


2-2006

# The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness

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## Recommended Citation

39 U.C. Davis L. Rev. 529 (2006)

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# The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness

Heather S. Murr\*

*Supervisory sexual extortion claims, where a supervisor extorts sex from a subordinate by threatening discharge or some other job detriment, do not fit neatly into the current employer liability framework for supervisory sexual harassment under Title VII. Prior to 1998, employers were strictly liable for such claims as they constituted quid pro quo sexual harassment. Since 1998, employer liability for supervisory sexual harassment has hinged upon the employer's official decision-making processes. An employer is strictly liable for supervisory sexual harassment only when the supervisor takes a tangible action, such as termination, that implicates the employer's official decision-making processes. In all other instances of supervisory sexual harassment, the employer may be vicariously liable but may defeat liability, or reduce damages, by asserting and proving a two-prong affirmative defense that considers the reasonableness of both the employer's and the subordinate's actions. In the supervisory sexual extortion context, certain courts have taken a realist effects-based approach and have imposed strict liability for these classic quid pro quo claims based on the supervisor's abuse of official power in extorting sex. Other courts have taken a formalist approach and have concluded that, because the supervisor did not take the threatened official action, the employer's official decision-making processes were not implicated. Consequently, such courts have imposed vicarious but not strict liability. These same courts then apply the two-*

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\* Visiting Assistant Professor, University of San Diego School of Law. I would like to thank Dean Daniel Rodriguez for his mentoring and guidance. I would also like to thank Michael Liu, Christina Minghine, and Abby Taylor for research assistance and Lisa Kahle for her invaluable research and cite-checking assistance. Thank you to Katharine Allen of the U.C. Davis Law Review for her editorial assistance. All errors are mine. Finally, thank you to Ryan for his unwavering support.

*prong affirmative defense and often deny liability on the grounds that the employer acted reasonably because it took some, often minimal, steps to prevent the supervisor's abusive conduct and the subordinate acted unreasonably because she failed to avoid harm by not reporting but instead submitting to the supervisor's abusive conduct.*

*This Article offers a normative framework for how the current employer liability standards should be applied to sexual extortion claims. It analyzes the realist-formalist dichotomy in the supervisory sexual extortion context and concludes that the formalist approach is more consistent with the current employer liability standards and related policy considerations. The Article then explains how certain courts have incorrectly applied the second prong of the affirmative defense and inappropriately denied liability by failing to consider the avoidable consequences doctrine and related harm-avoidance principles upon which the second prong is based. The Article concludes by offering a framework for how these harm-avoidance principles apply in the supervisory sexual extortion context specifically, and the supervisory sexual harassment context more generally, such that employers are held liable for supervisory sexual extortion and sexual harassment under circumstances where it is reasonable to impose liability.*

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## INTRODUCTION

Imagine a deaf-mute employee whose supervisor sexually harasses her and uses his authority to coerce her into performing numerous acts of oral sex on him. Her supervisor is the most senior manager at the facility during her shift. He is also the only person in the facility with whom she can communicate in sign language. The supervisor coerces the employee's submission to his sexual demands by tying her continued employment to her submission. Shortly before the harassment began, the employee and her husband purchased a family home, relying on her income to make the mortgage payments. Faced with the choice of either enduring her supervisor's abusive conduct or the prospect of losing her job and home if she reports his conduct or refuses his sexual demands, she submits. After enduring her supervisor's abuse for approximately six months, during which her home-life and marriage deteriorate, she musters the courage to report her supervisor's conduct to her employer.<sup>1</sup>

Prior to 1998, a victim's employer was strictly liable for a supervisor's sexual extortion under Title VII because the supervisor's conduct constituted quid pro quo sexual harassment — "one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace."<sup>2</sup> Unlike a hostile work environment sexual harassment claim, which involves "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment,"<sup>3</sup> a supervisory sexual extortion claim represents a classic quid pro quo, where the supervisor "explicitly or implicitly condition[s] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct."<sup>4</sup> In supervisory sexual extortion cases, power is the fundamental prerequisite for a supervisor's ability to extort sex through compelled submission to unwelcome sexual advances.<sup>5</sup> This same

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<sup>1</sup> These facts are essentially those found in *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994). See *infra* text accompanying note 55.

<sup>2</sup> *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004) ("The most oppressive and invidious type of workplace sexual harassment is quid pro quo sex . . . . Most workers subjected to sexual pressure in the workplace have little means of defense — other than the law. For economic reasons, most workers cannot simply abandon their employment — new jobs are hard to find"); *Nichols*, 42 F.3d at 510.

<sup>3</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

<sup>4</sup> *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995) (citing *Nichols*, 42 F.3d at 511).

<sup>5</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76-77 (1986) (Marshall, J., concurring) ("[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates."); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 504 (7th Cir. 1997) (en

power enables the supervisor to carry out his threats if the subordinate does not engage in the demanded sexual acts. The source of the perpetrating supervisor's power is a general grant of authority from the employer to make employment decisions, such as termination and promotion, regarding employees under his control. Because this grant of authority makes the supervisor's sexual extortion possible in the first instance, federal courts traditionally held employers strictly liable for a supervisor's quid pro quo harassment of a subordinate.<sup>6</sup> That is no longer the case.

The strict liability tide changed in 1998 when the Supreme Court issued its opinions in two companion cases, *Burlington Industries, Inc. v. Ellerth*<sup>7</sup> and *Faragher v. City of Boca Raton*.<sup>8</sup> While both cases addressed an employer's vicarious liability for supervisory sexual harassment, only *Ellerth* involved a quid pro quo claim, whereas *Faragher* involved a hostile work environment claim.

In *Ellerth*, the Court acknowledged that the quid pro quo label had become synonymous with strict liability, which in turn placed expansive pressure on the label as plaintiffs sought to plead their claims as quid pro quo.<sup>9</sup> This expansive pressure highlighted the need for a "uniform and predictable standard" for employer vicarious liability for quid pro quo claims.<sup>10</sup> Similarly, the hostile work environment claim in *Faragher* highlighted the need for a clear standard regarding the scope of an employer's vicarious liability for such claims.

To resolve the employer vicarious liability issues presented in *Ellerth* and *Faragher*, the Court relied on traditional agency principles and adopted a formalist approach. Instead of imposing strict liability based on the label affixed to the harassment claim involved or based on the supervisor's unique ability to sexually harass subordinates, the Court's formalist approach focused on the employer's official decision-making

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banc) (per curiam) (Cudahy, J., concurring) ("*Quid pro quo* is always a creature of power. It is the classic paradigm of powerful males forcing their will on vulnerable females."), *aff'd sub nom. Ellerth*, 524 U.S. 742; see also Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1172 (1998) (placing "women's subordination at the center of the sexual harassment analysis," and arguing that sexual harassment is "phenomenon that serves to preserve male control and entrench masculine norms in the workplace").

<sup>6</sup> As discussed in Part I.B.2 *infra*, the relevant question was whether the alleged conduct was within the quid pro quo definition, and definitions varied among the circuits.

<sup>7</sup> 524 U.S. 742 (1998).

<sup>8</sup> 524 U.S. 775 (1998).

<sup>9</sup> *Ellerth*, 524 U.S. at 753.

<sup>10</sup> *Id.* at 754.

processes.<sup>11</sup> Under this approach, the Court held that an employer is strictly liable for a supervisor's sexual harassment of a subordinate, regardless of whether the claim is labeled as quid pro quo or hostile work environment, when the "supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."<sup>12</sup>

In contrast, where severe or pervasive harassment exists, but where the supervisor does not take a tangible employment action against the subordinate, the Court in *Ellerth* and *Faragher* held that the employer is vicariously liable but may assert and prove a two-prong affirmative defense to liability or damages.<sup>13</sup> The first prong of the affirmative defense is based on negligence principles and requires the employer to prove that it "exercised reasonable care to prevent and promptly correct any sexually harassing behavior."<sup>14</sup> The second prong of the affirmative defense incorporates avoidable consequences principles associated with mitigation of damages.<sup>15</sup> This prong requires the employer to prove that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>16</sup>

Since the *Ellerth* and *Faragher* opinions in 1998, federal courts have grappled with the question of what constitutes a tangible employment action.<sup>17</sup> The Court provided some guidance when it explained that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision

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<sup>11</sup> See Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 347-48 (2004). Professor Chamallas discussed the formalist and realist approaches to employer liability for supervisory sexual harassment in the constructive discharge context. *Id.* She explained that a formalist approach focuses on the employer's "formal decisions and policies" and considers whether there has been any disparate treatment on unlawful grounds regarding the employer's official "decisionmaking process." *Id.* A realist approach "capture[s] more subtle or hidden forms of discrimination" as it focuses on the "actual effects of employer behavior (whether formal or informal) on employees and tak[es] into account the perspectives of the targets of behavior, as well as those who represent the enterprise." *Id.* at 348.

<sup>12</sup> *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

<sup>13</sup> See cases cited *supra* note 12.

<sup>14</sup> See cases cited *supra* note 12.

<sup>15</sup> See cases cited *supra* note 12.

<sup>16</sup> See cases cited *supra* note 12.

<sup>17</sup> As discussed in Part V *infra*, the courts have had similar difficulties in correctly applying the affirmative defense and, in particular, the second prong.



causing a significant change in benefits.”<sup>18</sup> This list, however, was merely illustrative and provided little guidance for more complex cases. Given the Court’s lack of guidance and the promise of strict liability associated with tangible employment actions, the tangible employment action label has experienced the same expansive pressure as the quid pro quo label prior to *Ellerth* and *Faragher*.<sup>19</sup>

*Ellerth* and *Faragher* left unresolved the question of whether the tangible employment action standard encompasses either of the related claims of constructive discharge and supervisory sexual extortion. In the constructive discharge scenario, the subordinate resigns in response to objectively intolerable working conditions created by the supervisor’s sexual harassment. In the supervisory sexual extortion scenario, the subordinate submits to the supervisor’s unwelcome sexual demands in response to the supervisor’s threats of tangible job detriment if the subordinate refuses. Although the claims differ in certain respects, they are largely analogous in the context of the tangible employment action analysis because, in both cases, the subordinate responds to the supervisor’s sexual harassment by taking the action — quitting or submitting — that brings about the resulting harm.<sup>20</sup> As might be expected, federal courts have reached varying conclusions regarding whether and under what circumstances a claim of either constructive discharge or supervisory sexual extortion constitutes a tangible employment action for which an employer is strictly liable.<sup>21</sup>

In *Pennsylvania State Police v. Suders*,<sup>22</sup> the Court determined that an employer’s strict liability for a constructive discharge resulting from

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<sup>18</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>19</sup> See *infra* Part III.

<sup>20</sup> See Chamallas, *supra* note 11, at 344 (analogizing constructive discharge cases to forced submission cases because in both cases “the employer makes an illegal demand and renders it impossible for the plaintiff to stay on the job on her own terms” and “in each situation the employee capitulates by behaving the way the supervisor wants her to behave”); see also *infra* note 218 and accompanying text (discussing how Third Circuit in *Suders* analogized constructive discharge claims to sexual extortion claims).

<sup>21</sup> For a discussion of the varied approaches taken by federal courts regarding constructive discharge and whether it constitutes a tangible employment action, see Chamallas, *supra* note 11, at 328-36. In her article, Professor Chamallas noted that some courts took a “formalist approach,” which focused on “characterization of the constructive discharge claim that purports to fit all cases, regardless of the facts,” while others took a “realist approach” focused on the “actual effects” of the constructive discharge suffered by the plaintiff. *Id.* at 328-34. Still, others took a “middle-ground” approach by “classifying some, but not all constructive discharges as tangible employment actions.” *Id.* The formalist-realist dichotomy applies equally in the analogous supervisory sexual extortion context. See *infra* Part III.

<sup>22</sup> 542 U.S. 129 (2004).

supervisory sexual harassment turns on whether an “official act of the enterprise” precipitated the plaintiff’s resignation.<sup>23</sup> In reaching this conclusion, the Court rejected a realist approach, which would impose strict liability on employers for all constructive discharges resulting from a supervisor’s creation of objectively intolerable working conditions.<sup>24</sup> Rather, as in *Ellerth* and *Faragher*, the Court took a formalist approach and held that, even when the constructive discharge is the result of objectively intolerable working conditions brought about *solely*, and perhaps intentionally, by supervisory sexual harassment, the constructive discharge constitutes a tangible employment action only when the plaintiff resigns in “reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation.”<sup>25</sup>

The Court, however, has not yet spoken directly regarding whether a subordinate’s submission to a supervisor’s sexual demands constitutes a tangible employment action for which an employer is strictly liable.<sup>26</sup> In the absence of guidance on this issue, federal courts have reached conflicting conclusions. The Second<sup>27</sup> and Ninth Circuits,<sup>28</sup> the only two

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<sup>23</sup> *Id.* at 2355 (citing *Ellerth*, 524 U.S. at 762).

<sup>24</sup> *Id.* at 2355-56.

<sup>25</sup> *Id.* at 2347.

<sup>26</sup> See, e.g., Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 681-83 (2000). Professor Grossman stated that it is unclear following *Ellerth* whether submission cases constitute tangible employment action cases for which employers are strictly liable. *Id.* She noted that the Equal Employment Opportunity Commission (the “EEOC”) guidelines regarding tangible employment actions do not address situations where an employee submits to a supervisor’s sexual demands to avoid the threatened harm. *Id.* Professor Grossman contended that “[i]t is, of course, anomalous to refuse to recognize that submission to a supervisor’s sexual extortion is itself an alteration in the terms and conditions of employment. It also strains the holding in *Ellerth*, contradicts the principles behind it, and undermines Title VII’s goals of deterrence and compensation.” *Id.* at 732. *But see Chamallas, supra* note 11, at 344-46 (noting that after *Ellerth* and *Faragher*, it is unclear how submission cases will be classified). Professor Chamallas stated:

[The] difficulty in developing a compelling rationale to retain vicarious liability in submission cases after *Ellerth/Faragher* is not surprising [as] [i]t flows from the problem of carving out some types of sexual harassment and treating them like disparate treatment cases, while relegating the rest of the sexual harassment cases to the category of hostile environment, even though both types of cases involve behavior on the part of a supervisor that is not qualitatively different in terms of its severity or its structure.

Chamallas, *supra* note 11, at 344-46; see also *infra* text accompanying notes 328-32.

<sup>27</sup> *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 87 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004); see *infra* Part III.A.1 (discussing Second Circuit’s opinion in *Jin*).

<sup>28</sup> *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1162 (9th Cir. 2003); see *infra* Part III.A.1

courts of appeals to publish opinions on the issue,<sup>29</sup> answered the question in the affirmative. Two district courts in the Eleventh Circuit concluded otherwise.<sup>30</sup>

As in the constructive discharge context, the conflicting conclusions turn on whether the reviewing court employed a formalist or realist approach to supervisory sexual extortion. The Second and Ninth Circuit adopted a realist approach focused on the supervisor's use of official power and the actual effects of supervisory sexual extortion.<sup>31</sup> In doing so, both courts concluded that a subordinate suffers a tangible employment action when her supervisor coerces her into performing unwanted sex acts through threats of discharge.<sup>32</sup> In contrast, the district courts in the Eleventh Circuit adopted a formalist approach to resolve the supervisory sexual extortion question. These courts focused on the employer's official decision-making processes. Under this formalist approach, these courts concluded that supervisory sexual extortion claims do not constitute tangible employment actions because, in the absence of the requisite official action by the employer, such claims are simply aggravated hostile work environment claims to which the *Ellerth/Faragher* affirmative defense applies.<sup>33</sup>

Based on the often egregious facts presented in supervisory sexual extortion cases, the realist approach taken by the Second and Ninth Circuits seems just. This is particularly true considering that, in the absence of a tangible employment action, the only alternative available to a sexual extortion victim following *Ellerth* and *Faragher* is to demonstrate an actionable hostile work environment and hope that the employer is unable to satisfy both prongs of the affirmative defense.

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(discussing Ninth Circuit's opinion in *Holly D.*).

<sup>29</sup> In its unpublished opinion in *Hetreed v. Allstate Ins. Co.*, No. 00-1787, 2001 WL 427785, at \*1 (7th Cir. Apr. 12, 2001); the Seventh Circuit reached the opposite conclusion from the Second and Ninth Circuits. See *infra* text accompanying note 208. For additional cases discussing, but not resolving the question of whether supervisory sexual extortion constitutes a tangible employment action, see *infra* text accompanying notes 187, 208.

<sup>30</sup> *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1227 (M.D. Fla. 2004); *Samedi v. Miami-Dade County*, 206 F. Supp. 2d 1213, 1223 (S.D. Fla. 2002); see *infra* Part III.A.2 (discussing district court's opinion in *Speaks*).

<sup>31</sup> Chamallas, *supra* note 11, at 345 (noting Second Circuit's realist approach to submission cases).

<sup>32</sup> *Holly D.*, 339 F.3d at 1162; *Jin*, 310 F.3d at 99.

<sup>33</sup> *Speaks*, 315 F. Supp. 2d at 1226; *Samedi*, 206 F. Supp. 2d at 1219 (holding without analysis that plaintiff did not allege tangible employment action based on her allegations that she submitted to unwelcome sexual intercourse and other sex acts with her superiors because they threatened her with termination if she did not do so, and concluding that such facts constitute severe hostile environment claim to which *Ellerth/Faragher* affirmative defense applies).

Given the documented pro-employer trend in granting summary judgment on the *Ellerth/Faragher* affirmative defense, and the courts' rather cursory and often incorrect analysis of the two prongs, it is highly unlikely that an employer will fail in its efforts to successfully assert the affirmative defense.<sup>34</sup> In light of this trend, it is understandable why harassment victims are pleading, and certain courts are construing, supervisory sexual extortion cases as tangible employment actions in an effort to hold employers strictly liable for such conduct.

Notwithstanding the appeal of holding employers strictly liable for supervisory sexual extortion, imposing strict liability in such cases does not comport with the Court's formalist tangible employment action approach in *Ellerth* and *Faragher*. This formalist approach and the related policy considerations in the analogous constructive discharge context further bolster this conclusion.

The purpose of this Article is two-fold. First, the Article explains why imposing strict liability in supervisory sexual extortion cases is inconsistent with both the Court's jurisprudence regarding tangible employment actions in *Ellerth*, *Faragher*, and *Suders*, as well as congressional intent regarding Title VII's goals of preventing and deterring harassment. Second, the Article proposes a normative framework to govern the application of the second prong of the *Ellerth/Faragher* affirmative defense in the context of sexual extortion cases. Under the proposed framework, employers will be liable for supervisory sexual extortion specifically, and supervisory sexual harassment more generally, under circumstances where it was not unreasonable for the employee to submit to the supervisor's abusive conduct.

Part I of this Article details the historical progression of the law regarding supervisory sexual harassment and the development of standards for vicarious employer liability in quid pro quo cases. It also explains the pressure placed on courts to expand the definition of "quid pro quo" in an effort to hold employers strictly liable for supervisory sexual harassment. Part II then discusses the paradigm shift from strict liability in quid pro quo sexual harassment cases to the new formalist approach under *Ellerth* and *Faragher*, which distinguishes between tangible employment action cases, for which an employer is strictly liable, and all other cases, to which negligence and avoidable consequences principles apply. Part III addresses the lower courts'

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<sup>34</sup> See *infra* Part V (discussing courts' application of second prong of affirmative defense).

application of *Ellerth* and *Faragher* to supervisory sexual extortion claims. It also discusses the Court's June 2004 opinion in *Suders*, in which the Court applied *Ellerth* and *Faragher* to constructive discharge claims resulting from supervisory sexual harassment. Part III then explains how *Suders* provides guidance in the analogous supervisory sexual extortion context. Part IV applies the tangible employment action analysis to supervisory sexual extortion cases and explains how the realist approach misinterprets and misapplies the tangible employment action standard.

Part V proposes a normative framework to govern the application of the second prong of the *Ellerth/Faragher* affirmative defense, which focuses on avoidable consequences principles in determining whether the subordinate acted unreasonably. Part V then explains how the second prong of the defense should apply in supervisory sexual extortion cases specifically, and supervisory sexual harassment cases more generally. Finally, Part V delineates factors that courts and fact-finders should consider in assessing whether supervisory sexual extortion and sexual harassment victims unreasonably failed to report or avoid harm.

## I. EVOLUTION OF SEXUAL HARASSMENT JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 (the "Act") provides that it "shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."<sup>35</sup> Yet, the Supreme Court did not address the question of whether sexual harassment constitutes an unlawful form of sex discrimination under the Act until 1986.<sup>36</sup> In *Meritor Savings Bank, FSB v. Vinson*, the Court concluded that it does.

### A. *Sexual Harassment as a Form of Sex Discrimination*

In *Meritor*, the Court held that sexual harassment constitutes a form of sex discrimination when the harassment is "because of the subordinate's sex."<sup>37</sup> In defining "sexual harassment," the Court deferred to the Guidelines on Discrimination Because of Sex (the "Guidelines") issued

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<sup>35</sup> 42 U.S.C. § 2000e-2 (2005).

<sup>36</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986).

<sup>37</sup> *Id.* at 64 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

by the Equal Employment Opportunity Commission (the "EEOC").<sup>38</sup> The Guidelines define "sexual harassment" as conduct including "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."<sup>39</sup> Moreover, the Court embraced the distinction made by the EEOC and lower courts between quid pro quo and hostile work environment sexual harassment claims.<sup>40</sup>

With respect to the standard of employer liability for supervisory sexual harassment, the Court in *Meritor* was less clear. The Court rejected the negligence approach taken by the district court, as well as the strict liability approach taken by the D.C. Circuit.<sup>41</sup> Instead, the Court agreed with the EEOC's position that agency principles should govern employer liability in the supervisory sexual harassment context.<sup>42</sup> Nevertheless, based on the "abstract" state of the factual record regarding employer liability, the Court declined to issue a definitive employer liability standard.<sup>43</sup> Instead, the Court stated that "Congress wanted courts to look to agency principles for guidance in this area."<sup>44</sup> The Court explained that the language of Title VII evinced "Congress'[s] . . . intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."<sup>45</sup> Based on the applicable agency principles, the Court concluded that "employers are [not] always automatically liable for sexual harassment by their supervisors" and an "absence of notice to an employer does not

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<sup>38</sup> *Id.* at 65. The EEOC is the administrative agency charged with enforcing the Act and promulgating the procedural regulations and guidelines thereunder. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (noting that EEOC is agency responsible for enforcement of Title VII, and further noting that EEOC's interpretation of Title VII is entitled to deference).

<sup>39</sup> *Meritor*, 477 U.S. at 65. The Court acknowledged that although the EEOC's interpretation of the Act was not controlling upon the federal courts, the Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (citations omitted).

<sup>40</sup> *Id.* The EEOC Guidelines define "quid pro quo sexual harassment" as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (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) (2004).

<sup>41</sup> *Meritor*, 477 U.S. at 72.

<sup>42</sup> *Id.* at 72.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

necessarily insulate that employer from liability.”<sup>46</sup> Not surprisingly, the failure to establish a definitive rule, and the lack of guidance as to whether liability depended on the category of harassment, led to confusion among lower courts regarding the applicable employer liability standard for supervisor harassment.

### B. Employer Liability for Supervisory Sexual Harassment

Following *Meritor*, lower courts turned to the agency principles set forth in the Restatement (Second) of Agency (the “Restatement of Agency”) to fashion employer liability standards for supervisory sexual harassment claims. The resulting liability standards varied depending on whether the claim was labeled as either hostile work environment or quid pro quo.

#### 1. Hostile Work Environment

In the hostile work environment context, federal courts attempted to grapple with the agency principles set forth in section 219 of the Restatement of Agency. As a result, they adopted varied and often conflicting approaches to employer liability for supervisor harassment.<sup>47</sup> For example, many courts required that the plaintiff demonstrate both vicarious and direct liability for the supervisor’s harassment, even though agency principles dictated that either of the two was sufficient to impose liability on an employer for injuries suffered by its employees.<sup>48</sup> Consequently, courts often required plaintiffs to demonstrate the employer’s vicarious liability by proving that the supervisor either acted

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<sup>46</sup> *Id.* In Justice Marshall’s concurring opinion, in which Justices Brennan, Blackmun, and Stevens joined, Justice Marshall concluded that the employer liability issue was properly before the Court and stated that he would adopt the rule historically followed by courts and the EEOC. *Id.* The rule states that an employer is strictly liable for a supervisor or agent who violates Title VII regardless of whether the employer knew or should have known of the unlawful conduct or “any other mitigating factor.” *Id.* at 75 (citing 45 Fed. Reg. 74,676 (Nov. 10, 1980)). The focus of Justice Marshall’s argument was that the supervisor’s power in the workplace enables him to commit the violation, regardless of whether the violation results in tangible job detriment or an abusive or hostile working environment. *Id.* at 76-77; see *infra* Part IV.A.1 (explaining that Second Circuit has essentially followed this reasoning and concluded that employee who submits to supervisor’s sexual extortion demands has suffered tangible employment action because supervisor abuses his power in coercing employee’s submission).

<sup>47</sup> See, e.g., David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 131-40 (1995) (discussing and critiquing various pre-*Ellerth/Faragher* approaches to employer liability for supervisory sexual harassment based on agency principles).

<sup>48</sup> *Id.* at 131-36.

within the scope of his employment or misused his authority when he engaged in the sexual harassment.<sup>49</sup> These courts also required plaintiffs to further demonstrate the employer's direct liability by proving that the employer was either negligent or reckless in failing to prevent or respond to the sexual harassment.<sup>50</sup> As a result of these varied approaches, the state of the law regarding employer liability for a hostile work environment created by a supervisor's conduct was uncertain.

## 2. Quid Pro Quo

The quid pro quo label suffered from a different lack of certainty. Because the quid pro quo label was synonymous with strict liability,<sup>51</sup> plaintiffs creatively pleaded sexual harassment claims as quid pro quo claims, which resulted in pressure to expand the definition of "quid pro quo."<sup>52</sup> In turn, this expansive pressure led to varied definitions of "quid

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<sup>49</sup> *Id.*; see also *id.* at 136-40 (discussing courts' other varied approaches to employer liability based on agency principles).

<sup>50</sup> *Id.*

<sup>51</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998) ("If the plaintiff established a *quid pro quo* claim, the Courts of Appeal held, the employer was subject to vicarious liability."); see also *Meritor*, 477 U.S. at 76 (Marshall, J., concurring) ("[E]very Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.").

<sup>52</sup> In *Ellerth*, the Court acknowledged the incentive for plaintiffs to state their claims as quid pro quo claims due to the equivalence of the quid pro quo label with vicarious liability. *Ellerth*, 524 U.S. at 753. For a detailed discussion regarding the tortured evolution of quid pro quo sexual harassment and the elements of the claim prior to the Court's opinions in *Ellerth* and *Faragher*, see Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998). In his article, Scalia traced the history of quid pro quo sexual harassment and concluded that the quid pro quo label is "functionally meaningless," "analytically useless and cumbersome," and "should be eliminated as a functional category of discrimination." *Id.* at 308. Scalia argued, consistent with the position advanced in this Article, that discrimination on the basis of sex should fall into one of two categories: first, disparate treatment, where an employee suffers an "adverse job action" on a discriminatory basis, including cases where the employee suffers an adverse job action for refusing her supervisor's advances; and second, harassment, including hostile work environment cases, submission cases where an employee submits to a supervisor's unwelcome sexual demands and thus avoids any adverse job action, and unfulfilled threat cases where the supervisor makes unwelcome sexual demands and threatens the employee with adverse job action, but the employee refuses and the supervisor does not follow through on the threat. *Id.* at 308-19. In the context of these two categories, Scalia concluded that a submission case is not actionable as an adverse job action case but should instead be evaluated as a hostile environment claim. *Id.* at 312, 316.

As discussed in Part II *infra*, the Court implicitly adopted Scalia's approach in *Ellerth* and *Faragher* when it distinguished between tangible employment action claims, for which employers are strictly liable, and all other hostile environment sexual harassment claims, for which an employer is vicariously liable but may assert and prove the two-prong



pro quo" among the circuits.<sup>53</sup>

In its most restrictive form, the quid pro quo definition included only those circumstances in which the employee suffered some form of tangible job detriment, such as termination, in retaliation for refusing to submit to a supervisor's unwelcome sexual advances.<sup>54</sup> This Article refers to these circumstances as "fulfilled threat" cases. In its more expansive form, the quid pro quo definition also included circumstances in which the employee submitted to the supervisor's unwelcome sexual advances and thereby avoided the threatened reprisals.<sup>55</sup> This Article refers to such scenarios as "submission" cases.<sup>56</sup> The policy behind including submission cases in the quid pro quo definition and holding employers strictly liable for such conduct is to avoid punishing plaintiffs

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affirmative defense. Moreover, as discussed in Part IV.A.1 *infra*, the tangible employment action standard incorporates the "adverse" component of adverse job action. Ironically, although the Court intended the tangible employment action standard to resolve the expansive pressure experienced by the quid pro quo label for purposes of imposing strict liability, the tangible employment action standard is experiencing the same expansive pressure (for the same reasons). The question now is whether successful supervisory sexual extortion constitutes a tangible employment action for which an employer is strictly liable. See *infra* Part IV (discussing whether submission case constitutes tangible employment action for which employer is strictly liable).

<sup>53</sup> See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 499 (7th Cir. 1997) (en banc) (per curiam) ("Defining an actionable *quid pro quo*, of course, is central to the liability standard."), *aff'd sub nom. Ellerth*, 524 U.S. 742..

<sup>54</sup> See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (holding that plaintiff had viable quid pro quo claim because she suffered tangible job detriment, in form of unfair suspension, based on her refusal to acquiesce to her supervisor's repeated demands that she engage in sex with him); cf. *Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (holding that plaintiff who endured her supervisor's sexual advances, groping, and rape as result of her supervisor's threats of adverse job consequences if she did not submit to such conduct was unable to allege viable quid pro quo claim because she did not suffer requisite tangible job detriment as supervisor never carried out any of his threats).

<sup>55</sup> See, e.g., *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994) (stating that employer is always strictly liable for supervisor's quid pro quo sexual harassment because supervisor's use of his "actual or apparent authority" gives rise to respondeat superior liability, and concluding that plaintiff had established prima facie case of quid pro quo sexual harassment based on allegations that her supervisor coerced her into submitting to his unwelcome sexual advances and performing numerous acts of oral sex on him by tying her continued employment and receipt of job-related benefits, such as appropriate performance reviews and leave time, to her submission to his sexual demands); *Karibian v. Columbia Univ.*, 14 F.3d 773, 776, 778 (2d Cir. 1994) (holding that pertinent inquiry in quid pro quo case is "whether the supervisor has linked tangible job benefits to the [plaintiff's] acceptance or rejection of sexual advances," and not whether employee can show economic or other tangible job detriment, and thus concluding that plaintiff alleged viable quid pro quo claim where her supervisor coerced her into having "violent sexual relationship" with him by tying conditions of her employment to her acquiescence to his sexual demands).

