Volume 45 | Issue 4 Article 7

2000

Supervisory Sexual Harassment and Employer Liability: The Third Circuit Sheds Light on Vicarious Liability and Affirmative Defenses

David F. McCann

SUPERVISORY SEXUAL HARASSMENT AND EMPLOYER LIABILITY: THE THIRD CIRCUIT SHEDS LIGHT ON VICARIOUS LIABILITY AND AFFIRMATIVE DEFENSES

I. INTRODUCTION

In today's environment, few employers, even those as noteworthy as the President of the United States, can afford to turn a blind eye towards the issue of sexual harassment.[1] The number of claims of sexual harassment by employees is rapidly increasing.[2] A significant number of those complaints have been filed against the employee's supervisor, as opposed to his or her co-workers.[3] Furthermore, the stakes are increasing as evidenced by a recent $8.3 million award to a television anchorwoman whose suit against her employer included charges of sexual harassment.[4]

Sexual harassment has been the subject of extensive litigation since Title VII of the Civil Rights Act of 1964[5] (Title VII) strictly forbade discrimination in the workplace on the basis of sex.[6] Through this litigation, the judiciary has attempted to resolve many of the questions left open by

1. *See* Margaret Carlson, *Sexual Harassment Chapter 999: This Time the Accused is Max Baucus. Do We Know When to Care Anymore?*, TIME , Sept. 20, 1999, at 45 (rehashing effects of Paula Jones sexual harassment suit against President Clinton).

2. *See* Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268 (5th Cir. 1998) (noting complaints filed with Equal Employment Opportunity Commission and state agencies have more than doubled from 6,833 in 1991 to 15,880 in 1997 (citing <http://www.eeoc.gov/stats/harass.html>)); Brian S. Kruse, Note, *Strike One—You're Out! Cautious Employers Lose Under New Sexual Harassment Law:* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), 78 NEB. L. REV. 444, 444 (1999) (noting that of 266 organizations surveyed, average number of sexual harassment complaints increased by .78 between 1995 and 1997 (citing Stacy VanDerWall, *Sexual Harassment Complaints Rising, SHRM Survey Finds*, SHRM/HR NEWS Online (Mar. 15, 1999) <http:www.shrm.org/hrnews/articles/031599a.html>)).

3. *See* Kruse, *supra* note 2, at 444-45 (calculating that 24% of complaints discussed in cited surveyed were brought against supervisor).

4. *See* Alain L. Sanders, *Television: The Dangers of Dropping Anchor*, TIME DAILY (Jan. 29, 1999), *available at* http://www.time.com/time/daily/0,2960,19111,00.html (recounting story of television network forced to pay $8.3 million to television anchor whose charges included sexual harassment); *see also* Jordan Lite, *Ex-UPS Manager Awarded $80M*, ASSOC. PRESS, Feb. 12, 1998, *available in* Westlaw, ASSOCPR Database (revealing that Ex-UPS manager received $80.7 million from United Parcel Service after claiming that company created sexually hostile work environment and retaliated against her after she formally complained that driver poked her in breast).

5. 42 U.S.C. § 2000e(2)(a)(1) (1998).

6. *See id.* (stating that it is "unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex* or national origin") (emphasis added).

the statute's sweeping language and its sparse legislative history.[7] For years, the United States Supreme Court appeared reluctant to address sexual harassment, not issuing its first opinion on the subject until 1986, and then only once more in 1993.[8] The Court then released a tumult of decisions regarding sexual harassment beginning in 1998, including *Burlington Industries, Inc. v. Ellerth*[9] and *Faragher v. City of Boca Raton*,[10] decided on the same day and addressing the issue of employer liability.[11] The decisions in *Ellerth* and *Faragher* have significantly reshaped sexual harassment, specifically in how courts must now approach employer liability when a supervisor sexually harasses an employee.[12]

This Casebrief focuses on when employers may be held liable for sexually hostile environments created by their supervisors.[13] Part II briefly examines how sexual harassment has evolved through statutory and agency law.[14] Part III discusses the Third Circuit's most recent treatment of sexual harassment.[15] Part IV acts as a practical guide in the Third Circuit for preventing and litigating employer liability for supervisory actions

7. *See* Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After* Faragher *and* Burlington Industries, 74 N.Y.U. L. REV. 1786, 1789 (1999) (noting wide latitude given to judiciary due to statute's broad language and lack of legislative history).

8. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 72 (1986) (instructing courts to look to agency law to determine employer liability). After its decision in *Meritor*, the Court did not hand down another decision on sexual harassment until *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), which approved of *Meritor*'s approach to an employer's liability.

9. 524 U.S. 742 (1998).

10. 524 U.S. 775 (1998).

11. *See* Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274, 277 (1998) (finding that under Title XI school district could be liable for teacher's sexual harassment of student only if official with authority to take action has "actual notice" of problem and does not act); Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 82 (1998) (holding that Title VII applies to same-sex sexual harassment in workplace). The Supreme Court continued its foray into sexual harassment with two additional decisions in 1999. *See* Kolstad v. American Dental Ass'n, 527 U.S. 526, 534-35 (1999) (concluding that employer's conduct does not have to be egregious for plaintiff to receive punitive damages under Title VII); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that under Title XI school district may be liable for one student's sexual harassment of another student if district "acts with deliberate indifference to known acts of harassment").

12. *See* Steven D. Baderian et al., *Managing Employment Risks in Light of the New Rulings in Sexual Harassment Law*, 21 W. NEW ENG. L. REV. 343, 351 (1999) (noting Supreme Court holdings will substantially change sexual harassment law in United States).

13. For a discussion of the significance of employer liability for sexual harassment in today's climate, see *supra* notes 1-10 and accompanying text.

14. For a discussion of sexual harassment in the context of Title VII and agency law, see *infra* notes 18-79 and accompanying text.

15. For a discussion of the latest two Third Circuit cases dealing with employer liability for sexual harassment, see *infra* notes 80-103 and accompanying text.

resulting in a sexually hostile environment.[16] Finally, Part V summarizes the position of the Third Circuit, including some questions the court may address.[17]

II. BACKGROUND

A. *Sexual Discrimination Finds Its Way into Title VII*

The initial draft of Title VII did not protect individuals from sexual discrimination.[18] Rather, bill opponents added sex discrimination at the last minute in an attempt to defeat the bill.[19] Despite this effort, the bill successfully passed and became law.[20] Although sexual discrimination was prohibited under Title VII, the Act's sweeping language and lack of legislative history, resulting from its last minute insertion on the floor of the House of Representatives, provided courts with little guidance as to how it should be applied.[21] As of 1979, the United States Court of Appeals for the Third Circuit was one of only three other circuits recognizing sexual harassment as a Title VII violation.[22] In *Tomkins v. Public Service Electric & Gas Co.*,[23] the Third Circuit subjected employers to strict vicarious liability for sexual harassment by its supervisors based on agency doctrine.[24] Agency law, however, provides several different doctrines for holding a

16. For a discussion of how to prevent and litigate employer liability for sexually hostile environments in the Third Circuit, see *infra* notes 104-53 and accompanying text.

17. For the conclusion of this Casebrief, see *infra* notes 154-57 and accompanying text.

18. *See* Baderian et al., *supra* note 12, at 344 (noting sexual discrimination was not included in original version of Title VII).

19. *See* Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977) (noting opponents inserted sex discrimination to block passage of bill).

20. *See* Baderian et al., *supra* note 12, at 344 (recounting that bill passed despite insertion of sexual discrimination provision).

21. *See* Smith, *supra* note 7, at 1789 (attributing lack of legislative history to insertion of sexual discrimination into Title VII on floor of House of Representatives); *see also* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 63 (1986) (noting prohibition against sexual discrimination was inserted into Title VII at last minute); Baderian et al., *supra* note 12, at 344 (discussing lack of legislative history for sexual discrimination).

22. *See* Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (recognizing sexual harassment as Title VII violation); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977) (concluding that Title VII is violated when supervisor sexually harasses subordinate); *Barnes*, 561 F.2d at 993 (recognizing sexual harassment as Title VII violation); Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (per curiam) (same).

23. 568 F.2d 1044 (3d Cir. 1977).

