file.[47] Because a quid pro quo demand usually results in a tangible job detriment, courts have fairly uniformly held that the employer should be strictly liable for such acts by its employees.[48] The Supreme Court acknowledged this consensus in *Meritor*, stating that "the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."[49]

The standard has been less clear, however, for hostile work environment claims and unfulfilled quid pro quo threats.[50] The

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which the court was asked to apply *McDonnell Douglas* to a credit discrimination case, that "[t]he Supreme Court has reminded us that *McDonnell Douglas* was not intended to be a straitjacket into which every discrimination case must be forced kicking and screaming") (citing *McDonnell Douglas*, 411 U.S. at 802 n.13, and United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)).

47. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2264 (1998). A quid pro quo claim could result in strict liability, while a hostile work environment claim lead the courts to apply whatever vicarious liability test existed in their jurisdiction. *See id.* at 2264-65. As the Supreme Court noted, Ellerth brought a quid pro quo suit (even though her supervisor did not follow through on his threats) because the strict liability standard gave her a better chance of forcing liability on Burlington Industries than would a hostile work environment claim. *See id.* at 2265, 2271.

48. The common presumption is that an employee must be using his or her agency status to inflict such a detriment, and that employers are responsible for noticing these situations. *See* N. James Turner, *Employer Liability for Acts of Sexual Harassment in the Workplace: Respondeat Superior and Beyond*, FLA. B.J., Dec. 1994, at 41, 42; *see also* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("Title VII demands that employers be held strictly liable for the discriminatory employment decisions of their supervisory personnel who are delegated the power to make such employment decisions.").

49. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 70-71 (1986); *see supra* text accompanying note 33.

50. The terms "unfulfilled quid pro quo threats" or "incomplete quid pro

Supreme Court raised the issue of vicarious liability for hostile work environment claims in *Meritor*, but declined to establish a standard for determining employer liability. Rather, the Court simply instructed lower courts to use agency doctrine to discern liability in this area.[51] The Court also noted that the standard should fall somewhere between strict liability[52] and

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quo" mean that the harasser threatened a tangible job detriment if the victim did not comply with sexual demands, but that the harasser never instituted such a detriment against the employee. *See Burlington*, 118 S. Ct. at 2263. This category of sexual harassment is usually grouped with hostile work environment claims for purposes of determining vicarious liability, because neither unfulfilled quid pro quo threats nor hostile work environments result in a tangible job detriment.

51. *See Meritor*, 477 U.S. at 72. The Court stated the following:

> We . . . decline . . . to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress's decision to define "employer" to include any agent of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Id. (citation omitted); *see also* Katherine Philippakis, *When Employers Should Be Liable for Supervisory Personnel: Applying Agency Principles to Hostile-Environment Sexual Harassment Cases*, 28 ARIZ. ST. L.J. 1275, 1278 (1996) (noting the void left by *Meritor*).

52. The EEOC, however, has consistently advocated strict liability:

> Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

29 C.F.R. § 1614.11(c) (1980). The EEOC did temporarily disavow this stance, though, in its *Meritor* amicus brief. In that brief, the EEOC proposed that 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. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment . . . . In all other cases, 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 had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Brief for United States and EEOC as Amici Curiae at 26, *Meritor* (No. 84-

allowing employers to avoid liability by claiming ignorance.[53] Lower federal courts have conscientiously followed this directive, but the result has been the development of myriad tests for employer liability.[54]

The *Restatement (Second) of Agency*[55] offers a number of theories under which an employer may be held liable for the torts of its servants.[56] An employer is generally liable under the doctrine of respondeat superior for tortious acts of its em-

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1979), *cited in Meritor*, 477 U.S. at 71.

Despite this apparent change in the EEOC's stance, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, also advocated strict liability in a *Meritor* concurrence:

> The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer liability with respect to agents and supervisory employees . . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." I would adopt the standard set out by the Commission.

477 U.S. at 75 (quoting 45 Fed. Reg. 74,676 (1980)). The EEOC's apparent about-face (even though the strict liability EEOC guideline is still in effect), combined with judicial interpretation of the EEOC's position, has only added to the confusion about agency theory and vicarious liability.

53. *See Meritor*, 477 U.S. at 72.

54. *See infra* notes 70-83 and accompanying text.

55. The applicable section of the Restatement reads:

> § 219. When Master is Liable for Torts of His Servants
>
> (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:
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> (a) the master intended the conduct or the consequences, or
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> (b) the master was negligent or reckless, or
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> (c) the conduct violated a non-delegable duty of the master, or
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> (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.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

56. There are a number of policy justifications for using agency theory to impose liability on employers for their supervisors' wrongful acts: First, such liability places some responsibility on the employer to monitor and control its workplace. Second, liability is placed on the entity with the greatest ability to provide the harmed employee with relief. Third, this method spreads the risk of harm as a cost of doing business. Finally, as with agency theory generally, vicarious liability requires the employer to ensure that it is placing authority in the hands of responsible people. If the law did not place some responsibility on the employer, there would be no incentive to choose appropriate, responsible agents.

ployees committed within the scope of employment.[57] Most courts, however, have been reluctant to find that a sexual harasser is acting within the scope of his or her employment.[58]

Nevertheless, there are two instances in which an employer may be liable[59] even if the employee is not acting within the scope of employment.[60] First, an employer will be liable when it commits a tort or when it fails to control the work of others.[61] This situation is known as "notice liability" because the employer is held liable when it knew or should have known[62] of the harassing conduct and failed to take appropri-

57. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

58. *See* Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 674 n.38 (1995). EEOC guidelines suggest that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment .... However, if the employer becomes aware of work-related sexual misconduct and does nothing to stop it, the employer, by acquiescing, has brought the supervisor's actions within the scope of employment." EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT § D(2)(c)(1) (1990).

59. *See* Lewis & Henderson, *supra* note 58 (noting that courts were most likely to hold employers' liable under a Restatement § 219(2)(b) notice liability standard or a § 219(2)(d) "aided by the agency relationship" standard). *But see* Oppenheimer, *supra* note 24, at 72 (classifying employer liability into four categories). Oppenheimer's first theory of vicarious liability is respondeat superior, in which the employee acts within the scope of his or her employment. *See id.* at 72. The second theory provides for employer liability "when an employee engages in wrongful conduct outside the scope of employment, if the employee took advantage of his position with the employer to commit the act." *Id.* The third theory imposes liability when the employer violated its public responsibility by delegating a non-delegable duty to employees. *See id.* Finally, direct liability is imposed (in Oppenheimer's terminology) when the employer is negligent enough to be directly responsible for the harassing environment. *See id.*

60. According to some scholars, every instance in which an employer is liable for its agent's actions outside the scope of employment is called "direct liability." *See* Philippakis, *supra* note 51, at 1280. Scholars use this term because the employer is liable not for the employee's actions, but for its own negligent failure to monitor the workplace, inappropriate grant of authority, negligent hiring and firing, or negligent failure to respond to harassment about which it should have had actual or constructive knowledge. *See id.* Thus, a court applying agency theory to impute employer liability must distinguish between the confusing terminology of notice liability, vicarious liability, direct liability, and respondeat superior. *See supra* note 59; *infra* notes 61-64 and accompanying text.

61. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

62. The Restatement also states that an employer may be liable when the master intended the conduct or when the employer attempted to delegate a non-delegable duty, but these standards are rarely used in the sexual harassment arena. Rather, notice liability encompasses a more general negli-

ate remedial measures.[63] The second instance in which an employer may be held liable even when the employee acts outside the scope of employment occurs when the agent commits a tort by means of his or her agency status.[64] This situation is termed "vicarious liability." Under the *Restatement (Second) of Agency*, an employer is vicariously liable if the employee is aided by the agency relationship in carrying out the harassment, or the agent utilized his or her apparent authority[65] to commit a tortious act and the victim relied on that authority.[66]

While any finding of notice or vicarious liability would ensure an employer's liability under the Restatement, federal courts have not uniformly embraced the Restatement. Courts have instead mixed notice and vicarious liability standards[67] to establish a number of different tests.[68] The result, of course, depended on each circuit's determination whether harassment falls within the scope of the harasser's employment[69] and each circuit's unique application of the principles set forth in the Restatement.

Prior to *Burlington* and *Faragher*, at least six different employer liability standards emerged as a result of the *Meritor* directive.[70] These standards ranged from an "aided by the

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gence standard. *See id.*

63. Some authors refer only to this as "direct liability." *See* Oppenheimer, *supra* note 24, at 72.

64. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958); *see also id.* § 219(2) cmt.

65. According to the EEOC, a victim has a greater claim that the harasser acted within the scope of his apparent authority if the employer does not have a strong anti-harassment policy and effective curative measures. *See* EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, *supra* note 58, § D(2)(c)(2).

66. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). Others have noted that one is aided by the agency relationship *because* he or she has apparent authority to act on behalf of the employer and close proximity to the harassed employee. *See* Philippakis, *supra* note 51, at 1286, 1292. This alternate theory of vicarious liability may therefore be redundant.

67. According to some legal scholars, this mixture of liability standards means that the courts have generally been misguided in their application of agency doctrine. *See* Oppenheimer, *supra* note 24, at 73.

68. *See infra* notes 70-83 and accompanying text.

69. Although a determination that harassment fell within the scope of employment was rare, some circuit courts found it possible. Moreover, the Restatement provides that "[a]n act may be within the scope of employment although consciously criminal or tortious." RESTATEMENT (SECOND) OF AGENCY § 231 (1958).

70. *See* Lewis & Henderson, *supra* note 58, at 670 (introducing a comprehensive discussion of previous sexual harassment vicarious liability standards and consideration of the standards on a circuit-by-circuit basis).

agency relationship" standard to a negligence/"actual or constructive knowledge" standard. In the Seventh[71] and Ninth[72] Circuits, for example, the primary question was whether the appropriate managing agent had actual or constructive knowledge of the harassment. In the First,[73] Fourth,[74] Fifth,[75] and Eighth[76] Circuits, an employer was held liable if it knew or should have known about the hostile work environment but failed to take appropriate remedial steps.

The other circuits promulgated an even more confusing array of standards. An employer in the Second Circuit was liable if the agent had actual or apparent authority to act on the employer's behalf, the harasser was aided by the agency relationship, the employer knew or should have known of the hostile work environment, or the employer had no remedial system in place.[77] The Eleventh Circuit adopted a variation of this standard, finding an employer liable only if the employer knew or should have known about the harassment and failed to take remedial action, the harassing employee acted within the scope of employment, or the harassing employee was aided in the harassment by the agency relationship.[78] In contrast, the

71. *See* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997) (en banc) (per curiam) (stating that a majority of the judges on the panel agreed that "the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability"), *aff'd*, Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

72. *See* Stanford Edward Purser, Note, Young v. Bayer Corp.: *When Is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 B.Y.U. L. REV. 909, 919-20 n.51 (citing Nichols v. Frank, 42 F.3d 503, 508 (9th Cir. 1994) ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known . . . .")).

73. *See* Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 437 (1st Cir. 1997).

74. *See* Reinhold v. Virginia, 135 F.3d 920, 930 (4th Cir. 1998), *opinion withdrawn and superseded upon reh'g*, 151 F.3d 172 (4th Cir. 1998).

75. *See* Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992).

76. *See* Davis v. City of Sioux City, 115 F.3d 1365, 1368-69 (8th Cir. 1997); *see also* Todd v. Ortho Biotech, Inc., 138 F.3d 733, 737-38 (8th Cir. 1998) (declining to impose liability on employer where employer took prompt remedial action when it learned about employee's sexually harassing behavior).

77. *See* Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997); *see also* Karibian v. Columbia University, 14 F.3d 773, 780 (2d Cir. 1994) (noting that notice liability is the standard for co-worker harassment, but that supervisory harassment can be imputed to the employer by notice or the heightened vicarious liability requirement).

78. *See* Farley v. American Cast Iron Pipe Co., 115 F.3d 1548, 1552 (11th

Third[79] and Tenth Circuits[80] considered an employer liable if the employer was negligent in failing to act on notice of harassment, the harassing employee acted within the scope of employment, and the victim relied on the harasser's apparent authority or the harasser was aided by the agency relationship. The Sixth Circuit imputed liability if the harassment was foreseeable or within the scope of employment and the employer failed to respond adequately.[81] The District of Columbia Circuit simply relied on "common law principles of agency"[82] without establishing a definitive test.[83]

Employer liability standards also differed between circuits as to the type of employer notice required to satisfy a notice liability standard.[84] Some circuits required only that "management level" have notice, while others stated that "higher management" must have notice.[85] This consideration added to the perplexing collection of employer liability standards among the circuits.[86]

Cir. 1997); *Faragher*, 111 F.3d at 1530.

79. *See* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106 (3d Cir. 1994).

80. *See* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1446 (10th Cir. 1997), *cert. granted and judgment vacated*, 118 S. Ct. 2364 (1998) (remanding for further consideration in light of *Burlington* and *Faragher*).

81. *See* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994).

82. Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995).