<sup>56</sup> See, e.g., *Nichols*, 42 F.3d at 514 (describing facts of case which exemplify submission case); *Karibian*, 14 F.3d at 776-78.

who lacked the capacity to resist their supervisor's threats of job detriment and risk incurring economic harm.<sup>57</sup>

Finally, the most expansive, and ultimately the most controversial definition of "quid pro quo" sexual harassment, included not only fulfilled threat and submission cases, but also those cases in which the supervisor threatened job detriment if the subordinate did not submit to the supervisor's sexual demands and yet the threat remained unfulfilled even though the subordinate refused to submit.<sup>58</sup> This Article refers to these cases as "unfulfilled threat" cases.

The policy behind including unfulfilled threats in the quid pro quo definition and holding employers strictly liable for such conduct was articulated in *Jansen v. Packaging Corporation of America*.<sup>59</sup> In *Jansen*, the Seventh Circuit recognized that "[e]mployees who have the wherewithal to call the supervisor's 'bluff' and suffer emotionally as a consequence should not have to go uncompensated, nor should a 'bluff' so likely to cause harm go unrecognized by the law."<sup>60</sup> The extension of the quid pro quo definition to the unfulfilled threat circumstances in *Jansen* would later serve as a catalyst for the creation of the new framework in *Burlington Industries, Inc. v. Ellerth*<sup>61</sup> and *Faragher v. City of Boca Raton*<sup>62</sup> for addressing supervisory sexual harassment claims.

### C. Expansion of Quid Pro Quo as a Catalyst for Change

In *Jansen*, the Seventh Circuit en banc held in a sharply divided opinion that an employer is strictly liable for quid pro quo harassment "even if the supervisor's threat does not result in a company act," such as termination.<sup>63</sup> *Jansen* involved two plaintiffs, Alice Jansen and Kimberly Ellerth, who alleged quid pro quo claims against their respective employers.<sup>64</sup> Because both cases involved an employer's liability for quid pro quo harassment and both were reargued en banc on

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<sup>57</sup> *Karibian*, 14 F.3d at 778.

<sup>58</sup> *Jansen*, 123 F.3d at 500; see also *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997) (holding that quid pro quo violation occurs when supervisor either (1) explicitly or implicitly conditions term, condition, or privilege of employment on employee's response to supervisor's unwelcome sexual advances, regardless of whether employee submits or whether threats are carried out, or (2) makes decisions regarding employee's compensation, etc., based on employee's response to unwelcome sexual advances).

<sup>59</sup> 123 F.3d 490 (7th Cir. 1997).

<sup>60</sup> *Id.* at 500.

<sup>61</sup> 524 U.S. 742 (1998).

<sup>62</sup> 524 U.S. 775 (1998).

<sup>63</sup> *Jansen*, 123 F.3d at 495.

<sup>64</sup> *Id.* at 492.

the same day, the Seventh Circuit consolidated the cases for decision.<sup>65</sup>

Alice Jansen claimed that her supervisor engaged in quid pro quo harassment when he conditioned certain terms, conditions, and privileges of her employment on her submission to his unwelcome sexual advances.<sup>66</sup> Jansen alleged that her supervisor intimated that he would withhold her raise if she refused to submit to his sexual advances.<sup>67</sup> Additionally, Jansen alleged that her supervisor said, "I haven't forgotten your [performance] review, it's on my desk," while at the same time patting his crotch.<sup>68</sup> Based on these allegations, the Seventh Circuit concluded that the supervisor implicitly conditioned a favorable performance review, and thus a raise, on the plaintiff's submission to his sexual advances.<sup>69</sup> Accordingly, the court held that Jansen demonstrated a triable issue of fact regarding whether the threat alone constituted quid pro quo harassment.<sup>70</sup>

Similarly, Kimberly Ellerth claimed that her supervisor's supervisor subjected her to unwelcome sexual advances over a year-long period. She claimed this supervisor implicitly threatened that her employment with the company would not progress unless she submitted to his advances.<sup>71</sup> Ellerth alleged that this supervisor once ogled her and threatened, "[Y]ou know, Kim, I could make your life [with the company] very hard or very easy."<sup>72</sup> On a subsequent occasion, when Ellerth requested permission to undertake a special project, the same supervisor said, "I don't have time for you right now, . . . unless you tell me what you're wearing."<sup>73</sup> On yet another occasion, the supervisor denied her request to undertake a special project and then asked her if she would start wearing shorter skirts because "that would make her job 'a whole heck of a lot easier.'"<sup>74</sup> Finally, during an interview for Ellerth's promotion, the same supervisor rubbed her knee and said he had reservations about promoting her because she was not "loose enough for him."<sup>75</sup> Notwithstanding these implicit threats and Ellerth's refusal to

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 493.

<sup>67</sup> *Id.* Although Jansen's supervisor initially withheld her raise because she rebuffed his advances, Jansen ultimately received her raise, and it was made retroactive. *Id.*

<sup>68</sup> *Id.* at 503.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 495.

<sup>71</sup> *Id.* at 493.

<sup>72</sup> *Id.* at 503.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

engage in the demanded sexual activity, Ellerth subsequently received a promotion.<sup>76</sup>

Although Ellerth's supervisor's threats remained unfulfilled, the Seventh Circuit found that a reasonable jury could conclude that these unfulfilled threats "condition[ed] or threaten[ed] to base the 'terms and conditions' of Ellerth's employment on [her] catering to [the alleged harasser's] sexual desires."<sup>77</sup> The court concluded that Ellerth demonstrated a triable issue of fact regarding whether she was subjected to quid pro quo sexual harassment for which her employer would be strictly liable.<sup>78</sup> Although the Supreme Court granted certiorari and affirmed the Seventh Circuit's judgment, it affirmed on very different grounds.

## II. EMPLOYER LIABILITY FOR SUPERVISORY SEXUAL HARASSMENT UNDER *ELLERTH AND FARAGHER*

When the Supreme Court issued its companion decisions in *Burlington Industries, Inc. v. Ellerth*<sup>79</sup> and *Faragher v. City of Boca Raton*,<sup>80</sup> the quid pro

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<sup>76</sup> *Id.* at n.13. Ellerth ultimately quit her employment as a result of her supervisor's harassment. *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1109 (N.D. Ill. 1996), *rev'd*, 102 F.3d 848 (7th Cir. 1996), *aff'd in part, rev'd in part sub nom. Jansen*, 123 F.3d 490, *aff'd sub nom. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). She subsequently filed an action against her employer alleging that she had been sexually harassed and subjected to a hostile work environment in violation of Title VII and that the harassment resulted in her constructive discharge. *Ellerth*, 912 F. Supp. at 1105; *see infra* Part III.B (discussing Court's opinion in *Suders*, in which Court addressed whether constructive discharge constitutes tangible employment action).

<sup>77</sup> *Jansen*, 123 F.3d at 503.

<sup>78</sup> *Id.* A minority of the en banc panel in *Jansen*, including Chief Judge Posner and Judges Manion and Karne, concluded that an "adverse job consequence" or "company act" was necessary to impose strict liability on an employer for quid pro quo sexual harassment. *Id.* at 499, 505, 513-15, 559-60. Thus, under this approach, strict liability should be imposed only in what this Article refers to as "fulfilled threat" cases — circumstances where the employee rebuffs the supervisor's advances and the supervisor then retaliates and "fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company's rules entitle her to receive." *Id.* at 512. In doing so, the supervisor is using the authority delegated to him by the employer to take a "company act." *Id.* Under this approach, strict liability should not be imposed under circumstances lacking a "company act," such as where the employee submits to the sexual extortion threats, the supervisor was merely "bluff[ing]," or the employee reports the harassment before the supervisor can effectuate the quid pro quo threat. *Id.* at 499. *See infra* Part II.C (discussing Court's opinions in *Ellerth* and *Faragher* where Court adopts this "company act" standard for purposes of imposing strict liability on employers for supervisory sexual harassment).

<sup>79</sup> 524 U.S. 742 (1998).

<sup>80</sup> 524 U.S. 775 (1998).

quo strict liability landscape appeared to change dramatically, although the extent of that change has been the subject of much debate.<sup>81</sup> *Ellerth* and *Faragher* represented a paradigm shift from employer strict liability for sexual harassment claims labeled as quid pro quo to employer strict liability for sexual harassment claims labeled as tangible employment actions. Although only *Ellerth* involved a discussion of quid pro quo sexual harassment and the “promise of vicarious liability for all quid pro quo claims” that then existed under case law,<sup>82</sup> both cases addressed in detail the principles of, and policy reasons underlying, employer vicarious liability for supervisory sexual harassment.

#### A. *Quid Pro Quo and Hostile Work Environment Labels*

In *Ellerth*, the Court first addressed the quid pro quo and hostile work environment labels and their impact, if any, on an employer’s vicarious liability for a supervisor’s misconduct. The Court acknowledged that the quid pro quo label had become synonymous with vicarious liability.<sup>83</sup> It also explained that this relationship created an incentive for plaintiffs to state their claims as quid pro quo harassment.<sup>84</sup> The pressure to plead sexual harassment claims as quid pro quo claims is illustrated by the question presented for certiorari in *Ellerth*, which does not reference an employer’s vicarious liability, but instead focuses exclusively on whether certain conduct falls within the quid pro quo rubric.<sup>85</sup>

Although the question presented focused on whether the plaintiff would succeed in labeling her unfulfilled threat claim as quid pro quo, the Court reframed the issue. It determined that, notwithstanding the label, the “issue of real concern to the parties is whether [the employer] has vicarious liability for [its supervisor’s] alleged misconduct, rather than liability for its own negligence.”<sup>86</sup> The Court explained that, although the terms “quid pro quo” and “hostile environment” are “helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether,” they are of “limited utility” beyond this demarcation as they

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<sup>81</sup> See *infra* text accompanying notes 134, 349-50.

<sup>82</sup> *Ellerth*, 524 U.S. at 765.

<sup>83</sup> *Id.* at 753.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (“Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?”).

<sup>86</sup> *Id.*

have no bearing on an employer's liability for supervisory sexual harassment.<sup>87</sup>

Because Ellerth's claim involved only unfulfilled threats, the Court characterized her claim as a hostile work environment claim.<sup>88</sup> It accepted the district court's finding that the alleged conduct was severe and pervasive and thus actionable under Title VII.<sup>89</sup> The question that remained unanswered, however, was whether Ellerth's employer was vicariously liable for the hostile work environment. The Court would ultimately resolve this question together with the hostile work environment claim alleged in *Faragher*.

*Faragher* involved allegations of a supervisor-created, sexually hostile work environment that did not involve any threat of tangible employment detriment.<sup>90</sup> Beth Ann Faragher alleged that while working as a city lifeguard, her immediate supervisor and next successively higher supervisor subjected her and other female lifeguards to boorish and offensive sexual comments and touching.<sup>91</sup> Although Faragher alleged that she endured this conduct for approximately five years, she

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<sup>87</sup> *Id.* at 751-52. The Court explained that the terms served a "specific and limited purpose" in *Meritor* where they were used to distinguish between discrimination based on explicit alterations in the terms or conditions of employment — the quid pro quo situation where a supervisor either subjects a subordinate to a tangible job detriment for refusing his sexual advances or demands sexual favors in return for a job benefit — and discrimination based on constructive alterations in the terms or conditions of employment — the hostile environment situation where an employee is subjected to sexually demeaning behavior. *Id.* at 752. Regarding the distinction between fulfilled and unfulfilled threat cases, the Court stated:

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

*Id.* at 753-54. In his dissent, Justice Thomas disagreed with the majority's characterization of the distinction between quid pro quo and hostile environment as relevant to whether discrimination occurred in the first instance. *Id.* at 770 n.3 (Thomas, J., dissenting). Justice Thomas clarified that fulfilled threat claims, where the supervisor "carries out his threat and causes the plaintiff a job detriment," are essentially disparate treatment claims for which employers are always strictly liable under Title VII, while unfulfilled threat claims should be analyzed as hostile work environment cases only. *Id.* (Thomas, J., dissenting) (citing Scalia, *supra* note 52, at 309-14).

<sup>88</sup> *Id.* at 754.

<sup>89</sup> *Id.*

<sup>90</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 785 (1998).

<sup>91</sup> *Id.* at 782.

did not report the conduct and eventually resigned.<sup>92</sup> In a seven-to-five opinion, the Eleventh Circuit en banc concluded that the City was not vicariously liable for the supervisors' conduct for three reasons.<sup>93</sup> First, the conduct fell outside the scope of the supervisor's employment. Second, the agency relation did not aid the supervisors in their harassment because they did not threaten to fire or demote Faragher. Finally, the City lacked constructive knowledge of the harassment.<sup>94</sup>

Subsequently, the Court granted review to determine the scope of and standard for an employer's vicarious liability for hostile environment harassment perpetrated by supervisory employees.<sup>95</sup> In an effort to answer the vicarious liability questions posed in *Ellerth* and *Faragher*, and to establish the "uniform and predictable standard" deemed necessary for employer vicarious liability, the Court returned to traditional agency principles as it directed lower courts to use twelve years earlier in *Meritor Savings Bank, FSB v. Vinson*.<sup>96</sup>

### B. Agency Principles

In *Ellerth* and *Faragher*, the Court focused its agency analysis on section 219(2) of the *Restatement of Agency*.<sup>97</sup> The pertinent provision of section 219(2) provides that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . the servant . . . was aided in accomplishing the tort by the existence of the agency relation."<sup>98</sup> The Court concluded that because most supervisory sexual harassment claims are premised on the supervisor's misuse of delegated authority, the appropriate analytical starting point is the Restatement's "aided in the agency relation" analysis.<sup>99</sup>

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<sup>92</sup> *Id.* at 780, 782.

<sup>93</sup> *Id.* at 784.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 780.

<sup>96</sup> 477 U.S. 57 (1986); see *Faragher*, 524 U.S. at 785-86; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

<sup>97</sup> *Faragher*, 524 U.S. at 793-806; *Ellerth*, 524 U.S. at 756-64. In *Faragher*, the Court noted that federal courts had been unanimous in holding employers vicariously liable for a supervisor's "discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment." *Faragher*, 524 U.S. at 790. Although it ultimately rejected certain approaches to vicarious liability previously used by federal courts, such as scope of employment, the Court in *Faragher* nevertheless approved of imposing vicarious liability under such circumstances based on applicable agency principles. *Id.* at 791 (noting that "the soundness of the results" of earlier cases remained viable "in light of basic agency principles").

<sup>98</sup> *Ellerth*, 524 U.S. at 758.

<sup>99</sup> *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 759-60.

Although the aided in the agency relation standard provided the Court with the analytical starting point, its “malleable terminology” presented a threshold issue of how broadly the standard should be construed.<sup>100</sup> At first blush, there was a certain appeal to an expansive interpretation of the standard whereby an employer would be held vicariously liable under any circumstance in which a supervisor abused his or her authority.<sup>101</sup> This appeal stemmed primarily from the fact that, in one sense, the agency relation always aids a supervisor because the power and authority granted by the employer cloaks the supervisor’s harassing conduct with “a particular threatening character.”<sup>102</sup> In addition to the supervisor’s power to influence subordinates in subtle yet discriminatory ways, an equally compelling reason for imposing vicarious liability for all acts of supervisor harassment is the employer’s opportunity and incentive to prevent supervisor harassment in the first instance through appropriate screening, hiring, training, and monitoring of its supervisors.<sup>103</sup>

Notwithstanding the laudable reasons for equating the standard with vicarious liability for all acts of supervisor harassment, the Court was constrained by *Meritor’s* holding that an “employer is not ‘automatically’ liable for harassment by a supervisor who creates the requisite degree of discrimination.”<sup>104</sup> Thus, to avoid automatic liability, something more than the mere “aid” provided by the supervisory relationship itself is necessary.<sup>105</sup> The *Faragher* Court identified two alternatives to automatic liability: (1) impose vicarious liability on the employer only upon a showing of an affirmative use of supervisory authority, or (2) impose

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<sup>100</sup> *Ellerth*, 524 U.S. at 763.

<sup>101</sup> *Id.*

<sup>102</sup> *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 763 (“[I]t is precisely because the supervisor is understood to be clothed with the employer’s authority that he is able to impose unwelcome sexual conduct on subordinates.” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring))).

<sup>103</sup> *Faragher*, 524 U.S. at 803; see also *infra* Part V.B (discussing employers’ efforts to implement antiharassment policies and monitor workplace compliance and how such efforts are potentially relevant in decreasing incidence of workplace harassment and increasing likelihood that sexual harassment victims will report).

<sup>104</sup> *Faragher*, 524 U.S. at 804; see *Ellerth*, 524 U.S. at 763. The Court also acknowledged that because “most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation,” vicarious liability based solely on the aided in the agency relation standard would be virtually limitless. *Ellerth*, 524 U.S. at 760. Further, if the proximity and regular contact afforded by the employment relationship were sufficient to impose liability, employers would be vicariously liable for not only all supervisor harassment but all coworker harassment as well, a result inconsistent with the position of the EEOC and the federal appellate courts. *Id.*

<sup>105</sup> *Faragher*, 524 U.S. at 804.



vicarious liability on the employer for actionable sexual harassment, but permit the employer to raise an affirmative defense under certain circumstances.<sup>106</sup>

With respect to the first alternative, the Court acknowledged that there was authority for requiring an affirmative, as opposed to implicit, misuse of supervisory authority as a condition precedent to imposing liability.<sup>107</sup> This authority stemmed from cases holding employers liable for a supervisor's discrimination that led to tangible employment-related results, such as terminations, promotions, and the like.<sup>108</sup> Notwithstanding such authority, the Court rejected the affirmative use alternative.<sup>109</sup> In doing so, the Court expressed concern that a rule that imposed liability *only* upon a showing of affirmative, as opposed to implicit, uses of power would enable employers to avoid liability entirely for the more subtle harms inherent in harassing conduct by supervisors.<sup>110</sup> Furthermore, such a rule would be unworkable in practice.<sup>111</sup> The Court reasoned:

Neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior . . . . How far from the course of ostensible supervisory behavior would a company officer have to step before his orders would not reasonably be seen as actively using authority? Judgment calls would often be close, the results would often seem disparate even if not demonstrably contradictory, and the temptation to litigate would be hard to resist.<sup>112</sup>

Thus, the Court was left with the second alternative, which held an employer vicariously liable for all actionable supervisor harassment, but recognized an employer's ability to raise an affirmative defense to liability or damages under certain circumstances. If the Court adopted this alternative, however, what circumstances would preclude the employer from raising the affirmative defense? Furthermore, if the employer could raise such a defense, what would it consist of?

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 804-05.

<sup>109</sup> *Id.* at 805.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*; see also *infra* notes 328-32 and accompanying text.

### C. *New Employer Liability Standards*

With respect to the circumstances under which an employer would be strictly liable, and thus precluded from raising the affirmative defense, the Court endeavored to draw a bright line. In doing so, it took a formalist approach. The Court concluded that the “something more” necessary to avoid automatic liability in all sexual harassment cases was satisfied where a supervisor “takes a tangible employment action against the subordinate.”<sup>113</sup> The reason for this bright-line rule was simple: when a supervisor’s harassment “culminates in a tangible employment action,”<sup>114</sup> “there is assurance the injury could not have been inflicted absent the agency relation.”<sup>115</sup>

In contrast, it is less clear whether the injury resulted from the agency relation in cases where the supervisor does not take a tangible employment action against the subordinate.<sup>116</sup> In such cases, the Court reasoned that permitting an employer to raise an affirmative defense would give effect to Title VII’s purposes if it considered the employer’s efforts to prevent and correct harassment and the employee’s corresponding duty to prevent and avoid harm as part of the liability calculus.<sup>117</sup> For example, because one of the goals of Title VII is to “promote conciliation rather than litigation,”<sup>118</sup> the Court reasoned that it would effectuate Congress’s intent to encourage employers to create and administer effective antiharassment policies and grievance mechanisms and to base employer liability at least in part on an evaluation of an employer’s efforts in these respects.<sup>119</sup> Additionally, the Court reasoned that a rule encouraging employees to report harassing conduct before it becomes actionable would serve Title VII’s preventive purposes.<sup>120</sup>

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<sup>113</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998). Similarly, in *Faragher* the Court stated: “There is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown.” 524 U.S. at 790.

<sup>114</sup> *Ellerth*, 524 U.S. at 765.

<sup>115</sup> *Id.* at 761-62.

<sup>116</sup> *Id.* at 763.

<sup>117</sup> *Faragher*, 524 U.S. at 805.

<sup>118</sup> *Ellerth*, 524 U.S. at 764. *But see* Grossman, *supra* note 26, at 720 (noting Court’s emphasis on deterrence and prevention and contrasting that emphasis with Court’s historic emphasis on Title VII’s “two separate, yet equally important goals: compensation and deterrence”).

<sup>119</sup> *Ellerth*, 524 U.S. at 764.

<sup>120</sup> *Id.* (citing *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995)).

In its efforts 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 forethought by employers and saving actions by objecting employees,” the Court adopted the following joint holding in *Ellerth* and *Faragher*:

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. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>121</sup>

Based on this holding, two questions remained: “what constitutes a tangible employment action?” and “how does an employer successfully assert the affirmative defense?”

### 1. Tangible Employment Action

The Court’s guidance regarding what constitutes a tangible employment action addressed the type of power wielded by supervisors. It also provided examples of the types of action taken against and injuries suffered by subordinates in the tangible employment action context. The Court explained that tangible employment actions are the

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<sup>121</sup> *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Elsewhere in the *Faragher* opinion, the Court indicated that there are still other means by which an employer may be directly liable for supervisory sexual harassment. Examples include situations where the employer had actual knowledge of the harassment and did nothing to stop it or where the supervisor is sufficiently high up in the organization’s hierarchical structure such that the supervisor is considered a “proxy” for the employer. 524 U.S. at 789; see, e.g., *Ackel v. Nat’l Commc’ns, Inc.*, 339 F.3d 376, 384 (5th Cir. 2003) (concluding that triable issue of fact existed as to whether president and general manager of corporation who was also stockholder and member of board of directors was corporation’s proxy, making *Ellerth/Faragher* affirmative defense unavailable to employer); see also B. Glenn George, *If You’re Not Part of the Solution, You’re Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133 (2001) (discussing employer’s direct liability for known supervisory sexual harassment based on negligence principles after *Ellerth* and *Faragher*, and arguing that *Ellerth/Faragher* affirmative defense applies only when employer was unaware of supervisor’s conduct).

“means by which the supervisor brings the official power of the enterprise to bear on subordinates,” and thus a “tangible employment decision requires an official act of the enterprise, a company act.”<sup>122</sup> The Court stated that a tangible employment action “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities,”<sup>123</sup> “demotion, or undesirable reassignment,”<sup>124</sup> or a “decision causing a significant change in benefits.”<sup>125</sup>

Additionally, as to the type of injury suffered by the subordinate, the Court explained that “in most cases, a tangible employment action will inflict ‘direct economic harm,’” which the Court noted is the type of injury that “only a supervisor, or other person acting with the authority of the company” can cause.<sup>126</sup> Moreover, because tangible employment decisions require an “official act of the enterprise” or “company act,” the Court posited that such decisions will, in most cases, be documented or otherwise reflected in official company records and will often be subject to review by the harasser’s superiors.<sup>127</sup> Finally, consistent with the company act requirement, the Court noted that the nature of a tangible employment action is such that the “supervisor often must obtain the imprimatur of the enterprise and use its internal processes.”<sup>128</sup>

## 2. Affirmative Defense

For those situations in which a harassing supervisor does not take a tangible employment action against the subordinate employee, but where the harassing conduct is nevertheless severe or pervasive, the Court attempted to provide guidance regarding the manner in which an employer might satisfy its burden of proof under each of the “two necessary elements” of the affirmative defense.<sup>129</sup> With respect to the employer’s obligations under prong one, the Court indicated that although an antiharassment policy and accompanying complaint

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<sup>122</sup> *Ellerth*, 524 U.S. at 762.

<sup>123</sup> *Id.* at 761. In the context of *Ellerth*, the Court noted that a tangible employment action “would have taken the form of a denial of [either] a raise or a promotion.” *Id.*

<sup>124</sup> *Id.* at 765.

<sup>125</sup> *Id.* at 761.

<sup>126</sup> *Id.* at 762.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *infra* text accompanying note 354 (discussing courts that have concluded that only one of two elements must be met for employers to avoid liability under certain circumstances).

procedure are not necessary as a matter of law, courts nevertheless should consider the need for such a policy and related procedures in assessing whether the employer has satisfied its burden.<sup>130</sup> Regarding the employee's corresponding burden under prong two, the Court explained that the second prong incorporates the principles underlying the avoidable consequences doctrine from tort law,<sup>131</sup> and thus imposes an affirmative duty on the plaintiff to avoid or otherwise mitigate harm.<sup>132</sup> The Court stated that an employer's proof that the plaintiff unreasonably failed to avail herself of the employer's complaint procedure will "normally suffice" to satisfy the employer's burden under prong two.<sup>133</sup> The Court then applied the newly minted vicarious liability standards and the accompanying affirmative defense to the facts of *Ellerth* and *Faragher*.<sup>134</sup>

In *Ellerth*, the Court noted that Ellerth had focused her efforts on proving that her claim fell within the quid pro quo category given the "promise of vicarious liability for all quid pro quo claims" under existing case law.<sup>135</sup> Because the quid pro quo and hostile work environment labels no longer control an employer's liability for a supervisor's harassing acts, the Court concluded that Ellerth should have an opportunity on remand to prove that her employer was liable.<sup>136</sup> In this

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<sup>130</sup> *Ellerth*, 524 U.S. at 765.

<sup>131</sup> *Id.* at 764.

<sup>132</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.15 (1982)); see *infra* Part V.B (discussing applicable avoidable consequences principles in context of second prong of affirmative defense).

<sup>133</sup> *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

<sup>134</sup> In his dissent in *Ellerth*, Justice Thomas lamented that the Court had provided "shockingly little guidance about how employers can actually avoid vicarious liability [under the affirmative defense]" and instead "issue[d] only Delphic pronouncements and le[ft] the dirty work to the lower courts" because the meaning of those pronouncements "remains a mystery." 524 U.S. at 773 (Thomas, J., dissenting). Justice Thomas predicted that under the affirmative defense, vicarious liability will be the rule, rather than the exception, because even an employer who acted reasonably will be held liable "so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm." *Id.*; see *infra* text accompanying notes 349-50, 353-54 (demonstrating that Justice Thomas's predictions have not come to fruition given pro-employer trend regarding application of affirmative defense and, in particular, second prong).

<sup>135</sup> *Ellerth*, 524 U.S. at 765.

<sup>136</sup> *Id.* at 765-66. In this respect, Ellerth would need to show that the acts to which she was subjected were sufficiently severe or pervasive to create a hostile work environment. *Id.* at 752. Notwithstanding the fact that Ellerth's complaint alleged that she had been constructively discharged, the Court stated that she had "not alleged she suffered a tangible employment action at the hands of [the harassing supervisor]." *Id.* at 766; see *infra* text accompanying note 231 (regarding how this foreshadowed Court's holding regarding constructive discharge cases in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *vacated sub nom.*

respect, the Court indicated that Ellerth's employer was vicariously liable for the actions of its supervisor, but Ellerth's employer would have an opportunity on remand to assert and prove the affirmative defense.<sup>137</sup>

The result in *Faragher* differed dramatically. Because the harassing acts of Faragher's supervisor did not include a tangible employment action taken against Faragher, the Court stated that the City would have had an opportunity to raise the two-prong affirmative defense "if there were any serious prospect of its presenting one . . . ."<sup>138</sup> The Court concluded, however, that the facts of the case foreclosed any possibility of the City presenting the affirmative defense.<sup>139</sup> Although the City had a sexual harassment policy, it had completely failed to distribute its policy to the plaintiff and her colleagues at the city beach.<sup>140</sup> Moreover, the City officials made no effort to oversee or otherwise keep track of its supervisors' conduct.<sup>141</sup> Additionally, the City's sexual harassment policy did not include any mechanism or assurance that a subordinate could bypass a harassing supervisor when registering a complaint.<sup>142</sup> Based on these facts, the Court held, as a matter of law, that the City could not satisfy the first prong of the affirmative defense because no reasonable jury could conclude that the City exercised reasonable care to prevent supervisory harassment.<sup>143</sup>

### III. THE PROGENY OF *ELLERTH* AND *FARAGHER*

*Burlington Industries, Inc. v. Ellerth*<sup>144</sup> and *Faragher v. City of Boca Raton*<sup>145</sup> clarified the vicarious liability standards for unfulfilled and fulfilled threat cases. In an unfulfilled threat case such as *Ellerth*, the employer was vicariously liable but would have an opportunity to establish the two-prong *Ellerth/Faragher* affirmative defense.<sup>146</sup> By comparison, an employer in a fulfilled threat case was strictly liable, and thus would not have an opportunity to raise the two-prong affirmative defense. What

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*Pa. State Police v. Suders*, 542 U.S. 129 (2004)).

<sup>137</sup> *Ellerth*, 524 U.S. at 766.

<sup>138</sup> *Faragher*, 524 U.S. at 808.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>145</sup> *Faragher*, 524 U.S. at 775.

<sup>146</sup> The same would be true if the action threatened and taken by the supervisor did not amount to a tangible employment action.

remained unclear, however, was how submission and constructive discharge claims fit into the newly minted *Ellerth/Faragher* tangible employment action, fulfilled/unfulfilled threat paradigm.

#### A. Submission Claims

Following *Ellerth* and *Faragher*, it was unclear whether a submission case constituted a tangible employment action for which an employer would be strictly liable or an unfulfilled threat case in which an employer could assert and prove the two-prong affirmative defense. Some courts construed submission claims as tangible employment actions, while others construed such claims as aggravated hostile environment claims to which the *Ellerth/Faragher* affirmative defense applied.<sup>147</sup>

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<sup>147</sup> Following *Ellerth* and *Faragher*, the EEOC issued *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* ("Enforcement Guidance") and took the position that an employee who submits to a supervisor's sexual demands and obtains a tangible job benefit has experienced a tangible employment action for which her employer is strictly liable. EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>. In *Enforcement Guidance*, the EEOC included as examples of tangible employment actions both "hiring and firing" and "promotion and failure to promote." *Id.* The EEOC explained as follows:

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant change in employment status; it did not require that the change be adverse in order to qualify as tangible.