24. *See id.* at 1048-49 (finding that under agency doctrine, Title VII is violated when supervisor sexually harasses employee). A standard of strict vicarious liability for an employer means that the employer would automatically be liable if the harasser has committed sexual harassment. *See* Smith, *supra* note 7, at 1791 (providing definition of strict vicarious liability).

principal liable for the acts of an agent.[25] As a result, strict vicarious liability was soon joined by negligence standards leading to a lack of uniformity in the circuit courts.[26]

B. *The Rise of Quid Pro Quo and Hostile Environment in the Midst of Agency Law*

In order to give some direction to the lower courts, the United States Supreme Court addressed sexual harassment for the first time in *Meritor Savings Bank, F.S.B v. Vinson.*[27] In *Meritor,* a female bank employee claimed her supervisor had subjected her to various forms of sexual harassment, such as inviting her to dinner and suggesting that they go to a nearby hotel to have sexual relations.[28] Although the supervisor never threatened the plaintiff with any adverse actions if she refused his advances, the plaintiff engaged in sexual intercourse with her supervisor, claiming that she feared losing her job.[29] Over the course of her four-year employment the plaintiff received several merit-based promotions, but was eventually dismissed for excessive use of sick leave.[30]

---

25. *See* RESTATEMENT (SECOND) OF AGENCY DOCTRINE § 219 (1958) (defining liability of master for acts of agents). The Restatement provides:

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:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Id.

26. *See* Smith, *supra* note 7, at 1788-93 (discussing alternative employer negligence standards that have been employed by courts over years). Courts have alternatively required the employer to have constructive notice, meaning the employer was negligent in learning about the harassment and allowing it to continue. *See id.* at 1791. The Third Circuit later adopted this approach. *See, e.g.,* Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) (employing constructive notice liability). Alternatively, some courts look to whether the employer had actual notice of the harassment and then allowed it to continue. *See* Smith, *supra* note 7, at 1791 (discussing courts that consider whether employer put on notice of harassment).

27. 477 U.S. 57 (1986).

28. *See id.* at 60. The plaintiff also alleged that her supervisor exposed himself to her in the ladies room and fondled her in the presence of other employees. *See id.*

29. *See id.* It was also for this reason that plaintiff claimed she did not report her supervisors behavior to anyone at the bank and did not take advantage of existing complaint procedures. *See id.* at 61.

30. *See id.* at 59-60.

In *Meritor*, the Court refused to establish a clear rule concerning employer liability for sexual harassment committed by a supervisor.[31] Instead, the Court determined that employer liability should be determined by adhering to traditional agency law.[32] The Court did, however, offer the ambiguous observation that employers should not "always automatically [be] liable for sexual harassment by their supervisors," nor should the "mere existence of a grievance procedure and a policy against discrimination, coupled with [the employees'] failure to invoke that procedure" insulate the employer from liability.[33]

The *Meritor* Court also acknowledged two categories of sexual harassment, quid pro quo, which first appeared in 1981 in the Equal Employment Opportunity Commission (EEOC) Guidelines and hostile environment.[34] Subsequently, these categories have been developed in the circuit courts.[35] Quid pro quo harassment occurs when an employee is forced to choose between giving in to sexual demands or forfeiting some job benefit, such as a raise or promotion.[36] For example, in *Robinson v. City of Pittsburgh*,[37] the United States Court of Appeals for the Third Cir-

31. *See id.* at 72 (declining "to issue a definitive rule on employer liability").

32. *See id.* (noting Congress' intention that courts look to agency principles for employer liability). For an excerpt from THE RESTATEMENT (SECOND) OF AGENCY § 219 (1958), see *supra* note 24.

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

34. *See* 29 C.F.R. § 1604.11 (1981) (establishing guidelines based on quid pro quo sexual harassment by employer).

35. *See Meritor*, 477 U.S. at 65-66 (discussing quid pro quo and hostile environment development in circuit courts).

36. *See, e.g.*, Highlander v. K.F.C. Nat'l Mgmt. Co., 805 F.2d 644, 648 (6th Cir. 1986) ("Quid pro quo sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments."); Smith, *supra* note 7, at 1805 (noting quid pro quo occurs when job benefits such as "retention or discharge, salary change, promotion or demotion" are conditioned on sexual favors); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998) (defining quid pro quo more simply as "cases based on threats which are carried out"). In *Robinson v. City of Pittsburgh* the Third Circuit considered the elements of a quid pro claim for the first time. 120 F.3d 1286, 1296 (3d Cir. 1997). In doing so, the court adopted the elements set out in the EEOC regulations, sections 1604.11(a)(1) and (2):

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment and (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

29 C.F.R. § 1604.11(a)(1)-(2).

There is no precise definition of quid pro quo sexual harassment, and the general concept has been refined over the years. For a detailed discussion of how the definition of quid pro quo harassment has evolved at the hands of the EEOC and various federal courts, see Philip K. Lyon & Bruce H. Phillips, Faragher v. City of Boca Raton *and* Burlington Industries, Inc. v. Ellerth: *Sexual Harassment Under Title VII Reaches Adolescence*, 29 U. MEM. L. REV. 601, 609-617 (1999).

37. 120 F.3d 1286 (3d Cir. 1997).

cuit found quid pro quo sexual harassment for a female police officer who had been denied a transfer to the detective bureau because she refused her unit commander's sexual advances.[38] In the wake of *Meritor*, the Third Circuit joined the other circuits in holding that an employer is strictly liable for quid pro quo harassment by a supervisor who had actual or apparent authority over the employee.[39]

---

38. *See Robinson*, 120 F.3d at 1298-99. In finding quid pro quo harassment, the Third Circuit focused on events that resulted in real or tangible negative consequences. *See id.* at 1296-97 (stating that "consequences attached to employee's response to sexual advances must be sufficiently severe 'as to affect compensation, terms, conditions, or privileges of employment'"). For instance, the officer described incidents where, after she rejected her supervisor, he would unjustifiably reprimand her in public, would frequently bother her at work and call her at home for reasons unrelated to work. *See id.* at 1298. The court was unwilling to find that these incidents were sufficient to constitute quid pro quo harassment. *See id.* (finding that allegations did not affect "compensation, terms, conditions, or privileges"). The court did speculate that reprimands that resulted in a poor notation in a personnel file might be sufficient for quid pro quo harassment. *See id.* (noting that formal reprimands could result in quid pro quo harassment, but harsh words without consequences would not).

39. *See id.* at 1296-97 n.9 (noting that all "[c]ourts have unanimously held an employer strictly liable for quid pro quo harassment by supervisor . . ."); *see also* Ellerth, 524 U.S. at 752-53 (observing that after *Meritor*, circuit courts subjected employers to strict vicarious liability for quid pro quo claims). As authority for the conclusion that strict liability should attach to quid pro quo harassment, the court cited the opinion in *Meritor*. *See id.* It is worth noting, however, that such language never appears in the *Mertior* opinion, although it was implied in the Court's decision that under the EEOC an employer could be held strictly liable in such circumstances. *See* Baderian et al., *supra* note 12, at 347 (noting that although *Meritor* is often cited as authority for strict employer liability under quid pro quo, no such language ever appears in opinion). The Supreme Court did not hand down strict employer liability for quid pro quo harassment; instead, various circuit courts developed it. *See id.* (noting federal courts of appeal consistently hold that employers are strictly liable when plaintiffs establish quid pro quo claims).

From as early as 1994, however, the Third Circuit found support for strict liability outside of *Meritor* by turning to the RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958), which, the court noted in dicta, is often used to determine liability in quid pro quo cases. *See* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 106 (1994) (observing that other courts have found support for strict liability in quid pro quo cases on basis of agency law); *see also* Ellerth 524 U.S. at 765 (same); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152 (1999) (same); Faragher v. City of Boca Raton, 524 U.S. 775, 790-91 (1998) (noting that agency law has been interpreted to require strict liability for harassment committed by employers while acting within scope of employment). Restatement section 219(1) holds employers liable for any torts their employees commit while acting within the scope of their employment. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating employer is liable for torts of employee while acting in scope of employment). Quid pro quo cases lend themselves to scope-of-employment liability because the supervisor has usually used his or her authority over the employee to extract sexual favors. *See Faragher*, 524 U.S. at 803 (noting that when supervisor discriminates, he or she draws on his or her supervisory position). The employer is responsible because without the authority bestowed on the supervisor by his or her employment, the quid pro quo harassment would not be possible. *See id.* at 802 (stating courts have noted that supervisory relationship assists harassing supervisor).