83. The EEOC suggests that courts first consider whether the employer was directly liable for the harassment because it knew or should have known about the hostile working environment. If the employer was not directly liable, the court should consider whether the employee was acting within the scope of employment, was acting with apparent authority, was acting in accordance with a duty the employer should not have delegated, or was aided in the accomplishment of the harassment by the agency relationship. In other words, the EEOC has recently suggested that courts should "consider" each of the principles contained in the Restatement. *See* EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, *supra* note 58, § D(2)(c)(1)-(3), *reprinted in* 1 CONTE, *supra* note 27, at 358-61.

84. *See* Purser, *supra* note 72, at 917.

85. Other factors that might also establish notice to the employer include the victim's filing a complaint to management or an EEOC charge; the pervasiveness of the harassment, or . . . evidence the employer had "deliberately turned its back on the problem" of sexual harassment by failing to establish a policy against it and a grievance mechanism to redress it. Moreover, an employer should be liable if there is no reasonably available avenue by which victims of sexual harassment can make their complaints known to appropriate officials who are in a position to do something about those complaints.

Turner, *supra* note 48, at 42.

86. The courts have also considered factors outside the scope of the Re-

An unfortunate disparity in the law resulted from the differing employer liability standards adopted by the circuits. A plaintiff could determine the outcome of his or her lawsuit by suing in a particular jurisdiction[87] or by choosing the cause of action (quid pro quo, hostile work environment, or discrimination) under which to bring the suit.[88] As sexual harassment suits became increasingly common,[89] it became clear that the Supreme Court needed to resolve this issue. The Court did so in the summer of 1998 with its companion decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*.

II. THE CHANGES *BURLINGTON* AND *FARAGHER* IMPOSED UPON TITLE VII CASES

Burlington and *Faragher* clarified two major aspects of the harassment landscape.[90] First, they removed the awkward differences in employer liability based solely on whether the em-

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statement. Some circuits, for example, have held that the standard for employer liability depends on the status of the harassing employee. *See, e.g.*, Cross v. Cleaver II, 142 F.3d 1059, 1074 (8th Cir. 1998) (applying strict liability in tangible job detriment retaliation claims, but noting that strict liability may be inappropriate when the retaliating employee is not high enough in the company hierarchy to impute liability to the employer and the retaliatory action is not the product of actual or apparent authority); *see also supra* notes 70-82 and accompanying text. In most jurisdictions, an employer is only responsible when an employee harasses a co-worker of equal status if the employer knew or should have known about the employee's conduct. *See* RALPH H. BAXTER, JR. & LYNNE C. HERMLE, SEXUAL HARASSMENT IN THE WORKPLACE: A GUIDE TO THE LAW 57-58 (3d ed. 2d prtg. 1989); J. Hoult Vandekerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 282 (1995). For cases in which the harassing employee supervised the victim, however, the circuit courts have adopted various formulations of § 219(2) of the Restatement. *See supra* notes 70-82 and accompanying text.

87. *See supra* notes 70-82 and accompanying text.

88. *See supra* note 47 and accompanying text; *see also* Jane Howard-Martin & Christopher K. Ramsey, *Supreme Court Stresses Employer Action to Prevent and Correct Sexual Harassment by Supervisors*, METRO. CORP. COUNS., Aug. 1998, at 7:

> Prior to *Ellerth* and *Faragher*, litigation standards for sexual harassment claims were governed by whether the claim was one of quid pro quo . . . or hostile work environment. This dichotomy resulted in arbitrary and awkward contortions of claims in order to warrant the higher standard of employer liability once reserved for quid pro quo harassment.

89. *See supra* note 27 and accompanying text.

90. Because the analysis in *Burlington* and *Faragher* is very similar and virtually identical in some places, the two cases will often be discussed together unless there is a specific reason to distinguish between them.

ployee pled quid pro quo harassment or hostile work environment.[91] *Burlington* and *Faragher* made clear that the determining factor in the employer liability analysis is whether an employee experienced a tangible job detriment because of gender.[92] The Court reasoned that this distinction is more appropriate because an employee cannot inflict a tangible job detriment on another employee without the aid of an agency relationship with the employer.[93] The employer essentially acts through the employee in tangible job detriment situations, thereby making the employer strictly liable.[94]

Second, the Court established an affirmative defense for employers in hostile work environment and unfulfilled quid pro quo cases, where there is no tangible job detriment. The Court was less willing to impose strict liability in non-tangible job detriment cases because the employer's role in the wrongful behavior is less clear.[95] Instead, the Court adopted a two-pronged test to "accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging

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91. *See* Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2265 (1998). The Court held that the pleading of quid pro quo instead of a hostile work environment claim was no longer the determinative factor in imputing employer liability, and that courts should instead determine whether the employee suffered a tangible job detriment. *See id.* Because quid pro quo by definition involves a tangible job detriment, though, and hostile work environment claims do not, claiming quid pro quo instead of a hostile work environment still necessarily affects courts' analysis of employer liability. If courts are to take the Supreme Court's distinction between tangible and non-tangible job detriments at face value, that distinction must be applied uniformly to *McDonnell Douglas* tangible job detriment claims as well as to quid pro quo and hostile work environment harassment claims.

92. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292-93 (1998); *Burlington*, 118 S. Ct. at 2265. In other words, the employee is not required to prove a tangible job detriment to state an actionable Title VII claim, but the nature of the court's analysis of the claim will vary depending on whether the plaintiff can prove a tangible job detriment.

93. *See Burlington*, 118 S. Ct. at 2269 ("A tangible employment decision requires an official act of the enterprise, a company act."); *see also Faragher*, 118 S. Ct. at 2291.

94. *See Burlington*, 118 S. Ct. at 2269; *see also Faragher*, 118 S. Ct. at 2290. For example, a supervisor cannot fire an employee without the action showing up in company records or coming to the attention of a superior supervisor. The imposition of a tangible job detriment requires company knowledge and action, if only through the human resources paperwork that necessarily accompanies such decisions. It is therefore reasonable to require a company to have some knowledge of its supervisor's reasons for imposing a tangible job detriment upon an employee.

95. *See Burlington*, 118 S. Ct. at 2269.

forethought by employers and saving action by objecting employees."[96] After the plaintiff-employee proves that the harassment affected the terms and conditions of his or her employment,[97] the defendant-employer has the opportunity to prove "(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."[98] This practicable affirmative defense for harassment cases has partially changed the landscape of employer liability, but suggests that the Title VII employer liability landscape must change as a whole to achieve the equitable resolution of all Title VII claims.