*Id.* The EEOC did not clarify whether obtaining a "tangible job benefit" included only those circumstances where the employee obtained a job benefit to which the employee was not otherwise entitled or also included those circumstances where the employee was performing satisfactorily and retained her job solely because she submitted to her supervisor's sexual demands. Grossman, *supra* note 26, at 682-83 (noting that EEOC did not address circumstances where employee "submits to avoid harm rather than obtain a benefit"). Although the EEOC would likely contend that the job-retention scenario is also included in "tangible job benefit," an employee under such circumstances has not experienced the requisite "significant change in employment status" under *Ellerth*. See

### 1. Tangible Employment Action

In 2002, four years after *Ellerth* and *Faragher*, the Second Circuit addressed whether an employee experiences a tangible employment action when, instead of refusing her supervisor's sexual extortion demands, she submits to the demanded conduct. In *Jin v. Metropolitan Life Insurance Co.*,<sup>148</sup> the Second Circuit took a realist approach to employer liability for sexual extortion. It concluded that a submission plaintiff experiences a tangible employment action where her supervisor requires her to repeatedly submit to sexual abuse under explicit threats of termination if she does not accede to his demands.<sup>149</sup>

The circumstances in *Jin* were particularly egregious. After working successfully for Metropolitan Life Insurance Company ("MetLife") for approximately four years, Jin encountered a new colleague who began a thirteen-month campaign of egregious conduct toward her.<sup>150</sup> Six months into his campaign, the colleague became Jin's supervisor.<sup>151</sup> The conduct included:

- (a) making numerous crude sexual remarks to her, both in the office and by calling her at home;
- (b) offensively touching Jin's buttocks, breasts, and legs on numerous occasions at the office, including when she was making sales calls at her desk and walking clients to the elevator;
- (c) requiring Jin . . . to attend weekly Thursday night private meetings in [Jin's supervisor's] locked office during which he would threaten her with a baseball bat, kiss, lick, bite and fondle her, attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her; and
- (d) repeatedly threatening to fire Jin if she did not accede to his sexual demands, as well as threatening her with physical harm.<sup>152</sup>

Jin alleged that she endured the weekly sexual abuse out of fear of losing her job.<sup>153</sup>

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discussion *infra* Part IV.A. Moreover, as discussed in Part IV.A.1 *infra*, the EEOC's position that the change in employment status need not be adverse is inconsistent with *Ellerth* and *Faragher*.

<sup>148</sup> 310 F.3d 84 (2d Cir. 2002).

<sup>149</sup> *See id.* at 94.

<sup>150</sup> *Id.* at 88.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 88-89.

<sup>153</sup> *Id.* at 89.



Ultimately, Jin filed a sexual harassment action against MetLife.<sup>154</sup> Although the jury concluded that Jin had been subjected to an actionable hostile environment, Jin did not prevail on her claim because she had not suffered the requisite tangible adverse action.<sup>155</sup>

On appeal, Jin argued that her submission to her supervisor's sexual abuse became an added job requirement necessary to keep her job, and thus, constituted a tangible employment action.<sup>156</sup> The Second Circuit concluded that Jin had suffered a tangible employment action,<sup>157</sup> reasoning that the agency relation aided Jin's supervisor in his sexual extortion efforts because MetLife empowered him to make economic decisions impacting his subordinates.<sup>158</sup> Furthermore, the power MetLife bestowed upon Jin's supervisor to make such decisions enabled him to compel Jin to report to him and remain in his office while he harassed her.<sup>159</sup>

Additionally, the Second Circuit agreed with the EEOC's position that a tangible employment action occurs when an employee submits to a supervisor's unwelcome sexual demands and "obtains a job benefit."<sup>160</sup> It concluded that the pre-*Ellerth* strict liability approach to submission claims is "sound even under the Supreme Court's new liability analysis."<sup>161</sup> The Second Circuit reasoned that the proper focus for imposing liability on an employer is on the supervisor's decision to either retain or terminate the subordinate based on the subordinate's reaction to his sexual demands.<sup>162</sup> Based on this reasoning, the court concluded that Jin had presented evidence of a tangible employment action because her supervisor required her to submit to his sexual demands and used her "submission as a basis for granting her a job benefit (her continued employment)."<sup>163</sup>

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<sup>154</sup> *Id.* at 87-88.

<sup>155</sup> *Id.* at 90. The court instructed the jury that to hold Jin's employer strictly liable on a tangible employment action theory, Jin had to show that her supervisor subjected her to a "tangible adverse action." *Id.* (emphasis added).

<sup>156</sup> *Id.* at 94.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* The court explained that a coworker could not have "compelled Jin's acquiescence because a mere co-worker lacked the authority to either terminate or retain Jin based on her response to sexual demands." *Id.* But see *infra* text accompanying note 244.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 94-95 (citing EEOC, *supra* note 147).

<sup>161</sup> *Id.* at 96.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 97. The *Jin* court also concluded that the Supreme Court in *Ellerth* expressly recognized the inherent difference between a submission case and an unfulfilled threat case

Finally, the Second Circuit rejected the argument that submission claims lack the “official act of the enterprise” or “company act” required for a tangible employment action.<sup>164</sup> The court concluded that Jin’s supervisor’s actions constituted an act of Jin’s employer because the supervisor “brought ‘the official power of the enterprise to bear’ on [her] by explicitly threatening to fire her if she did not submit, and then allowing her to retain her job based on her submission.”<sup>165</sup> The court reasoned:

It would be anomalous to find an employer liable when an employee was able to stand up to a supervisor’s sexual demands, and therefore provoke an action such as termination, but to find no liability when the employee was unable to refuse and was actually subjected to sexual abuse. Such a rule would punish employees who submit because, for example, they desperately need the income to make house payments... or because a sick spouse or child depends on their health benefits.<sup>166</sup>

Accordingly, the Second Circuit concluded that Title VII should not shield employers from liability when a subordinate cannot refuse a supervisor’s sexual demands.<sup>167</sup>

Subsequently, in *Holly D. v. California Institute of Technology*,<sup>168</sup> the Ninth Circuit joined the Second Circuit in taking a realist approach to

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because the question for review made it clear that *Ellerth* consisted of circumstances involving an unfulfilled threat as opposed to a plaintiff’s “submission” or a plaintiff’s suffering “tangible effects” for refusing to submit. *Id.*

<sup>164</sup> *Id.* at 98.

<sup>165</sup> *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (“When a supervisor requires sexual favors as a *quid pro quo* for job benefits, the supervisor, by definition, acts as the company.” (quoting *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989))).

<sup>166</sup> *Jin*, 310 F.3d at 99 (citing *Nichols v. Frank*, 42 F.3d 503, 507 (9th Cir. 1994)); see also *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1209 (D.R.I. 1991) (describing supervisor’s threat to take away benefits if Showalter refused to engage in requested sexual acts). The court also relied upon the EEOC’s guidelines and noted the “perverse result” if cases where the employee avoids tangible job detriment by submitting do not constitute tangible employment actions, but cases where the employee receives a job benefit by submitting do constitute tangible employment actions. *Jin*, 310 F.3d at 99 n.11 (quoting EEOC, *supra* note 147, at \*5).

<sup>167</sup> Cf. Kelly Collins Woodford & Harry A. Risetto, *Tangible Employment Action: What Did the Supreme Court Really Mean in Faragher and Ellerth?*, 19 LAB. LAW. 63, 76-78 (2003) (discussing Second Circuit’s opinion in *Jin*, and concluding that court’s analysis was inconsistent with *Ellerth* and *Faragher* because Second Circuit incorrectly construed facts as alleging viable tangible employment action claim).

<sup>168</sup> 339 F.3d 1158 (9th Cir. 2003).

submission claims. The Ninth Circuit concluded that a subordinate states a tangible employment action claim when she alleges that her supervisor coerced her into performing unwelcome sex acts by either explicitly or implicitly threatening her with termination if she refused.<sup>169</sup> Holly D. alleged that her new supervisor leered at her breasts and buttocks, commented on his preferred sexual activities, and showed her pornographic websites.<sup>170</sup> Although her supervisor ceased this behavior when she informed him that she was not interested, he subsequently criticized her work and threatened to extend her six-month probationary period indefinitely.<sup>171</sup> Notwithstanding the threat, he did not extend her probationary period.<sup>172</sup>

Two months after her probationary period ended, however, she received a negative performance rating that she believed resulted from her prior refusal to engage in sexual conversations with her supervisor.<sup>173</sup> She ultimately concluded that if her supervisor made sexual demands of her, she had to acquiesce to the demands to keep her job.<sup>174</sup> One month after receiving the negative performance rating, Holly D.'s supervisor visited her office, engaged her in a sexual conversation, and then sexually propositioned her.<sup>175</sup> Based on her subjective belief that she had to engage in the conduct to keep her job, she submitted.<sup>176</sup> For the next year, Holly D. and her supervisor engaged in numerous sex acts during work hours, including intercourse and oral sex.<sup>177</sup> At the end of the one-year period, she received her second performance review, which she characterized as excellent. After an unsuccessful attempt to transfer to another office, she filed a sexual harassment action in which she alleged that her submission constituted a tangible employment action.<sup>178</sup>

The Ninth Circuit agreed with Holly D. Like the Second Circuit in *Jin*, the Ninth Circuit relied heavily on the malleable nature of the aided in the agency relation standard discussed in *Ellerth* and *Faragher* to conclude that a submission case constitutes a tangible employment

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<sup>169</sup> *Id.* at 1162.

<sup>170</sup> *Id.* at 1163.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1164.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

action.<sup>179</sup> The Ninth Circuit first noted that if Holly D.'s supervisor terminated her employment as a result of her resistance to his alleged threats, her termination would have constituted the requisite tangible employment action for which her employer would be strictly liable.<sup>180</sup> The court reasoned that a successful extortion or submission case implicates the "same abuse of supervisory authority — the power, for example, to hire and fire" that renders a termination a tangible employment action.<sup>181</sup> In both cases, the supervisor "successfully brings to bear the weight of the employer's enterprise in order to achieve the unlawful purpose."<sup>182</sup>

To fit the submission case within the tangible employment action rubric, the Ninth Circuit reasoned that the supervisor makes the "initial conditional decision" to discharge the employee unless his sexual demands are met.<sup>183</sup> Once the plaintiff acquiesces to his demands, he makes the "subsequent final decision to retain the employee in her position."<sup>184</sup> In this sense, the subordinate's "participation in unwanted sexual acts becomes a condition of the employee's employment — a critical condition that effects a substantial change in the terms of that employment."<sup>185</sup> Moreover, in addressing the *Ellerth/Faragher* requirement that tangible employment actions require "some form of sufficiently concrete employment action," the Ninth Circuit reasoned that the threat in a submission case is "not unfulfilled or inchoate, but is implemented when the supervisor actually coerces sex by abusing the employer's authority, and thus makes concrete the condition of employment he has imposed. In short, the threat culminates in a tangible employment action."<sup>186</sup> Accordingly, the Ninth Circuit concluded that the *Ellerth/Faragher* affirmative defense is unavailable to an employer when a "supervisor who abuses his supervisory authority

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<sup>179</sup> *Id.* at 1167.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1168.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1169.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1170. Additionally, the Ninth Circuit concluded that the examples of tangible employment actions provided by the Court in *Ellerth* and *Faragher* — hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits — constituted further support for the conclusion that successful supervisory sexual extortion constitutes a tangible employment action. *Id.*

succeeds in coercing an employee to engage in sexual acts by threats of discharge.”<sup>187</sup>

## 2. Aggravated Hostile Environment

In April 2004, a federal district court in Florida issued its opinion in *Speaks v. City of Lakeland*.<sup>188</sup> In contrast to the realist approach adopted in *Jin* and *Holly D.*, the district court adopted a formalist approach and held that a submission claim is simply an aggravated hostile environment

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<sup>187</sup> *Id.* at 1173. Notwithstanding the Ninth Circuit’s holding regarding submission cases, the court concluded that the plaintiff’s employer would be permitted an opportunity to assert the *Ellerth/Faragher* affirmative defense because the plaintiff was unable to provide any evidence “connecting any discussion of her job duties [or other job-related matters] with [her supervisor’s] requests that she engage in sex acts with him,” much less prove either an explicit or implicit threat. *Id.* at 1175-76. Ultimately, the Ninth Circuit concluded that the plaintiff’s employer established both prongs of the affirmative defense by demonstrating that: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of the employer’s complaint mechanisms by failing to seek relief through any of the numerous avenues provided by her employer until after she endured a full year of unwelcome sexual activity and two years from the date of the first sexual incident. *Id.* at 1177-79. Notwithstanding the plaintiff’s documented financial and psychological disabilities, the plaintiff did not contend that either her depression or her financial circumstances contributed to her decision to forego reporting. *Id.* at 1179 n.24. For a discussion of how a victim’s financial circumstances should be considered in assessing whether the plaintiff unreasonably failed to avoid harm under the second prong of the affirmative defense, see *infra* Part V.B.

There are additional cases implicitly approving of the *Jin* and *Holly D.* courts’ tangible employment action approach to submission cases. See *Suders v. Easton*, 325 F.3d 432, 458-59 (3d Cir. 2003) (stating in dicta that circumstance where plaintiff who submits to supervisor’s demands for sexual favors in return for “job benefits, such as continued employment,” constitutes tangible employment action even though such circumstances are void of any “official company act”), *vacated sub nom.* *Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Walton v. Johnson & Johnson Servs., Inc.*, 203 F. Supp. 2d 1312, 1321 (M.D. Fla. 2002) (suggesting in dicta that tangible employment action might exist where plaintiff’s supervisor uses “‘supervisory authority’ to . . . demand sex in return for job promotion”), *aff’d*, 347 F.3d 1272 (11th Cir. 2003); *Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190, 204 (N.D.N.Y. 2002) (stating in dicta that supervisor takes tangible employment action when he grants tangible job benefit based on subordinate’s submission to sexual demands); *Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638, 655 n.8 (D. Md. 2002) (stating in dicta that “[a]n employer is liable for sexual harassment both when an employee garners tangible job benefit because the employee submitted to supervisor’s sexual advances and when an employee suffers tangible job detriment because the employee rebuffed sexual advances”); *Perrigo v. Harveys Iowa Mgmt. Co.*, No. CIV. 1-99-CV-10003, 2000 WL 33363252, at \*6 (S.D. Iowa Mar. 14, 2000) (implicitly holding that plaintiff’s submission to her supervisor’s sexual advances constitutes tangible employment action where submission was based on supervisor’s express or implied promise to change plaintiff’s work hours and plaintiff’s belief that she would suffer reprisals if she refused his advances); *infra* text accompanying note 340.

<sup>188</sup> 315 F. Supp. 2d 1217, 1227 (M.D. Fla. 2004).

claim to which the *Ellerth/Faragher* affirmative defense applies.

Speaks worked in one of the four police squads in the City of Lakeland's police department.<sup>189</sup> Approximately two and one-half years into her tenure with the City, a police sergeant began making unwelcome sexual advances toward her.<sup>190</sup> Speaks alleged that she submitted to and did not report the sergeant's sexual demands because she feared that he would harm, transfer, or fire her if she refused.<sup>191</sup> Approximately one year after Speaks's sexual relationship with the sergeant began, the sergeant threatened to transfer her to a different squad.<sup>192</sup> Speaks then told her husband about the sergeant's behavior.<sup>193</sup> Shortly thereafter, Speaks's husband reported the sergeant's alleged misconduct.<sup>194</sup> Speaks subsequently filed an action for sexual harassment in violation of Title VII.<sup>195</sup>

The City moved for summary judgment on the grounds that Speaks did not suffer a tangible employment action and that the City satisfied both prongs of the *Ellerth/Faragher* affirmative defense.<sup>196</sup> Speaks argued, however, that the *Ellerth/Faragher* affirmative defense was unavailable to the City on her quid pro quo claim because she suffered a tangible employment action when the harassing sergeant "used his supervisory authority (including threats of termination or transfer) to obtain [Speaks's] consent to engage in sexual activities."<sup>197</sup> Speaks analogized her submission situation to the circumstances in *Suders v. Easton*, in which the Third Circuit held that an employee suffers a tangible employment action when she is constructively discharged as a result of a supervisor's repeated episodes of sexually harassing behavior.<sup>198</sup>

The district court found Speaks's tangible employment action argument problematic for two reasons: (1) it was inconsistent with *Ellerth* and *Faragher* and appeared to be a "return to the pre-*Faragher*/*Ellerth*

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<sup>189</sup> *Id.* at 1220 n.3.

<sup>190</sup> *Id.* at 1220.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1221.

<sup>195</sup> *Id.* at 1222.

<sup>196</sup> *Id.* at 1223.

<sup>197</sup> *Id.* at 1224.

<sup>198</sup> *Id.* Speaks analogized her situation to *Suders* even though more than three months prior to the City filing for summary judgment, the Court had granted certiorari on the constructive discharge issue presented in *Suders*. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. *Suders*, 542 U.S. 129 (2004). See *infra* Part III.B for a discussion of the Court's opinion in *Suders*, in which the Court reversed the Third Circuit.

state of sexual harassment law where the category of harassment determined vicarious liability; and (2) it undermine[d] the concept of an employee having a coordinate duty to avoid harm.”<sup>199</sup> In rejecting Speaks’s argument, the district court first noted that, following *Ellerth* and *Faragher*, the label quid pro quo was no longer controlling regarding employer liability.<sup>200</sup> Thus, to permit Speaks to use the quid pro quo label as a subterfuge to avoid the tangible employment action requirement would be inconsistent with *Ellerth*.<sup>201</sup> Moreover, the district court explicitly disagreed with *Jin*. It reasoned that “maintenance of the status quo” where an employee “continu[es] to work with the same job, pay, benefits, and responsibilities is not a change in status and is not analogous to any of the [tangible employment action] examples provided by the Court in *Ellerth* or *Faragher*.”<sup>202</sup>

The district court then explained how Speaks’s tangible employment action argument was inconsistent with the employee’s duty under *Ellerth* and *Faragher* to avoid harm.<sup>203</sup> It reasoned that, by holding that an employee’s submission in *Jin* or constructive discharge in *Suders* constitutes a tangible employment action, the Second and Third Circuits undermined the avoidable consequences principles underpinning the second prong.<sup>204</sup> According to the district court, such an approach leads to the anomalous result whereby an employee who submits to a supervisor’s demands in the Second Circuit or an employee who quits as a result of a supervisor’s sexual harassment in the Third Circuit “fares better by submitting . . . [or] quitting[,] respectively,] than by immediately reporting the misconduct.”<sup>205</sup>

Finally, the district court reasoned that this approach “encourages Plaintiffs’ counsel to bring and fit facts into certain types or categories of harassment claims” in an effort to impose strict liability.<sup>206</sup> This is precisely the type of semantics that the Supreme Court sought to avoid in *Ellerth* and *Faragher*.

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<sup>199</sup> *Speaks*, 315 F. Supp. 2d at 1225.

<sup>200</sup> *Id.* at 1223, 1225.

<sup>201</sup> *Id.* at 1225. Additionally, given the Court’s explicit statement in *Ellerth* that the quid pro quo label is not controlling for purposes of an employer’s vicarious liability for sexual harassment, the district court rejected the argument that a different vicarious liability standard applies in a quid pro quo submission case as compared to the unfulfilled threat quid pro quo case presented in *Ellerth*. *Id.* at 1225 n.20.

<sup>202</sup> *Speaks*, 315 F.Supp.2d at 1225.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1226.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1226 n.22.

For these reasons, the district court concluded that the Second Circuit's approach to submission in *Jin* and the Third Circuit's approach to constructive discharge in *Suders* were inconsistent with the vicarious liability and harm avoidance balance struck by the Court in *Ellerth* and *Faragher*.<sup>207</sup> Accordingly, the district court held that Speaks had not suffered a tangible employment action and that the City could assert the *Ellerth/Faragher* affirmative defense.<sup>208</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.* The court then concluded that the employer satisfied both prongs of the *Ellerth/Faragher* affirmative defense. *Id.* at 1229. With respect to the second prong, the court concluded that Speaks's outright failure to report the harassment, and the fact that her husband did not report the harassment until it had been ongoing for over one year, was unreasonable as it was based solely on Speaks's subjective fear of reprisals. *Id.* Furthermore, Speaks could have avoided "[m]ost, if not all, of the harm" if she had simply reported the sergeant's behavior at the beginning of the harassment. *Id.*; see *infra* Part V.B (discussing factors courts should consider under prong two of affirmative defense in determining whether subordinate's submission to her supervisor's demands was unreasonable under circumstances).

Additional cases have concluded that a subordinate's submission to her supervisor's sexual demands does not constitute a tangible employment action. See *Coker v. Ball Janitor Serv., Inc.*, No. 99-5099, 2000 WL 305487, at \*4 (10th Cir. Mar. 24, 2000) (holding that plaintiff who submitted to sexual acts with her supervisor based on subjective fear that she would be terminated if she resisted did not suffer tangible employment action based on submission); *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 988 (S.D. Iowa 2003) (concluding that plaintiff's "submission" to her supervisor's sexual comments, touching, and sexual advances did not constitute tangible employment action but rather amounted only to "unfulfilled threats" in absence of "detrimental" employment action taken against her (citing *Newton v. Cadwell Labs.*, 156 F.3d 880 (8th Cir. 1998))); *Samedi v. Miami-Dade County*, 206 F. Supp. 2d 1213, 1219 (S.D. Fla. 2002) (holding that plaintiff did not allege tangible employment action based on her allegations that she submitted to unwelcome sexual intercourse and other sex acts with her superiors because they threatened her with termination if she did not do so, and concluding that such facts constitute severe hostile environment claim to which *Ellerth/Faragher* affirmative defense applies); *Hetreed v. Allstate Ins. Co.*, No. 96 C 2021, 1999 WL 311728, at \*4-5 (N.D. Ill. May 12, 1999) (holding that plaintiff did not suffer tangible employment action when she submitted to "repeated, coerced sexual encounters" with her supervisor "in return for 'reasonably appropriate future evaluations, compensation (including bonuses and pay raises), responsibilities, and other job-related treatment'" because "harassment itself does not constitute tangible employment action" and she "did not suffer any sort of negative repercussions . . . as a result of the harassment"), *aff'd*, No. 00-1787, 2001 WL 427785, at \*1 (7th Cir. Mar. 16, 2001) (stating that plaintiff's contention that "sexual relations are 'tangible employment actions' is at variance with the definition given in *Faragher* and *Ellerth*," and further stating that "a supervisor's sexual activity is not attributed to the firm unless it fails to take preventive or responsive steps within its power"); *Johnson v. Brown*, No. 94 C 6530, 1998 WL 483521, at \*4 (N.D. Ill. Aug. 10, 1998) (granting judgment in favor of employer following bench trial, and concluding that plaintiff had not alleged tangible employment action where plaintiff's supervisor subjected her to crude and "offensive" behavior and engaged in threatening and intimidating behavior, which ultimately coerced plaintiff to engage in unwanted sexual intercourse with him out of fear that she would be terminated if she rejected his advances), *rev'd on other grounds*, *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000); *Grozdanich v. Leisure*



### B. Constructive Discharge Claims

Two months after *Speaks*, the Supreme Court issued its long-awaited opinion in the constructive discharge case of *Pennsylvania State Police v. Suders*.<sup>209</sup> Contrary to the Third Circuit's conclusion, the Court held that a constructive discharge caused by a supervisor's sexual harassment of a subordinate does not constitute a tangible employment action, except in limited circumstances. Because submission and constructive discharge claims are analogous for the purposes of the tangible employment action analysis — in each instance it is the employee who takes action in response to the supervisor's conduct — the Court's opinion in *Suders* provides useful guidance regarding whether submission cases constitute tangible employment actions.

*Suders* involved a situation where an employee's supervisors subjected her to what the Court referred to as a "'wors[t] case' harassment scenario, harassment ratcheted up to the breaking point."<sup>210</sup> Commencing with *Suders*'s employment with the Pennsylvania State Police (the "PSP"), her three supervisors subjected her to a campaign of sexual harassment that stopped only when she quit her employment less than six months later.<sup>211</sup> The conduct included repeated obscene gestures, vulgar comments, and frequent discussions regarding bestiality.<sup>212</sup> In addition, *Suders*'s supervisors subjected her to other harassment, which included twice unfairly accusing *Suders* of work-related misconduct.<sup>213</sup>

*Suders* subsequently filed a Title VII action based upon her supervisors' sexual harassment, which caused her to resign.<sup>214</sup> Because *Suders* did not label her claim as one of constructive discharge, the district court did not consider whether her allegations constituted a constructive discharge. Instead, it granted summary judgment in favor of the PSP because *Suders* unreasonably failed to report her supervisors' harassment.<sup>215</sup> The Third Circuit reversed and remanded on the grounds

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Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 968-69 (D. Minn. 1998) (concluding that plaintiff stated "unfulfilled threat" claim to which *Ellerth/Faragher* affirmative defense applies where she alleged that she retained her employment only because she "passively submit[ted]" to her supervisor's unwelcome sexual advances in form of inappropriate touching and groping).

<sup>209</sup> 542 U.S. 129 (2004).

<sup>210</sup> *Id.* at 147-48.

<sup>211</sup> *Id.* at 134-35.

<sup>212</sup> *Id.* at 134-37.

<sup>213</sup> *Id.* at 136-37.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 137.

that, *inter alia*, the district court erred in failing to construe Suders's allegations as a constructive discharge claim. The Third Circuit held that, if proven, a constructive discharge claim constitutes a tangible employment action claim that deprives the employer of the *Ellerth/Faragher* affirmative defense.<sup>216</sup>

In reaching this conclusion, the Third Circuit in *Suders* took a realist approach. It focused on the harm suffered by employees who are forced to resign as a result of supervisory sexual harassment, and concluded that an official act was not necessary for the resignation to constitute a tangible employment action.<sup>217</sup> In doing so, the Third Circuit analogized constructive discharge cases to submission cases and relied on the reasoning in *Jin*:

[S]ome of the most pernicious forms of workplace harassment, clearly amounting to tangible employment actions, are often not accompanied by official company acts. This is especially true in *quid pro quo* cases where a victimized employee submits to a supervisor's demands for sexual favors in return for job benefits, such as continued employment. In these cases, it is rare that a supervisor's demands for sexual liberties, and the corresponding threat of adverse consequences for failure to submit, will be documented anywhere in company records. Therefore, a rule requiring a victimized employee who submits to a supervisor's indecent demand for sexual favors to prove an official company act in order to establish a tangible employment action strains common sense. As the Second Circuit has held, the more sensible approach in the *quid pro quo* context is to recognize that, by his or her actions, a supervisor invokes the official authority of the enterprise. . . . This rationale is equally applicable in the context of constructive discharge.<sup>218</sup>

Based on this reasoning, the Third Circuit concluded that a plaintiff who alleges that she was constructively discharged as a result of her supervisor's sexual harassment is not required to show an official company act to prove a tangible employment action.<sup>219</sup>

Subsequently, the Supreme Court granted review to resolve the question of whether "a constructive discharge brought about by

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<sup>216</sup> *Id.* at 138-39.

<sup>217</sup> *Suders v. Easton*, 325 F.3d 432, 459 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. *Suders*, 542 U.S. 129 (2004); *see Chamallas, supra* note 11, at 331 (noting that Third Circuit took realist approach to constructive discharge based on "actual effects").

<sup>218</sup> *Suders*, 325 F.3d at 458-59.

<sup>219</sup> *Id.* at 459.

supervisor harassment ranks as a tangible employment action.<sup>220</sup> In an eight-to-one opinion, it reversed the Third Circuit and concluded that a constructive discharge constitutes a tangible employment action only when a “supervisor’s official act precipitates the constructive discharge.”<sup>221</sup> The Court further noted that in the absence of a tangible employment action, the employer could assert the two-prong affirmative defense.<sup>222</sup>

The Court began its analysis by noting that the companion opinions of *Ellerth* and *Faragher* distinguished between “supervisor harassment unaccompanied by an *adverse* official act,” to which employers may assert the *Ellerth/Faragher* affirmative defense, and supervisor harassment attended by a tangible employment action, for which an employer is strictly liable.<sup>223</sup> It reaffirmed the aided in the agency relation analysis set forth in *Ellerth* and *Faragher* and, in doing so, explained that a tangible employment action is “in essential character, ‘an official act of the enterprise, a company act.’”<sup>224</sup> Thus, the Court focused its analysis on whether an official act was necessary for a constructive discharge to constitute a tangible employment action when the discharge resulted solely from supervisory sexual harassment.<sup>225</sup>

In *Suders*, the Court disagreed with the Third Circuit’s realist approach and reaffirmed the *Ellerth* and *Faragher* formalist approach to strict liability. It reasoned that, unlike an actual termination, which can only be achieved through a supervisor’s official act, the intolerable conditions that result in a constructive discharge “may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts.”<sup>226</sup> “A constructive discharge involves both an employee’s decision to leave and precipitating conduct: [t]he former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.”<sup>227</sup> Thus, in the absence of an “‘official act of the enterprise’ . . . as the last straw, the employer ordinarily would have no particular reason to suspect that a

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<sup>220</sup> *Suders*, 542 U.S. at 139.

<sup>221</sup> *Id.* at 140-41.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 137 (emphasis added).

<sup>224</sup> *Id.* at 145-46 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

<sup>225</sup> The Court focused on the “official act” requirement presumably because a constructive discharge results in a “significant change in employment status” by ending the employment relationship and it constitutes the legal equivalent of an actual discharge in damages enhancing respects. *Id.* at 140, 148.

<sup>226</sup> *Id.* at 148.

<sup>227</sup> *Id.*

resignation is not the typical kind daily occurring in the work force."<sup>228</sup> In contrast, a circumstance where "an official act [is] reflected in company records — a demotion or a reduction in compensation, for example — shows 'beyond question' that the supervisor has used his managerial or controlling position to the employee's disadvantage."<sup>229</sup>

The Court also reasoned that it was logically inconsistent to construe all constructive discharges as tangible employment actions. By dispensing with the official act requirement, the Third Circuit created the anomalous result whereby "the *graver* claim of hostile-environment constructive discharge [is] *easier* to prove than its lesser included component, hostile work environment."<sup>230</sup> Accordingly, the Court concluded that, in the absence of an official act, an employer could assert the *Ellerth/Faragher* affirmative defense to a constructive discharge claim based on supervisory harassment.<sup>231</sup>

Finally, in an effort to provide guidance to lower courts as to how the official act requirement applies in the constructive discharge context, the Court approved of the First and Seventh Circuit's respective approaches to constructive discharge in *Reed v. MBNA Marketing Systems, Inc.*<sup>232</sup> and *Robinson v. Sappington.*<sup>233</sup> In *Reed*, the First Circuit concluded that a supervisor's sexual harassment of a subordinate, accompanied by threats to discharge her if she reported, were "exceedingly unofficial and involved no direct exercise of company authority" and constituted "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed."<sup>234</sup> In *Robinson*, the Seventh Circuit concluded that the requisite official act was present when a plaintiff who had been sexually harassed resigned after being transferred to another supervisor and being told that her new position "probably would be

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* (quoting *Ellerth*, 524 U.S. at 760).

<sup>230</sup> *Id.* at 149. Thus, the Court implicitly rejected the Third Circuit's concern that "removing constructive discharge from the category of tangible employment actions could have the perverse effect of discouraging an employer from actively pursuing remedial measures and of possibly encouraging intensified harassment" to cause the employee to quit. *Suders v. Easton*, 325 F.3d 432, 461 (3d Cir. 2003), *vacated sub nom.* 542 U.S. 129 (2004).

<sup>231</sup> *Suders*, 542 U.S. at 148-49. The *Suders* Court noted that the omission of "constructive discharge" from the examples of tangible employment actions included in *Ellerth* and *Faragher* was conspicuous, and equally telling was the Court's conclusion that *Ellerth* had not alleged that she suffered a tangible employment action. *Id.* at 148.

<sup>232</sup> 333 F.3d 27 (1st Cir. 2003).

<sup>233</sup> 351 F.3d 317 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2909 (2004); *Suders*, 542 U.S. at 149-50.

<sup>234</sup> *Suders*, 542 U.S. at 149-50 (citing *Reed*, 333 F.3d at 33).