Hostile environment harassment, unlike quid pro quo, only requires that the harassing conduct create an offensive or abusive working environment and does not subject the employer to strict liability.[40] Successful employer liability claims based on a hostile environment require courts to consider several factors, including a respondeat superior element.[41]

Following the prompting of the Supreme Court, the United States Court of Appeals for the Third Circuit in *Bouton v. BMW of North America, Inc.*,[42] found satisfaction of the respondeat superior element by following the Restatement of Agency ("Restatement").[43] In *Bouton*, a female employee alleged that her supervisor had sexually harassed her by, among other things, rubbing up against her in sexually provocative ways.[44] In

---

As one commentator has noted, however, whether a supervisor is acting within the scope of his employment often depends on the viewpoint of the observer. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 88 (1995) (examining viewpoints of employer, supervisor and employee). From the employer's viewpoint, the harassment may be unrelated to the task for which the supervisor was hired. *See id.* (stating employer may view behavior as outside scope of employment or as private matter). The supervisor might also fail to conceive that his ability to subject the employee to his harassment stems from his position. *See id.* (stating that supervisor may not view harassment as privilege of position).

> But from the employee's point of view, the supervisor's ability to harass her is created precisely by the agency relationship, which affords the supervisor the authority to call her into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger.

Id.

40. *See Meritor*, 477 U.S. at 65-67 (establishing basis for hostile environment harassment). In *Harris v. Forklift Sys., Inc.*, the Court attempted to clarify when a hostile environment exists. 510 U.S. 17, 20-21 (1993). The Court explained that a reasonable person must find the conduct hostile, and that the plaintiff must also find the conduct hostile. *See id.* at 21-22. (explaining that conduct must be objectively and subjectively hostile); *see also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (same); Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (1997) (same).

41. *See* Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997) (discussing necessary factors to make out prima facie case of hostile environment sexual harassment (citing *Andrews*, 895 F.2d at 1482)); Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (listing factors necessary to establish prima facie hostile environment (citing *Andrews*, 895 F.2d at 1482)). For a prima facie case of hostile environment sexual harassment, the *Knabe* court required the plaintiff to show:

> (1) the employee suffered intentional discrimination because of [his or her] sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.

Knabe, 114 F.3d at 410.

42. 29 F.3d 103 (3d Cir. 1994).

43. *See id.* at 106 (noting that Supreme Court has instructed courts to use agency principles to decide employer liability for hostile work environments).

44. *See id.* at 105.

considering BMW's liability, the Third Circuit determined that an employer could be liable for sexual harassment by its employees in one of two ways.[45] First, under Restatement section 219(2)(b)(1), the employer is liable for its own negligence or recklessness, which, in harassment cases, is a failure to discipline the employee or a failure to take some form of remedial action after notification of the harassment.[46] Alternatively, an employer could be liable under Restatement section 219(2)(d) if the supervisor relied upon apparent authority or was aided by the agency relationship.[47]

The Third Circuit would not, however, automatically hold an employer strictly liable for a sexually hostile work environment, even if a supervisor were responsible.[48] The court concluded that an effective grievance procedure, meaning the procedure was known to the victim and timely stopped the harassment, would allow an employer to escape liability under either section 219(2)(b) or section 219(2)(d) of the Restatement of Agency.[49] BMW's "open door policy," and its thorough and immediate investigation of the plaintiff's allegations, shielded BMW from any negligence for hostile environment sexual harassment.[50]

C. *Vicarious Employer Liability Emerges from* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton

In the companion cases, *Burlington Industries, Inc. v. Ellerth*[51] and *Faragher v. City of Boca Raton*,[52] the United States Supreme Court faced the

45. *See id.* at 106.

46. *See id.* at 106-08 (noting that employer may be liable for its own negligence); *see also Knabe*, 114 F.3d at 412 (holding that employer is liable under negligence theory if management-level employees had actual or constructive knowledge of sexually hostile work environment, but did not take prompt and adequate remedial action (citing *Andrews*, 895 F.2d at 1486)).

47. *See Bouton*, 29 F.3d at 106, 108-10; *see also Knabe*, 114 F.3d at 411 (reiterating that employers may be liable if supervisor relied upon apparent authority or was aided by agency relationship). For a discussion of the agency relationship and its current application, see *infra* notes 59-79 and accompanying text.

48. *See Bouton*, 29 F.3d at 106 (noting that *Meritor* rejected notion that employers are strictly liable for hostile environment); *see also Knabe*, 114 F.3d at 411 (refusing to find employers automatically liable for hostile environment).

49. *See Bouton*, 29 F.3d at 110 (holding effective grievance procedure protects employer from Title VII liability). The court reasoned that by definition there could be no negligence if an effective policy existed. *See id.* (stating "there is no negligence if the procedure is effective"). The *Bouton* court took a public policy stance with respect to apparent authority, reasoning that allowing employers to escape liability would promote the establishment of effective anti-harassment policies. *See id.* (stating that employers have economic incentives "to recruit, train, supervise their managers to prevent hostile environments").

50. *See id.* at 110 (concluding that BMW's procedure was adequate and rendered them not negligent under Title VII hostile environment).

51. 524 U.S. 742 (1998).

52. 524 U.S. 775 (1998).

issue of when an employer is liable for a supervisor whose acts create a hostile work environment for subordinates.[53]

In *Ellerth*, Kimberly Ellerth, a midlevel sales manager, alleged that her supervisor, Ted Slowick, sexually harassed her repeatedly during her one-year employment with Burlington Industries.[54] Ellerth cited numerous examples of sexual harassment, including one incident when Slowick commented that he "could make [Ellerth's] life very hard or very easy at Burlington" after Ellerth failed to give him any encouragement concerning remarks he made about her breasts.[55] On a second occasion, Slowick allegedly expressed reservations about promoting Ellerth because she was not "loose enough," and then proceeded to rub her knee.[56] Ellerth also alleged that on yet another occasion, Slowick informed her that her job would be much easier if she wore short skirts.[57] Based on these events, the lower courts found that Ellerth's claim could be classified as quid pro quo sexual harassment, even though Slowick's threats had never come to fruition.[58]

In resolving the case, the Supreme Court stated that although the categories of quid pro quo harassment and hostile work environment would still be useful in concluding that discrimination had occurred, the categories were no longer controlling in determining vicarious liability for the employer.[59] In keeping with its decision in *Meritor*, the Court once again looked to the law of agency to determine employer liability.[60] The Court determined that a supervisor could be held liable under the Restatement section 219(1) if the supervisor was acting within the scope of his

53. *See Ellerth*, 524 U.S. at 754, 757 (addressing whether employer can be vicariously liable for hostile work environment created by supervisor); *Faragher*, 524 U.S. at 785-86 (exploring issue of when employer is liable for acts of supervisory employee whose acts have created hostile environment for subordinates).

54. *See Ellerth*, 524 U.S. at 747-48.

55. *Id.* at 748.

56. *See id.*

57. *See id.*

58. *See id.* at 750 (noting disagreement within lower courts as to whether employer liability for unfulfilled quid pro quo harassment claim should be vicarious liability or negligence). Not only did Ellerth's supervisor fail to follow through with his threats, but Ellerth was actually promoted during this period. *See id.* at 748 (noting that Ellerth received promotion following her promotion interview). For a discussion of the requirements of quid pro quo sexual harassment claims, see *supra* notes 36-39, and accompanying text.

59. *See* Ellerth, 524 U.S. at 751-52 (finding categories of quid pro quo and hostile work environment absent from statutory text of Title VII). The Court retained the categories to determine when the sexual harassment is actionable. *See id.* at 753 (illustrating relevance of categories to Title VII litigation). A showing of quid pro quo harassment is actionable under Title VII because it establishes a change in the terms and conditions of employment. *See id.* at 753-54. If the claim falls under hostile environment sexual harassment, however, the plaintiff must go further and show that the harassment was severe or pervasive. *See id.* at 754.