III. A NEW APPROACH: FOLLOWING PARALLEL PATHS IN ANALYZING TITLE VII DISCRIMINATION AND HARASSMENT CLAIMS

A. *BURLINGTON* AND *FARAGHER* ESTABLISH A VALID TEST OF LIABILITY FOR HOSTILE WORK ENVIRONMENT CLAIMS

1. Hostile Work Environment Claimants Must Still Establish a Prima Facie Case

Following the *Burlington* and *Faragher* decisions, lower courts still require plaintiff-employees to establish a prima facie case of a hostile work environment.[99] Courts tend to focus primarily on the fourth prong[100] of the prima facie case because that prong is most difficult to prove.[101] The tangible job detri-

96. *Faragher*, 118 S. Ct. at 2292; *Burlington*, 118 S. Ct. at 2270.

97. Plaintiffs must show that the harassment affected the terms and conditions of their employment in order to state an actionable hostile work environment claim. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *see also supra* note 34 and accompanying text.

98. *Faragher*, 118 S. Ct. at 2293; *Burlington*, 118 S. Ct. at 2270.

99. This Note assumes it is necessary to establish a prima facie case (whether through direct or circumstantial evidence) in any discrimination suit, and therefore focuses its analysis on burden shifting and affirmative defense questions.

100. The fourth prong requires the plaintiff to prove the harassment affected a term, condition, or privilege of employment. *See supra* note 45 and accompanying text.

101. *See, e.g.*, Caro v. City of Dallas, 17 F. Supp. 2d 618, 627-29 (N.D. Tex. 1998) (focusing on this element in a discussion of actionable hostile work envi-

ment versus non-tangible job detriment distinction only makes a plaintiff's ability to prove that the harassment affected "the terms, conditions, or privileges of employment" less certain. While *Oncale* makes it clear that Title VII was never intended to be a civility code,[102] *Burlington* suggests that a tangible job detriment is not necessary; if proven, it only helps the plaintiff import strict liability to the defendant.[103] It is difficult for a plaintiff to prove the middle ground—that terms and conditions of employment have changed even though the plaintiff experienced no tangible job detriment.

The fourth prong of the prima facie case is nonetheless essential to hostile work environment analysis. If this element were not required, a plaintiff would have the power to hold an employer liable for teasing or for isolated incidents.[104] The new focus on tangible versus non-tangible job detriments highlights the injustice in holding an employer liable for isolated incidents or mild teasing. Without this focus on proving an actionable (if not tangible) job detriment, the employer would essentially be liable for any employee discomfort and Title VII would become a civility code.

2. The *Burlington* and *Faragher* Affirmative Defense Is Well-Grounded in Public Policy

A major impact of *Burlington* and *Faragher* results from their construction of a new affirmative defense for employers.[105]

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ronment claims). It does not require a great deal of discovery to prove that the plaintiff is a female or is a member of a racial minority, that some degree of harassment (however minor) occurred, or the reason for the alleged harassment. It is much more difficult to show, however, that the hostile environment affected a term, condition, or privilege of employment because this is a question of severity and degree, and the term or condition is not a tangible factor.

102. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998).

103. *See supra* notes 94-95 and accompanying text.

104. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2284 (1998). ("Simple teasing ... offhand comments, and isolated incidents (unless exremely serious) will not amount to discriminatory changes in the terms and conditions of employment."). As Justice Scalia, author of the majority opinion in *Oncale*, also noted, "[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 118 S. Ct. at 1002 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

105. The affirmative defense itself is new, but the elements of the defense have been separately considered by courts before. *See* Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 777 n.6 (W.D. Ky. 1998) ("The Supreme Court's announce-

While some criticize the Court's application of agency doctrine, the affirmative defense nonetheless considers appropriate legal and policy factors and serves to impart liability only in appropriate situations.[106]

First, it is important to note that neither the Supreme Court, nor any other court in the United States, is required to adopt the Restatement of Agency. Commentators have been quick to criticize the Court's application of agency theory in employer liability cases. They claim that the Court has a tendency to mix the concepts of "direct liability" and "notice liability" and that it fails to separate the types of liability in the rigid manner the Restatement suggests.[107] The rigid separation in the Restatement, however, is probably not necessary because the ultimate question—whether the employer had control over the employee and the workplace—overrides the distinction between "notice" and "direct" liability.[108] The categorization of agency liability is, after all, an academic question that serves to justify imposing liability on an employer for failing to properly control the workplace. The alternate liability theories under the Restatement should therefore be treated as factors that help define the extent of the employer's control rather than as separate tests of the employer's control.

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ment of an affirmative defense in some ways is no more than the formal and succinct statement of a rule already adopted by several circuits."). These circuits did not, however, consider these elements as part of an affirmative defense. Instead, they looked at them as factors contributing to a determination of whether an employer should be liable. *See id.*

106. While this Note does not argue that the *Burlington* and *Faragher* defense is appropriate for discrimination claims, it suggests that the discrimination and harassment claims should follow a parallel and similar path. It would be pointless to argue that the tests for Title VII should shift slightly to fit the *Burlington/Faragher* path unless that path is itself a valid starting point.

107. *See supra* notes 59-67 and accompanying text (discussing scholars' various approaches to agency theory in employer liability cases and noting their criticisms of judicial approaches). It is also important to note, however, that the Supreme Court is not required to adopt the Restatement of Agency when it is interpreting federal law. *See* Burlington Indus. v. Ellerth, 118 S. Ct. at 2265 ("We rely on the general common law of agency, rather than on the law of any particular State, to give meaning to [agency] terms.") (citations and internal quotations omitted); *see also id.* at 2266 ("As *Meritor* acknowledged, the Restatement (Second) of Agency . . . is a useful beginning point for a discussion of general agency principles.").

108. This is the purpose of determining whether an employee is acting within the scope of employment, *see* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958), or not, *see id.* § 219(2).

Determining the scope of an employer's control is one goal of the Court's new affirmative defense. While the Justices purport to base their test on the fact that supervisors are aided by the agency relationship in carrying out the harassment, they do consider other factors. The second prong of the affirmative defense—that the employee must have unreasonably failed to take advantage of the employer's remedial measures—is related to notice liability.[109] An employer's anti-harassment policy will usually include a means by which the harassed employee can report the harassment without fear of retaliation by the harasser. This reporting mechanism is necessary to give the employer notice of the harassment so it can take the proper remedial actions.[110] Without actual or constructive notice of a harassment problem, it is unjust to hold an employer liable because the employer has not had an opportunity to remedy the harassment situation before it rose to a level affecting the terms of employment.[111] Because the second prong of the affirmative defense focuses on the employee's attempts to notify the employer about harassment, notice liability remains part of this affirmative defense despite the Supreme Court's stated sole reliance on the "aided by the agency relationship" theory.