'hell'" and that she should consider resigning.<sup>235</sup>

According to the *Suders* Court, the First and Seventh Circuits in *Reed* and *Robinson* "properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor harassment claims according to the presence or absence of an official act, mark the path that constructive discharge claims based on harassing conduct must follow."<sup>236</sup> Because the Third Circuit failed to consider whether the requisite "official act" preceded *Suders*'s alleged constructive discharge, the Court reversed and remanded the judgment for further proceedings.<sup>237</sup>

The Court's opinion in *Suders* helped resolve any uncertainty regarding whether submission cases constitute tangible employment actions.<sup>238</sup> As explained below, because submission cases do not constitute tangible employment actions, an employer should be permitted to assert and prove the *Ellerth/Faragher* affirmative defense.

#### IV. ANALYSIS OF SUBMISSION CLAIMS UNDER *ELLERTH* AND *FARAGHER*

Nearly eight years after *Burlington Industries, Inc. v. Ellerth*<sup>239</sup> and *Faragher v. City of Boca Raton*,<sup>240</sup> the problem the Supreme Court attempted to remedy — namely, the expansive pressure to label and construe sexual harassment claims as quid pro quo claims for purposes of holding an employer strictly liable — still exists in submission cases. The only difference is that the label has changed. Instead of characterizing submission claims as quid pro quo claims, plaintiffs now plead such claims as tangible employment actions, knowing that the tangible employment action label is synonymous with strict liability. There is an additional reason why plaintiffs are attempting to expand the tangible employment action definition to include submission cases — district courts have demonstrated a tendency to grant summary judgment in favor of defendant employers in hostile environment claims not involving a tangible employment action on the grounds that the employers have satisfied both prongs of the *Ellerth/Faragher* affirmative

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<sup>235</sup> *Id.* (citing *Robinson*, 351 F.3d at 324).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 151-52.

<sup>238</sup> *But see generally* Michael Starr & Adam J. Heft, *Employment Law, Sexual Harassment*, 26 NAT'L L.J. 18 (2004) (noting contrasting approaches to submission claims in *Jin* and *Speaks*, and further noting that Court's decision in *Suders* may shed some light on whether submission claims constitute tangible employment action, but concluding that result is "still unclear" even after *Suders*).

<sup>239</sup> 524 U.S. 742 (1998).

<sup>240</sup> 524 U.S. 775 (1998).

defense.<sup>241</sup> In addition to plaintiffs' efforts to creatively plead submission cases, certain courts have misconstrued and misinterpreted the tangible employment action principles provided in *Ellerth* and *Faragher* and instead equated classic quid pro quo scenarios with an employer's strict liability. Perhaps the egregious circumstances presented in cases such as *Jin v. Metropolitan Life Insurance Co.*<sup>242</sup> and *Holly D. v. California Institute of Technology*<sup>243</sup> fueled this result.

The opinions in *Jin* and *Holly D.* are compelling. From a realist perspective, it seems unjust to permit an employer to assert the *Ellerth/Faragher* affirmative defense under circumstances where a supervisor successfully coerces an employee's repeated submission to unwelcome sexual acts. Indeed, a supervisor's ability to extort sexual acts from a subordinate is perhaps the quintessential example of the aided in the agency relation standard. Unlike a typical hostile environment scenario where a coworker and supervisor may be equally capable of inflicting harm, there are few scenarios where sexual extortion could occur absent the agency relation and the supervisor's use of power.<sup>244</sup> It is precisely because "successful coercion . . . depends on the same abuse of supervisory authority — the power to hire and fire — that . . . renders a discharge a 'tangible employment action'" that some courts have equated submission claims with tangible employment actions.<sup>245</sup>

While a supervisor's abuse of power alone may be sufficient reason to hold an employer *vicariously* liable for a supervisor's sexual extortion, the Court in *Ellerth* and *Faragher* took a formalist approach to employer liability. In doing so, it required something more than the supervisor's unique ability to sexually harass subordinates before holding an employer *strictly* liable for a supervisor's misconduct. Rather, to impose strict liability on an employer, a plaintiff must show that she suffered a

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<sup>241</sup> See *infra* text accompanying note 349 (regarding lower courts' pro-employer trend in granting summary judgment on affirmative defense).

<sup>242</sup> 310 F.3d 84 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004).

<sup>243</sup> 339 F.3d 1158 (9th Cir. 2003).

<sup>244</sup> Ironically, the circumstances in *Jin* are one example of a scenario where sexual extortion was accomplished by a coworker, given that the perpetrator in *Jin* did not become her supervisor until approximately six months into his campaign of harassment accompanied by threats of physical harm. See *Jin*, 310 F.3d at 88 (stating that perpetrator began working in Jin's branch in May 1993 and "by at least January 1994" he became her manager and supervisor), *cert. denied*, 125 S. Ct. 52 (2004); see also *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 513 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting) (positing that coworker might threaten to steal employee's work tools if she did not submit to him), *aff'd sub nom. Ellerth*, 524 U.S. 742.

<sup>245</sup> *Holly D.*, 339 F.3d at 1168.

tangible employment action. To do so, the plaintiff must demonstrate that she experienced a significant change in employment status that was brought about by an “official act of the enterprise, a company act.” As explained in Part IV.A.1 below, the change in employment status must be adverse.

This Part articulates the reasons why submission cases do not satisfy the formal requirements of a tangible employment action and why construing submission cases as tangible employment actions is inconsistent with the policies underlying *Ellerth* and *Faragher*. For discussion purposes, it is necessary to break submission cases into two subsets.

The first subset involves circumstances where the subordinate submits to the supervisor’s unwelcome sexual advances because the supervisor threatens to impose a tangible job detriment or deny the subordinate tangible job benefits to which she is entitled. In such a scenario, the subordinate avoids the tangible job detriment or continues to enjoy the job benefits to which she was otherwise entitled by submitting to the supervisor’s demands. Thus, this Article refers to the first subset as an “avoided-job-detriment” case.

The second subset involves circumstances where the subordinate submits to the supervisor’s unwelcome sexual advances because the supervisor promises her a job benefit to which she is not otherwise entitled. In such a scenario, the subordinate receives the unwarranted job benefit by submitting to the supervisor’s sexual demands. This Article refers to the second subset as a “received-job-benefit” case.

As explained in this Part, both subsets of submission cases lack the formal requirements of a tangible employment action. The avoided-job-detriment cases lack the requisite significant change in employment status. Moreover, both the avoided-job-detriment and received-job-benefit cases lack the necessary adverse change required under *Ellerth* and *Faragher*. Further, the avoided-job-detriment cases lack the requisite official act necessary to hold the employer strictly liable for the supervisor’s sexual extortion. Thus, these claims amount to mere unfulfilled threat cases to which the *Ellerth/Faragher* affirmative defense applies. In addition to lacking the formal requirements of a tangible employment action, construing submission cases as tangible employment actions is inconsistent with the policies underlying the Court’s opinions in *Ellerth* and *Faragher*. Such a conclusion is inconsistent with the bright line the Court endeavored to draw in *Ellerth* and *Faragher*, and leads to the same expansive pressure that previously

existed whereby plaintiffs sought to label claims as quid pro quo to impose strict liability.

A. *Significant Change in Employment Status*

In an attempt to bring avoided-job-detriment claims within the definition of a “tangible employment action,” the *Jim* and *Holly D.* courts reasoned that an avoided-job-detriment plaintiff experiences a significant change in employment status in the form of a significant change in her job requirements.<sup>246</sup> The premise is that an avoided-job-detriment plaintiff experiences a significant change in job requirements when retention of her job becomes conditioned upon her engaging in unwelcome sexual conduct.<sup>247</sup> Although there is some appeal to the change-in-responsibilities approach, this approach ultimately fails as it necessarily encompasses circumstances where a hostile work environment plaintiff claims that she too was forced to endure her supervisor’s sexual comments, innuendo, inappropriate touching, and the like.

The plaintiffs in both the submission and hostile environment cases claim that enduring the supervisor’s abusive behavior effectively became an additional job requirement or, alternatively, resulted in a constructive reduction in pay. Indeed, it is precisely because actionable sexual harassment, regardless of the label, “alter[s] [the] terms or conditions of [the victim’s] employment” that the Court concluded that such harassment violates Title VII.<sup>248</sup> Nevertheless, because all hostile work environments created by a supervisor necessarily impose this additional job requirement, or the corresponding constructive reduction in pay, construing submission cases as imposing an additional job requirement tantamount to a significant change in status would eviscerate the distinction the Court drew between hostile work environment cases and those involving tangible employment actions.<sup>249</sup> For this reason alone, construing the subordinate’s submission in an avoided-job-detriment case as a change in job responsibilities equal to a significant change in employment status is inconsistent with *Ellerth* and *Faragher*.<sup>250</sup>

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<sup>246</sup> *Id.* at 1169.

<sup>247</sup> *Id.* Because the supervisor imposes this new job requirement and yet the subordinate continues to receive the same rate of pay, such a scenario might alternatively be viewed as a constructive yet significant reduction in pay.

<sup>248</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see *Ellerth*, 524 U.S. at 752.

<sup>249</sup> See *Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638, 655 n.8 (D. Md. 2002) (stating that creation of hostile work environment does not constitute tangible employment action).

<sup>250</sup> For this same reason, the constructive yet significant reduction in pay does not



Additionally, the Court's examples of what constitutes a significant change in employment status suggest that this change in status must be a material action or omission beyond the change in job requirements experienced by an employee subjected to supervisor harassment.<sup>251</sup> Such significant changes in employment status include material actions "such as hiring, firing, . . . reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," as well as "demotion, or undesirable reassignment" and certain material omissions, such as a "failure to promote."<sup>252</sup> The fact that official

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constitute the requisite "decision causing a significant change in benefits" for a tangible employment action under *Ellerth*.

<sup>251</sup> For an example of how the *Ellerth/Faragher* tangible employment action standard differs from the pre-*Ellerth/Faragher* "tangible job detriment" standard and thus leads to different outcomes regarding employer liability, compare the pre-*Ellerth* result in *Reinhold v. Virginia*, 135 F.3d 920, 931-33 (4th Cir. 1998) (stating that tangible job detriment is necessary element for quid pro quo claim, and concluding that plaintiff established prima facie case of quid pro quo harassment by demonstrating that, following plaintiff's rejection of her supervisor's unwelcome sexual advances, she suffered tangible job detriment in form of extra and inappropriate work assignments and being denied opportunity to attend valuable professional conference), with the post-*Ellerth* result in *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (holding upon reconsideration following Court's decisions in *Ellerth* and *Faragher* that assignment of extra work does not amount to tangible employment action for which employer is strictly liable because increased workload does not amount to "change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities"). See also *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (holding that employee does not experience requisite "change in employment status" when employer changes her work schedule, expands her duties, and requires her to check with her supervisor before taking breaks); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153-54 (3d Cir. 1999) (holding that plaintiff suffered tangible employment action when employer deprived plaintiff of negotiated conditions of plaintiff's employment and further deprived plaintiff of client files, which resulted in 50% decrease in her earnings); cf. Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 839 (2002) (discussing courts' narrow interpretation of tangible employment action, arguing that focus of tangible employment action analysis is "not so much the dimension of the action taken against the subordinate, but the source of the power the supervisor uses to take that action," and concluding that "[i]f that power is derived from the authority the supervisor derives from his relationship with the employer, the action taken is a [tangible employment action], regardless of whether it alters the subordinate's status in any ultimate sense").

<sup>252</sup> *Ellerth*, 524 U.S. at 761, 765. Given the Court's use of the phrase "such as" when listing actions that constitute a significant change in status and the Court's subsequent decision in *Suders* in which the Court held that a significant change in employment status not specifically included in the illustrative list — a constructive discharge preceded by an official act — may constitute a tangible employment action, the *Jin* court was correct in its conclusion that the list of possible tangible employment actions was not exhaustive. See *Jin v. Metro. Life Ins. Co.*, 310 F.3d 94, 97 n.8 (2d Cir. 2002), cert. denied, 125 S. Ct. 52 (2004). Although the list was not exhaustive, submission cases nevertheless do not constitute tangible employment actions because the circumstances lack the prerequisites of an adverse significant change in employment status brought about by an official act for the

company records will reflect most of these actions further supports the material nature of the actions and omissions contemplated by the Court in *Ellerth*.<sup>253</sup>

Because an avoided-job-detriment plaintiff maintains the status quo, she cannot demonstrate the requisite change in employment status, much less the requisite significant change. This was essentially the conclusion reached in *Speaks v. City of Lakeland*,<sup>254</sup> in which the district court concluded that an employee who simply maintains the status quo has not experienced the requisite change in status. Nevertheless, this conclusion must be reconciled with the significant change in employment status that occurs where a plaintiff, who is entitled to a promotion, is not promoted because she resisted her supervisor's advances and thus maintains the status quo.

To reconcile the differing results in the failure to terminate and failure to promote scenarios, one need only look at the categories into which the significant change in employment status examples provided by the Court fall. With the sole exception of hiring, as discussed more fully below, the examples of a significant change in employment status fall into one of two categories: either an unwarranted detrimental job action, such as a termination or a demotion, or an unwarranted failure to carry out a beneficial job action under circumstances where the employee was entitled to the action, such as a failure to promote.<sup>255</sup> Thus, when a supervisor fails to promote a subordinate who is otherwise entitled to a promotion because the subordinate refused his unwelcome sexual advances, the subordinate continues to work with the same job, pay, benefits, and responsibilities and thus maintains the status quo. Yet, such a failure to promote would constitute the requisite change in employment status precisely because the supervisor prevented the employee from receiving something to which the employee was entitled.

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reasons discussed more fully in Part IV.

<sup>253</sup> *Ellerth*, 524 U.S. at 762; see Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 75 (1999) (arguing that "critical consideration [in determining what constitutes a tangible employment action] should be whether the discriminating supervisor has recorded or reported his discriminatory action . . . so that it is readily available for review").

<sup>254</sup> 315 F. Supp. 2d 1217, 1227 (M.D. Fla. 2004).

<sup>255</sup> The "significant change in employment status" examples provided by the Court appear at first blush to contemplate three types of results: (1) actions and omissions with *negative* consequences such as "firing, failure to promote," "demotion, or undesirable reassignment," (2) actions that may have *positive, neutral, or negative* consequences such as "reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," and (3) actions with *positive* consequences such as "hiring." Nevertheless, as explained more fully in Part V.A.1, the change must be adverse.

Applying the same reasoning to an avoided-job-detriment case, the analysis collapses because the supervisor has not deprived the employee of anything to which she was entitled, and thus, the employee has not experienced a change in employment status, much less a significant change. For this reason, the Ninth Circuit's conclusion that the significant change in employment status examples necessarily include their opposites — firing necessarily implies failing to fire<sup>256</sup> — is incorrect, at least with respect to circumstances where the employee who submits maintains the status quo to which she is otherwise entitled.

To better understand these differences, it is helpful to employ a spatial construct composed of trajectories that represent an employee's standing and progress within the employer's organization. In this example, the construct consists of three employees with corresponding trajectories: Employee A, who is performing well, entitled to a promotion, and on an upward trajectory within the organization; Employee B, who is performing satisfactorily, entitled to retain her position, and on a flat trajectory within the organization; and Employee C, who is performing poorly, subject to termination, and on a downward trajectory within the organization. Employee A, who is entitled to a promotion but who does not receive it because she spurned her supervisor's advances, effectively experiences a change in her employment status as her trajectory shifts from upward to flat. Employee B, who retains her job either because she submitted to her supervisor's advances or because she refused but then suffered no job detriment, does not experience a change in her employment status as her trajectory remains flat. Finally, Employee C, who is performing poorly and is subject to termination but is not terminated because she submitted to her supervisor's advances, experiences a change in her employment status as her trajectory shifts from downward to flat.

In the scenarios described above, Employees A and C are the only employees who experience the requisite change contemplated in *Ellerth*.<sup>257</sup> Whether a court labels Employee B's situation as an avoided-

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<sup>256</sup> *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1170 (9th Cir. 2003); see text accompanying note 147 (noting EEOC includes both promotion and failure to promote as examples of tangible employment actions).

<sup>257</sup> The Ninth Circuit concluded:

When a supervisor [1] hires or promotes an employee *because* she complies with his sexual demands — or when he [2] fires or passes her over for promotion *because* she refuses to comply — he has abused his authority as the employer's agent and has taken a 'tangible employment action.' The same is true when a supervisor determines that the retention of an employee in the employer's

job-detriment claim or, as the Second and Ninth Circuit concluded, the “receipt of a job benefit” in the form of continued employment,<sup>258</sup> the result is the same — Employee B’s trajectory remains unchanged. Thus, Employee B’s employment status has not changed significantly as required under *Ellerth*. Moreover, as discussed in Part IV.A.1 below, because the Court’s decision in *Ellerth* suggests that the change in trajectory must be downward or negative, Employee B has not experienced the requisite adverse change under *Ellerth*.

Although Employee C’s trajectory has changed, she faces a similar hurdle. Employee C received a benefit to which she was not otherwise entitled, and her trajectory shifted from downward to flat precisely because she submitted to her supervisor’s advances. Because the Court included the positive action of hiring as one of the examples of a significant change in employment status, Employee C’s retention of employment under circumstances where she was not otherwise entitled to do so may constitute a change in employment status akin to the change experienced by someone who is fired or not promoted because she refused a supervisor’s sexual demands. Nevertheless, because the shift in trajectory must be downward or negative, Employee C, like Employee B, has not experienced the adverse change required under *Ellerth*.

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employ will depend on her participation in sexual acts, and then either [3] fires her because she does not participate or [4] retains her in her position because she does.

*Holly D.*, 339 F.3d at 1171. While the Ninth Circuit is correct that the “supervisor has abused his authority as the employer’s agent” in each of the four scenarios and the employees in categories 1, 2, and 3 have experienced the requisite change in status, the employee in category 4 has not experienced the requisite “change in status” for the reasons explained above. Moreover, although the employees in categories 1, 2, and 3 have experienced the requisite change in status to constitute a tangible employment action, the employee in category 1 lacks the requisite adverse change, and thus has not experienced a tangible employment action, as explained more fully below.

<sup>258</sup> *Holly D.*, 339 F.3d at 1169; *see also* *Jin v. Metro. Life Ins. Co.*, 310 F.3d 94, 97 (2d Cir. 2002) (noting that tangible employment actions do not require economic harm), *cert. denied*, 125 S. Ct. 52 (2004). Presumably the reason the Second and Ninth Circuits characterized the avoided-job-detriment scenario as the subordinate’s receipt of a “benefit” in the form of continued employment was because the characterization appears analytically closer to *Ellerth*’s required significant change in employment status or benefits. Additionally, by characterizing the avoided-job-detriment case in this fashion, both courts were likely trying to bring the circumstances within the EEOC’s definition of a “tangible employment action.” *See* EEOC, *supra* note 147. Notwithstanding the characterization, the fact remains that the avoided-job-detriment plaintiff has not experienced the requisite change in status as discussed above. Moreover, even if the avoided-job-detriment scenario is characterized as a “benefit” received, such a characterization raises a separate issue: the plaintiff lacks the requisite adverse change. *See* discussion *infra* Part IV.A.1.

### 1. Adverse Change Requirement

Notwithstanding the Court's inclusion of the term "hiring" in its illustrative list of significant changes in employment status, these examples must be interpreted in light of the *Ellerth* opinion as a whole, which indicates that the change in employment status must be adverse.<sup>259</sup> Indeed, the significant change in employment status concept stems from Chief Judge Posner's opinion in *Jansen v. Packaging Corporation of America*<sup>260</sup> where he coined the phrase "company act." Chief Judge Posner defined a "company act" as a "significant alteration in the terms or conditions of [the] victim's employment" under circumstances where a supervisor engages in any of the following adverse actions or omissions: "fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company rules entitle her to receive."<sup>261</sup> The adverse nature of these actions is further supported by Chief Judge Posner's statement that strict liability should attach when a subordinate is terminated or otherwise injured in this manner.<sup>262</sup>

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<sup>259</sup> Indeed, when illustrating the distinction between actions that are sufficient to constitute a tangible employment action and those that are not, the Court cited disparate treatment cases. In doing so, it suggested that tangible employment actions are those comprised of a "material adverse change" as compared with those actions that implicate a slight imposition or inconvenience. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (comparing *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) ("A materially *adverse* change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices that might be unique to a particular situation.") (emphasis added), with *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 887 (6th Cir. 1996) (holding that demotion without change in pay, benefits, duties, or prestige is insufficient to constitute tangible employment action), and *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (finding reassignment to more inconvenient job insufficient)). Additionally, the Court later suggested in its joint holding in *Ellerth* and *Faragher* that any reassignment must be *adverse*: "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or *undesirable* reassignment." *Pa. State Police v. Suders*, 542 U.S. 129, 137-38 (2004) (quoting same) (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (emphasis added).

<sup>260</sup> 123 F.3d 490 (7th Cir. 1997).

<sup>261</sup> *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 512 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting), *aff'd sub nom. Ellerth*, 524 U.S. 742.

<sup>262</sup> *Id.*; see *id.* at 499 (Flaum, J., concurring) (acknowledging Chief Judge Posner's position that "adverse job consequence is necessary to succeed on *quid pro quo* claim," and noting that "adverse job consequence" "takes the guise of [a] 'company act' in Chief Judge Posner's opinion").

Moreover, the Court's repeated use of the terms "threat," "injury," "harm," and "inflicted" in *Ellerth* suggests that it contemplated that tangible employment actions would encompass only adverse actions and omissions.<sup>263</sup> For example, the Court distinguished between circumstances where a supervisor's "threats are carried out and those where they are not or are absent altogether . . . ."<sup>264</sup> The Court did not mention "promises of job benefits made and fulfilled." Furthermore, with respect to the "injury inflicted" upon the plaintiff when a supervisor takes a tangible employment action, the Court explained:

When a supervisor makes a tangible employment decision, there is assurance the *injury* could not have been *inflicted* absent the agency relation. A tangible employment action in most cases *inflicts* direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of *injury*.<sup>265</sup>

In addition to the term "injury," the Court also used the term "harm" when describing the tangible effect of the supervisor's abuse of authority. For example, the Court referred to the "direct economic *harm*" caused by most tangible employment actions.<sup>266</sup> It also referred to the "*harm* caused by misuse of supervisory authority" and the subordinate's coordinate duty to "avoid *harm*."<sup>267</sup> In each of these instances, the Court used the terms "threat," "injury," "harm," and "inflicted" to denote the negative job-related consequences suffered by a subordinate as a result of the adverse action or omission.

While both an avoided-job-detriment and a received-job-benefit plaintiff may suffer psychological injury or harm, the Court's efforts to distinguish psychological injuries from the job-related injury uniquely caused by a supervisor's official adverse action or omission further compels the conclusion that tangible employment actions must be adverse. In this respect, the Court stated:

A tangible employment action in most cases *inflicts direct economic harm*. As a general proposition, *only a supervisor*, or other person acting with the authority of the company, *can cause this sort of injury*. A co-worker can break a co-worker's arm as easily as a supervisor,

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<sup>263</sup> See Woodford & Risetto, *supra* note 167, at 79-80 (noting that terms "threat," "against," "injury," and "harm" denote adverse actions).

<sup>264</sup> *Ellerth*, 524 U.S. at 751.

<sup>265</sup> *Id.* at 761-62 (emphasis added).

<sup>266</sup> *Id.* at 762 (emphasis added).

<sup>267</sup> *Id.* at 764-65 (emphasis added).

and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another.<sup>268</sup>

To illustrate the distinction between the type of injuries resulting from a supervisor's adverse action or omission and those resulting from nonadverse actions or omissions, recall the injuries suffered by Employees A, B, and C in the hypothetical discussed above. Employee A suffers job-related, although not necessarily economic, injury when her supervisor fails to promote her because she did not submit to his sexual demands. In contrast, the injuries suffered by the employees who submit to the supervisor's sexual demands — B, the avoided-job-detriment case, and C, the received-job-benefit case — are psychological.<sup>269</sup>

All three employees suffered injuries that the supervisor had the unique ability to inflict, but the types of injury they suffered differ in legally significant ways. The job-related injury suffered by Employee A is uniquely within the supervisor's ability to inflict. The injuries suffered by Employees B and C, however, are exclusively psychological. Thus, they are the same type of injury suffered by a plaintiff who endures sexual harassment in the form of offensive behavior by either a coworker or supervisor. Accordingly, the Court's distinction between psychological injuries and the types of job-related injuries uniquely inflicted by a supervisor's adverse action or omission is yet another reason supporting the conclusion that the Court intended to include only adverse actions or omissions in the tangible employment action definition.

Additionally, the Court's use of the phrase "taken against a subordinate" when referring to the phrase "tangible employment action" further bolsters the conclusion that tangible employment actions include only adverse actions or omissions with job-related negative consequences:

At the outset, we can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of harassment: when a supervisor *takes a tangible employment action against* the subordinate . . . . Whatever the exact contours of the aided in the agency relation standard, its

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<sup>268</sup> *Id.* at 762 (citations omitted) (emphasis added).

<sup>269</sup> Admittedly, such injuries are as "tangible as an injury can be." *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1171 (9th Cir. 2003).

requirements will always be met when a supervisor *takes a tangible employment action against a subordinate.*"<sup>270</sup>

If the Court intended tangible employment actions to also include positive or neutral actions and omissions, it could have easily used the phrase "takes a tangible employment action *regarding or with respect to* a subordinate."

Finally, the Court's opinion in *Pennsylvania State Police v. Suders*<sup>271</sup> further supports the conclusion that tangible employment actions encompass only adverse actions and omissions. In *Suders*, the Court noted that *Ellerth* and *Faragher* "distinguished between supervisor harassment unaccompanied by an *adverse* official act and supervisor harassment attended by a 'tangible employment action.'"<sup>272</sup>

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<sup>270</sup> *Ellerth*, 524 U.S. at 760-63 (emphasis added).

<sup>271</sup> 542 U.S. 129 (2004).

<sup>272</sup> *Suders*, 542 U.S. at 137-38 (quoting *Ellerth*, 524 U.S. at 765) (emphasis added). In light of the Court's repeated references to changes in employment status that are adverse in nature, the Court's reference to the "hiring" context in *Ellerth* should be construed as a reference to a "failure to hire" where the applicant was otherwise qualified but was not hired because she did not submit to the supervisor's advances.

Certain cases have concluded that a tangible employment must be adverse. See *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1280-81 (11th Cir. 2003) (quoting language employed in *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001)), *cert. denied*, 124 S. Ct. 1714 (2004); *Frederick*, 246 F.3d at 1311 (requiring tangible employment action be adverse to impose strict liability); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (stating that *Ellerth* Court "suggested that some kind of significantly adverse employment action is necessary to prove an employer's Title VII liability" for sexual harassment); *Molnar v. Booth*, 229 F.3d 593, 600 (7th Cir. 2000) (stating that tangible employment action must cause "'a substantial detriment to plaintiff's employment relationship'" (quoting *Savino v. C.P. Hall Co.*, 199 F.3d 139, 932, n. 8 (7th Cir. 1999)); *Savino*, 199 F.3d at 932 n.8 (stating that tangible employment action must cause "a substantial detriment to the plaintiff's employment relationship" and is "akin to an adverse employment action"); *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999) (stating that tangible employment action must be adverse, but not addressing whether tangible employment action is synonymous with "adverse employment action" for purposes of Title VII retaliation claim); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) (stating employer is strictly liable when subordinate suffers tangible adverse employment action); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (stating that tangible employment action exists when sexual harassment culminates in adverse employment decision); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1367 (11th Cir. 1999) (Barkett, J., concurring specially) (stating that Court in *Ellerth* "differentiated between cases in which an employee suffers an adverse 'tangible employment action' as a result of sexual harassment and those cases in which an employee suffers the intangible harm of the indignity and humiliation caused by hostile work environment sexual harassment"); *Wilbur v. Corr. Servs. Corp.*, No. 5:02CV220-OC10GRJ, 2003 WL 23009901, at \*4 (M.D. Fla. 2003) (concluding that "adverse employment action" and tangible employment action are synonymous); *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 988 (S.D. Iowa 2003) (noting that Eighth Circuit has taken position that "absent a tangible job detriment, no 'tangible employment action' can be shown"); *Gonzalez v. Beth Israel Med. Ctr.*, 262 F. Supp. 2d 342,



For all of these reasons, submission cases do not constitute the requisite significant change in employment status. The avoided-job-detriment plaintiffs cannot demonstrate the requisite change in status, even where the circumstances are characterized as a received-job-benefit case. Moreover, neither avoided-job-detriment nor received-job-benefit cases encompass the necessary adverse action or omission contemplated by the Court in *Ellerth*. Accordingly, submission cases do not constitute the tangible employment action necessary to impose strict liability on an employer under *Ellerth*. Furthermore, avoided-job-detriment cases suffer from an additional fatal flaw: they lack the requisite official act under *Ellerth*.

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351-52 (S.D.N.Y. 2003) (construing tangible employment action to mean “improperly motivated conduct by supervisors that brings ‘the official power of the enterprise to bear on subordinates,’ negatively impacting the worker’s employment status in a significant, but not necessarily materially adverse, way”) (quoting *Ellerth*, 524 U.S. at 762)); *Crosson v. Caremark, Inc.*, 212 F. Supp. 2d 875, 882 n.5 (N.D. Ill. 2002) (noting that Seventh Circuit construes tangible employment action as adverse action and thus looks to “adverse employment action” cases to determine whether plaintiff has suffered tangible employment action); see also *Chamallas*, *supra* note 11, at 346 (noting that, notwithstanding Second Circuit’s conclusion in *Jin* that adverse action is not required, other courts will likely require plaintiff to show that she “suffered an adverse change in employment status”); Nancy R. Mansfield & Joan T.A. Gabel, *An Analysis of the Burlington and Faragher Affirmative Defense: When Are Employers Liable?*, 19 LAB. LAW. 107, 115-16 (2003) (suggesting that tangible employment action must be adverse); David F. McCann, *Supervisory Sexual Harassment and Employer Liability: The Third Circuit Sheds Light on Vicarious Liability and Affirmative Defenses*, 45 VILL. L. REV. 767 (2000) (using phrase “adverse tangible employment action” throughout when describing *Ellerth* tangible employment action standard); *Woodford & Risetto*, *supra* note 167, at 79-81 (concluding that *Ellerth* Court’s language “implies that the Court was thinking solely of adverse actions”).

For cases concluding that a tangible employment action need not be adverse, see *supra* Part III.A.1 and the discussion of *Jin* and *Holly D.* See *supra* Part III.B for a discussion of the Third Circuit’s approach to constructive discharge in *Suders*, which was reversed by the Court, and see *infra* text accompanying notes 340, 342. A number of additional cases have concluded that a tangible employment action need not be adverse. See *Brown v. Perry*, 184 F.3d 388, 395 (4th Cir. 1999) (implying that receipt of promotion may constitute tangible employment action); *Lewis v. Forest Pharms., Inc.*, 217 F. Supp. 2d 638, 655 n.8 (D. Md. 2002) (“Tangible employment actions . . . need not be adverse.”); see *supra* text accompanying note 147 (describing EEOC’s position); see also Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1160 (1998) (arguing that tangible employment action under *Ellerth* “need not be ultimate nor materially adverse, but it must involve an act ‘within the special province of the supervisor’”); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 537 n.237 (2001) (stating that “[w]hether a tangible employment action must be materially adverse is debatable”).