60. *See id.* (turning to principles of agency law to determine employer liability because Title VII defines "employer" to include "agents").

employment, but that, as a general rule, sexual harassment by a supervisor is not considered to be within the scope of employment.[61]

The Court found the "aided in the agency relationship" requirement described in section 219(2)(d) to be of greater relevance and used it as the foundation for its new rule for establishing employer liability, which focused on whether a tangible employment action had occurred.[62] In an opinion that is also set forth in *Faragher*, the Court then went on to hold that employers are vicariously liable when a supervisor with immediate or successively higher authority over the victimized employee creates an actionable hostile environment.[63]

Where no tangible employment action has been taken against the employee, the employer can avoid liability and damages by raising an affirmative defense.[64] The affirmative defense consists of two prongs: (1) the employer must demonstrate that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[65] The Court stated that although it is not necessary for an

61. *See id.* at 756-57 (acknowledging that while employer may be held liable for torts of employees acting within scope of their employment, sexual harassment by supervisor is generally not considered to be conduct within scope of employment); *see also* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 150-52 (3d Cir. 1999) (finding employer may be liable for supervisors acting within scope of employment).

62. *See Ellerth*, 524 U.S. at 759-63 (discussing "aided in agency relation" standard in context of tangible employment action).

63. *See id.* at 765 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively) higher authority over the employee."); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (same).

64. *See Ellerth*, 524 U.S. at 765 ("When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . ." (citing FED. R. CIV. P. 8(c)); *Faragher*, 524 U.S. at 807 (same).

65. *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. 807. The two-prong affirmative defense may subject an employer to liability even though the employer has taken all possible steps to prevent and remedy the harassment. *See* Baderian et al., *supra* note 12, at 359 (illustrating how employer may be unable to avoid liability); Kruse, *supra* note 2, at 461 (noting employer may take all reasonable steps and still be liable). A commonly posited scenario is one in which an employer has an effective anti-harassment policy, follows up all complaints with an immediate and thorough investigation, and takes proper disciplinary action against the harassing supervisor. *See* Baderian et al., *supra* note 12, at 359 (creating scenario); Kruse, *supra* note 2, at 461 (same). If the employee utilizes the employer's complaint procedure, then the employee has not unreasonably failed to take advantage of the preventive or corrective measures of the employer, and the affirmative defense is unavailable. *See* Baderian et al., *supra* note 12, at 359 (finding second prong of affirmative defense troublesome); Kruse, *supra* note 2, at 461 (same). Despite taking all reasonable steps suggested by the Supreme Court, an employer may still be liable for the acts of its supervisors:

> Once the employer learns of an employee's sexual harassment complaint, the employer has little incentive to investigate the complaint if the em-

employer to have an anti-harassment policy with a complaint procedure, the litigation of the first element may appropriately address the need for such a policy, considering the employment circumstances.[66] Furthermore, the Court reasoned that the employer is not limited to evidence that the employee failed to use the employer's complaint procedures when proving the employee failed to use reasonable care to avoid harm, but that such a failure by the employee will usually fulfill the employer's burden under the second prong.[67]

> ployer will be liable regardless of its response. From a purely economic standpoint, employers may wonder why they should terminate or discipline high-level executives or "rainmaking" supervisors who have been accused of sexual harassment, if the ultimate outcome of the complaint will be that the employer is found liable regardless of its actions.

Baderian et al., *supra* note 12, at 359; *accord* Kruse, *supra* note 2, at 461-62 (arguing that affirmative defense, which is dependent in part on actions of employee, leads to judicial remedy that is "purely punitive").

It has been argued, however, that the affirmative defense is unfair to harassed employees.

> [T]here are often circumstances where a victim's fear of retaliation or stigma or hesitance keeps her from reporting the harassment . . . . [T]he victim's inaction is often immediately deemed unreasonable. This is done in accordance with *Ellerth*, despite what are often genuinely compelling circumstances to recognize the inaction as quite reasonable.

Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why* Ellerth *Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 316 (1999) (arguing unfairness of affirmative defense to harassed employees).

66. *See Ellerth*, 524 U.S. at 765 ("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 employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *Faragher*, 524 U.S. at 807 (same). In light of these words, the circuit courts have given great weight to the existence of an effective anti-harassment policy when considering the employer's obligations under the first prong of the affirmative defense. *See* Savino v. C.P. Hall Co., 199 F.3d 925, 932-33 (7th Cir. 1999) (considering employer's posted sexual harassment policy with instructions for reporting harassment in determining that employer had exercised reasonable care); Sims v. Health Midwest Physician Serv. Corp., 196 F.3d 915, 919 (8th Cir. 1999) (reproducing employer's sexual harassment policy when deciding whether material facts remained concerning employer's exercise of reasonable care); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (noting that although not dispositive, "an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of this defense"); Pacheco v. New Life Bakery, Inc., 187 F.3d 1055, 1061 (9th Cir. 1999) (noting that employer had no sexual harassment policy or complaint procedure in determining employer had not satisfied reasonable care standard under first prong of affirmative defense); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998) (holding effective anti-harassment policy is "compelling proof" of effort to stop harassment).

67. *See Ellerth*, 524 U.S. at 765 ("And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing 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."); *Faragher*, 524 U.S. at 807-08 (same); *Savino*, 199 F.3d at 932-34 (granting affirmative defense because

In cases where the supervisor's harassment results in a tangible employment action, the affirmative defense is not available.[68] The Court defined an adverse tangible employment action as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[69] Because Ellerth had not alleged a tangible employment action at the hands of her supervisor, the case was remanded to give Burlington an opportunity to assert and prove the affirmative defense.[70]

In *Faragher*, the companion case to *Ellerth*, the Supreme Court once again dealt with the issue of when an employer may be liable for a supervisor who has created a hostile work environment by sexually harassing subordinates.[71] Ann Faragher was a lifeguard working for the city of Boca Raton.[72] Faragher alleged that her immediate supervisors, Bill Terry and

---

employee failed to report harassment when asked and then waited several months to report it); *Caridad*, 191 F.3d at 295-96 (granting affirmative defense because of employee's failure to report sexual harassment); Scrivner v. Socorro Indep. Sch. Dist., 169 F.3d 969, 971-72 (5th Cir. 1999) (granting affirmative defense considering plaintiff's failure to report harassment); Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) (noting employer must go beyond showing plaintiff unreasonably delayed in reporting harassment and must also show reasonable person in plaintiff's position could have prevented harassment from becoming "severe or pervasive" by coming forward earlier); Phillips v. Taco Bell Corp., 156 F.3d 884, 889-90 (8th Cir. 1998) (remanding case because reasonableness of waiting for two months to report harassment was question of fact). *But see* Sharp v. City of Houston, 164 F.3d 923, 931 (5th Cir. 1999) (noting plaintiff was reasonable not to report harassment because plaintiff could have lost job).

68. *See Ellerth*, 524 U.S. at 765 (holding no affirmative defense available if harassment leads to tangible employment action); *Faragher*, 524 U.S. at 808 (holding affirmative defense is unavailable if supervisor harassment results in tangible employment action). The circuits have determined a wide array of examples that do not qualify as adverse tangible employment actions. *See Savino*, 199 F.3d at 933 n.8 (stating that reassignment to comparable office was not tangible employment action); *Caridad*, 191 F.3d at 294 (holding that constructive discharge does not constitute tangible employment action); Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) (holding that changing grocery store clerk's work schedule, expanding duties to include mopping floor, cleaning chrome in produce department, or requiring clerk to check in with supervisor are not changes in employment status); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268 (5th Cir. 1998) (finding that teacher's voluntary withdrawal from extracurricular activities following her receipt of anonymous mail and phone calls allegedly from principal did not constitute tangible employment action); Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (rejecting assignment of extra work not in plaintiff's job description and not permitting her to attend professional conference as tangible employment actions). *But see* Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1999 WL 58578, at *30 (E.D. Pa. Jan. 26, 1999) (finding assignment of extra, less desirable work and subjecting plaintiff to other harm as result of rejection of sexual advances constituted adverse tangible employment action).

69. *Ellerth*, 524 U.S. at 761.

70. *See id.* at 766 (remanding case).

71. *See Faragher*, 524 U.S. at 780 (setting forth issue of case).