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109. The Supreme Court noted in *Meritor* that "absence of notice to an employer does not necessarily insulate that employer from liability." 477 U.S. at 72. It is important to clarify that the *Burlington* affirmative defense does not change this. It instead considers whether the employer made avenues available so it would discover workplace harassment and/or the harassed employee would have the opportunity to give the employer notice. Hence, the defense does not look at what the employer knew or should have known; instead, it considers whether the employer and employee took adequate steps to assure knowledge.

110. *See* Stephen D. Shawe & Bruce S. Harrison, *High Court Opens Harassment Door, Underscoring Need for Prevention*, DAILY REC., July 1, 1998, at 3C:

> Knowledge is power. In defending against sexual harassment charges and lawsuits, we have found great benefit in being able to show that supervisors and managers received adequate information to recognize when a claim was being made, to understand their responsibility to pass on and participate in investigation of such complaints, and to avoid conduct that could be construed as retaliatory.

111. Determining negligence is, consequently, another underlying consideration of this affirmative defense. If an employee did utililize the employer's preventive and remedial procedures, but the employer chose not to react to the situation, the employer has failed to exercise a Title VII duty of care. Practically speaking, per se negligence is then imposed upon the employer. This imposition is reflected by the employer's inability to prove the affirmative defense when it has not taken appropriate action to remedy a harassment situation.

The *Burlington* and *Faragher* affirmative defense is also useful because it requires courts and parties to look to practical evidence that actually indicates whether employers and employees acted to prevent and remedy discrimination. Employers, no matter how vigilant they may be, cannot completely prevent harassment from occurring in the workplace.[112] However, business choices such as the existence of an anti-harassment policy, diversity training, a reporting mechanism for victims, and publication of policies to employees do indicate the extent to which an employer has fulfilled its Title VII duties. Furthermore, employers can work to prevent and remedy workplace harassment generally, and they can remedy specific problems if they have the opportunity to know about them. To help employers accomplish prevention and correction, it is also practical to consider the employee's role in reporting harassment and taking advantage of employer policies rather than suffering in silence and suing later.[113]

This affirmative defense is acceptable for an additional reason: lower courts have already incorporated aspects of the *Burlington* and *Faragher* affirmative defense into their analysis of Title VII harassment claims. The EEOC guidelines, authors of law review articles, and some courts[114] have all con-

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112. *See Burlington*, 118 S. Ct. at 2273 ("Sexual harassment is simply not something that employers can wholly prevent without taking extraordinary measures, constant video and audio surveillance, for example, that would revolutionize the workplace in a manner incompatible with a free society.") (Thomas, J., dissenting) (citing Judge Posner's dissent in *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 513 (7th Cir. 1997)). Moreover, because simple teasing is not actionable under Title VII, and because the difference between teasing and harassment is often nebulous, employers may have great difficulty recognizing actionable harassment without imposing a strict "civility code" on employees.

113. This dual approach to removing employer liability can be likened to a negligence and contributory negligence dichotomy. An employer should not be liable if the employee is negligent in failing to take responsibility for her or his own well-being.

114. *See supra* note 52 and accompanying text (quoting the EEOC's amicus brief in *Meritor* stating that the availability of an anti-harassment policy and the employee's attempts to take advantage of that policy are relevant in determining an employer's liability). Indeed, it appears that the EEOC lost the battle in *Meritor* (because the Court failed to establish a vicarious liability standard for all Title VII harassment claims), but ultimately won the war. Compare the EEOC's amicus brief in *Meritor*, *supra* note 52, with Justice Kennedy's comment in *Burlington*:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employ-

sidered, inter alia, whether the employer had an effective anti-harassment policy and whether the employer knew of the harassment. The federal circuit courts have employed any number of factors in determining when to impute liability to an employer, including those factors which have now become the two prongs of the *Burlington* and *Faragher* affirmative defense.[115]

3. The *Burlington* and *Faragher* Analysis Is Also Appropriate in Harassment Cases Involving Other Protected Classes

The standard for a sexually hostile work environment should not be any different than that for any other protected class under Title VII,[116] despite Justice Thomas's implications in his dissents to *Burlington* and *Faragher*.[117] Victims of racial

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ment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

118 S. Ct. at 2270. For an example of a situation in which this analysis was applied, see Sconce v. Tandy Corporation, 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998) (applying *Burlington*'s affirmative defense to hostile work environment case and finding that employer was not liable because employer had effective anti-harassment policy in place and plaintiff-employee knew about the policy but failed to utilize it). This case and Justice Kennedy's remark promote this Note's earlier suggestion that, because the complaint procedure is designed to give the employer an opportunity to remedy workplace harassment, notice to the employer is still a factor, if not *the* factor, in determining employer liability.

115. The *McDonnell Douglas* burden-shifting scheme constitutes the only truly unacceptable defense to harassment because there are always more appropriate ways to deal with employees than harassing them. Even if the employer has a legitimate concern about the employee's working skills or attitude, it is unlikely a jury will be sympathetic to the employer's claim that "I was only *harassing* the employee because I didn't like his or her work—it had nothing to do with race, gender, or religion!"

116. Justice Souter's opinion in *Faragher* impliedly supports the notion that the standards should be the same for race and sex harassment. In a footnote in the *Faragher* opinion, Justice Souter wrote that "[a]lthough racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." 118 S. Ct. at 2283 n.1. For whatever reason, though, Justice Souter failed to take the additional step of explicitly stating that the *Burlington/Faragher* analysis should apply equally to racial (or religious or national origin) harassment. Some courts have taken this footnote to mean, though, that standards are the same for racial and sexual harassment. *See* Cully v. Milliman & Robertson, Inc., 20 F. Supp. 2d 636, 642 (S.D.N.Y. 1998).

117. *See Burlington*, 118 S. Ct. at 2271 (stating concern that employer li-

and sexual harassment have equal ability to take advantage of diversity, promotion and anti-harassment policies. Moreover, it is equally suitable to require an employer to prove the existence of policies for preventing and remedying racial harassment as it is to require policies for preventing sexual harassment. Finally, it does not matter whether the victim is female or belongs to another protected class: employers have no more or less ability to control harassment because the victim is a member of one protected class rather than another. The kind of behavior that constitutes illegal discrimination may be different,[118] but the analysis should follow the same path. Continuity would benefit both litigants and judges. The affirmative defense should therefore be applicable to all protected classes.[119]

B. PLAINTIFFS MUST ESTABLISH A PRIMA FACIE CASE IN ALL TANGIBLE JOB DETRIMENT CASES, BUT A THREE-STEP BURDEN-SHIFTING ANALYSIS IS NOT NECESSARY

1. The Hostile Work Environment Affirmative Defense Is Inappropriate for Tangible Job Detriment Cases

Tangible job detriment cases can involve employer discrimination,[120] retaliation, constructive discharge, or quid pro quo suits. In such cases, the employer is expected to have knowledge of the supervisor's wrongful conduct.[121] There is no

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ability standards for racially hostile work environment are stricter than those for sexually hostile work environment); *Faragher*, 118 S. Ct. at 2294 (incorporating *Burlington* concerns into *Faragher* dissent).