## 2. Official Act Requirement

Notwithstanding *Ellerth's* requirement of "an official act of the enterprise, a company act,"<sup>273</sup> certain courts faced with avoided-job-detriment cases<sup>274</sup> and certain courts faced with constructive discharge cases have dispensed with the official act requirement. They have done so by either explicitly stating it does not apply to submission cases or implicitly concluding it does not apply in such cases by engaging in the somewhat circular reasoning that the plaintiff satisfied the official act requirement because the supervisor "invoke[ed] the official authority of the enterprise" in causing the resulting harm.<sup>275</sup> Although these overlapping approaches may be superficially appealing, neither is consistent with the Court's tangible employment action jurisprudence, particularly in light of the Court's recent constructive discharge decision in *Pennsylvania State Police v. Suders*.<sup>276</sup>

Dispensing with the official act requirement is inconsistent with the plain language of *Ellerth*, which unequivocally requires an official act.<sup>277</sup> Although certain courts appear inclined to treat submission cases as unique and thus dispense with the official act requirement, the *Suders* Court specifically reaffirmed *Ellerth's* official act requirement in the analogous constructive discharge context. In doing so, the Court explicitly stated that *Ellerth* and *Faragher* "divided the universe of supervisor-harassment claims according to the presence or absence of an official act."<sup>278</sup>

Prior to *Suders*, the Third Circuit dispensed with the official act requirement in the constructive discharge context by analogizing constructive discharge claims to submission claims in reliance on the reasoning in *Jin*.<sup>279</sup> According to the Third Circuit, the better approach for both claims was to simply dispense with the official act requirement and recognize that a supervisor who either "creates a hostile work environment so severe than an employee has no alternative but to

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<sup>273</sup> *Ellerth*, 524 U.S. at 762.

<sup>274</sup> Part IV.A.2.a addresses only avoided-job-detriment cases because the "official act" requirement is met in received-job-benefit cases — the supervisor's official act in bestowing the unwarranted benefit suffices.

<sup>275</sup> *Suders v. Easton*, 325 F.3d 432, 459 (3d Cir. 2003) (citing *Jin v. Metro. Life Ins. Co.*, 310 F.3d 94, 98 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004)), *vacated sub nom.* *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

<sup>276</sup> 542 U.S. 129 (2004).

<sup>277</sup> *Ellerth*, 524 U.S. at 762.

<sup>278</sup> *Suders*, 542 U.S. at 149-50.

<sup>279</sup> See *supra* notes 218-19 and accompanying text.

resign" or extorts sexual acts from subordinates "brings the official power of the enterprise to bear" on the victimized subordinate.<sup>280</sup> The Court in *Suders* drew the line differently and in a way that contradicts the reasoning and conclusions in *Jin* and *Holly D.* The Court reversed the Third Circuit and required that a plaintiff who is constructively discharged, and thus experiences the requisite significant change in employment status *solely* as a result of supervisory sexual harassment, must still prove that an official act precipitated the constructive discharge. In doing so, the Court noted that a constructive discharge involves both an employee's decision to leave and the conduct that precipitated the resignation. It reasoned that an employee's resignation obviously involves no official action, while the precipitating conduct may. Accordingly, the Court held that a constructive discharge constitutes a tangible employment action only when precipitated by an official act of the enterprise.<sup>281</sup> The same rationale applies in the submission context.

Like a constructive discharge situation, where an employee decides that she has no choice but to resign to avoid the harm, a submission situation involves an employee's decision to avoid the threatened harm by engaging in the unwelcome conduct. And like the employee's unilateral decision to resign in the constructive discharge context, the employee's unilateral decision to submit involves no official action.<sup>282</sup> For this reason alone, a submission plaintiff must prove an official act.

Moreover, as in the constructive discharge context, dispensing with the official act requirement in the avoided-job-detriment case would lead to an anomalous result. A subordinate who submits to a supervisor's unwelcome sexual advances to avoid the threatened termination arguably possesses a *graver* claim than a subordinate who successfully resists her supervisor's advances and threats but is not terminated.<sup>283</sup> Yet, in the absence of an official action requirement, the submission plaintiff's claim is an *easier* claim to prove than the hostile work

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<sup>280</sup> *Suders*, 325 F.3d at 459.

<sup>281</sup> *Suders*, 542 U.S. at 148; *see supra* notes 226-31 and accompanying text.

<sup>282</sup> *See infra* note 285 and accompanying text (discussing reasons why supervisor's threat of job detriment does not constitute requisite official action).

<sup>283</sup> As the court in *Jin* recognized, "the employee who is coerced into satisfying a supervisor's sexual demands to keep her job may suffer a greater injury than the employee who is able to refuse those demands." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 99 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004). And as Justice Reinhardt appropriately noted in *Nichols*, "[n]othing is more destructive of human dignity than being forced to perform sexual acts against one's will." *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994).

environment claim available to the resisting employee.<sup>284</sup> For these reasons, dispensing with the official act requirement in the submission context is inconsistent with *Ellerth*, *Faragher*, and *Suders*. Thus, the remaining question is whether an avoided-job-detriment plaintiff can demonstrate the requisite official act. The answer to that question is “no.”

a. Absence of Official Act

An avoided-job-detriment plaintiff may attempt to demonstrate the presence of an official act through one of two approaches. First, the plaintiff may show that the supervisor’s purported decision to not take the threatened action because the plaintiff submitted constitutes an official act. Second, the plaintiff may construe the supervisor’s threat of job detriment coupled with her submission as the requisite official act.<sup>285</sup> Nevertheless, both approaches fail because an avoided-job-detriment plaintiff cannot show the requisite “change in employment status.”

Under the first approach, the Ninth Circuit characterized the plaintiff’s submission as the catalyst for a final decision, or official act, taken by the employer after the submission occurred. In doing so, it created a construct whereby the supervisor’s threat to terminate an employee is deemed to be a conditional decision to terminate.<sup>286</sup> The Ninth Circuit then treated the supervisor’s decision to retain the employee once she submitted as essentially rescinding the earlier conditional decision and making a further purported final determination to retain the employee.<sup>287</sup> Based on this reasoning, the Ninth Circuit concluded that “determining not to fire an employee who has been threatened with discharge constitutes a ‘tangible employment action,’ at least where the reason for

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<sup>284</sup> Moreover, unlike a constructive discharge plaintiff, a submission plaintiff does not bear the burden of meeting a high liability threshold that requires proof of objectively intolerable working conditions.

<sup>285</sup> Because the Court in *Ellerth* concluded that Ellerth’s resignation did not constitute a tangible employment action, it necessarily follows that Ellerth’s supervisor’s threats to deny her tangible job benefits did not constitute the official act necessary to transform Ellerth’s resignation into a tangible employment action constructive discharge. For the same reasons, the Court implicitly rejected the argument that a supervisor’s refusal to provide guidance or permission to complete a job-related task constitutes the official act necessary to transform a forced resignation into a tangible employment action constructive discharge. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748 (1998) (noting that Ellerth’s supervisor had refused to provide permission to insert customer’s logo on fabric sample when he stated: “I don’t have time for you right now, Kim . . . — unless you tell me what you’re wearing.”).

<sup>286</sup> *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003).

<sup>287</sup> *Id.*

the change in the employment decision is that the employee has submitted to the coercive sexual demands."<sup>288</sup> In essence, treating a submission case as a series of three actions, as opposed to the two actions consisting of the supervisor's threat followed by the employee's submission, shifts the focus of the last action from that of the employee to the supervisor's "nonaction" or fictional decision to retain the employee. By shifting the focus, the Ninth Circuit attempted to show that the last action in the series was the supervisor's official act in retaining the employee.<sup>289</sup>

Although the Ninth Circuit's approach is analytically innovative, it does not satisfy the official act requirement. The only way to shift the focus from the employee to the supervisor in the avoided-job-detriment scenario is to employ the fiction that once the employee submitted, the supervisor decided to retain the employee. A tangible employment action, however, requires an adverse change in status brought about by an official act, not merely a change in decision. That adverse change in status only occurs once the supervisor takes a concrete action or makes a concrete and final decision in the form of an official act.<sup>290</sup> In the absence of such an adverse change in employment status, it is impossible to know whether the supervisor initially decided to terminate the employee or whether he was merely bluffing.

Additionally, the Court's subsequent opinion in *Suders* rejected an analogous focus-shifting argument in the constructive discharge context. In *Suders*, various amici curiae argued that a constructive discharge satisfies the official act requirement because the "official nature of the discharge is reinforced by the employer's receipt, acceptance, processing and recording of the employee's letter or other notice of resignation."<sup>291</sup>

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<sup>288</sup> *Id.*

<sup>289</sup> As discussed more fully in Part IV.B *infra*, this is essentially a return to the pre-*Ellerth/Faragher* state of the law regarding quid pro quo in which an employer was held strictly liable for a supervisor's "unwelcome sexual conduct" when the supervisor used the victim's reaction to that conduct "as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994). The focus is now on whether the plaintiff suffered a tangible employment action in the form of an adverse significant change in status brought about by a supervisor's official act.

<sup>290</sup> See, e.g., *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 588 (11th Cir. 2000) (concluding in Title VII retaliation context, which requires that plaintiff prove that she suffered "adverse employment action," that "a proposed action that is corrected as soon as the proper official is made aware of it before it goes into effect, so that the employee does not actually suffer any consequence, is not 'adverse'").

<sup>291</sup> Brief for the Lawyers' Committee for Civil Rights Under Law et al. at 23, *Suders v. Easton* 325 F.3d 432 (3d Cir. 2003) (No. 03-95).

Essentially, this argument analyzes a constructive discharge as consisting of a series of three acts: the supervisor's harassment of the subordinate, the subordinate's resignation, and the employer's receipt and processing of the subordinate's resignation. By characterizing a constructive discharge in this manner, the amici curiae essentially construed the third act in the series — the employer's processing of the discharge — as the official act. Nevertheless, the Court in *Suders* held that a constructive discharge is only a tangible employment action when an official act *precedes* the resignation. Because the Court rejected this focus-shifting analysis in the analogous constructive discharge context, it implicitly rejected the same analysis in the submission context.

The second approach is to construe the supervisor's threat coupled with the employee's action in submitting as the official act. This approach fails, however, because the Court in *Suders* implicitly rejected this approach when it approved of the First Circuit's approach to constructive discharge in *Reed v. MBNA Marketing System, Inc.*<sup>292</sup> In *Reed*, the plaintiff's supervisor subjected her to inappropriate sexual touching, comments, and assaults, which prompted the plaintiff to resign.<sup>293</sup> Following her resignation, she alleged that her employer was strictly liable for her supervisor's actions because she had been constructively discharged.<sup>294</sup> She argued that she satisfied *Ellerth's* official action requirement because she refrained from reporting the verbal harassment and sexual assault due to her supervisor's threats to fire her if she reported the harassment.<sup>295</sup> The First Circuit concluded that the circumstances lacked the requisite official action to render a constructive discharge a tangible employment action, even though the plaintiff refrained from reporting the harassment and assault because of her supervisor's threatening statements.<sup>296</sup> Subsequently, the *Suders* Court expressly approved of the First Circuit's conclusion that the supervisor's behavior did not involve any official act, that the conduct was "exceedingly unofficial and involved no direct exercise of company authority," and that it was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed."<sup>297</sup>

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<sup>292</sup> *Reed v. MBNA Mktg. Sys. Inc.*, 333 F.3d 27 (1st Cir. 2003).

<sup>293</sup> *Id.* at 30-31.

<sup>294</sup> *Id.* at 33.

<sup>295</sup> *Id.* at 37.

<sup>296</sup> *Id.* at 33-34.

<sup>297</sup> *Pa. State Police v. Suders*, 542 U.S. 129, 150 (2004) (citing *Reed*, 333 F.3d at 33). This conclusion could not have come as much of a surprise for two reasons. First, the Court had foreshadowed this result in *Ellerth*. See *supra* text accompanying note 285. Second, because

Accordingly, the employer in *Reed* could assert the *Ellerth/Faragher* affirmative defense.

Under the reasoning in *Reed*, as approved by *Suders*, there may be circumstances in which a supervisor sexually harasses a subordinate, threatens to discharge her if she reports, and perhaps even increases the intensity of the sexual harassment to cause her to quit. The Third Circuit in *Suders* even acknowledged that “[s]ome employers might wish for an employee to quit voluntarily[, while] others might even tacitly approve of increased harassment to achieve that result.”<sup>298</sup> Nevertheless, even when a constructively discharged plaintiff refrains from reporting supervisor harassment precisely because her supervisor explicitly threatened her with discharge, as in *Reed*, the supervisor’s threat coupled with the employee’s submission does not constitute the official act necessary to hold the employer strictly liable.

The reasoning of *Reed* applies equally to submission cases. Just as a supervisor’s explicit threats of discharge that cause a plaintiff to *refrain from acting* involve no official action, a supervisor’s explicit threats of discharge that cause a plaintiff to *act and submit* to sexual demands involve no official action.<sup>299</sup> Accordingly, an avoided-job-detriment case simply falls on the wrong side of the bright line that the Court sought to draw between official act-tangible employment actions for which an employer is strictly liable and all other cases to which the *Ellerth/Faragher* affirmative defense applies.<sup>300</sup>

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the “official act” concept was coined by Chief Judge Posner in *Jansen*, Chief Judge Posner’s conclusion that a mere threat does not constitute an “official act,” even when the threat is successful, foreshadows a similar result:

Strict liability is inappropriate . . . when the supervisor merely makes threats, even if the threats are effective. This is why it is important to distinguish between the type of *quid pro quo* harassment in which the supervisor actually alters the terms and conditions of his victim’s employment and the type of harassment in which he merely threatens to do so, whether or not the victim yields to the threats. Suppose the supervisor threatens to fire a subordinate unless she’ll have sex with him, and she agrees — or refuses and he does not carry out his threat. In either case, because he has not used his delegated authority to commit a company act, there is no way in which a system for vetting such acts would catch him out.

*Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 513 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting), *aff’d sub nom. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>298</sup> *Suders v. Easton*, 325 F.3d 432, 461 (3d Cir. 2003), *vacated sub nom. Pa. State Police v. Suders*, 542 U.S. 129 (2004).

<sup>299</sup> See *supra* text accompanying note 297.

<sup>300</sup> *Suders*, 542 U.S. at 149-50 (stating that *Ellerth* and *Faragher* classified such claims

b. Absence of Fulfilled Threat

To compensate for the lack of a significant change in employment status and the lack of an official act in the avoided-job-detriment case, the Ninth Circuit in *Holly D.* attempted to construe the circumstances as a fulfilled threat case where the threat itself gives rise to a tangible employment action.<sup>301</sup> Notwithstanding the *Ellerth* Court's conclusion that the quid pro quo label does not control vicarious liability, the Ninth Circuit reasoned that in the classic quid pro quo avoided-job-detriment scenario, the "threat does not simply remain unfulfilled or inchoate, but rather results in a concrete consequence. The supervisor accomplishes the objective of the threat — the coercion of the sexual act — by bringing to bear the authority to make critical employment determinations on behalf of his employer."<sup>302</sup>

The fundamental problem with the Ninth Circuit's approach is that *Ellerth* requires something more than the supervisor "bringing to bear the authority to make critical employment determinations on behalf of his employer" to impose strict liability on an employer. If the supervisor's abuse of authority was sufficient, the Court would have retained the quid pro quo category of harassment as a proxy for strict liability instead of creating the tangible employment action standard. Indeed, if abuse of authority alone was sufficient, a supervisor's reassignment of a subordinate who spurned his advances to a more inconvenient job would constitute a tangible employment action. Nevertheless, the Court in *Ellerth* explicitly rejected this conclusion when it excluded reassignment to a more inconvenient job from the list of tangible employment actions.<sup>303</sup>

Moreover, if the supervisor's successful coercion of sexual acts is sufficient to constitute a fulfilled threat for which an employer is strictly

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"according to the presence or absence of an official act").

<sup>301</sup> *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1170 (9th Cir. 2003).

<sup>302</sup> *Id.* at 1169. For a similar argument in the context of a constructive discharge claim based on allegations of quid pro quo harassment, see Christy M. Hanley, Comment, *A "Constructive" Compromise: Using the Quid Pro Quo and Hostile Work Environment Classifications to Adjudicate Constructive Discharge Sexual Harassment Cases*, 73 U. CIN. L. REV. 259, 284-86 (2004) (arguing that constructive discharges resulting from quid pro quo harassment constitute tangible employment actions because "the supervisor brings the 'official power of the enterprise . . . to bear' on the employee when he or she directly threatens or shows an intent to discharge or demote the subordinate if sexual requests are rejected").

<sup>303</sup> *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (noting "reassignment to more inconvenient job insufficient").



liable, then the *Suders* Court would have concluded that a supervisor's success in causing an employee to quit by increasing the level of harassment constitutes a fulfilled threat case. In fact, various amici curiae made this argument when they urged that the official act is the creation of workplace conditions so intolerable that the harassed employee had no choice but to resign.<sup>304</sup> In concluding that an official act must precede a constructive discharge, the *Suders* Court implicitly rejected this fulfilled threat argument.

Additionally, if successful coercion constitutes a fulfilled threat, then it is irrelevant in a received-job-benefit case whether the supervisor actually confers the benefit that results in the "nonadverse" yet significant change in employment status. In both the avoided-job-detriment and received-job-benefit scenarios, the supervisor coerces sex from the subordinate by "bringing to bear the authority to make critical employment determinations on behalf of his employer."<sup>305</sup> Based on this successful coercion theory, however, the only difference between an avoided-job-detriment case and a received-job-benefit case is the type of recoverable damages.<sup>306</sup> Given the Court's requirement that a subordinate suffer an adverse, significant change in employment status brought about by an official act, imposing strict liability on an employer solely because a supervisor succeeded in his unlawful goal would undermine the balance struck in *Ellerth*.

Construing an avoided-job-detriment scenario as a fulfilled threat case is also inconsistent with the Ninth Circuit's interpretation of *Ellerth* and *Faragher*. The Ninth Circuit acknowledged that strict liability "attaches only if a quid pro quo threat is implemented by some form of *sufficiently concrete employment action*."<sup>307</sup> While the supervisor accomplishes the

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<sup>304</sup> Brief for the Lawyers' Committee for Civil Rights Under Law et al., *supra* note 291, at 23.

<sup>305</sup> *Holly D.*, 339 F.3d at 1169.

<sup>306</sup> If the subordinate engaged in the demanded sexual acts but did not receive the promised promotion, she would have a viable tangible employment action claim for which her employer would be strictly liable. She would then likely attempt to recover emotional distress damages to compensate her for her having given the quid — engaging in the sexual acts — without receiving the quo — the promotion. In contrast, even if the subordinate received the bargained-for promotion, she would have a viable tangible employment action claim for which her employer would be strictly liable. She would then likely attempt to recover emotional distress damages to compensate her for her supervisor's abuse of authority, although it seems unlikely that a jury would award anything more than nominal damages under such circumstances. Under either scenario, the subordinate would be entitled to recover her attorney's fees under Title VII. *See* 42 U.S.C. § 1988 (2000).

<sup>307</sup> *Holly D.*, 339 F.3d at 1170 (emphasis added).

objective of the threat when the subordinate submits, the circumstances amount to nothing more than an unfulfilled threat case. The threat of discharge is not fulfilled precisely *because* the subordinate submitted. This conclusion is consistent with the *Ellerth* Court's interpretation of "unfulfilled threat," where the Court embraced Chief Judge Posner's terminology in *Jansen*: "[i]n the emergent terminology, an unfulfilled quid pro quo is a mere threat to do a company act rather than the act itself."<sup>308</sup> Chief Judge Posner's words in *Jansen*, upon which the company act concept is based, further demonstrate that an avoided-job-detriment case constitutes an unfulfilled threat case:

[T]he term 'company act' signifies an act that significantly alters the terms or conditions of employment of the victim of sexual harassment and 'noncompany act' signifies . . . the kind of quid pro quo harassment that involves only unfulfilled threats (either because the victim submits or because she calls the supervisor's bluff), so that no company act is committed.<sup>309</sup>

An additional problem with construing submission cases as fulfilled threat cases is that in a submission case, the subordinate takes the affirmative step that inflicts the harm. In other words, the threat is fulfilled because the subordinate submits. Such a result is inconsistent with *Ellerth* and *Faragher*, which impose strict liability on an employer only when the supervisor brought about the threatened harm. Indeed, the Court's joint holding specifically provides that an employer is strictly liable for a supervisor's harassment only "when a supervisor takes a tangible employment action against the subordinate."<sup>310</sup> This is yet another reason why tangible employment actions require an official act.

Finally, *Suders*, through its approval of *Reed*, demonstrates that even where a supervisor abuses his power by subjecting a subordinate to unwanted sexual harassment and intentionally intensifies the harassment to coerce her resignation, the supervisor's success in accomplishing his goal does not transform a hostile work environment claim into a tangible employment action claim. Moreover, even though the *Reed* court characterized the plaintiff's failure to report as submission to the supervisor's discharge threat,<sup>311</sup> it nevertheless concluded that the supervisor's threat, coupled with the employee's submission, was

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<sup>308</sup> *Ellerth*, 524 U.S. at 750-51 (citing *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 515 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting)).

<sup>309</sup> *Jansen*, 123 F.3d at 515 (Posner, C.J., concurring and dissenting) (emphasis added).

<sup>310</sup> See *supra* notes 113, 121 and accompanying text.

<sup>311</sup> *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 37 (1st Cir. 2003).

insufficient to render the circumstances a fulfilled threat case precisely because the discharge threat was not fulfilled. *Suders* confirms that an official act is required in both cases.

The reasoning in *Suders* and *Reed* applies equally to the avoided-job-detriment scenario. Where the supervisor threatens an employee with discharge unless she submits to his sexual advances and the employee submits in response to the threat, the threat remains unfulfilled because the discharge did not occur. Thus, notwithstanding the supervisor's successful abuse of authority, the avoided-job-detriment scenario constitutes an unfulfilled threat case to which the *Ellerth/Faragher* affirmative defense applies.<sup>312</sup>

### B. Policy Considerations

In addition to the above deficiencies in submission claims, construing such claims as tangible employment actions represents a return to the pre-*Ellerth/Faragher* state of the law regarding quid pro quo. This is inconsistent with the broader vicarious liability and harm avoidance principles set forth in *Ellerth* and *Faragher*. By expanding strict liability to include submission cases, it necessarily follows that the only classic quid pro quo circumstances for which an employer would not be strictly liable are those where the supervisor threatens but does not take a detrimental job action. That was not the balance struck in *Ellerth* and *Faragher*. Instead, the Court in *Ellerth* and *Faragher* created the tangible employment action standard and accompanying affirmative defense which, as the Third Circuit in *Suders* acknowledged, "reflects an intricate balance incorporated into a complex rule of law with multiple components."<sup>313</sup>

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<sup>312</sup> In addition, because an avoided-job-detriment case lacks the requisite significant change in employment status and official act, the circumstances also lack any "document[ation] in official company records," and thus the decision is not subject to review by higher level supervisors. *Ellerth*, 524 U.S. at 762. For the same reasons, the supervisor does not obtain the imprimatur of the enterprise, nor does the supervisor use the employer's internal processes. Moreover, as discussed in Part IV.A.1, neither an avoided-job-detriment plaintiff nor a received-job-benefit plaintiff suffers any economic harm. Because the Court in *Ellerth* used the permissive terms "most," "may," and "often," respectively, with respect to these tangible employment action indicia, these deficiencies alone are not fatal to the submission-as-tangible-employment-action argument. *Id.* Nevertheless, the collective absence of any of these indicia in the submission context — particularly in the avoided-job-detriment scenario — is simply further support for the conclusion that submission cases do not constitute tangible employment actions.

<sup>313</sup> *Suders v. Easton*, 325 F.3d 432, 451 (3d Cir. 2003), *vacated sub nom.* Pa. State Police v. *Suders*, 542 U.S. 129 (2004). If that was the result the Court envisioned, the Court could have responded "no" to the question presented for certiorari in *Ellerth*: "Whether a claim

Additionally, imposing strict liability in submission cases improperly bases the employer's liability on the *employee's* reaction to either the supervisor's threat in the avoided-job-detriment case or the supervisor's promise in the received-job-benefit case. Although the Second Circuit rejected this argument in *Jin*, it relied on the reasoning and definition of "quid pro quo" from its pre-*Ellerth/Faragher* opinion in *Karibian v. Columbia University*.<sup>314</sup> It thus concluded that quid pro quo "liability results from the *supervisor's* use of the employee's reaction to the *supervisor's* unwelcome sexual conduct as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment."<sup>315</sup> Again, the problem is that employing this standard constitutes a return to the pre-*Ellerth/Faragher* state of the law regarding quid pro quo.<sup>316</sup> Moreover, the reasoning in *Karibian* leads to perverse results when applied to submission claims. As discussed in Part IV.A.2.a, the only

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of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?" *Ellerth*, 524 U.S. at 753.

<sup>314</sup> *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994).

<sup>315</sup> *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 97 (2d Cir. 2002) (quoting *Karibian*, 14 F.3d at 777), *cert. denied*, 125 S. Ct. 52 (2004). To bolster its conclusion that *Karibian* was still viable after *Ellerth* and *Faragher*, the *Jin* Court noted that the *Faragher* Court, as part of its illustrative list of cases setting forth the various bases upon which federal courts had held employers vicariously liable for supervisory sexual harassment, cited *Nichols*, where the plaintiff alleged a viable quid pro quo claim based on her allegations that she avoided tangible job detriment by submitting to her supervisor's demands that she perform oral sex on him. *Jin*, 310 F.3d at 96 n.7; *see supra* text accompanying note 97 (discussing various approaches to vicarious liability prior to *Ellerth* and *Faragher*). The *Jin* court concluded that the *Faragher* Court's reference to *Nichols* demonstrated that the Court intended that submission cases constituted tangible employment actions for which an employer is strictly liable. Such an assertion is incorrect — the important distinction is between *vicarious* liability and *strict* liability. The Court's reference to *Nichols* and the quid pro quo and agency principles discussed therein simply indicates that the Court found it appropriate to hold the employer *vicariously* liable for such conduct. Under *Ellerth* and *Faragher*, even if an employer is held *vicariously* liable for the supervisor's conduct, the employer is permitted to assert and prove the affirmative defense to liability or damages unless the subordinate suffered a tangible employment action for which the employer is *strictly* liable. Thus, as discussed in this Part, the pertinent question is whether a submission case constitutes a tangible employment action.

<sup>316</sup> The EEOC acknowledged as much in its 1999 *Enforcement Guidance*. *See supra* note 147 and accompanying text (defining tangible employment action, and noting that "*such harassment previously would have been characterized as 'quid pro quo.'*" (emphasis added)). Although EEOC regulations and guidance are entitled to deference, they are not persuasive when, as in these circumstances, they are contrary to existing law. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482-84 (1999) (invalidating EEOC regulations regarding Americans with Disabilities Act on grounds that regulations were inconsistent with intent and policies underlying Act).

way to shift the focus from the employee to the supervisor in the avoided-job-detriment case under *Karibian* is to employ the fiction that once the employee submits, the supervisor decides to retain the employee.<sup>317</sup> In the absence of an official act or change in employment status, it is impossible to know whether the supervisor actually makes such a decision or whether the decision is a mere fiction because the supervisor was only bluffing. Imposing strict liability based on a mere fiction is inappropriate.

The received-job-benefit scenario presents an easier case for why an employer should not be strictly liable. Although the supervisor grants the unwarranted job benefit, he would not have done so but for the employee's decision to submit to his unwelcome sexual advances. Thus, it is wholly inappropriate to hold an employer strictly liable for the employee's bargained-for job benefit.

Under both of the above scenarios, the imposition of strict liability turns not on the supervisor's conduct but instead on whether the employee either successfully resisted the threat of an unwarranted job detriment or refused the promise of an unwarranted job benefit. In both scenarios, the supervisor's conduct alone warrants the imposition of strict liability. Furthermore, the conduct most worthy of deterrence in the first instance is the supervisor's initial threat or promise. Thus, a more appropriate result would be to hold an employer strictly liable for all circumstances where a supervisor abuses his authority by attempting to extort sexual favors through either threatening an unwarranted job detriment or promising an unwarranted job benefit. Indeed, this is precisely the result reached by the Seventh Circuit en banc in *Jansen*. Nevertheless, in *Ellerth* and *Faragher*, the Court rejected this result as inconsistent with *Meritor's* holding that employers are not always strictly liable for supervisory sexual harassment. The Court required something more than the supervisor's threats or fictional decision to retain the subordinate to impose strict liability on an employer. That something more is a tangible employment action, which is lacking in the sexual extortion context.

Additionally, by dispensing with the formal requirements and construing submission cases as tangible employment actions, employers will be strictly liable for actions of which they likely had no notice. This is counter to the desired deterrent effect of the tangible employment

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<sup>317</sup> The Ninth Circuit employed a similar construct when analyzing whether an avoided-job-detriment plaintiff could prove the requisite "official act." See *supra* Part IV.A.2.a (discussing why this construct fails in light of Court's opinion in *Suders*).

action standard. As Chief Judge Posner reasoned in *Jansen*, strict liability is appropriate when a plaintiff suffers the tangible job detriment that follows from a tangible employment action because strict liability “is likely to deter this kind of sexual harassment.”<sup>318</sup> The deterrent effect stems from the knowledge that strict liability looms in the background for adverse job-related actions. This knowledge provides an incentive for employers to review adverse decisions of which they have notice, such as where an employee is terminated or receives an undesirable reassignment.<sup>319</sup> In contrast, in the avoided-job-detriment case, there is nothing to review, and thus, there is no notice. To the outside observer, the subordinate simply maintains the status quo.

Moreover, even in the context of a supervisor-subordinate relationship, there is no reason to suspect that a subordinate’s continued employment is out of the ordinary, as the difference between a consensual as opposed to a coercive relationship is subtle, if discernable at all:

The words, the gestures, the other behaviors that differentiate the fully consensual relationship from the coercive relationship will often be invisible to the supervisor’s superiors. The yielding to a threat will look no different from yielding to a lawful proposal. It is only when the threat is carried out that the abusive supervisor does something, such as firing the supervised employee, that the employer will know about and should monitor.<sup>320</sup>

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<sup>318</sup> *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 512 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting), *aff’d sub nom.* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>319</sup> As Chief Judge Posner stated in *Jansen*:

In well-managed companies, decisions having such consequences are subject to rules, and to review by higher-ups in the company — the industrial equivalent of appellate review. The rules will be more carefully formulated and the supervisor’s compliance with them in firing or otherwise hurting a subordinate more carefully reviewed by the supervisor’s superiors if the employer is strictly liable for the supervisor’s use of his delegated powers to harass subordinates.

*Id.* at 512-13. He then applied the above reasoning to the avoided-job-detriment scenario:

But if [the supervisor] doesn’t propose to fire her, whether because she has submitted to his sexual extortion or called his bluff, there will be no proposed action to review. It will be no more feasible for the company to determine what is going on than it would be if the harasser were a coworker who had threatened to steal the victim’s work tools if she didn’t submit to him.

*Id.* at 513.