72. *See id.*

David Silverman, created a sexually hostile atmosphere through "uninvited and offensive touching" of her and the other female lifeguards, as well as making lewd comments.[73] Faragher never officially reported the sexually harassing behavior to any upper-level management.[74] The city had adopted a sexual harassment policy, which was contained in a memorandum from the City Manager and addressed to all employees, but the memorandum never reached Faragher's division.[75] Two months before Faragher's resignation, another female employee wrote to the city, complaining that Terry and Silverman had sexually harassed her and several other female lifeguards.[76] The city then investigated the complaint, and, after finding that Terry and Silverman had behaved inappropriately, reprimanded them and forced them to choose between leave without pay or forfeiture of annual leave.[77]

Employing the standard they had devised in *Ellerth*, the Court found in favor of the plaintiff and held the city liable for the hostile environment created by its supervisors.[78] The Court concluded that the city could not use the affirmative defense against liability because it had failed to disseminate its sexual harassment policy to the beach employees, as well as failing to keep track of the conduct of its supervisors.[79]

III. NARRATIVE ANALYSIS OF THE THIRD CIRCUIT'S APPLICATION OF THE *FARAGHER/ELLERTH* STANDARD

The decisions in *Faragher* and *Ellerth* have significantly reshaped employer liability for sexual harassment by a supervisor. The Third Circuit has addressed employer liability concerning a supervisor's sexual harassment twice within the last year.[80]

A. Durham Life Insurance Co. v. Evans

In *Durham Life Insurance Co. v. Evans*,[81] the United States Court of Appeals for the Third Circuit dealt with a female life insurance agent, Diane Evans, who alleged that she was sexually harassed by the managers of the agency.[82] Evans claimed that on one occasion a manager, William

73. *See id.*

74. *See id.* at 782-83 (noting that Faragher did speak informally with another supervisor who did not feel authorized to report it).

75. *See id.* at 781-82.

76. *See id.* at 783.

77. *See id.*

78. *See id.* at 810 (remanding case to district court for judgment to be reentered in favor of plaintiff).

79. *See id.* at 808.

80. *See, e.g.*, Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999) (addressing employer liability for supervisor's sexually harassing conduct); Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) (same).

81. 166 F.3d 139 (3d Cir. 1999).

82. *See id.* at 144.

McKaskill, told her she "made too much money for a goddamn woman," and later grabbed her buttocks and told her she smelled good.[83] Another manager, William Owens, allegedly asked Evans to go dancing "into the fields with him," informing her that he could fire her if she didn't acquiesce to his wishes, and that she would be sued by her employer if she reported the incident or quit and took her business with her.[84] Following these incidents, Evans' secretary was taken away, and she was assigned a disproportionate amount of "lapsed books," policies that are no longer active, which had a significant negative impact on Evans' commission earnings.[85] Finally, Evans resigned and filed a discrimination suit after she was deceptively stripped of her private office and denied access to client files that were necessary for her to perform her work.[86]

The Third Circuit began its decision concerning employer liability by questioning whether the supervisory acts fell inside or outside the scope of employment.[87] The court was guided in its approach by the Supreme Court's decisions in *Faragher* and *Ellerth*, which held that, in addition to the "aided in the agency test," an employer may be liable for its supervisor's acts under a scope of employment theory.[88] The *Evans* court rejected utilizing a scope of employment analysis, however, because the district court had not provided the necessary findings concerning the harasser's intent.[89] Furthermore, the *Evans* court determined that even though a scope of employment analysis may be available to a plaintiff, the aided in the agency test, and how it is to be utilized, has been more clearly defined by the Supreme Court and, therefore, should be used instead.[90]

---

83. *See id.* at 145-46.

84. *See id.* at 145.

85. *See id.* at 146.

86. *See id.*

87. *See id.* at 150.

88. *See Evans*, 166 F.3d at 150 (acknowledging that *Faragher* and *Ellerth* considered scope of employment as possible source of liability); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (holding that employer may be liable if supervisor, acting within scope of employment, harasses employee); Faragher v. City of Boca Raton, 524 U.S. 775, 793-94 (discussing scope of employment as possible basis for employer liability for supervisory acts). For a further discussion of scope of employment liability, see *supra* note 39.

89. *See Evans*, 166 F.3d at 151.

90. *See id.* at 151-52 (holding that scope of employment is elusive concept, and agency relation test should be favored); *see also* Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 119 n.18 (3d Cir. 1999) (noting Supreme Court had not discussed how motivations for scope of employment should be determined). Despite holding that the aided in the agency test should be favored, the Third Circuit did engage in an informative and "metaphysical" discussion concerning the theoretical application of, and remaining questions surrounding, scope of employment. *See Evans*, 166 F.3d at 151-52 n.6 (discussing overlap between aided in agency and scope of employment tests).

Employing the aided in the agency test, the Third Circuit concluded that Evans had suffered a tangible adverse employment action.[91] The court's conclusion was based on the "loss of Evans' office, the dismissal of her secretary, the missing files, and the lapse assignments that led to a fifty percent pay decrease."[92] Because Evans suffered a tangible employment action, the court found that an affirmative defense to liability was not available, and that the employer was automatically liable for the manager's conduct.[93] The court next rejected the argument that McKaskill was not Evans' supervisor, which would have precluded automatic liability under the aided in the agency test.[94] The court noted that witnesses considered him to be part of the ruling "triumvirate" in the office, and that he was two levels above the plaintiff according to the company's own charts.[95]

B. Hurley v. Atlantic City Police Department

In *Hurley v. Atlantic City Police Department*,[96] the United States Court of Appeals for the Third Circuit once again addressed the issue of employer liability. Donna Hurley, a female police sergeant, brought a sexual harassment suit against the Atlantic City Police Department ("ACPD"), alleging that a police chief, a police captain and a police sergeant sexually harassed her over the course of her employment.[97] Hurley alleged that when she complained to her supervisor, Captain Henry Madamba, about various incidents of harassment, he replied that women working in the private sector avoided sexual harassment because they "sleep with their bosses."[98] In light of Madamba's additional comments, such as that he lost weight by "having sex a few times a day," and that women would come to him "when they're ready," Hurley believed he was soliciting her for sex.[99]

---

91. *See Evans*, 166 F.3d at 153-54 (stating that loss of secretary and private office, which were negotiated conditions of Evans' employment, constituted tangible adverse actions).

92. *Id.* at 153-54.

93. *See id.* at 152 (holding employer automatically liable if tangible adverse employment action occurred). The employer argued that the affirmative defense should still apply because Evans had not reported the harassment as soon as it occurred, which would have permitted the employer to investigate and stop the harassment before any tangible employment action had occurred. *See id.* at 154 (refusing to consider counterfactual inquiry). The court rejected this argument because it would lead to complex litigation and would perversely burden plaintiffs' with extensive evidence of past discrimination. *See id.* (examining impact of permitting employers to use argument).

94. *See id.* at 154-55 (holding that McKaskill was Evans' supervisor).

95. *See id.* (holding that other employees and company considered him to exert authority around office). The court also noted that it is unnecessary to have complete authority to act alone in order to qualify for supervisor liability under Title VII's agency standard. *See id.*

96. 174 F.3d 95 (3d Cir. 1999)

97. *See id.* at 103-06 (describing various incidents of sexual harassment, such as sexually explicit graffiti, solicitations for sex and derogatory poetry).

98. *Id.* at 120.

99. *See id.*

In *Hurley*, the issue before the court was whether to award the ACPD, which had been found liable for its supervisors' harassment, a new trial in light of the new *Faragher/Ellerth* standard that had been handed down just after the initial oral arguments on the appeal.[100] Based on the affirmative defense established in *Faragher* and *Ellerth*, the court held that the jury had not been improperly informed that an effective sexual harassment policy was only one factor in determining liability and was not an absolute defense.[101] Furthermore, the court found the point moot because the ACPD's five avenues by which to lodge a complaint were ineffective; therefore, the policy did not satisfy the first prong of the affirmative defense.[102] The court then went on to hold that Hurley was under no obligation to try all the available avenues by which to file a complaint because she had informed her immediate supervisor of the harassment.[103]

IV. PRACTITIONERS' GUIDE TO LITIGATING EMPLOYER LIABILITY IN THE THIRD CIRCUIT

A. *What is an Adverse Tangible Employment Action?*

Determining whether the plaintiff-employee has suffered a tangible adverse employment action is of paramount importance in litigating employer liability for a hostile environment created by a supervisor.[104] If there is a tangible adverse employment action, the employer is automatically liable, whereas if there is no such action, the employer may seek refuge in the affirmative defense.[105] As noted above, the Supreme Court defined an adverse tangible employment action as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a signifi-

100. *See id.* at 117 (discussing possible basis for new trial in light of recent Supreme Court decisions).