118. The classic example is that of segregated bathrooms: there are physiological reasons to segregate men's bathrooms from women's, while it would be wholly discriminatory to separate Caucasian men's bathrooms from African-American men's bathrooms.

119. The only thing standing in the way of expanding the *Burlington* and *Faragher* analysis to other protected class harassment cases is the Supreme Court's failure to make this extension explicit. It could be argued, however, that the Court simply did not have the appropriate facts before it to make that extension. Justice Thomas is correct in his statement that the vicarious liability standard should be no different for racial harassment cases than it is for sexual harassment cases, *see Burlington*, 118 S. Ct. at 2271, and this commonsense notion may be reason enough to assume the affirmative defense is applicable to all Title VII harassment/non-tangible job detriment cases.

120. As previously mentioned, "discrimination" encompasses disparate treatment and disparate impact cases ("glass ceiling" treatment) for the purposes of this Note.

121. *See supra* note 48 and accompanying text.

need to prove that an employer took steps to prevent or remedy the imposition of a wrongful tangible job detriment because, in such situations, the employer simply failed to take responsibility to determine whether the employee's termination was warranted.[122] Furthermore, the victim often has no opportunity to utilize remedial or preventive policies for either of two reasons: the victim has not been hired or has been fired and therefore is not an employee, or the victim suffered one tangible job detriment which, unlike an ongoing harassment situation, cannot be remedied midstream. Finally, as Justice Kennedy noted in *Burlington*, conduct resulting in tangible job detriments are company acts that the supervisor can only perform because of his or her agency relationship with the company.[123] The company is the actual entity acting in such a situation, and the plaintiff need go no further to prove an agency relationship. Thus, the *Burlington* and *Faragher* affirmative defense is not appropriate in tangible job detriment cases.

2. The *McDonnell Douglas* Burden-Shifting Analysis Must Change in Light of the *Burlington* and *Faragher* Quid Pro Quo Analysis

In keeping with the Supreme Court's dictate that the tangible versus non-tangible job detriment distinction is the most important factor in determining employer liability, courts should now use a similar, modified analysis for all discrimination cases. The *McDonnell Douglas* burden-shifting scheme has become burdensome to courts and litigants.[124] With the

122. If the case involves mixed (discriminatory/quid pro quo and nondiscriminatory) motives for firing the employee, an additional step is necessary in the *McDonnell Douglas* test. In such situations, the employer can escape liability only by proving that the employee would have been terminated for the nondiscriminatory reason alone. This Note does not discuss those situations, though, for lack of space. In strict retaliatory or quid pro quo cases, it should be fairly easy for a reasonably diligent employer to discover that the employee was fired (or demoted, etc.) for improper reasons. A simple exit review of the employee's records, or an exit interview with the employee and his or her supervisors (together or separately) might easily be enough to discover, or at least infer, the real reason for termination.

123. 118 S. Ct. at 2269.

124. *See* Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998) (following the lead of "an increasing number of district courts" in conceding the existence of a prima facie case, "thereby bypassing the much criticized minuet or burden shifting analysis of *McDonnell Douglas Corp. v. Green*," and citing a number of cases on this point).

Court's adoption of a new affirmative defense, courts are now expected to apply the *McDonnell Douglas* scheme to some claims and the *Burlington* and *Faragher* affirmative defense to other claims while attempting to maintain some continuity among all Title VII cases. The *McDonnell Douglas* test has not proven inherently inequitable, but it seems inappropriate to have varying tests for claims arising from a single statute with the single purpose of protecting certain minority classes. The *Burlington* and *Faragher* affirmative defense is an appropriate test for non-tangible job detriment cases. It may, however, result in procedural inequities if the burdens on the parties are different depending on whether they plead a tangible or non-tangible job detriment. The *McDonnell Douglas* test should therefore be streamlined so that its burdens of proof are consistent with the *Burlington* and *Faragher* burdens, but the analysis should remain slightly different to account for the existence of a tangible job detriment. One way to streamline *McDonnell Douglas* is to remove its third burden-shifting step and treat the second step as an affirmative defense parallel to the *Burlingon* and *Faragher* affirmative defense.

3. A Parallel Scheme Is Needed for All Title VII Tangible Job Detriment Lawsuits

Courts attempting to deal with the usual laundry list of Title VII complaints currently face a burdensome task. It is not uncommon for courts to apply, all in the same case, the *Burlington* and *Faragher* test to the sexual harassment claim, the *McDonnell Douglas* burden-shifting analysis to the sex discrimination claim, and the "knew or should have known" analysis to a race discrimination claim.[125] This approach is not only laborious, but it complicates the discovery and litigation

125. *See, e.g.*, Newton v. Cadwell Lab., 156 F.3d 880 (8th Cir. 1998) (discussing gender discrimination and hostile work environment claims); Rodriguez v. Kantor, No. 97-1668, 1998 WL 546098 (4th Cir. Aug. 20, 1998) (retaliation and national origin discrimination) (unpublished); Cross v. Cleaver II, 142 F.3d 1059 (8th Cir. 1998) (retaliation and hostile work environment); Joyner v. Fillion, 17 F. Supp. 2d 519 (E.D. Va. 1998) (hostile work environment, retaliatory discharge, and racial discrimination); Kolp v. New York State Office of Mental Health, 15 F. Supp. 2d 323 (W.D.N.Y. 1998) (hostile work environment and gender discrimination); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481 (S.D.N.Y. 1998) (national origin discrimination, retaliatory discharge, and hostile work environment); Lovell v. Glen Oaks Hosp. Inc., No. CA397-CV-318-R, 1998 WL 417774 (N.D. Tex. Jul. 21, 1998) (hostile work environment and retaliation); Sconce v. Tandy Corp., 9 F. Supp. 2d 773 (W.D. Ky. 1998) (hostile work environment and quid pro quo).

processes because both parties must be on the offensive *and* defensive on numerous different grounds. As the burden shifts back and forth between the parties, the need for extensive discovery and the complications of litigation grow exponentially.