<sup>320</sup> *Id.*

Further complicating matters is the fact that some romantic relationships between supervisors and subordinates “start well and turn ugly and engender charges of sexual harassment that sometimes have and sometimes lack merit.”<sup>321</sup> In the absence of the notice provided by either the adverse change in employment status inherent in a tangible employment action or by a complaint from the subordinate, it is virtually impossible for an employer to detect such unlawful conduct.<sup>322</sup> For this reason, vicarious liability, as opposed to strict liability, is the appropriate standard where engaging in sexual acts or submitting to offensive sexual conduct is the basis for the subordinate’s claim.

Equally compelling is the fact that construing submission cases as tangible employment actions undermines Title VII’s policy of encouraging plaintiffs to avoid harm by promptly reporting sexually harassing conduct. As the *Speaks* court noted, such an interpretation would lead to the anomalous result that an employee who submits to a supervisor’s demands “fares better [from a liability perspective] by submitting” than an employee who does not immediately complain about the supervisor’s conduct.<sup>323</sup> As the *Speaks* court correctly concluded, such a result “seem[s] contrary to the balance sought by the Supreme Court.”<sup>324</sup>

Although the harm avoidance principles apply equally to both avoided-job-detriment and received-job-benefit scenarios, the received-job-benefit scenario is even more troubling from a harm avoidance standpoint. In a received-job-benefit scenario, the plaintiff submits and receives a job benefit to which she was not otherwise entitled. While it is wholly inappropriate for a supervisor to engage in sexual extortion, an employer should not be strictly liable for what essentially amounts to a fully performed contract between the supervisor and subordinate.<sup>325</sup>

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<sup>321</sup> *Id.*; see *Nichols v. Frank*, 42 F.3d 503, 510-11 (9th Cir. 1994) (“[E]ven the question of what constitutes the most blatant form of sexual harassment — *quid pro quo* harassment — is not always answered easily. For one thing, it is frequently not clear what the facts actually are. The parties may tell totally conflicting stories, in the trial court and elsewhere, and there are often no percipient witnesses.”).

<sup>322</sup> See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 855 (1991) (arguing that *quid pro quo* harassment is more difficult for employer to monitor and detect than hostile work environment harassment, as “threats and promises tied to sex are far more likely to take place in private, whereas the hostility of the environment is often all too obvious and patent”).

<sup>323</sup> *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1226 (M.D. Fla. 2004).

<sup>324</sup> *Id.*

<sup>325</sup> It is true that the employee would not suffer any economic damages, but psychological damages might possibly be awarded and, in any event, the subordinate would be entitled to recover her attorney’s fees. See 42 U.S.C. § 1988 (2000). Given an

Indeed, it is unlikely that the Court in *Ellerth* and *Faragher* envisioned such a result.

Finally, if a supervisor's misuse of authority coupled with the plaintiff's submission is sufficient to hold an employer strictly liable for the supervisor's conduct, then there is no realistic end to the supervisory conduct for which an employer will be strictly liable. This potentially endless expansion of liability stems from the fine line between a supervisor's affirmative, as opposed to implicit, use of power and the malleability of the term "submission," which can be interpreted to either expand or contract liability.

With respect to a supervisor's use of power, consider a typical hostile environment sexual harassment case. The supervisor does not use or even attempt to use his supervisory authority but instead "uses unwanted terms of endearment; . . . fondles or rubs up against [the] victim; . . . displays sex toys or tells dirty jokes; . . . brags about his sexual skills; . . . proposes marriage; . . . threatens to kill himself; . . . or rapes [his subordinate]." <sup>326</sup> Even in the absence of any affirmative misuse of authority, a subordinate is more likely to submit to, rather than complain about, the supervisor's offensive conduct because the supervisor has the authority to hire and fire. <sup>327</sup>

Additionally, in many cases, the line between a hostile work environment and quid pro quo harassment is virtually indiscernible:

[S]exual harassment does not sort itself into tidy categories . . . . When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from "hostile environment" harassment to "quid pro quo" harassment. <sup>328</sup>

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employee's duty to avoid harm, a received-job-benefit plaintiff would also likely fail under the second prong of the *Ellerth/Faragher* affirmative defense, as it is likely unreasonable for her to bargain for a job benefit to which she is not otherwise entitled by offering sex. See *infra* Part V.B (discussing relevant factors to consider in determining whether subordinate's submission was unreasonable).

<sup>326</sup> *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 511-12 (7th Cir. 1997) (en banc) (per curiam) (Posner, C.J., concurring and dissenting), *aff'd sub nom.* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>327</sup> *Id.* at 512.

<sup>328</sup> *Jansen*, 123 F.3d at 567; see also *Chamallas*, *supra* note 11, at 3; *Estrich*, *supra* note 322, at 834 (noting that distinction between quid pro quo and hostile work environment sexual harassment "takes the form of a continuum rather than a divide," and thus, even in hostile environment context, which lacks "manifest threat" but where "boss propositions a female daily or, when in order to do her job, a woman must endure a range of physical and



This is particularly true given that “sexual asides and insinuations are the well-worn tools of a sexual harasser.”<sup>329</sup>

Thus, if a tangible employment action does not require tangible job detriment but can instead be based on a threat coupled with a subordinate’s submission, at what point does a supervisor’s conduct cross the hostile work environment/tangible employment action threshold?<sup>330</sup> How clear must the threat be to justify the employee’s submission and hold the employer strictly liable?<sup>331</sup> These are simply variations of the same types of questions that plagued courts regarding what constituted quid pro quo harassment prior to *Ellerth* and *Faragher*. The varied answers to these questions in the submission context would lead to precisely the type of uncertainty, contradictory outcomes, and temptation to litigate that *Ellerth* and *Faragher* sought to avoid.<sup>332</sup>

In addition to the fine line between a supervisor’s affirmative, as opposed to implicit, use of power, consider the distinction between a supervisor’s attempts to use unofficial as compared to official power. For example, on a daily basis a supervisor “kiss[es], lick[s], bite[s] and fondle[s] [a subordinate], and attempt[s] to undress” her.<sup>333</sup> In addition, the supervisor “physically force[s] her to unzip his pants and fondle

emotional abuse,” results are same as in quid pro quo situation because “victim will submit, quit, or end up being fired”); Scalia, *supra* note 52, at 323 (“[I]t is a fiction that the quid pro quo harasser acts with more authority — actual or apparent — than the boss who takes without asking in the environmental discrimination case.”); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 275-76 (1995) (noting similarities between hostile environment and quid pro quo sexual harassment, and stating that “it is thus quite puzzling that the law of employment discrimination treats these categories of sexual harassment so differently”).

<sup>329</sup> *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312 (11th Cir. 2001) (discussing supervisor’s claim that he was only joking when he suggested to plaintiff that they go to Holiday Inn to negotiate her raise (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993))).

<sup>330</sup> See *Estrich*, *supra* note 322, at 855 (arguing that quid pro quo and hostile environment sexual harassment are essentially same regarding supervisor’s use of power as, “[i]n both cases, the supervisor is abusing the power that has been entrusted to him, . . . is acting for his own reasons and not the employer’s, . . . [and] his threats carry weight and his insults must be tolerated precisely because he is the supervisor, this is a workplace, and most women need their jobs”).

<sup>331</sup> See *supra* text accompanying note 187 (discussing circumstances in *Holly D.*, and ultimately concluding that plaintiff was unable to show either implicit threat of job detriment or any causal connection between her job duties and her supervisor’s requests that she engage in sex with him). In *Ellerth*, the Court declined to express an opinion regarding whether a “single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.” 524 U.S. at 754.

<sup>332</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775, 804-05 (1998).

<sup>333</sup> *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 88 (2d Cir. 2002), *cert. denied*, 125 S. Ct. 52 (2004).

him” and subsequently “push[es] against her with his penis exposed, and ejaculate[s] on her.”<sup>334</sup> At the same time, the supervisor wields a baseball bat and threatens the subordinate with physical harm if she does not accede to his sexual demands.<sup>335</sup> In the absence of any attempt to misuse official supervisory authority, the supervisor’s conduct is even less “official” than the supervisor’s sexual assault and accompanying verbal harassment in *Reed*, which the Court described as “exceedingly unofficial” and “exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed.”<sup>336</sup>

Suppose that, in addition to the egregious facts and threat of physical harm described above, the facts also include the supervisor’s explicit threat to discharge the subordinate if she does not accede to his demands — essentially the facts upon which the Second Circuit imposed strict liability in *Jin*.<sup>337</sup> Under these circumstances, if the subordinate submits to the supervisor’s sexual conduct, she does so out of a fear of either termination or being bludgeoned with a baseball bat, or a combination of both. Because the threat of physical harm is “exceedingly unofficial” and thus insufficient to impose liability, and the threat of discharge would constitute a misuse of official authority under *Jin* and *Holly D.*, must a reviewing court determine which threat, or combination of threats, compelled the plaintiff’s submission before imposing strict liability? Is the mere presence of a job-related threat enough even if the threat was not a factor, much less a motivating factor, in the plaintiff’s submission?

Under the above scenario, requiring a reviewing court to determine the extent to which either or both of the two threats compelled the subordinate’s submission leads to the lack of clarity and certainty that the Court sought to resolve in *Ellerth*. The desire for clarity and certainty motivated the *Ellerth* Court to essentially ignore the quid pro quo label for vicarious liability purposes, create the tangible employment action standard, and conclude that the threat alone, job-related or otherwise, is insufficient to impose strict liability in the absence of a tangible employment action. Nevertheless, under *Jin* and *Holly D.*, the discharge threat, coupled with the plaintiff’s statement that she was cowed by the threat, is sufficient to impose strict liability on the employer.

Taking the reasoning of *Jin* and *Holly D.* even further shows how such reasoning turns *Ellerth* on its head. Consider essentially the same

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 88-89.

<sup>336</sup> See *supra* note 297 and accompanying text.

<sup>337</sup> *Jin*, 310 F.3d at 88-89.

egregious circumstances as those above but omit the threat of physical harm. Suppose further that the job-related threat does not implicate a tangible employment action such as discharge, but is instead a threat to reassign the subordinate to a more inconvenient job. Because *Ellerth* specifically excluded reassigning an employee to a more inconvenient job from the tangible employment action examples, an employer whose supervisor subjects a subordinate to such an action to retaliate for spurned sexual advances is not strictly liable for the supervisor's conduct. Nevertheless, under the reasoning in *Jin* and *Holly D.*, the supervisor misused his authority in making the job-related threat of a nontangible employment action and the employer would be strictly liable if the threat was successful at coercing sex.<sup>338</sup>

If this reasoning is taken to its logical extreme, virtually any job-related threat or promise would be sufficient to impose strict liability if it accomplished the supervisor's goal of coercing a subordinate's submission to any sexually offensive conduct. This is true regardless of whether actually taking the threatened action constitutes a tangible employment action, particularly given the potentially expansive nature of the term "submission." Submission can be construed narrowly to include only circumstances where a subordinate "submits" to the supervisor's threats or promises by acting — engaging in sexual acts — or broadly to include all circumstances where a subordinate "submits" to the supervisor's threats or promises by refraining from acting — passively tolerating the conduct and refraining from reporting.

To understand the potential breadth of the term "submission" and the corresponding strict liability imposed on employers for such claims, consider the facts presented in *Ellerth*. A supervisor subjects a subordinate to unwelcome sexual comments and touching coupled with threats to deny the subordinate tangible job benefits to which she is entitled. As in *Ellerth*, the subordinate does not complain, but instead endures the conduct and is ultimately promoted. Because the supervisor misused his authority in making the threats, the employee's failure to complain could be construed as the subordinate submitting to the sexually offensive conduct. Moreover, the supervisor's failure to terminate or otherwise take any detrimental job action against the subordinate, as well as the subsequent promotion, may be viewed as the

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<sup>338</sup> Cf. *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 989 (S.D. Iowa 2003) (concluding that supervisor's refusal to provide necessary job-related information to his subordinate unless subordinate responded favorably to his sexual advances was not tangible employment action because supervisor's conduct lacked requisite "official act of the enterprise" (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998))).

benefit received by the subordinate for submitting to the unwelcome conduct. Under *Jin* and *Holly D.*, these facts could constitute a submission claim for which an employer is strictly liable. Nevertheless, the *Ellerth* Court rejected such a strict liability result, and thus implicitly rejected this interpretation of submission, when it concluded that Ellerth's allegations presented an unfulfilled threat case to which the affirmative defense applied. The *Suders* Court's approval of *Reed* further supports this conclusion. As in *Reed*, labeling the claim as a submission claim does not transform a mere unfulfilled threat claim into a claim for which the employer is strictly liable.<sup>339</sup>

Finally, imposing strict liability in this context would contradict the policy of encouraging employees to report harassing conduct before it becomes unlawful. Nonetheless, at least one court has similarly misconstrued *Ellerth* and *Faragher* by suggesting that a plaintiff's receipt of a job benefit to which she was not entitled in exchange for not reporting sexually harassing conduct might constitute a tangible employment action.<sup>340</sup>

If submission claims are synonymous with tangible employment actions and give rise to the accompanying strict liability, the Supreme Court is right back where it started when it first heard *Ellerth* and *Faragher*. Plaintiffs and their counsel have an incentive to "fit facts into certain types or categories of harassment claims"<sup>341</sup> in an effort to impose

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<sup>339</sup> See *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 33-34 (1st Cir. 2003) (concluding that supervisor's threat of discharge, which prompted plaintiff to "submit" and refrain from reporting, did not constitute requisite official act but instead amounted to unfulfilled threat, and thus, affirmative defense applied).

<sup>340</sup> *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 267-68 (4th Cir. 2001). The *Matvia* court stated in dicta that the *Ellerth/Faragher* affirmative defense may not be available when a sexually harassing supervisor grants job benefits in exchange for an employee's silence regarding the harassing conduct. *Id.* at 268. Nevertheless, the court ultimately rejected the plaintiff's claim that she experienced a tangible employment action in the form of "a raise, promotion, and good evaluations" in exchange for her "silently suffer[ing]" her supervisor's sexual advances. *Id.* at 267. The court found that the plaintiff was unable to demonstrate either (1) any promise of employment benefits in exchange for her tolerance of unwelcome conduct, or (2) any connection between her "refraining from reporting the unwelcome conduct" and her receipt of such employment benefits. *Id.* at 267-68. The court reasoned that to conclude otherwise would be inconsistent with *Ellerth* because it "would transform any ordinary employment action," such as "an upgrade in equipment used by the employee, a grant of sick leave, or any other mundane, non-adverse action," into a tangible employment action "so long as sexual harassment is present." *Id.* at 267. *But see Fisher*, 278 F. Supp. 2d at 988 ("[S]ubmission' cases, where a supervisor makes favorable decisions that affect the terms and conditions of plaintiff's employment, such as awarding benefits or merely permitting the victim to keep her job, involve only 'unfulfilled threats'" (citing *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998))).

<sup>341</sup> *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1226 n.22 (M.D. Fla. 2004).

strict liability.<sup>342</sup> Nearly eight years later, only the label differs. This labeling trend ignores the bright line drawn by the Supreme Court between cases where a tangible employment action is taken by a supervisor and those with no tangible employment action.

Although an employee's submission to a supervisor's sexual demands may be a reasonable alternative under certain circumstances, strict liability should not be the rule. Rather, the employer should be vicariously liable for the supervisor's conduct, but then be permitted to assert the *Ellerth/Faragher* two-prong affirmative defense. With respect to the second prong and assessing the subordinate's submission, courts should require the employer to prove that the employee's submission was unreasonable under the circumstances.<sup>343</sup> If the employer is unable to demonstrate that an employee's submission was unreasonable, the employer will be liable for the supervisor's conduct. Such a result addresses the concern that sexual extortion victims will be punished for their submission.<sup>344</sup> Indeed, under the second prong correctly applied, the rights of victims whose submission was not unreasonable under the circumstances will be vindicated in a way that is consistent with Title VII's interrelated goals of preventing harm, encouraging employees to report unlawful behavior, and compensating victims of harassment.<sup>345</sup>

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<sup>342</sup> For an example of how the tangible employment action standard is being improperly applied and expanded to impose strict liability in the submission context, similar to the quid pro quo label prior to *Ellerth* and *Faragher*, see *Temores v. SG Cowen*, 289 F. Supp. 2d 996, 1002 (N.D. Ill. 2003) (concluding that employer could be held strictly liable in unfulfilled threat scenario in which supervisor made unwelcome sexual advances toward subordinate and allegedly tied monetary bonus to sexual favors, even though employee neither received bonus nor engaged in demanded sexual conduct).

<sup>343</sup> In *Suders*, the Court clarified that the defendant bears the burden of pleading and proving that the plaintiff unreasonably failed to mitigate harm. *Pa. State Police v. Suders*, 542 U.S. 129, 151-52 (2004). The Court held that although a plaintiff might choose to allege facts related to mitigation in her pleadings or as part of her case in chief, she would be doing so only in anticipation of the employer raising the *Ellerth/Faragher* affirmative defense, as she is not required to do so. *Id.*

<sup>344</sup> *Karibian v. Columbia Univ.*, 14 F.3d 773, 778-79 (2d Cir. 1994) (noting probability that "victims of sexual harassment who surrender to unwelcome sexual encounters" will be punished for their submission).

<sup>345</sup> For an alternative approach to workplace sexual extortion whereby the supervisor is held criminally liable for such conduct, see Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213 (1994) (concluding that current state criminal coercion statutes are insufficient to address all forms of quid pro quo sexual harassment, and arguing that states should adopt criminal statutes specifically aimed at quid pro quo sexual harassment); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (arguing that current rape statutes should be revised to encompass circumstances where perpetrator accomplishes sexual intercourse with his victim through coercion, including abuses of power); Christian Jordan, Note, *The Casting Couch Is More Than Tortious: The Case for Expanded Interpretations of Rape Statutes*, 13 S. CAL. REV. L. &

Part V addresses the manner in which courts should apply the second prong in the submission context.

#### V. THE DUTY TO AVOID HARM UNDER *ELLERTH* AND *FARAGHER*

The conclusion that a submission claim does not constitute a tangible employment action for which an employer is strictly liable will undoubtedly make it more difficult for a submission plaintiff to prevail on her otherwise meritorious sexual harassment claim.<sup>346</sup> In the absence of a tangible employment action, a submission plaintiff will prevail only if she can show that she was subjected to an actionable hostile work environment and her employer fails to prove that she “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>347</sup> In addition to these hurdles, a pro-employer trend has emerged in the lower courts’ application and analysis of both prongs of the affirmative defense, and many courts are incorrectly applying the second prong.<sup>348</sup> Thus, plaintiffs have endeavored to expand the definition of “tangible employment action” to include submission claims and thereby avoid application of the affirmative defense.

For example, some district courts are granting, and appellate courts are affirming, summary judgment in favor of employers at a disproportionately high rate on the grounds that the employer has satisfied both prongs of the affirmative defense.<sup>349</sup> Additionally, some

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WOMEN’S STUD. 199, 214-17 (2003) (arguing that because professionals invest considerable “education, time, money and foregone alternative employment, . . . a boss who conditions job security or chances for promotion on sex in a professional setting [creates] a high stakes problem for a victim to confront,” and arguing that modern forcible rape statutes should be revised to hold supervisor liable for such sexual extortion based on expanded interpretation of “force,” “duress,” or “menace”).

<sup>346</sup> See, e.g., 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, 307, 332 (1999) (noting that, by requiring tangible job detriment to impose strict liability on employer and assessing victim’s reasonableness in all other harassment cases, many harassment victims who suffer intangible, but no less damaging, harms will go unprotected and uncompensated); Grossman, *supra* note 26, at 732 (noting “employer in a submission case will typically be able to make out both prongs of the affirmative defense and thus defeat liability”).

<sup>347</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Of course, this is in addition to the employer being able to prove that it satisfied its burden under prong one of the affirmative defense, which has not proved difficult under most circumstances. See *infra* Part V.B for a discussion of how courts construe “file-cabinet compliance” as sufficient under prong one.

<sup>348</sup> See *infra* text accompanying notes 349-50, 353-54.

<sup>349</sup> See, e.g., Grossman, *supra* note 26, at 703, 708 (noting pro-employer trend in granting

lower courts' analysis of whether the employer has satisfied its burden of proof under each prong of the affirmative defense, and particularly the second prong, is often cursory and, at times, virtually nonexistent.<sup>350</sup> As one commentator noted, even when courts analyze the second prong, they often do so incorrectly by failing to apply the requisite avoidable consequences principles dictated by *Burlington Industries, Inc. v. Ellerth*<sup>351</sup> and *Faragher v. City of Boca Raton*.<sup>352</sup> Instead, they apply what amounts to contributory negligence so that a plaintiff's recovery is completely barred due to her failure to report or her delay in doing so.<sup>353</sup> Moreover,

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summary judgment, and further noting that courts have "significantly curtailed the scope of *Faragher* and *Ellerth* using two techniques: (1) by construing the affirmative defense to completely absolve the employer of liability regardless of the type of harassment; or (2) by refusing to apply a rule of vicarious liability where the employer responds appropriately to the plaintiff's complaint"); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 213-14 (2004) (documenting high incidence of summary judgment in favor of employers on affirmative defense, and concluding that affirmative defense effected little change in sexual harassment cases because federal courts reward employers for superficial compliance with prong one of affirmative defense, without inquiring whether employer's efforts to prevent sexual harassment are effective at decreasing incidence of workplace harassment, and federal courts penalize harassment victims who do not report under prong two of affirmative defense notwithstanding fact that social science research demonstrates that common, and thus arguably reasonable, response to supervisory sexual harassment is not reporting); John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1404-05 (2002) (noting pro-employer trend, and arguing that affirmative defense has become "summary judgment safe harbor" for employers); David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1283-89 (documenting high rate of summary judgment in favor of employers on affirmative defense, and noting that such results are directly counter to predictions by experts that affirmative defense would preclude summary judgment for employers in most cases).

<sup>350</sup> See Lawton, *supra* note 349, at 210, 243 ("[I]n sixty-seven percent of the cases addressing prong two [from January 1, 2001 through June 30, 2003], the courts improperly interpret[ed] the employer's obligation under prong two"); Marks, *supra* note 349, at 1429 (noting courts' outright failure to discuss avoidable consequences and its related harm-avoidance principles under second prong).

<sup>351</sup> 524 U.S. 742 (1998).

<sup>352</sup> 524 U.S. 775 (1998).

<sup>353</sup> Marks, *supra* note 349, at 1429 (noting that courts are concluding that employers satisfy second prong by showing that employees delayed reporting and that, in so doing, courts are treating "purportedly unreasonable delays as something akin to contributory negligence — a complete bar to recovery"). Out of the hundreds of cases addressing the second prong of the *Ellerth/Faragher* affirmative defense, fewer than 10 mention the avoidable consequences doctrine by name, and none of those include any discussion as to how the avoidable consequences doctrine should apply in the sexual harassment context where the plaintiff is forced to engage in the cost-benefit analysis discussed in Part V.B *infra*. See *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 162 (3d Cir. 1999) (Weis, J.,

a few courts have dispensed entirely with the second prong in an effort to avoid holding employers liable for supervisor conduct that occurs on only one occasion, over a brief period of time, or suddenly and without warning.<sup>354</sup> These courts have done so even though *Ellerth* and *Faragher* described the dual prongs as the “two necessary elements” of the defense.<sup>355</sup>

Based on these post-*Ellerth/Faragher* trends, it is probable that these same trends will continue in the submission context. In other words, many courts faced with submission claims will likely either simply ignore the second prong altogether or simply conclude with little or no analysis that the plaintiff unreasonably failed to take advantage of the employer’s preventive opportunities or to avoid harm because she submitted to the unwelcome conduct. Given these documented pro-employer trends, the fact that submission cases do not constitute tangible employment actions will likely lead to unjust results in the submission context in the absence of guidance as to how the second prong should apply in such circumstances.

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concurring); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 934-35 (7th Cir. 1999); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 266 (5th Cir. 1999); *Jones v. Dist. of Columbia*, 346 F. Supp. 2d 25, 49-52 (D.D.C. 2004); *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1228-29 (M.D. Fla. 2004); *Duhe v. United States Postal Serv.*, No. Civ. A 03-746, 2004 WL 439890, at \*5 (E.D. La. Mar. 9, 2004); *Akers v. Alvey*, 180 F. Supp. 2d 894, 901 (W.D. Ky. 2001).

<sup>354</sup> See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 772 (8th Cir. 2004) (concluding that in case involving only single occasion of supervisor’s sexually harassing conduct, employer is entitled to “modified” *Ellerth/Faragher* affirmative defense that dispenses with second prong and instead focuses only on first prong and employer’s efforts to prevent and correct sexual harassment), *cert. denied*, 125 S. Ct. 1088 (2005); *Watkins v. Prof’l Sec. Bureau*, No. 98-2555, 1999 WL 1032614, at \*5 n.16 (4th Cir. Nov. 15, 1999) (“[W]e cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment [as the employer did here] . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense.”); *Indest*, 164 F.3d at 265 (stating, “a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor’s protracted or extremely severe acts that created a hostile environment,” and holding that employer is not vicariously liable in incipient hostile environment case where plaintiff promptly complains and employer promptly responds and stops harassment); see also *Marks*, *supra* note 349, at 1424-28 (noting courts’ inclination to interpret affirmative defense in disjunctive whereby “and” between two prongs becomes “or”).

<sup>355</sup> *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; see also *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1025-26 (10th Cir. 2001) (acknowledging and affirming Tenth Circuit’s prior rejection of Judge Jones’s reasoning in *Indest*, and reaffirming requirement that employer must prove both prongs of *Ellerth/Faragher* affirmative defense); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313 (11th Cir. 2001) (“Both elements [of the *Ellerth/Faragher* affirmative defense] must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements.”).



To avoid this potentially unjust result, this Part proposes a normative framework to govern the application of the second prong in the submission context. This Part assumes the existence of an actionable hostile work environment. The term “submission” is used in its broadest sense and thereby includes any circumstances in which a subordinate fails to report and either passively tolerates a supervisor’s unwelcome sexual advances and offensive sexual conduct or actively submits to a supervisor’s sexual demands and engages in the unwelcome sexual acts.<sup>356</sup>

As explained below, the avoidable consequences doctrine and the related harm-avoidance principles underpinning the second prong dictate that determining whether a submission plaintiff unreasonably failed to report or otherwise avoid harm is generally an issue for the jury.<sup>357</sup> This is particularly true given that the reasonableness threshold under the avoidable consequences doctrine is considerably lower than that applied in the traditional negligence context when assessing whether an individual acted reasonably.<sup>358</sup> In making this reasonableness determination, the jury must consider the victim’s unique circumstances. Those circumstances include whether the plaintiff possessed a credible fear of harm, the plaintiff’s working environment, the consequences of not submitting based on the perceived threat of harm, and any other aspect of the circumstances that bears on whether she was unreasonable in submitting rather than reporting the harassing behavior.<sup>359</sup> By requiring a trier of fact to consider the victim’s unique circumstances, submission victims will not be punished. They will

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<sup>356</sup> The purpose of this Part is to provide guidance regarding how the second prong should be applied in submission cases to avoid the incorrect contributory negligence approach taken by many courts. Thus, this Part focuses on the threshold question of whether the victim unreasonably failed to report or avoid harm, treated as one interrelated issue, and the relevant factors the trier of fact should consider when making such a determination in the submission context. If, after assessing the circumstances in the manner described in this Part, the trier of fact concludes that the victim unreasonably failed to avoid harm to some degree, the trier of fact must then consider whether the victim unreasonably failed to avoid all harm. If so, the trier of fact may conclude that the employer should avoid liability altogether. If the victim unreasonably failed to avoid only some of the harm, however, the trier of fact must ascertain at what point the supervisor’s actions became actionable and then determine the extent to which the victim’s damages should be reduced for the harm she could have reasonably avoided. See Marks, *supra* note 349, at 1420-21.

<sup>357</sup> See *id.* at 1448-49 (noting that uniquely factual nature of inquiry under second prong is question for jury, and thus summary judgment is rarely appropriate); George, *supra* note 121, at 155-56 (noting “reasonableness” standard warrants fewer summary judgments).

<sup>358</sup> See discussion *infra* Part V.B.

<sup>359</sup> *Id.*

instead have their rights vindicated in a way that is consistent with Title VII's interrelated goals of preventing harm, encouraging employees to report unlawful behavior, and compensating victims of discrimination.

#### A. *The Obligation to Report*

A fundamental premise underlying the second prong of the *Ellerth/Faragher* affirmative defense is that "sometimes inaction is reasonable."<sup>360</sup> Although the Court in *Ellerth* stated that a subordinate's failure to report supervisory sexual harassment would "normally suffice" to satisfy the employer's burden under prong two, such a failure is not always sufficient.<sup>361</sup> Indeed, if a failure to report was always sufficient, the Court would have concluded that *Ellerth* unreasonably failed to report or otherwise avoid harm. Not only did *Ellerth* fail to report her supervisor's harassing conduct and accompanying threats, she also admitted that she knew about her employer's antiharassment policy and made a conscious decision to refrain from reporting and ultimately quit her employment.<sup>362</sup> Notwithstanding *Ellerth's* decision, the Court remanded the case to give her an opportunity to prove a hostile work environment claim and her employer an opportunity to establish the affirmative defense.<sup>363</sup> In contrast, the Court in *Faragher* had no difficulty concluding that the City was unable as a matter of law to satisfy its burden under prong one of the affirmative defense.<sup>364</sup>

The Court's decision to remand in *Ellerth*, instead of concluding as a matter of law that the employer established the second prong based on *Ellerth's* failure to report, demonstrates that sometimes inaction is reasonable. The circumstances under which inaction is reasonable remain unclear, however. The avoidable consequences principles underpinning the second prong provide guidance for resolving this issue.

#### B. *Avoidable Consequences Principles*

With respect to the legal principles underlying the second prong, the *Ellerth* Court explained that "Title VII borrows from tort law the avoidable consequences doctrine . . . and the considerations which

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<sup>360</sup> *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 36 (1st Cir. 2003).

<sup>361</sup> *See supra* note 133 and accompanying text.

<sup>362</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 749 (1998).

<sup>363</sup> *Id.* at 766.

<sup>364</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998); *see supra* notes 139-43 and accompanying text (discussing deficiencies of City's actions to prevent sexual harassment).

animate that doctrine would also support limitation of employer liability in certain circumstances."<sup>365</sup> The Court in *Faragher* elaborated further:

The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable to avoid or minimize the damages" that result from violations of the statute.<sup>366</sup>

This statement of the avoidable consequences doctrine is virtually identical to that provided in section 918 of the *Restatement (Second) of Torts* (the "*Restatement of Torts*"). Section 918 explains that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort."<sup>367</sup>

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<sup>365</sup> *Ellerth*, 524 U.S. at 764 (citation omitted).

<sup>366</sup> *Faragher*, 524 U.S. at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)); see also MCCORMICK ON DAMAGES, ch. 5, § 34, at 132 (1935) ("[W]hat the injured person can do at moderate expense or with reasonable exertions to minimize the loss or injury, he must do, or bear the risk of his inaction.").