101. *See id.* at 118-19 (describing affirmative defense established by Supreme Court and holding effective sexual harassment does not create absolute defense). *But see* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994) (concluding that BMW's effective sexual harassment procedure was adequate and rendered them not negligent under Title VII hostile environment claim).

102. *See Hurley*, 174 F.3d at 118 (pointing out that Hurley could have gone to her direct supervisor, Internal Affairs, Affirmative Action Officer, Police Chief and Union, but that all these options were proved ineffective).

103. *See id.* (holding plaintiff had fulfilled obligation under ACPD's own procedure by putting immediate supervisor on notice of harassment).

104. *See* Lyon & Phillips, *supra* note 36, at 633 ("The presence of a tangible action is now the guidepost for liability in all cases involving sexual harassment by supervisors."); Jules L. Smith & Harry B. Bronson, *Avoiding and Litigating Sexual Harassment Claims Under the 1998 Supreme Court Decisions:* Ellerth, Faragher, *and* Oncale, 606 PLI/LIT. 289, 305 (1999) ("[D]isputes of the existence of tangible adverse action will be hotly contested in certain factual scenarios in the future.").

105. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that whether employer may seek affirmative defense hinges on existence of tangible adverse employment action); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (same).

cant change in benefits . . . and in most cases inflicts direct economic harm."[106] Some courts have taken a restrictive view of the Court's words, holding that non-economic actions such as constructive discharges, job reassignments and extra work do not constitute an adverse tangible job action.[107]

The Third Circuit has taken a more expansive view of what qualifies as a tangible adverse employment action, holding in *Durham* that "[a]lthough direct economic harm is an important indicator of a tangible adverse employment action, it is not the sine qua non."[108] The Third Circuit then went on to conclude that the loss of the plaintiff's office, the firing of her secretary and missing files could also qualify as tangible adverse employment actions.[109] In *Glickstein v. Neshaminy School District*,[110] the United States District Court for the Eastern District of Pennsylvania heard the case of a plaintiff who alleged that her supervisor assigned her extra work, as well as less desirable work, such as monitoring study hall and the cafeteria.[111] The district court also took a more expansive ap-

106. *Ellerth*, 524 U.S. at 765 (listing "discharge, demotion, or undesirable reassignment" as examples of tangible employment action).

107. *See* Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999) (finding that reassignment to comparable office is not tangible employment action); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294 (2d Cir. 1999) (holding "constructive discharge does not constitute a 'tangible employment action'"); Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) (holding that changing one's work schedule, expanding duties to include mopping the floor, cleaning chrome in produce department, or requiring employee to check in with supervisor, are not significant changes in employment status); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268 (5th Cir. 1998) (holding that teacher's voluntary withdrawal from extracurricular activities following her receipt of anonymous mail and phone calls allegedly from principal did not constitute tangible employment action); Reinhold v. Virginia, 151 F.3d 172, 175 (4th Cir. 1998) (holding that supervisor assigning extra work, and work not in plaintiff's job description, as well as not allowing her to attend professional conference, were not tangible employment actions); Darrell S. Gay et al., *Summary Judgment in the Aftermath of* Ellerth *and* Faragher, 604 PLI/LIT. 49, 77-78 (1999) (noting that caselaw seems to indicate courts are unwilling to extend definition of tangible adverse employment action); Paul E. Starkman, *Learning the New Rules of Sexual Harassment:* Faragher, Ellerth *and Beyond*, 66 DEF. COUNS. J. 317, 323 (1999) (noting that majority of tangible employment actions will involve some kind of economic injury and decreased chances for employment).

108. Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153 (3d Cir. 1999). Sine qua non is "[w]ithout which not. That without which cannot be. An indispensable requisite or condition." BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).

109. *See Evans*, 166 F.3d at 153-54; *see also* DiIenno v. Goodwill Indus. of Mid-Eastern Pa., 162 F.3d 235, 236 (3d Cir. 1998) (holding that lateral transfer to position that employer knows may constitute adverse employment action in retaliation claim). The *Evans* court considered the more difficult lapse assignments to constitute a tangible adverse employment action, but qualified its finding by noting that the assignments resulted in the loss of 50% of the plaintiff's earnings. *See Evans*, 166 F.3d at 153-54 (concluding that actions by employer constituted adverse tangible employment).

110. No. 96-6236, 1999 WL 58578, *1 (E.D. Pa. Jan. 26, 1999).

111. *See id.* at *14.

proach, concluding that such action could constitute a tangible employment action "akin to a demotion or a reassignment entailing significantly different job responsibilities."[112]

The Third Circuit has potentially opened a floodgate as to what actions may constitute a tangible adverse employment action. While adverse economic actions taken by a supervisor against an employee will present the strongest arguments for an adverse tangible employment action, the Third Circuit has indicated that a plaintiff may also succeed by establishing other non-economic means by which a supervisor has negatively impacted his or her work.[113]

B. *Is the Affirmative Defense Available?*

The most heated litigation involving Title VII harassment will be cases in which there has been no tangible adverse employment action, allowing an employer to seek refuge from liability in the affirmative defense established by *Faragher* and *Ellerth*.[114] The affirmative defense is only applicable if the employer can satisfy two elements.[115] First, the employer must have "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[116] Second, the plaintiff-employee must not have "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[117]

1. *Employer's Duty of Care*

In addressing the first prong of the affirmative defense, the Supreme Court stated that a disseminated and effective anti-harassment policy appropriate to the circumstance could be proof that an employer exercised reasonable care.[118] The *Faragher* Court emphasized the need for an effective anti-harassment policy when it held that an employer did not exercise

112. *Id.*

113. For a further discussion of economic and noneconomic tangible employment actions, see *supra* notes 104-12 and accompanying text.

114. *See* Lyon & Phillips, *supra* note 36, at 620 ("This affirmative defense will most certainly be the future battle ground in cases involving sexual harassment by supervisors that do not involve a tangible employment action."); *see also* Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 66 (1999) ("Much of the post-*Faragher/Burlington* litigation involving employer liability for supervisor harassment likely will focus on the question of whether the employer can satisfy the two-part affirmative defense.").

115. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (discussing two requirements to utilize affirmative defense); Faragher v. City of Boca Raton, 524 U.S. at 807 (1998) (same).

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

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

118. *See Ellerth*, 524 U.S. at 765 (holding that although not necessary in every instance, need for anti-harassment policy may be addressed); *Faragher*, 524 U.S. at 807 (same).

reasonable care because the employer had failed to disseminate its anti-harassment policy, and that the policy was inadequate because it did not offer any assurance that the employee could bypass the harassing supervisors when filing a complaint.[119] The various circuits have followed suit, holding that an effective anti-harassment policy is an important factor in determining whether an employer has exercised reasonable care and, therefore, satisfied the first prong of the affirmative defense.[120]

In *Hurley*, the Third Circuit was careful to note that it would not allow "an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort."[121] The court did, however, indicate that an effective, widely disseminated anti-harassment policy is a factor to consider in determining whether an employer has exercised reasonable care.[122] The court then proceeded to reject an affirmative defense as a plausible option for the police department because, as the district court found, the department's five avenues of complaint were ineffective.[123]

Prevention through an effective, written anti-harassment policy is only one aspect of an employer's duty to exercise reasonable care; an employer must also respond to and correct the harassing behavior once it is reported.[124] The United States Courts of Appeal for the Second, Seventh and Ninth Circuits have considered the adequacy of the employer's inves-

119. *See Faragher*, 524 U.S. at 808 (addressing findings by district court).