Moreover, because some claims are easier to prove than others, there is still incentive for a complainant to state multiple grounds for recovery arising out of one Title VII incident.[126] A complainant may, for example, plead a retaliation claim, a discrimination claim, and a constructive discharge claim knowing the result may be different for each claim depending on the court's application of *McDonnell Douglas* and the extent to which a constructive discharge in the complaint may turn a hostile work environment claim into a tangible job detriment claim.[127] Even where one claim may not have more merit than another, the plaintiff may prevail under one doctrine because of the varied burdens and analyses used in Title VII cases. A court could, for example, find for the plaintiff on a quid pro quo claim once the plaintiff proves a threat and a tangible job detriment, but for the defendant on a sex discrimination claim because the defendant has the opportunity to prove a legitimate business purpose. Because the employer's conduct is virtually the same in either case, this dichotomy is troublesome.[128]

4. Employers Need a Defense When They Have a Legitimate Reason for Imposing a Tangible Job Detriment

The tests for harassment and conduct that result in a tangible job detriment cannot be exactly the same because, as

126. An example of this kind of pleading can be found in *Fierro v. Saks Fifth Avenue*, a case in which the plaintiff claimed "(1) that he was terminated because [his supervisor and employer] discriminated against him on the basis of his Italian-American heritage; *and/or* (2) that he was terminated in retaliation for his decision to stand up to [his supervisor's] treatment of him." 13 F. Supp. 2d at 488 (emphasis added).

127. The constructive discharge is a particularly problematic issue in Title VII analysis after *Burlington* and *Faragher*. If the employee pleads a constructive discharge (as Kimberly Ellerth did) and the facts support this contention at all, has the employee plead a tangible job detriment such that *Burlington* and *Faragher* no longer apply? If so, plaintiff-employees could essentially turn any hostile work environment claim into a strict liability tangible job detriment case. The Court in *Burlington* suggested that the facts did not support Ellerth's constructive discharge claim, so the issue remains unresolved. *See supra* note 7 and accompanying text.

128. *See* Scalia, *supra* note 44, at 320 & n.48. Scalia suggests that quid pro quo should not be recognized as a separate cause of action at all because it, like most discrimination claims, results in an "adverse job action." *Id.*

noted above, there is no legitimate business reason for harassing an employee. Of course, neither is there a legitimate defense for retaliating against an employee, but employers must have the opportunity to prove that they imposed a job detriment on an employee for a valid, nondiscriminatory, and nonretaliatory reason.[129] There are situations in which an employer must fire employees for economic, organizational, or performance reasons, and it would be disrupting and unfair to businesses if the employer had no opportunity to prove a legitimate motive for imposing a tangible job detriment.

This need to preserve the "legitimate business reasons" analysis for tangible job detriment cases has, however, no bearing on the precise cause of action for which the employee brings suit. It is related to the *employer's* needs and the American notion of justice that counsels against presuming the defendant is "guilty" (or, in this situation, that the employer operated with an improper motive). It should not matter whether an employee states a quid pro quo claim or a disparate treatment claim. The employee must first establish that he or she belongs to a protected class and suffered a tangible job detriment. The burden then shifts to the defendant to prove a legitimate business reason for imposing the detriment or withholding the benefit. The defendant might attempt to satisfy its burden by proving that the detriment had no relation to a supervisor's request for sexual favors, that membership in the protected class is a bona fide occupational requirement, or that membership in the protected class carried no weight in the employer's decision to impose the detriment.[130]

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129. In such situations, the employer should be liable only on a hostile work environment basis when the supervisor made threats and unwanted advances in a quid pro quo suit, but the actual tangible job detriment was not causally related to the threats. *See Burlington*, 118 S. Ct. at 2273 n.3 (Thomas, J., dissenting).

130. The four elements of a prima facie case of quid pro quo harassment are: (1) plaintiff was a member of a protected class; (2) he or she was subjected to unwelcome sexual advances; (3) the request was based on gender; and (4) submission to the request was a condition for receiving job benefits or avoiding job detriments. *See, e.g.*, Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995); Kauffman v. Allied Signal Inc., 970 F.2d 178, 186 (6th Cir. 1992). Proof of the second and third elements illustrates that the supervisor had a wrongful motive for imposing a tangible job detriment on the employee.

Under the new *Burlington* and *Faragher* analysis, though, the more important question for strict liability purposes is whether the employee suffered a tangible job detriment. The fourth prong as it now stands does not address this question, but only considers whether a threat was part of the request.

The analysis would not, then, continue by shifting the burden back to the plaintiff to prove pretext. The "legitimate business purpose" analysis is, in a sense, the employer's affirmative defense. While the Supreme Court has labeled the end of this analysis "strict liability" in quid pro quo claims,[131] courts still give employers the opportunity to prove they had no discriminatory purpose in imposing a detriment upon an employee.[132] Thus, the employer retains some measure of defense for its actions even in tangible job detriment cases, but does not have the benefit of showing that it tried to prevent or remedy the situation. The employer is, essentially, strictly liable

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After *Burlington* and *Faragher*, it seems far more logical to require the plaintiff to prove that he or she suffered a tangible job detriment related at least temporally to the unwanted sexual advances, and then shift the burden to the defendant to show a legitimate business purpose for imposing the tangible job detriment. This shift would be in keeping with the change (in some jurisdictions) of the prima facie case for hostile work environment claims. Some courts attached a fifth prong to that test: the employer knew or should have known of the harassment and failed to take remedial action. *See* Callanan v. Runyun, 75 F.3d 1293, 1296 (8th Cir. 1996). Under *Burlington* and *Faragher*, the new affirmative defense takes the place of the fifth element, and the burden shifts, only once, to the defendant to prove that defense. The legitimate business purpose defense would accomplish the same feat for all tangible job detriment cases.

Thus, the test for a quid pro quo action, for example, would have four prongs: the employee must show (1) that he or she was a member of a protected class; (2) that he or she was subjected to unwelcome sexual advances; (3) that the request was based on gender; and (4) that the employee suffered a tangible job detriment at least temporally related to the sexual advances. The defendant would then have to prove the tangible job detriment was unrelated to any discriminatory or harassing act on the part of the employer or its supervisors, and the plaintiff could undermine this defense by proving the job detriment was directly related to his or her failure to comply with the unwanted request. If the plaintiff failed to show this causation, he or she might still have a claim for hostile work environment under a similar prima facie case; he or she would only have to prove as prong four that the sexual harassment changed the terms or conditions of employment rather than that it imposed a tangible job detriment. This pattern is similar to that which would be followed for any Title VII tangible job detriment case.

131. Circuit courts have drawn the same conclusion about retaliation cases. *See, e.g.*, Cross v. Cleaver II, 142 F.3d 1059, 1072-74 (8th Cir. 1998).