<sup>367</sup> RESTATEMENT (SECOND) OF TORTS § 918(1) (1979) [hereinafter RESTATEMENT]. This provision is subject to an exception for circumstances involving intentionally or recklessly inflicted harm:

One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

*Id.* § 918(2). The *Restatement of Torts* explains:

one who intends a particular harmful result or who is aware of the result and is recklessly indifferent to its happening, is required to pay damages for it, unless the injured person, realizing the danger, intentionally fails to act in the protection of his own interests or is heedlessly indifferent to them.

*Id.* § 918 cmt. a. In the context of intentionally or recklessly inflicted harm, "[t]he merely careless or stupid person is thus protected from consequences that the tortfeasor intended or was willing to have occurred while, on the other hand, the person who stubbornly refuses to protect his own interests is given no legal redress." *Id.* Although the Court in *Ellerth* stated that "[s]exual harassment under Title VII presupposes intentional conduct," the Court's recitation of the avoidable consequences principles underlying the second prong, and the fact that the Court's language is virtually identical to the avoidable consequences standard for negligence claims under the *Restatement of Torts*, indicates that the Court intended to apply the negligence standard when assessing an employer's vicarious liability under the affirmative defense. *Ellerth*, 524 U.S. at 756; cf. *Smith v. Henderson*, 376 F.3d 529, 539 (6th Cir. 2004) (holding that avoidable consequences doctrine does not apply to intentional torts, such as disability discrimination under Americans with Disabilities Act); *Johnson v. City of Saline*, 151 F.3d 564, 573-74 (6th Cir. 1998) (same).

The Court in *Faragher* explained in general terms how the harm-avoidance principles of the avoidable consequences doctrine apply in the sexual harassment context:

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated, no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.<sup>368</sup>

To fully understand the scope of a plaintiff's obligation to report and avoid harm in the sexual harassment context, it is helpful to return to the policy underlying and the harm-avoidance principles embodied in the avoidable consequences doctrine.

The policy underlying the avoidable consequences doctrine is the premise that "recovery for the harm [suffered] is denied because it is in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources, both physical [and] economic."<sup>369</sup> With respect to harm-avoidance, the *Restatement of Torts* provides that an injured person is free to choose among the available reasonable courses of action or alternatives in an effort to avoid additional harm.<sup>370</sup> So long as the chosen alternative is reasonable, it is irrelevant whether it turned out to be the best alternative in hindsight.<sup>371</sup> Additionally, the standard of

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<sup>368</sup> *Faragher*, 524 U.S. at 806-07.

<sup>369</sup> RESTATEMENT, *supra* note 367, § 918 cmt. a.

<sup>370</sup> In this regard, the *Restatement of Torts* provides:

He is required to exercise no more than reasonable judgment or fortitude; and, if different courses of action are open to him he is not required, as a condition of obtaining full damages, to choose the course that events later show to have been the best. He is not barred from full recovery by the fact that it would have been reasonable for him to make expenditures or subject himself to pain or risk; it is only when he is unreasonable in refusing or failing to take action to prevent further loss that his damages are curtailed.

*Id.* § 918 cmt. c.; see also MCCORMICK ON DAMAGES, *supra* note 366, ch. 5, § 35, at 134.

<sup>371</sup> RESTATEMENT, *supra* note 367, § 918 cmt. c; see also MCCORMICK ON DAMAGES, *supra* note 366, ch. 5, § 34, at 134; see also Bauchner, *supra* note 346, at 317 (noting potential for

reasonableness applied in assessing the injured person's chosen alternative is considerably less strict than that applied in determining negligence liability in tort.<sup>372</sup> Thus, in attempting to avoid harm, the injured person "cannot be expected to incur unusual, unwarranted, or disproportionate expense," and any "inconvenience or financial sacrifice" necessary to avoid harm may "obviously bear upon the reasonableness" of the victim's chosen course.<sup>373</sup>

In assessing the reasonableness of the injured person's chosen course of action, the *Restatement of Torts* provides additional guidance. It states that "it is frequently reasonable for a person threatened by further harm from a tortious act to refuse to subject himself to pain or to a danger of a different kind, which it would be necessary to undergo if further harm is to be averted."<sup>374</sup> Additionally, in deciding which avenue to pursue to avoid harm, the plaintiff may engage in her own cost-benefit analysis and, in doing so, the *Restatement of Torts* provides that she may take into account her own unique circumstances.<sup>375</sup> Finally, the victim may

hindsight bias under second prong and how such bias may undermine victim's ability to recover if trier of fact does not assess reasonableness of her actions from perspective of victim at time she made her decision); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 48 (2000) ("When the law is determined on a case-by-case basis after disputes arise rather than prospectively, adjudicators' evaluations about what an individual should have done are likely to be tainted by information about the results of the individual's actions.").

<sup>372</sup> MCCORMICK ON DAMAGES, *supra* note 366, ch. 5, § 34, at 134.

<sup>373</sup> *Id.* at 134-35.

<sup>374</sup> RESTATEMENT, *supra* note 367, § 918 cmt. d. Moreover, as noted by the Seventh Circuit, the avoidable consequences doctrine does not require a plaintiff to choose an alternative that would "creat[e] a bigger crisis . . . by solving the immediate one." *Lawson v. Trowbridge*, 153 F.3d 368, 378 (7th Cir. 1998) (concluding that mentally ill civil rights plaintiff who had been falsely imprisoned did not fail to avoid harm when he refused to risk eviction and use his rent money to pay bond necessary to obtain his release from confinement).

<sup>375</sup> In this regard, the *Restatement of Torts* provides:

A person whose body has been hurt or whose things have been damaged may not be unreasonable in refusing to expend money or effort in repairing the hurt or preventing further harm. Whether or not he is unreasonable in refusing the effort or expense depends upon the amount of harm that may result if he does not do so, the chance that the harm will result if nothing is done, the amount of money or effort required as a preventive, his ability to provide it and the likelihood that the measures will be successful. There must also be considered the personal situation of the plaintiff. A poor man cannot be expected to diminish his resources by the expenditure of an amount that might be expected from a person of greater wealth. So too, whether it is unreasonable for a slightly injured person not to seek medical advice may depend on his ability to pay for it without financial embarrassment.

RESTATEMENT, *supra* note 367, § 918 cmt. e.

recover for any expense or injury incurred while taking the chosen course of action, so long as the chosen course is reasonable.<sup>376</sup>

To understand the harm-avoidance principles embodied in the avoidable consequences doctrine, it is helpful to examine two hypothetical scenarios from the *Restatement of Torts*. In the first scenario, a tort victim suffers bodily injury but then fails to protect her own interests by stubbornly refusing to promptly seek treatment for those injuries.<sup>377</sup> Under such circumstances, the victim may recover only for the harm proximately caused by the tortfeasor and not the aggravation of the initial injuries attributable to her stubborn and thus unreasonable failure to obtain prompt medical treatment. In this first scenario, the victim must decide between promptly obtaining medical treatment and delaying medical treatment. Her choice to pursue the second alternative and delay treatment is unreasonable in the absence of any explanation other than sheer stubbornness.<sup>378</sup>

In a second scenario provided in the *Restatement of Torts*, the same tort victim suffers the same bodily injury but is faced with additional risks relevant to her decision-making process.<sup>379</sup> Although the victim in this second scenario realizes that her injury likely requires prompt expert treatment, seeking such treatment would require traveling ten miles over treacherous ice-covered roads. Due to the hazards of travel, the victim waits until the following day to go to the nearest physician. Because of the delay, the victim suffers further injury. Under circumstances such as these where the victim is choosing between two potentially costly or harmful alternatives, harm-avoidance principles dictate that a trier of fact may reasonably conclude that the victim did not act unreasonably in delaying professional treatment.<sup>380</sup> If the trier of fact so concludes, the victim can recover for the additional damages caused by the delay in seeking treatment.<sup>381</sup> What makes this second scenario different from the first are the circumstances facing the victim — two competing alternatives each with a corresponding potential harm — when she is deciding upon the appropriate course of action.<sup>382</sup> The potentially different outcome in the second scenario is driven by a cost-benefit

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<sup>376</sup> MCCORMICK ON DAMAGES, *supra* note 370, ch. 5, § 42, at 152.

<sup>377</sup> RESTATEMENT, *supra* note 367, § 918 illus. 1.

<sup>378</sup> *Id.*

<sup>379</sup> This example is based on the RESTATEMENT OF TORTS, *supra* note 367, § 918 illus. 10.

<sup>380</sup> *See id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

analysis of the two competing alternatives.<sup>383</sup> The above examples apply equally in the sexual harassment context.

In the sexual harassment context, a plaintiff whose supervisor sexually harasses her must choose between promptly reporting the supervisor's behavior or continuing to endure the harassment. The viability of the plaintiff's claim from a harm-avoidance perspective depends on whether she is merely choosing between reporting or not, or whether she is choosing between two competing — and legally sufficient — alternatives, each with a corresponding harm.

A plaintiff who fails to report without explanation or justification will not be viewed as choosing between two reasonable, competing alternatives. Thus, the trier of fact is likely to consider such circumstances as akin to the first scenario described above, in which the victim's delay in seeking medical treatment is unreasonable. In contrast, when the plaintiff possesses a credible belief that reporting would result in harm to her, the cost-benefit analysis may yield a different result depending on the victim's unique circumstances. For example, a plaintiff who has been subjected to supervisory sexual harassment and who is faced with a credible fear of job detriment must choose between two competing alternatives, each with a corresponding harm. The first option is to submit and continue to endure the supervisor's harassing conduct, but avoid the job detriment. The second option is to report the conduct and suffer the job detriment, but avoid the emotional harm that would result from enduring the harassment.

To many, it may seem that the only reasonable option under such circumstances is to promptly report the conduct. This is particularly true where the conduct is egregious. Nevertheless, to a plaintiff in such circumstances, reporting the conduct may be the more costly, and thus less reasonable option, given her unique circumstances. These circumstances may include her financial status and her dependence on job-related benefits, such as health care. If she chooses incorrectly and her supervisor terminates her, she may suffer a significant financial loss for which she can only hope to recover years later in a legal action brought against her employer. Thus, based on her unique

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<sup>383</sup> Under such circumstances, the cost-benefit analysis is comprised of two principle variables: the probability-weighted costs of seeking treatment promptly and the probability-weighted costs of not seeking treatment promptly. The cost-benefit analysis of the two alternatives in the second scenario requires an assessment of the circumstances the victim faced — treacherous ice-covered roads and a distance of ten miles, as compared to the need for prompt treatment — to determine whether the victim's ultimate decision to delay treatment is reasonable. Thus, the trier of fact must have the opportunity to assess the victim's choice in light of the circumstances in which it was made.

circumstances, the victim may instead reasonably choose to submit and thereby avoid the graver harm of termination. Depending on the victim's financial and personal circumstances, it is neither surprising nor unreasonable to believe that a plaintiff faced with this choice may reasonably choose to suffer humiliation, shame, and emotional anguish, rather than endure the end of a career or financial ruin. Regardless of the choice, the fact-finder should have an opportunity to determine whether the victim's decision to submit to the harassment was unreasonable under the circumstances.<sup>384</sup>

In this analysis, the relevant factors are interrelated and may include: whether the victim possessed a credible fear of harm; the plaintiff's working environment, which requires an assessment of, inter alia, the workplace culture, the terms of the employer's antiharassment/antiretaliation policy, and the employer's efforts to implement such policies; and the perceived consequences of her refusal to submit.<sup>385</sup> While some of these factors are generally assessed under prong one of the affirmative defense, the trier of fact must also have an opportunity to consider them in the context of the second prong.<sup>386</sup>

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<sup>384</sup> Although not relying on avoidable consequences principles, Professor Grossman argued that the trier of fact must consider context and the victim's perspective in determining whether the victim's response was reasonable. Grossman, *supra* note 26, at 728-29. But see *infra* note 386 and accompanying text, where Professor Grossman argued that because the employer's efforts to prevent sexual harassment are to be assessed under prong one, any further inquiry regarding such efforts is unnecessary when assessing the reasonableness of the victim's actions.

<sup>385</sup> The assessment required under avoidable consequences principles is largely consistent with considerations deemed relevant by social scientists and psychologists regarding a victim's response to sexual harassment. Specifically, a leading researcher in the field noted:

The way in which any individual will cope with potentially harassing situations depends on (1) her cognitive evaluation of the situation with respect to its significance for well-being (i.e., is it irrelevant, benign, or threatening) and (2) the options that are realistically available, their costs and benefits, and what is at stake. Such evaluations are part of a complex, reflexive process that changes over time as the situation unfolds. Additional influences on response include resources and constraints, both personal and environmental; these include both individual characteristics (e.g., assertiveness, sex role attitudes, economic and psychological vulnerability) and also organizational ones (e.g., climate, tolerance for harassment, etc.).

Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 5 J. SOC. ISSUES 117, 129 (1995).

<sup>386</sup> Professor Grossman contended that the "proper analysis of the second prong turns exclusively on the plaintiff's conduct." Grossman, *supra* note 26, at 700 n.140. Her contention, however, is based on an assumption that courts will engage in the necessary searching inquiry under prong one regarding the employer's efforts to prevent sexual



### 1. Credible Fear of Harm

From a harm-avoidance standpoint, it is important to ascertain whether the plaintiff possessed a credible fear of harm at the time she submitted. In the sexual harassment context, many scholars argue that a victim's failure to report is per se reasonable based on empirical studies documenting that most harassment victims subjectively fear retaliation and, for the small percentage who report, they do in fact suffer retaliation at a high rate.<sup>387</sup> Based on these studies, it would be logical to conclude that because a large majority of harassment victims fear retaliation and thereby fail to report because of these fears, a particular victim's failure to report based on such fears would not be unreasonable. In this respect, the second prong seems at odds with social science research regarding sexual harassment, as the Court indicated that a plaintiff's failure to report will "normally suffice" to satisfy the employer's burden under prong two. As a result of this inconsistency, some scholars argue that the Court should revise or jettison the affirmative defense<sup>388</sup> and, in particular, the second prong.<sup>389</sup> Some have

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harassment by examining the "employer's policies, procedures, and penchant for (or against) retaliation." *Id.* As Professor Grossman acknowledged, this assumption is not supported by the courts' analysis of the first prong, which tends to be cursory at best. *See id.* at 723-27; *infra* note 413 and accompanying text. In any event, the harm-avoidance principles of the avoidable consequences doctrine demonstrate that it is necessary for the trier of fact to assess the victim's unique circumstances (including her work environment and steps taken by her employer to prevent harassment and retaliation) in determining whether the victim's chosen course of action was reasonable.

For an example of how the second prong of the *Ellerth/Faragher* affirmative defense and the avoidable consequences doctrine are applied to sexual harassment claims under California's antidiscrimination statute, see *State Department of Health Services v. Superior Court*, 79 P.3d 556, 565 (Cal. 2003) (applying *Ellerth/Faragher* affirmative defense to damages but not liability, and concluding that avoidable consequences principles of second prong allows employers "to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment").

<sup>387</sup> Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 306-23 (2001) (discussing social science studies regarding low reporting rates among victims of harassment and reasons for same); Grossman, *supra* note 26, at 723-27 (discussing empirical studies that examine myriad reasons why victims fail to report harassment, and noting that primary reason is fear of adverse consequences and that many victims, in fact, suffer such negative consequences); Lawton, *supra* note 349, at 208 (noting that most common victim response to sexual harassment is to refrain from reporting, and citing social science studies demonstrating same).

<sup>388</sup> Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 71 (2003) (collecting and

taken a more moderate approach and argued that the affirmative defense should only reduce a victim's recoverable damages, instead of permitting an employer to avoid liability.<sup>390</sup> In June 2004, however, the *Suders* Court reaffirmed the tangible employment action standard and the two-prong affirmative defense.

Additionally, the Court in *Ellerth* and *Faragher* implicitly rejected the argument that an employee's unsubstantiated fears of job detriment are sufficient to excuse an employee's failure to report. As the First Circuit noted in *Reed v. MBNA Marketing System*, when the Supreme Court issued its companion decisions nearly twelve years after *Meritor Savings Bank, FSB v. Vinson*,<sup>391</sup> the Court undoubtedly knew that an employee who reports a supervisor's inappropriate conduct might be uncomfortable, embarrassed, frightened, or any combination of these.<sup>392</sup> Moreover, the Court was also undoubtedly aware of the various studies that provided empirical evidence demonstrating that many plaintiffs reasonably fear embarrassment and job detriment if they report and that

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discussing empirical research regarding why sexual harassment occurs and how victims respond, concluding that affirmative defense is "doctrinally unjustifiable," and thus calling for "elimination of the affirmative defense, greater availability of punitive damages, and the recognition of individual liability").

<sup>389</sup> *Beiner, supra* note 387, at 330-32 (arguing that "fail to avoid harm otherwise" language in prong two "is so vague as to be unworkable and should be eliminated entirely," and positing that affirmative defense should not be defense to liability but to punitive damages); *Lawton, supra* note 349, at 259-66; *Sherwyn et al., supra* note 349, at 1299 (arguing that second prong of affirmative defense should be eliminated).

<sup>390</sup> *See Grossman, supra* note 26, at 735-36 (2000) (arguing that affirmative defense should not be defense to liability but should reduce damages and that such approach would be more consistent with Title VII's goals of compensation and deterrence, and concluding that Congress should take action to effectuate proposed approach). This approach essentially argues that the avoidable consequences doctrine should be applied to sexual harassment claims in the same manner as it is applied to common law torts where, unlike contributory negligence which may serve as a complete bar to recovery, the avoidable consequences doctrine simply results in a reduction of the victim's damages for those injuries the victim could have avoided with reasonable efforts. *See* RESTATEMENT, *supra* note 367, § 918 cmt. a (distinguishing contributory negligence, which precludes recovery, from avoidable consequences, which has no bearing on existence of cause of action but applies only to diminution of damages). Notwithstanding the traditional application of the avoidable consequences doctrine in the common law tort context, the Court in *Faragher* indicated that a plaintiff's failure to avoid harm could serve as a complete bar to recovery under some circumstances. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care . . . ."); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 935 (7th Cir. 1999) (noting that Court intended that plaintiff's failure to avoid harm would absolve employer of liability under certain circumstances regardless of whether avoidable consequences doctrine functions differently in common law tort context).

<sup>391</sup> 477 U.S. 57 (1986).

<sup>392</sup> *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003).

many suffer job detriment after reporting.<sup>393</sup> The Court nevertheless “require[d] the employee in normal circumstances to make this painful effort if the employee wants to impose vicarious liability on the employer and collect damages under Title VII.”<sup>394</sup> The First Circuit reasoned:

The complaint mechanism, after all, can be used to address threats of retaliation as well as harassment, and unless patently futile, concerns as to whether the complaint mechanism will fail can be tested by trying it out if failure is the only cost. But where there is a truly credible threat of retaliation that the complaint mechanism will not prevent, the employee’s position is more hazardous and inaction more easily explained.<sup>395</sup>

For this reason, numerous courts have properly applied *Ellerth* and *Faragher* to conclude that a plaintiff’s subjective or generalized fears of either embarrassment or job detriment are insufficient to excuse the plaintiff’s failure to report.<sup>396</sup>

In contrast, as the First Circuit suggested in *Reed*, certain courts have properly concluded that a victim’s failure to report may not be unreasonable when the victim possesses a credible belief that reporting would either result in harm to her or otherwise be futile.<sup>397</sup> A primary

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<sup>393</sup> *Id.* at 36.

<sup>394</sup> *Id.* at 35.

<sup>395</sup> *Id.* at 36 (emphasis added).

<sup>396</sup> See, e.g., *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296, 1301-02 (11th Cir. 2000) (affirming summary judgment for employer, and concluding that plaintiffs’ reporting to individuals other than those designated in employer’s antiharassment policy and resulting delay in reporting to appropriate individuals was unreasonable as matter of law where it was based on plaintiffs’ generalized fear of “potential negative consequences” and plaintiffs admitted that they understood policy and individuals to whom report should be submitted); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (concluding that plaintiff’s failure to report her supervisor’s sexual harassment was unreasonable as matter of law because it was not based on “credible fear that her complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint,” but was instead based on her concern regarding negative reaction of coworkers); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (affirming summary judgment for employer, and holding that plaintiff’s failure to report her supervisor’s sexual harassment was unreasonable as matter of law when it was based on plaintiff’s discomfort at discussing with her employer “offensive and repulsive sexual conduct” she endured because “an employee’s subjective fears of confrontation, unpleasantness, or retaliation do not alleviate the employer’s duty under *Ellerth* to alert the employer to the allegedly hostile environment”).

<sup>397</sup> See *infra* Part V.C.1 (discussing *Reed*, 333 F.3d 27, and *Bennett v. Progressive Corp.*, 225 F. Supp. 2d 190 (N.D.N.Y. 2002)); see also *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 526 (5th Cir. 2001) (affirming jury finding that plaintiff’s eight to nine month delay in reporting supervisor’s repeated sexual advances and other sexually offensive conduct was not unreasonable failure to complain or otherwise avoid harm where delay

factor relevant to assessing the credibility of the victim's belief is whether the victim was explicitly or implicitly threatened with harm.<sup>398</sup> Moreover, as discussed more fully below, a victim's working environment bears directly on the question of whether she possessed a credible fear of harm. Because the employer bears the burden of proof under prong two,<sup>399</sup> the employer must demonstrate that it created an environment in which reporting is encouraged, sexual harassment is taken seriously, and retaliation is prohibited and promptly addressed. Furthermore, the employer must show that an employee who does not report under such circumstances acted unreasonably.

## 2. Working Environment

In addition to an explicit or implicit threat of harm from the perpetrating supervisor, the working circumstances themselves may also reinforce or evidence a credible threat of harm.<sup>400</sup> Empirical studies

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stemmed from supervisor's high stature within defendant university and supervisor's comments referring to his power in university and implicit threats of retaliation if subordinate complained); *cf.* *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1289-91 (11th Cir. 2003) (holding that plaintiff's two and one-half month delay in reporting her supervisor's sexually offensive conduct and accompanying rape was unreasonable as matter of law because plaintiff could have "avoided most, if not all, of the actionable harassment by reporting" her supervisor's behavior and because delay resulted from plaintiff's "subjective" fear of job reprisals based on her supervisor's comment that he was "well-connected to upper management and that he could assist her in getting the promotion" she desired and plaintiff's "subjective" fear of suffering physical harm if she reported based on her supervisor having twice showed her his gun prior to sexually assaulting her); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (affirming summary judgment in favor of employer, and concluding that plaintiff's failure to report was unreasonable notwithstanding her supervisor's admonition not to "go over his head").

<sup>398</sup> In the oral argument in *Suders*, Justice Scalia acknowledged that if a subordinate is threatened with death if she reports sexual harassment, it is "reasonable for her not to file a grievance," but he noted that the employer should not be strictly liable for the harassment given the unofficial nature of the conduct. Transcript of Oral Argument at 33, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-95.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-95.pdf); see Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 583-86 (1999) (arguing that employee should have opportunity to prove that she acted reasonably under second prong when supervisor has made "specific threats of retaliation," such as discharge, and suggesting that "lesser threats" may be insufficient to justify failure to report, but not addressing avoidable consequences principles).

<sup>399</sup> See *supra* text accompanying note 343.

<sup>400</sup> See Fitzgerald et al., *supra* note 385, at 122 (noting that "organizational context — that is the organizational norms and culture" of workplace that are "powerful predictors of sexual harassment" — is equally relevant in influencing victim's response to such harassment); see also Chamallas, *supra* note 11, at 381 ("Courts should recognize that the informal culture of an organization is as important as the formal policies in the employee

demonstrate that the “norms and culture” of the workplace are highly relevant in predicting the incidence of harassment and in influencing a victim’s response to sexual harassment.<sup>401</sup> Thus, in assessing the credibility of the perceived threat of harm specifically, and considering the reasonableness of the victim’s failure to report more generally, the trier of fact must consider all relevant aspects of the victim’s working environment. Such an assessment may include a consideration of the workplace culture, as well as the terms of the employer’s antiharassment and antiretaliation policies.

a. Workplace Culture

Empirical studies demonstrate that sexual harassment is more likely to occur and employees are more reluctant to report when the employer creates or permits an environment in which sexual harassment is acceptable.<sup>402</sup> As one commentator suggested: “[I]f harassment is tolerated, or is not properly punished, employees will receive the

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handbook and should make their assessments of whether employers and employees act reasonably against this backdrop.”); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 650 (2005) (noting that “[e]mployers’ organizational choices can both facilitate and constrain the development of discriminatory work cultures”).

<sup>401</sup> Fitzgerald et al., *supra* note 385, at 122; see Green, *supra* note 400, at 678 (identifying work culture as one source of discrimination in workplace and arguing that one alternative for remedying work culture discrimination is to require employers “to take reasonable steps to rid their workplaces of discriminatory work cultures as part of their obligation to exercise reasonable care to prevent and promptly correct all harassing behavior”); Grossman, *supra* note 388, at 53, 56 (collecting and discussing empirical research regarding relevant factors for improving victim reporting rates, and noting that reporting rates “may be influenced by the organizational structure of the workplace,” and suggesting that reporting rates may increase if employers increase efforts toward “eliminating gender imbalance in the workplace and maintaining tighter control over the work environment”); Grossman, *supra* note 26, at 726-27 (same).

<sup>402</sup> Beiner, *supra* note 387, at 295-303 (relying on social science research, and stating that victim’s work environment and amount of harassment that occurs is influenced by “general atmosphere on the job, the attitudes of supervisors, the diversity of the workforce, as well as what behavior is tolerated or not,” and noting that message communicated to victims based on these factors bears directly on whether victim reports harassing behavior); Grossman, *supra* note 26 (discussing empirical sexual harassment studies, and noting that antiharassment policies, training, and reporting mechanisms proactively implemented by employers may impact overall work environment and may have some positive impact on preventing harassment and encouraging reporting, but noting that some studies undercut this correlation); Lawton, *supra* note 349, at 223-28 (noting that “the more tolerant an organization is of harassment,” as evidenced by supervisors’ behavior in workplace and manner in which harassment complaints are addressed and resolved, the more likely potential harassers will engage in harassing behavior and the less likely victims are to report harassment, and citing empirical research supporting same).

message that it is acceptable behavior."<sup>403</sup> In contrast, where an employer's policies and actions demonstrate its commitment to a harassment-free workplace, harassment will be less likely to occur and employees will be more likely to report harassment.

For example, an employer may implicitly communicate its attitude toward sexual harassment and its related attitude toward harassment complaints in the way it implements its antiharassment policy. While one employer may demonstrate a casual attitude toward sexual harassment by simply requiring new employees to view an antiharassment video at the commencement of their employment, another employer may communicate a stronger antiharassment message by having periodic training sessions that require employees to actively participate and thoughtfully respond to difficult questions about sexual harassment.<sup>404</sup> The employer may further demonstrate its commitment to a harassment-free workplace by periodically evaluating its training program and its supervisors' efforts to implement and adhere to the desired practices.<sup>405</sup>

Additionally, the way in which an employer addresses complaints and the behavior of supervisors communicates a powerful message to employees regarding the employer's attitude toward sexual harassment and harassment complaints. For example, by failing to respond appropriately or at all to a sexual harassment complaint, an employer may implicitly suggest that harassment is tolerated and reporting is

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<sup>403</sup> Beiner, *supra* note 387, at 298; *see, e.g., Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (affirming verdict in favor of plaintiff police officer on her sexual harassment claim based on her employer's negligence, and concluding that plaintiff's failure to report her supervisor's sexually harassing conduct did not absolve employer of liability because hierarchical structure of police department and unwritten code of silence effectively forbade lodging complaint against fellow officer such that anyone who violated code of silence "would suffer such a pattern of social ostracism and professional disapprobation that he or she would likely sacrifice a career" and plaintiff was thus left with untenable decision of whether to "report the harassment and lose her career, or endure the harassment and lose her dignity").

<sup>404</sup> Beiner, *supra* note 387, at 330.

<sup>405</sup> *See, e.g., Susan Bisom-Rapp, An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 30-31 (2001) (noting that efficacy of training programs is unclear, and thus arguing that employer training programs should not be sufficient to avoid liability but should be designed and evaluated to ensure that they accomplish desired goals); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 142-44 (2002) (same); Grossman, *supra* note 26 (noting that "there remains a significant gap" between "the empirical evidence of a training effect" and "conclusion that training will actually reduce harassment").+

futile.<sup>406</sup> Moreover, if higher level supervisors engage in sexually harassing behavior, others may conclude that such behavior is acceptable in the workplace and thus reporting is futile.<sup>407</sup> The implicit message to an employee subjected to supervisor harassment under such circumstances is that reporting sexually harassing behavior is rife with danger and submission is the reasonable alternative under the circumstances.<sup>408</sup>

b. Antiharassment/Antiretaliation Policy

In addition to evaluating the culture of the victim's working environment, the trier of fact should ascertain whether the employer maintained an antiharassment policy and, if so, whether the victim knew of the employer's antiharassment policy. Although *Ellerth* and *Faragher* do not require that an employer demonstrate that it actually distributed or made its policy available to the victim to satisfy the first prong of the defense, the City's outright failure to disseminate its policy in *Faragher* proved fatal to its ability to assert the affirmative defense.<sup>409</sup> Moreover,

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<sup>406</sup> Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call For Women*, 68 BROOK. L. REV. 457, 507 (2002) (arguing that courts should require employers to address women's fears of retaliation by demonstrating effectiveness of their antiharassment policies through dissemination of results of, and actions taken against harassers regarding, prior sexual harassment complaints); see also EEOC, *supra* note 147, ¶ V.D.1.c. ("[A]n employee would have a reasonable basis to believe that the complaint process is ineffective if . . . he or she was aware of instances in which co-workers' complaints failed to stop harassment.").

<sup>407</sup> EEOC, *supra* note 147, ¶ V.D.1.c.; see, e.g., *Frank v. Plaza Constr. Corp.*, 186 F. Supp. 2d 420, 430-31 (S.D.N.Y. 2002) (denying summary judgment for employer, and concluding that triable issue of fact existed as to whether plaintiff had been unreasonable in her outright failure to report sexually harassing conduct by chairman of board of directors and chief executive officer when her failure was based on harasser's high rank within company and fact that prior reports of harassment by other executive had been ignored and "provoked heightened hostility towards her," and implying that harasser's status alone may have been sufficient to create triable issue of fact); see also *Harper*, *supra* note 253, at 68-69 (noting that in assessing whether victim is lower cost avoider under circumstances it is necessary to consider victim's circumstances, including comparison of relative value of supervisor and victim to employer such as, for example, relative disparity between supervisor who is company's "leading sales producer" and victim who works as "filing clerk"). For an alternative basis for imposing employer liability based on the conduct of a high-level supervisor who serves as a "proxy" for the corporation, see *supra* text accompanying note 121.

<sup>408</sup> See, e.g., *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747-48 (M.D. Tenn. 1998) (concluding that employer could not establish that employee's failure to report was unreasonable under second prong where employer had not provided copy of its antiharassment policy to plaintiff and employee's work environment had "atmosphere" where employees feared retaliation and retribution for reporting).

<sup>409</sup> See *supra* notes 139-43 and accompanying text.

the fact that the victim is either unaware of or has not seen the terms of the policy bears on the reasonableness of the victim's response under the second prong.<sup>410</sup> If the victim knew about the policy, the trier of fact should then examine the specific terms of the policy as they bear directly on whether a plaintiff's decision to submit was unreasonable.