120. *See* Savino v. C.P. Hall Co., 199 F.3d 925, 932-33 (7th Cir. 1999) (considering employer's posted sexual harassment policy with instructions for reporting harassment in determining that employer had exercised reasonable care); Sims v. Health Midwest Physician Serv. Corp., 196 F.3d 915, 919 (8th Cir. 1999) (reproducing employer's sexual harassment policy in deciding whether material facts remained concerning employer's exercise of reasonable care); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (noting that while not dispositive, "an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of the defense"); Pacheco v. New Life Bakery, Inc., 187 F.3d 1055, 1061-62 (9th Cir. 1999) (deciding that employer had not satisfied reasonable care standard under first prong of affirmative defense because employer had no sexual harassment policy and no complaint procedure); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998) (holding that effective anti-harassment policy is compelling proof of effort to stop harassment).

121. Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1998).

122. *See id.* at 119-20 (discussing anti-harassment policy and upholding jury instructions that considered such policy to be factor in employer liability); Whitaker v. Mercer County, 65 F. Supp. 2d 230, 245 (D.N.J. 1999) (discussing existence of complaint procedure in context of affirmative defense); *see also* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152 (3d Cir. 1999) (rejecting scope of employment analysis fearing it "might make effective anti-harassment programs irrelevant to employer liability in many hostile environment cases").

123. *See Hurley*, 174 F.3d at 118 (noting that district court found direct supervisor, Internal Affairs, the Affirmative Action Officer, the Chief and Union to be ineffective avenues of complaint).

124. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding employer must prevent and promptly correct harassing behavior); *Faragher*, 524 U.S. at 807 (same).

tigation, whether the harassing supervisor has been reprimanded, as well as other remedies, such as relocating the employee, to determine whether the employer has corrected the harassment.[125] In *Hurley*, the Third Circuit held that the police department had not exercised reasonable care, in part, because of its failure to investigate the harassing behavior of its employees, as well as the inaction of the plaintiff's supervisor upon discovering the existence of the sexual harassment.[126]

Although the Third Circuit has provided little guidance as to what steps an employer must take to correct the harassment in the aftermath of *Faragher* and *Ellerth*, its earlier decisions may be indicative of what is necessary to satisfy the employer's duty of reasonable care. In *Knabe v. Boury Corp.*,[127] the United States Court of Appeals for the Third Circuit held that an employer exercised reasonable care when the harassing supervisor was warned that the company would not tolerate harassment on penalty of suspension or termination.[128] The harassed employee was also returned to the work schedule from which she had been removed and was provided with four names and phone numbers in the event of further harassment.[129] The court determined that the remedial action was "adequate as a matter of law because it was reasonably calculated to prevent further harassment."[130] Furthermore, the court determined that even if the investigation into the harassment was flawed, an employer might escape liability, unless the remedial action taken by the employer was also inadequate.[131] The court did acknowledge, however, that in some instances an investigation may be so flawed, such as missing certain severe instances of harassment, that the chosen remedial action could not possibly be adequate.[132] In *Bouton*, the court held that the employer had taken adequate remedial measures by promptly investigating upon receipt of the first complaint of harassment and immediately transferring the employee to a different supervisor.[133]

125. *See Savino*, 199 F.3d at 933 (holding that investigation of complaint, reprimanding of supervisor followed by suspension, and relocation of employee, satisfied employer's duty of reasonable care); *Caridad*, 191 F.3d at 295 (finding that employer satisfied reasonable care under first prong because it investigated and remedied problems reported by employees); *Pacheco*, 187 F.3d at 1062 (holding that employer failed to exercise reasonable care when relative of employer conducted investigation, other female employees were not interviewed, and supervisor was not reprimanded despite his admission he may have grabbed plaintiff).

126. *See Hurley*, 174 F.3d at 118.

127. 114 F.3d 407 (3d Cir. 1997).

128. *See id.* at 413.

129. *See id.*

130. *Id.*

131. *See id.* at 414 (holding that court would overlook flawed investigation if effective action).

132. *See id.* at 414.

133. *See Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994). Given the Third Circuit's attention to whether an investigation has been conducted, employer's should be advised to implement a thorough investigation program. For

The most important lesson to be gleaned from the foregoing discussion is that employers should be advised of the necessity of implementing effective anti-harassment policies.[134] In general, the policy should: (1) include examples of unacceptable behavior and explain that no company official or supervisor may engage in such conduct; (2) provide a bypass mechanism whereby an employee may contact alternative departments or people in the event that the employee is uncomfortable talking to a supervisor; and (3) make clear that any allegations will be investigated with no fear of retribution.[135] All employees should also receive a copy of the policy by the first day of work, and "the employee should sign a receipt acknowledging that he or she has received the policy, has read it, and understands it. This receipt should be kept in the employee's personnel file .... [These steps] will have been useless unless the employer immediately conducts a thorough, well-documented investigation of all complaints."[136]

---

an in depth discussion of how to conduct a proper investigation into allegations of sexual harassment written from the perspective of a Third Circuit practitioner, refer to Judith E. Harris, *Sexual Harassment Investigations*, SE17 ALI-ABA 53 (1999), and Rosalind S. Fink, *Overview of Sexual Harassment Law*, 621 PLI/LIT. 7, 40-42 (1999).

134. *See* Lyon & Phillips, *supra* note 36, at 646 (arguing that distributed, written anti-harassment policy is key to showing employer acted reasonably); *see also* Richelle Wise Kidder, Comment, *A Conciliatory Approach to Workplace Harassment:* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton, 36 HOUS. L. REV. 1316, 1345 (1999) (noting that employers should make sure policies are distributed and establish grievance procedure).

135. *See* Lyons & Phillips, *supra* note 36, at 646-67 (explaining necessary elements of effective anti-harassment policy); *see also* Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 1203 (D. Colo. 1998) (finding that policy containing similar criteria was adequate); Baderian et al., *supra* note 12, at 365 (listing elements to include in anti-harassment policy); Smith & Bronson, *supra* note 104, at 306-17 (discussing in detail elements that will, and will not, make employer's policy adequate); Starkman, *supra* note 107, at 333 (listing steps employer must take to construct adequate policy to exercise reasonable care); Kidder, *supra* note 134, at 1349 (broadly outlining what effective anti-harassment policy should contain); Kruse, *supra* note 2, at 467-68 (discussing steps employer must take regarding sexual harassment policy).

136. Lyons & Phillips, *supra* note 36, at 646-47. In Baderian et al., the authors also go beyond the scope of an effective anti-harassment policy in providing steps an employer may take to prevent and respond to anti-harassment suits:

1. Review Your Sexual Harassment and Anti-Retaliation Policy . . .
2. Identify All Supervisors and Make Them Accountable for Compliance with the Employer's Sexual Harassment and Anti-Retaliation Policy . . .
3. Train All Supervisors on Sexual Harassment Prevention . . .
4. Train Non-Supervisory Employees on the Sexual Harassment Policy and the Procedures to Follow if They Experience Sexual Harassment . . .
5. Obtain a Signed Receipt When Distributing the Sexual Harassment Policy . . .
6. Periodically Redistribute the Sexual Harassment Policy and Obtain Updated Receipts . . .

2. *Employee Duty of Care*

In addition to requiring the employer to exercise reasonable care by responding to and correcting the sexual harassment, the Supreme Court also held that the affirmative defense will not apply unless "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[137] The Court then elaborated that showing an employee failed to use any complaint procedure provided by the employer is one way to fulfill the employer's burden under this element.[138]

In *Hurley*, the Third Circuit held that the plaintiff-employee satisfied her obligation under the second prong of the affirmative defense by putting her supervisor on notice of the harassment, despite the fact that the supervisor was himself responsible for much of the harassment.[139] Furthermore, the *Hurley* court rejected the police department's argument that the employee was obligated to explore all of the department's five avenues of complaint, holding that it was sufficient that the plaintiff notified her supervisor, who, according to the police department's own policy, was responsible for preventing and correcting the harassment.[140] Therefore, employers must make sure that all channels for communicating sexually harassing behavior are effective.[141]

---

7. Instruct Appropriate Managers on the Guidelines for Conducting Investigations of Sexual Harassment Complaints . . .
8. Incorporate the Sexual Harassment Policy into New Employee Orientation . . .
9. Document Efforts to Prevent and Correct Harassment and Any Employee's Failure to Take Advantage of the Opportunities Provided by the Employer . . .
10. Assert the New Affirmative Defense in Pending or Future Sexual Harassment Lawsuits

Baderian et al., *supra* note 12, at 365-68.

137. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). For suggestions on how a plaintiff should conduct discovery under the second prong of the affirmative defense, see Loretta T. Attardo & Tamsin R. Kaplan, *Practice Pointers on Opposing the Affirmative Defense Established by* Ellerth *and* Faragher. *The Second Prong: That the Sexually Harassed Employee "Unreasonably Failed to Take Advantage of Any Preventive or Corrective Opportunities Provided by the Employer or to Avoid Harm Otherwise"*, 606 PLI/LIT. 347, 352-53 (1999).

138. *See Ellerth*, 118 524 U.S. at 765 (noting that, while not dispositive, employee's failure to use employer's complaint procedure normally satisfies employer's burden under second prong); *Faragher*, 524 U.S. at 807-08 (same).

139. *See Hurley*, 174 F.3d 95, 118 (3d Cir. 1999) (noting that supervisor was responsible for some acts of harassment).

140. *See id.* (noting that plaintiff was not obligated to try all available channels by which to file complaint). The court noted the plaintiff could also have complained to the "Internal Affairs, the Affirmative Action Officer, the Chief through his 'open door policy,' and the union grievance procedure." *Id.*

141. *See* Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999) (noting employee's failure to report acts of harassment which she later alleged in suit); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295-96 (2d Cir. 1999) (granting affirmative defense in light of employees' failure to report sexual harass-

Although the Third Circuit has not yet indicated how it will proceed in the event that an employee does not notify an employer of the sexual harassment, the majority of the other circuits have been unforgiving in such scenarios. For instance, in *Caridad v. Metro North Commuter Railroad*,[142] the United States Court of Appeals for the Second Circuit granted the employer the protection of the affirmative defense, holding that the employee had no valid excuse for not reporting the harassment because there was no fear that her complaint would not be taken seriously or that she would be exposed to an adverse consequence for filing the complaint.[143] The Third Circuit has not faced a situation in which an employee has delayed reporting the sexual harassment, although other circuits have permitted consideration of such delays in determining whether the employer has satisfied the second prong of the affirmative defense.[144]

While much attention has been devoted to whether an employee has taken advantage of an employer's preventive or corrective measures, the *Faragher* and *Ellerth* decisions provided no guidance regarding how to determine when an employee failed "to avoid harm otherwise."[145] As a last resort, employers may be able to take advantage of this undefined area to creatively prove that an employee has failed to meet the obligation to prevent the sexual harassment.[146] For instance, there has been some speculation that an employer may be able to use the following phrase as a defense: "where the employee joined in sexual banter or horseplay in the

---

ment); Scrivner v. Socorro, 169 F.3d 969, 971-72 (5th Cir. 1999) (granting affirmative defense when plaintiff failed to report sexual harassing conduct of supervisor to investigator acting in response to anonymous letter). *But see* Sharp v. City of Houston, 164 F.3d 923, 931 (5th Cir. 1999) (noting plaintiff was reasonable in not reporting harassment because of potential ramifications which included losing her career).

142. 191 F.3d 283 (2d Cir. 1999).

143. *See Caridad*, 191 F.3d at 295-96 (granting affirmative defense in light of employee's failure to report sexual harassment).

144. *See, e.g., Savino*, 199 F.3d at 932-33 (emphasizing fact that plaintiff waited several months before reporting harassment in deciding jury properly granted affirmative defense); Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) (noting that employer must go beyond showing plaintiff unreasonably delayed in reporting harassment and must also show that reasonable person in plaintiff's position could have prevented harassment from becoming "severe or pervasive" if he or she came forward earlier); Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (8th Cir. 1998) (remanding case because reasonableness of waiting for two months to report harassment was question of fact).

145. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (discussing second requirement for affirmative defense); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (same).

146. *See* Baderian et al., *supra* note 12, at 360 (noting phrase may be additional avenue for employer to show employee did not adequately prevent harassment); Lyon & Phillips, *supra* note 36, at 644 ("[T]his little phrase added to the end of the second prong, appearing to be almost an afterthought, could be fertile ground for both argument and future litigation, and may well serve as a last resort for the employer in the appropriate case.").

workplace, [but probably not] where the plaintiff wore provocative clothing to work."[147]

C. *Supervisor or Not?*

Under the *Faragher/Ellerth* standard, an employer is subject to automatic liability only if the hostile environment is created by a supervisor with "immediate (or successively) higher authority over the employee."[148] In *Durham,* the Third Circuit looked to a variety of sources to determine whether the person in question was the plaintiff-employee's supervisor.[149] The court noted that witnesses testified that the alleged supervisor was a member "of the ruling 'triumvirate,'" that he was two levels above the plaintiff according to the company's own charts, and that he joined forces with two other men to coerce the supervisor into stripping the plaintiff of her office.[150] Finally, the court noted that it is not necessary to have complete authority to act on behalf of the employer without consulting others in order to be considered a supervisor under Title VII.[151] The court's holding indicates that litigating "who" constitutes a supervisor will not be limited to merely examining the titles bestowed on an individual, but will extend to an individual's functions, actions and how one is perceived in the workplace.[152]

V. CONCLUSION

In expounding upon the issues raised by the Supreme Court's holdings in *Faragher* and *Ellerth,* the Third Circuit has chosen to foster creative litigation by rejecting rigid definitions. For instance, the Third Circuit has indicated a willingness to look beyond merely economic adverse consequences in determining if an employee has been subjected to an adverse

147. Lyon & Phillips, *supra* note 36, at 644.

148. *Ellerth,* 524 U.S. at 765 (setting forth situation by which employer may be held vicariously liable); *Faragher,* 524 U.S. at 807 (same).

149. *See* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 154-55 (3d Cir. 1999) (examining various sources to determine supervisory capacity).

150. *See id.* at 154 (listing variety of indicators that McKaskill was plaintiff's supervisor); *see also,* Goodwin v. Seven-Up Bottling Co., No. 96-CV-2301, 1998 WL 438488, at *8-9 (E.D. Pa. July 31, 1998) (holding high-level executive was supervisor based on job description). In *Goodwin,* the individual in question was an officer of a realty company and a bottling company, both of which operated from the same plant. *See id.* (noting evidence presented to prove individual was plaintiff's supervisor). The harassing individual spent most of his time working for the realty company, but the court noted that executives of the bottle company set labor policies and managed the day-to-day operations of both companies. *See id.* Based on these facts, the court found that a jury could conclude that a necessary supervisory role existed. *See id.* (holding that sufficient evidence existed to support jury decision).

151. *See Evans,* 166 F.3d at 154-55 (citing *Bonenberger v. Plymouth Township,* 132 F.3d 20, 23 (3d Cir. 1997)).

152. For a discussion of the Third Circuit's approach to employer liability, see *supra* notes 104-52 and accompanying text.

tangible employment action.[153] Furthermore, while giving due weight to the existence of an effective anti-harassment policy, the Third Circuit has also focused on the employer's remedial actions in determining whether it has secured the protection of the affirmative defense to strict liability.[154] The Third Circuit has allowed for much leeway in determining whether one may be considered a supervisor for the purposes of Title VII.[155]

At the same time, the Third Circuit has left some questions unanswered. For instance, future litigation is necessary to determine under what circumstances an employee may reasonably fail to notify an employer of incidents of sexual harassment by a supervisor.[156] Certainly, the decisions handed down by the Third Circuit will afford an opportunity for both plaintiffs and employers to be creative in litigating employer liability for sexually hostile environments perpetrated by supervisors.

David F. McCann

153. For a discussion of the Third Circuit's interpretation of an adverse tangible employment action, see *supra* notes 104-13 and accompanying text.

154. For a discussion of the Third Circuit's treatment of anti-harassment policies and remedial actions, see *supra* notes 118-36 and accompanying text.

155. For a discussion of who may be considered a supervisor according to the Third Circuit, see *supra* notes 149-53 and accompanying text.

156. For a discussion of an employee's duty to take advantage of an employer's preventive and corrective measures, see *supra* notes 137-48 and accompanying text.