132. This is basically a variation on the mixed motive analysis. *See supra* note 122. The supervisor may have a mixed motive in imposing a tangible job detriment on the plaintiff-employee while the employer only has a legitimate business motive. If the employer has a legitimate motive it considered reason enough to impose a tangible job detriment *and* no knowledge of the supervisor's mixed motives, the employer should not be liable for the improper motive of its supervisor.

only when the plaintiff proves that a supervisor and the employer perceptibly violated Title VII.[133]

5. The Pretext Analysis Is Bound up with the "Legitimate Business Reason" Analysis and Is Not Necessary As a Third Step

Courts can take one final step to streamline their analysis in Title VII cases; they should remove the "pretext" burden-shifting step altogether. There are a number of reasons for this proposal. First, the pretext analysis is already bound up with the "legitimate business purpose" step. If the employer's stated purpose for imposing a tangible job detriment upon an employee is pretextual, then it cannot also be legitimate.[134]

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133. This result is appropriate not only in light of the common "tangible job detriment" consequence of discrimination, quid pro quo, and retaliation claims, but also in light of the agency theories the Supreme Court employed in *Burlington* and *Faragher*. *See supra* notes 48-49. Just as in harassment tangible job detriment cases, the person hiring, firing, or supervising the employee could not impose a discriminatory tangible job detriment if not for its agency powers. Thus, the employer is acting through the discriminating employee in either situation. Moreover, the employer always retains some responsibility to monitor its diversity, hiring, firing, and transfer policies and history.

134. The major complaint in many of the cases cited *supra* at note 125 is that *McDonnell Douglas* is inefficient in reaching the ultimate question: what was the real reason the supervisor (and therefore the employer) imposed the tangible job detriment? This Note agrees that this is the ultimate question, but disagrees that skipping straight to the pretext stage is the proper way to answer it. To reduce the redundancy of this "minuet," the more appropriate solution is to incorporate the pretext analysis into the legitimate business reason analysis. Rather than have the burden shift first to the employer and then to the employee to prove a legitimate business reason and pretext, respectively, it is more logical to require the employer to prove a business reason that is legitimate and the real basis for the tangible job detriment. This does not change Justice Scalia's admonition in *St. Mary's Honor Center v. Hicks* that "the Title VII plaintiff at all times bears the "ultimate burden of persuasion," despite the *McDonnell Douglas* burden shifting scheme. 509 U.S. 502, 511 (1993).

This change places the burden to prove legitimate reasons on the entity in the best position to prove its own motives, the employer. Further, this "one-step" approach to "legitimate business reason" analysis removes the likelihood that the parties to a lawsuit will wind up as "two ships passing in the night." The burden-shifting test encourages employers to argue exhaustively that they had *a* legitimate business reason, but the employee will state time and again that one motive was discrimination, and neither party directly proves the other wrong. This shift in the *McDonnell Douglas* analysis does not remove the employee's ability and burden to prove pretext, but it allows the parties to more directly argue that one reason was *the* reason for imposing a tangible job detriment.

The employee's ability to prove that the purpose was pretextual consequently negates the employer's ability to state a legitimate business purpose.

Ridding the *McDonnell-Douglas* analysis of this step arguably puts a greater burden on the employer because the burden does not shift back to the plaintiff to prove pretext. Instead, it remains with the employer, and the employee merely prevents an employer from sustaining its burden in proving a legitimate business purpose. There is, however, a trade-off: the employer avoids strict liability with the aid of a "legitimate business purpose" defense, while the employee still has to prove a causal relation between the illegal act and the tangible job detriment.

The second rationale for eliminating the final step of the *McDonnell Douglas* test is that the burden-shifting scheme has fallen into some disfavor with courts in recent years.[135] Some have disapproved of it for its mere ubiquity and others either seek to avoid shifting the burden multiple times or simply disapprove outright of the scheme's redundance.[136] However, *McDonnell Douglas* has not lost its usefulness because, as previously noted, the *Burlington* and *Faragher* defense is not appropriate for all situations.[137] Streamlining the *McDonnell Douglas* test and classifying discrimination cases into only two categories, tangible and non-tangible job detriment cases, may reduce the burden associated with applying *McDonell Douglas*.

Finally, ridding *McDonnell Douglas* of this third step has two added benefits for litigants. First, the parties have to prove similar elements no matter what tangible job detriment claim the complainant brings. Some considerations will certainly be different based on the nature of the claim; quid pro quo is invariably a different situation than retaliation, though both involve a tangible job detriment. Nonetheless, the common path of litigation and of each party's burden of proof makes the applicable legal standard more predictable.

Second, both sides' (and the courts') ability to predict the path of litigation provides the additional benefit of easier preparation, and would reduce the number of factors peculiar to each cause of action. This may in turn reduce the expensive and invasive discovery efforts of each party. Of course, courts

135. *See supra* note 125 and accompanying text.

136. *See supra* note 125 and accompanying text; *see also supra* note 46.

137. *See supra* Part III.B.1; *see also supra* note 106.

will continue to require separate inquiries into the elements of the *Burlington* and *Faragher* affirmative defense, but the parallel litigation of all Title VII claims should ease the burden on the parties.

This proposed alteration will not change the elements that either party must prove to succeed in a Title VII lawsuit. Employees already must establish a prima facie case, and the Supreme Court is unlikely to alter its decisions in *Burlington* and *Faragher* in the near future. Because the terminology of different Title VII claims has, however, become increasingly confused every time a new defense to a prima facie case is proposed,[138] it is necessary to significantly reduce confusion, if not eradicate it, by streamlining the conceptualization and analysis of Title VII claims.

CONCLUSION

The Supreme Court's introduction in *Burlington* and *Faragher* of a new approach to sexual harassment analysis raises new questions about old standards. One of these questions is whether the new distinction between tangible and non-tangible job detriment cases and the new affirmative defense apply equally to all harassment suits. *Burlington* and *Faragher* also make the status and usefulness of the *McDonnell Douglas* burden-shifting analysis unclear. Because it is only logical to adjudicate the claims of all harassment plaintiffs and defendants in the same manner, courts must apply the same analysis and provide the same affirmative defense for all litigants regardless of the protected class to which the plaintiff belongs. Toward this goal, courts should recognize that the major distinction among Title VII claims is between cases involving tangible and non-tangible job detriments. In addition, the *Burlington* and *Faragher* analysis should be applied to *all* harassment and unfulfilled quid pro quo (non-tangible job detriment) cases. In tangible job detriment cases, however, the courts should adopt a streamlined *McDonnell Douglas* analysis that disregards the third burden-shifting step as unnecessary. This reconfiguration will render the *McDonnell Douglas* analysis more congruent to the *Burlington* and *Faragher* analysis, increase consistency in Title VII litigation, recognize the pri-

138. Consider the analysis discussed *supra* at notes 39-41, 86, 91-98, 122 and accompanying text.

mary distinction between classes of job detriments, and subtly streamline the pleading and litigation stages for all parties.