Currently, the specific terms of the employer's antiharassment policy are assessed, if at all, only under prong one.<sup>411</sup> Nevertheless, a searching inquiry under prong one is often lacking. Courts routinely conclude that the employer satisfies its burden under prong one through "file-cabinet compliance," "where the employer demonstrates that it "develop[ed] and distribut[ed] [its] nicely worded harassment polic[y] and procedures."<sup>412</sup> Such a conclusion is problematic in the submission context because, in lieu of analyzing the plaintiff's conduct and whether her failure to report is unreasonable under prong two, many courts engage in the following flawed syllogism: if the employer's efforts to prevent sexual harassment — file-cabinet compliance — are reasonable, then the plaintiff's failure to follow such procedures is thus necessarily unreasonable.<sup>413</sup>

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<sup>410</sup> See, e.g., *Boyd v. Snow*, 335 F. Supp. 2d 28, 36 (D.D.C. 2004) (stating that employer's failure to provide copy of its antiharassment policy to victim and further failure to direct her to its company website which contained information regarding employer's antiharassment policy was relevant to assessing reasonableness of victim's response to her supervisor's harassment).

<sup>411</sup> See, e.g., *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1028 (10th Cir. 2001) (stating that employer failed to satisfy its burden under prong one where employer failed to provide its nonsupervisory personnel with copies of antiharassment policy, and failed to post policy on employee bulletin boards including bulletin boards in women's changing room, and plaintiff was neither informed of nor provided copy of policy); *Grossman*, *supra* note 26, at 697 (stating that employer's failure to disseminate its antiharassment policy is relevant to whether employer satisfied its burden under prong one to take reasonable steps to prevent sexual harassment).

<sup>412</sup> *Lawton*, *supra* note 349, at 198; see *supra* notes 139-43 and accompanying text (demonstrating how "file-cabinet compliance" is inconsistent with outcome in *Faragher*).

<sup>413</sup> *Lawton*, *supra* note 349, at 215, 242; *Sherwyn et al.*, *supra* note 349, at 1290 (noting tendency of courts to conclude that, because employer took reasonable steps to prevent sexual harassment and thus satisfied prong one, employee's failure to report was "per se 'unreasonable'"); see, e.g., *Ashmore v. J.P. Thayer Co.*, 303 F. Supp. 2d 1359, 1372 (M.D. Ga. 2004) (reversing jury verdict in favor of plaintiffs, concluding that employer's antiharassment policy constituted reasonable efforts to prevent harassment under prong one, and further concluding that plaintiffs' failure to follow terms of such reasonable policy, which required that plaintiffs report sexual harassment within 48 hours of its occurrence, was therefore unreasonable). The flawed syllogism renders the reasonableness assessment under the second prong superfluous. As discussed in Part V.A *supra*, the Court's statement that an employee's unreasonable failure to report will "normally suffice" indicates that a failure to comply with a reasonable complaint procedure does not always suffice.



Worse yet, the tendency to conclude that a victim's failure to report is unreasonable when her employer demonstrates file-cabinet compliance under prong one leads to a perverse result. Instead of incentivizing employers to provide multiple formal and informal reporting avenues for employees, employers may conclude that they may immunize themselves from liability by implementing a cryptic policy that provides fewer reporting avenues, and thus make it harder for an employee to report sexual harassment.<sup>414</sup> Under this theory, employers will fare better in sexual harassment cases by making it more difficult for employees to complain by, for example, canceling their "1-800" harassment reporting lines.<sup>415</sup> Such a result is obviously counter to the goals of *Ellerth* and *Faragher*. In any event, the more logical analysis is that the more cryptic and difficult a policy is to follow, the more likely the trier of fact will conclude that a subordinate's failure to follow that policy was not unreasonable.<sup>416</sup>

Moreover, because most employees subjectively fear retaliation and consider this fear a factor in their decision whether to report, courts should scrutinize the terms of the employer's antiretaliation policy, the

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<sup>414</sup> Sherwyn et al., *supra* note 349, at 1294.

<sup>415</sup> *Id.*; see Lawton, *supra* note 349, at 252-53 (contending that "[b]y permitting employers to restrict the methods by which victims can report harassment, courts make reporting more difficult . . . [which], in turn, ensures that fewer employees will do so," and further arguing that this approach permits employer to avoid liability by "narrowly defining when it obtains notice" and thus "frustrat[es] *Ellerth's* and *Faragher's* stated goal of deterrence").

<sup>416</sup> Marks, *supra* note 349, at 1457 (acknowledging inverse relationship between steps taken by employers to combat harassment and victim's reasonableness in failing to report); EEOC, *supra* note 147, ¶ V.D.1.b. ("[E]mployee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints . . . [such as] if the process entailed undue expense by the employee, inaccessible points of contact for making complaints, or unnecessarily intimidating or burdensome requirements."); see, e.g., *Fiscus v. Triumph Group Operations, Inc.*, 24 F. Supp. 2d 1229, 1240-41 (D. Kan. 1998) (holding that plaintiffs' failure to complain of various incidents of supervisor's sexually harassing conduct was unreasonable as matter of law where employer had written antiharassment policy that permitted complaints through numerous avenues, company "condemned harassing behavior in a public forum and conducted antiharassment workshops/training for its supervisors," and plaintiffs' prior complaints had been promptly addressed and resolved); cf. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1310, 1316 (11th Cir. 2001) (reversing summary judgment for employer, and concluding that triable issue of facts existed as to whether plaintiff's delay of more than one year in reporting her supervisor's sexual advances and offensive touching constituted unreasonable failure to take advantage of preventive or corrective opportunities or to otherwise avoid harm where plaintiff claimed that she had not received her employer's antiharassment policy, employer's code of conduct was unclear about how to report complaint even though it included reference to anonymous "Ethics Code Hotline" available to employees, and when plaintiff did complain she was allegedly told not to pursue her complaint).

formal and informal mechanisms implemented by the employer to prevent and remedy retaliation, and the efficacy of those mechanisms in preventing retaliation.<sup>417</sup> Indeed, the EEOC's Guidelines require that an employer not only make it clear that retaliation is not tolerated, but also require that the employer "undertake whatever measures are necessary to ensure that retaliation does not occur."<sup>418</sup> For example, an antiretaliation provision will appear more credible to an employee, particularly an employee who fears job detriment, if the employer details and then takes affirmative steps to prevent and address retaliation, instead of simply asserting that the employer adheres to a "zero tolerance" retaliation policy.<sup>419</sup> One commentator suggested that courts should require employers to follow up with the complainant some time after the complaint to determine whether the complainant experienced any form of retaliation.<sup>420</sup> If an employer maintained and implemented an effective antiretaliation policy, employees might be encouraged to report. In any event, the employer's efforts in this regard would be one factor tending to show why an employee's failure to report was unreasonable under the circumstances.

Another alternative is to provide a specific retaliation bypass mechanism in the policy itself by mandating that a supervisor other

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<sup>417</sup> Fitzgerald et al., *supra* note 385, at 135 ("[If] resistance is to have any meaning, interventions must be developed to ensure that organizations provide a safe environment for victims to express that resistance through both formal and informal channels. Training programs designed to teach women to be more assertive and to access organizational complaint procedures, well-intentioned though they may be, are insufficient and misguided, without meaningful organizational protection from stigma and retaliation."); Harper, *supra* note 253, at 66-67 (arguing that, in absence of tangible employment action, employer should be able to avoid vicarious liability for harassment under affirmative defense "if and only if the employer has taken reasonable steps to make reporting of this harassment seem of relatively low cost to victim, and victim has still failed to report offending conduct"); see also MCCORMICK ON DAMAGES, *supra* note 366, ch. 5, § 42, at 152-55 (stating that in evaluating reasonableness of course of action, victim's recovery is not diminished if course of action by which victim might have avoided or "lessened the injury" is of "such debatable efficacy that a reasonable man might either have adopted it or not").

<sup>418</sup> EEOC, *supra* note 147, ¶ V.D.1.b.

<sup>419</sup> Harper, *supra* note 253, at 77-78 n.139 (arguing that, to prevail on second prong of affirmative defense, employer should be required to demonstrate that it "has successfully neutralized [the] risks [of retaliation] for a reasonable victim of harassment," and noting that employer's attitudes toward sexual harassment are "reflected in their actions rather than in their words").

<sup>420</sup> Lawton, *supra* note 349, at 267-68 (arguing that in evaluating prongs one and two of affirmative defense, courts should "require employers to produce evidence of the following: (1) complaint records; (2) a system of post-complaint follow-up; (3) employees' evaluations of the employer's policy and procedure; and (4) a system for evaluating managers on their compliance with the firm's antiharassment policy and procedure").

than, or in addition to, the harassing supervisor evaluate the complainant's work performance for a specified period, perhaps a year, after any complaint.<sup>421</sup> A bypass mechanism would likely make the antiretaliation provision more credible and would be relevant in assessing whether the employee's failure to report was unreasonable. Even in the absence of such a protective measure, the policy should at least inform employees that an unreasonable failure to promptly report harassment may preclude their ability to recover from their employer for such harassment.<sup>422</sup>

Given the relationship between a victim's working environment and her willingness to report, the trier of fact should have an opportunity to evaluate these circumstances in assessing whether the victim's chosen course of action was unreasonable under the circumstances. Although employers cannot control the behavior of every supervisor, they can certainly create, and should be required to demonstrate to the trier of fact, the existence of a working environment that communicates and reinforces a strong antiharassment/antiretaliation message to supervisors and victims alike.

### 3. Consequences of Harm

Finally, in determining whether the victim's decision to submit was unreasonable, the trier of fact must consider the consequences of the alternative courses of action available to the victim, in light of her unique circumstances. For example, the *Restatement of Torts* provides that a victim's financial resources are directly relevant to the victim's cost-benefit analysis in determining which course of action to pursue.<sup>423</sup>

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<sup>421</sup> See, e.g., Allen G. King, *Resist and Report: A Policy to Deter Quid Pro Quo Sexual Harassment*, 50 BAYLOR L. REV. 333, 343 (1998) (arguing pre-Ellerth/Faragher that antiharassment policy directed at sexual extortion should include, inter alia, assurances that "any adverse actions taken against her for a specified period will be scrutinized carefully by higher management" and "resist and report" provision that imposes affirmative duty on victim to resist and report quid pro quo threats and advances and subjects victim to discipline for failing to do so). Given the courts' tendency to equate file-cabinet compliance with reasonable efforts to prevent sexual harassment, and thus conclude that a victim who failed to follow such reasonable procedures was necessarily unreasonable, a resist and report provision would simply provide further grounds for pro-employer courts to conclude that the victim's submission was unreasonable under prong two because she breached the resist and report duty. A duty to resist and report would pose less of a problem if courts ceased engaging in the flawed syllogism discussed above and instead properly applied the second prong and considered the victim's unique circumstances.

<sup>422</sup> Bauchner, *supra* note 346, at 318.

<sup>423</sup> RESTATEMENT, *supra* note 367, § 918 cmt. e ("A poor man cannot be expected to

While a trier of fact may conclude that it is unreasonable for a victim of financial means to submit under certain circumstances, that same trier of fact may conclude that submission on the part of a victim who lives paycheck-to-paycheck or is in a financially precarious position is not unreasonable under otherwise identical circumstances.<sup>424</sup> The same would apply to a victim who, for example, desperately needs health benefits for either herself or a loved one and who does not have the means to secure those health benefits elsewhere.<sup>425</sup>

In addition to financial consequences, the above principles relate equally to intangible considerations, such as the negative impact of reporting on career advancement.<sup>426</sup> For example, imagine a well

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diminish his resources by the expenditure of an amount that might be expected from a person of greater wealth. So too, whether it is unreasonable for a slightly injured person not to seek medical advice may depend on his ability to pay for it without financial embarrassment.”); see *supra* text accompanying note 375; cf. Amanda M. Jarratt, Comment, *Customizing the Reasonable-Woman Standard to Fit Emotionally and Financially Disabled Plaintiffs Is Outside the Scope of the Civil Rights Act’s Prohibition on Sex-Based Discrimination: Holly D. v. California Institute of Technology*, 34 GOLDEN GATE U. L. REV. 127, 144-57 (arguing that plaintiff’s financial circumstances are not relevant to whether her failure to report was unreasonable but not considering relevant avoidable consequences principles underlying second prong, which call for just such assessment of victim’s unique circumstances).

<sup>424</sup> See, e.g., *Hawk v. Americold Logistics, LLC*, No. 02-3528, 2003 WL 929221, at \*9-10, 12 (E.D. Pa. Mar. 6, 2003) (denying summary judgment for employer on grounds that reasonable jury could find that, notwithstanding fact that plaintiff had attended antiharassment training and was aware of her employer’s antiharassment policy, plaintiff’s seven to eight month delay in reporting her direct supervisor’s sexually offensive conduct was not unreasonable failure to either report or otherwise avoid harm when reason for delay was plaintiff’s fear that she would lose her job given her probationary status with employer and her supervisor’s knowledge of how important job was to plaintiff).

<sup>425</sup> See, e.g., *Aldridge v. State*, No. 96-2382-JWL, 1997 WL 614323, at \*3, 8 (D. Kan. Sept. 10, 1997) (concluding in pre-*Ellerth* quid pro quo context that plaintiff alleged viable quid pro quo claim based on threats alone where plaintiff’s supervisor implicitly threatened plaintiff’s job when he knew that plaintiff’s daughter was terminally ill and, after plaintiff again rejected his unwelcome sexual advances, he commented, “[y]ou know if you ever lost this job, no one would ever insure [your daughter]” and further queried, “[h]ow would you ever pay for [your daughter’s surgeries] without insurance?”); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1209 (D.R.I. 1991) (holding that plaintiff stated viable claim of quid pro quo harassment pre-*Ellerth* where his supervisor coerced him to engage in unwelcome sexual acts through supervisor’s threats that he would use his extensive connections in plaintiff’s industry to ensure that plaintiff would be “blackballed from the industry if he did not comply” and further threatened plaintiff with “loss of his medical benefits if he failed to participate in the sexual activity” when supervisor had previously learned from plaintiff that plaintiff’s son had “heart defect and had undergone three open heart surgeries”), *aff’d sub nom. Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4 (1st Cir. 1993).

<sup>426</sup> Lawton, *supra* note 349, at 257 (noting that empirical studies show that “victims do not report harassment because they believe that reporting will make the situation worse,” including beliefs that reporting will “adversely affect their careers”).

regarded female associate in a prestigious law firm who will be considered for partnership promotion in one year's time. She has been explicitly threatened with nonadvancement by a partner responsible for a large portion of firm revenue. Depending on the circumstances, she may reasonably conclude that the least costly alternative given her situation is to submit. Indeed, under some circumstances, the power disparity alone might be enough to create a triable issue of fact as to whether her failure to report was unreasonable under the circumstances.<sup>427</sup>

Moreover, many harassment victims have invested considerable time and effort to achieve their current level of career success and goodwill with their employer.<sup>428</sup> While a victim slowly amasses success and goodwill in the workplace over time, it is easily lost by reporting the harassing conduct of a superior who possesses not only the power to hire and fire but, perhaps more importantly, the power to influence, if not make, promotion decisions. Furthermore, given the difficulty of building goodwill, securing a different job that is comparable in all respects, including goodwill, is likely to be extraordinarily difficult, if not virtually impossible. And although Title VII may compensate the victim for any loss of income, it is highly unlikely that the victim will be compensated for the loss of goodwill. Thus, in some circumstances, the victim may still be worse off for having reported the supervisor's harassing conduct.

Furthermore, in fields such as law or medicine, where a specific career "track" consisting of a certain number of years exists, the victim who reports in the face of a threat of nonadvancement may end up unofficially "off-track" with her current employer. Because no employee is consistently perfect, the victim's employer will have no difficulty explaining that the level of scrutiny increases as the victim progresses toward partnership or its equivalent and that the victim's unofficial off-track status is simply the result of the victim's failure to live up to the employer's standards when subjected to such increased scrutiny.<sup>429</sup>

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<sup>427</sup> See *supra* text accompanying note 407.

<sup>428</sup> See Jordan, *supra* note 345, at 214-15; see also Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 532-33 (1997) (discussing value of work and how "[w]ork shapes individual identities in ways both general and particular"); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000) (discussing how work in United States "has been constitutive of citizenship, community, and even personal identity").

<sup>429</sup> See Estrich, *supra* note 322, at 835-36 (noting that proving causal element in quid pro quo or other discrimination claim is often difficult as "an employer can always find good reasons to fire people"); see also Grossman, *supra* note 26, at 724-25 (noting that

Moreover, given the high burden for retaliation claims under Title VII and the highly subjective nature of promotion decisions in the professional setting, a victim may have difficulty characterizing her unofficial off-track status as an “ultimate employment decision” or “adverse employment action” required for a retaliation claim.<sup>430</sup> Under such circumstances, a jury should be permitted to assess a victim’s cost-benefit analysis and determine not whether submitting was the best alternative as revealed in hindsight, but whether it was simply a reasonable alternative under the victim’s unique circumstances.<sup>431</sup>

Given the avoidable consequences principles and the highly factual nature of the inquiry, courts should permit the trier of fact to consider all relevant aspects of the victim’s circumstances in determining whether her decision to submit was unreasonable. It is only when the victim’s failure to report was patently “stubborn” or similarly without any reasonable basis under the circumstances that an employer should prevail on the second prong as a matter of law. While some may argue, as the First Circuit observed in *Reed*, that the second prong potentially serves as a “loophole for false or overstated claims of threat by one hoping to reach a sympathetic jury,” juries are expected to be able to detect false claims and evaluate both the evidence and “reasonable behavior in human situations.”<sup>432</sup> More importantly, the Court’s opinions in *Ellerth* and *Faragher* mandate such an assessment.

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“documented consequences of reporting harassment are quite severe” and may include monetary consequences and, “[f]or women in professional careers, such as law, medicine, or academics, silence in the face of harassment may be a calculated measure to avoid losing the sponsorship or mentorship of an older, more established male partner, doctor, or tenured professor”).

<sup>430</sup> See *Henry*, *supra* note 398, at 554 (arguing that high threshold for retaliation claims under Title VII is inconsistent with second prong’s requirement that victims report because actions such as “change in job duties” or “negative evaluation” do not constitute “ultimate employment decisions” required for viable retaliation claim, and thus proposing more inclusive approach to retaliation claims); *Lawton*, *supra* note 349, at 265-66 (discussing that, because “[c]ourts are split on whether unfairly evaluating performance alone can trigger retaliation,” plaintiffs who report and receive unfair performance evaluations may be unprotected as they may not be able to state prima facie retaliation case under Title VII).

<sup>431</sup> The situations discussed in this Part V.B are simplistic accounts for illustration purposes. The factors delineated are not intended as a comprehensive list of the relevant factors to be considered by the jury, although such factors are likely relevant in many situations in which harassment arises. In addition to the factors delineated in this Part, the jury must also consider any other aspect of the circumstances that bears on whether the plaintiff was reasonable in submitting rather than reporting the harassing behavior. See *supra* text accompanying notes 359, 385.

<sup>432</sup> *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 37 (1st Cir. 2003).

### C. Illustrative Cases Applying the Second Prong

Although not expressly basing their analysis on avoidable consequences principles, a small minority of courts have implicitly recognized the need for the trier of fact to engage in this type of cost-benefit and context analysis when determining whether a plaintiff's failure to report or her submission to sexually harassing conduct was unreasonable under the circumstances. A case that correctly applied the avoidable consequences principles required under *Ellerth* and *Faragher* is discussed below in Part V.C.1. For comparison purposes, a case that failed to correctly apply the requisite avoidable consequences principles is included in Part V.C.2.

#### 1. Second Prong Correctly Applied

In *Bennett v. Progressive Corp.*,<sup>433</sup> the district court concluded that a triable issue of fact existed regarding whether Bennett unreasonably failed to report and instead submitted to her supervisor's eight-month campaign of unwelcome sexual advances because she feared her supervisor's threats of job detriment. Bennett initially ignored her supervisor's unwelcome conduct, but the conduct became progressively more severe.<sup>434</sup> Nevertheless, she did not report the conduct because she needed her job, as she was financially supporting her family, her father was ill, her mother had lost her job, and her brother had moved in with her after losing his home.<sup>435</sup> She feared retaliation because her supervisor had previously overburdened another employee who he disliked, which ultimately caused that employee to resign.<sup>436</sup> Moreover, when Bennett attempted to distance herself from the supervisor, he delayed her projects, refused to answer work-related questions, and intimated that he was her "only protection" in the office.<sup>437</sup>

Over the subsequent months, Bennett's supervisor's behavior continued to increase in severity both in and out of the office.<sup>438</sup> Although she periodically contemplated reporting her supervisor's conduct, she did not do so because she feared losing her job.<sup>439</sup> Additionally, she felt insecure about complaining to her supervisor's

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<sup>433</sup> *Bennet v. Progressive Corp.*, 225 F. Supp. 2d 190 (N.D.N.Y. 2002).

<sup>434</sup> *Id.* at 197-98.

<sup>435</sup> *Id.* at 198.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at 199-200.

<sup>439</sup> *Id.* at 199.

superior because of the close personal relationship between them.<sup>440</sup> Ultimately, based on Bennett's fear of termination and her supervisor's continued and escalating pressure to coerce her into acquiescing to his advances, she submitted to her supervisor's sexual advances and ultimately had sexual intercourse with him.<sup>441</sup> When Bennett subsequently threatened to file a complaint if he did not cease his behavior, the supervisor told her that her career with their employer would be over if she complained.<sup>442</sup> Ultimately, Bennett reported her supervisor's conduct.<sup>443</sup>

Based on these facts, the court denied the employer's motion for summary judgment and concluded that a jury could find that Bennett's failure to report the eight-month period of harassment and her submission to unwelcome sexual intercourse was not unreasonable.<sup>444</sup> The court found that Bennett's eight-month delay in reporting her supervisor's conduct was not dispositive.<sup>445</sup> It reasoned that a delay of such length is "reasonably explained by her fear of retaliatory termination and the financial insecurity such termination would bring with it."<sup>446</sup>

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<sup>440</sup> *Id.* at 197, 199.

<sup>441</sup> *Id.* at 199.

<sup>442</sup> *Id.* at 200.

<sup>443</sup> *Id.* at 201.

<sup>444</sup> *Id.* at 209.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* The court noted the delay in reporting might also be explained by the fact that it is difficult for a plaintiff to determine when the harassment becomes actionable. *Id.* at n.5 (citing Marks, *supra* note 349, at 1429); see also Reed v. MBNA Mktg. Sys., 333 F.3d 27, 36 (1st Cir. 2003) (concluding as matter of law that plaintiff was not unreasonable in failing to report her supervisor's verbally offensive conduct that occurred months prior to sexual assault because plaintiff "could reasonably have regarded this low-level harassment as not worth reporting; indeed, standing alone, it may not have triggered Title VII liability at all"). Additionally, because it is difficult to determine when harassment becomes actionable, a victim's informal efforts to prevent harassment should be considered as evidence bearing on the reasonableness of the victim's actions. See, e.g., Hardy v. Univ. of Ill. at Chi., 328 F.3d 361, 365 (7th Cir. 2003) (reversing summary judgment in favor of employer, and concluding that triable issue of fact existed as to whether plaintiff's six-week delay in reporting her supervisor's repeated sexual advances was unreasonable given her initial efforts to resolve situation informally through numerous requests to supervisor that he stop behavior).

For a case in which the First Circuit engaged in a similar cost-benefit analysis regarding whether the plaintiff's failure to report was unreasonable, see Reed, 333 F.3d at 37 (concluding that triable issue of fact existed as to whether 17-year-old plaintiff had been unreasonable in failing to report that her supervisor, who was twice her age, had sexually assaulted her and expressly threatened discharge if she reported).



## 2. Second Prong Incorrectly Applied

In contrast to the *Bennett* court's correct application of the second prong, one of the most egregious examples of an incorrect application of the second prong in the submission context and the unjust result that followed is seen in *Samedi v. Miami-Dade County*.<sup>447</sup> Samedi was a Haitian native who understood<sup>448</sup> and spoke only minimal English<sup>449</sup> and was unable to read English.<sup>450</sup> She worked as a temporary county employee, and her duties generally included picking up trash in the field and performing other custodial duties in various office environments.<sup>451</sup> Shortly after she began working, two of her superiors began sexually assaulting her.<sup>452</sup> According to Samedi, the two superiors each forced her to engage in numerous unwelcome sex acts with them during working hours by telling her that she had to submit to them because they were her superiors and by threatening to fire her if she refused.<sup>453</sup> During many of the sexual assaults, she attempted to defend herself, but her attacker physically overwhelmed her.<sup>454</sup> These sexual assaults spanned a five-year period and included numerous incidents of "digital vaginal penetration, sexual intercourse, and/or oral copulation."<sup>455</sup> During the entire five-year period, Samedi remained a temporary employee.<sup>456</sup>

Five years into Samedi's temporary employment with the county, she had an opportunity to meet with the county's human resources officer, at which time she promptly informed the officer of the sexual assaults.<sup>457</sup> The officer immediately began an investigation and, as a result of the investigation, Samedi's superiors were demoted and relocated.<sup>458</sup>

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<sup>447</sup> 206 F. Supp. 2d 1213 (S.D. Fla. 2002).

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* at 1215.

<sup>450</sup> *Id.*; *Samedi v. Miami-Dade Co.*, 134 F. Supp. 2d 1320, 1325 (S.D. Fla. 2002).

<sup>451</sup> *Samedi*, 206 F. Supp. 2d at 1215.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 1216.

<sup>455</sup> *Id.* at 1216 n.4. Other debasing conduct included one instance in which Samedi's superior instructed one of her male coworkers to remove his clothing and ordered Samedi to join the nude coworker. *Id.* at 1216. She endured numerous other instances where her superior would refuse to take her to the restroom while she worked in the field so that she was relegated to urinating on public streets while her superior watched her. *Id.*

<sup>456</sup> *Id.* at 1217.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

Subsequently, Samedi filed suit against her employer for sexual harassment.<sup>459</sup> The county moved for summary judgment on the grounds that it satisfied both elements of the *Ellerth/Faragher* affirmative defense.<sup>460</sup> Regarding the second prong, the employer alleged that Samedi unreasonably failed to report the five-year campaign of abuse, notwithstanding her temporary status and her allegations that her superiors had repeatedly threatened her with discharge.<sup>461</sup> The district court concluded: “[N]ot only is it totally unreasonable that the [p]laintiff took no other action in four years to stop the alleged forcible rapes and harassment, but it seems inconceivable.”<sup>462</sup> The court stated that the first prong of the affirmative defense is satisfied by mere posting, and considered it irrelevant that Samedi never saw the employer’s antiharassment policy, which was posted on a bulletin board at the work site and written only in English.<sup>463</sup> The court noted that Samedi had numerous complaint avenues available to her, such as her temporary agency, other supervisors, the police, and fellow employees.<sup>464</sup> It further surmised that “the fact that [the plaintiff] did nothing in the face of such extreme abuse, tends to shed some doubt on the [p]laintiff’s allegations.”<sup>465</sup> The court also found it significant that Samedi previously complained to one of her abusive superiors about a coworker who mocked her inability to speak English and admitted that she was pleased with how the situation was handled.<sup>466</sup> Accordingly, the court concluded that her “failure to do anything to prevent the harm she complains of was unreasonable.”<sup>467</sup>

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<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 1218-19.

<sup>461</sup> *Id.* at 1222-23.

<sup>462</sup> *Id.* at 1223. Alternatively, the court could have concluded that the lengthy delay was tangible evidence of the plaintiff’s credible fear of job detriment. *See supra* text accompanying note 446.

<sup>463</sup> *Samedi*, 206 F. Supp. 2d at 1220.

<sup>464</sup> *Id.* at 1223.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*; *see also* *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (affirming summary judgment for employer, and concluding that plaintiff, whose senior supervisor had previously subjected her to unwelcome sexual advances and groping at work-related conference, “utterly failed ‘to avoid harm otherwise’” at similar work-related conference six months later because she “unnecessarily put herself in a situation that permitted repetition of precisely the same kind of advances” when, after receiving senior supervisor’s apology for his prior conduct and his promise not to “touch her,” plaintiff accepted senior supervisor’s invitations to accompany him to two bars and later to his hotel room where he again subjected plaintiff to unwelcome sexual advances and groping).

Based on the avoidable consequences principles underlying the second prong of the affirmative defense, the *Samedi* court incorrectly applied the second prong. It shifted the burden of proof from the employer to Samedi by requiring her to demonstrate the reasonableness of her actions, and then failed to consider the circumstances relevant to whether her submission and accompanying failure to report was unreasonable. Specifically, the court failed to consider the fact that Samedi was a recent immigrant who worked in an English-speaking environment, but could not read and spoke and understood very little English. The court also did not consider it relevant that Samedi neither saw nor read the county's sexual harassment policy. Moreover, the court did not acknowledge the relevance of her financially precarious temporary employment status and her related hope that she would ultimately obtain a permanent position. The court also made no mention of the fact that she was physically overwhelmed by her superiors when sexually assaulted.

Instead of requiring the employer to demonstrate that it created a working environment in which employees were made to feel comfortable and protected when reporting harassment, the court put the burden on Samedi to demonstrate a work environment in which harassment was rampant and reporting was futile. The court then excluded as irrelevant evidence of sexual harassment complaints and disciplinary action records relating to employees other than the perpetrators.<sup>468</sup> Finally, the court ignored the fact that once Samedi came into contact with a human resources officer, she promptly reported the conduct.

Although a jury could have concluded that Samedi's submission and failure to report was unreasonable, the circumstances represent perhaps the quintessential example of a triable issue of fact regarding the reasonableness of her actions. Nevertheless, the court usurped the jury's role, shifted the burden of proof from the employer to Samedi, ignored the pertinent circumstances in which she found herself, and concluded that her submission and failure to report was unreasonable as a matter of law. This outcome directly conflicts with the result mandated by *Ellerth* and *Faragher*.

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<sup>468</sup> Such evidence had been submitted by the plaintiff in opposition to an earlier summary judgment motion on her civil rights and Title VII sexual harassment claim. *Samedi*, 134 F. Supp. 2d at 1330-31.

## CONCLUSION

While supervisory sexual extortion is no less pernicious than it was prior to 1998, the employer liability standards for this classic quid pro quo scenario changed following the Court's decisions in *Burlington Industries, Inc. v. Ellerth*<sup>469</sup> and *Faragher v. City of Boca Raton*.<sup>470</sup> Instead of holding an employer strictly liable for supervisory sexual extortion due to the supervisor's use of official power and the deleterious effects that the supervisor's conduct has on a submission victim, *Ellerth* and *Faragher* focused on whether the employer's official decision-making processes were implicated in the supervisor's conduct, as evidenced by a tangible employment action. Under this new framework, strict liability is appropriate only when the supervisor takes a tangible employment action against a subordinate for refusing to submit to the supervisor's unwelcome sexual advances.

In the submission context, a sexual extortion victim will be unable to make the necessary showing to impose strict liability under *Ellerth* and *Faragher* because her submission enabled her to avoid the job detriment required for a tangible employment action. In the absence of a tangible employment action, a submission plaintiff's circumstances must be evaluated as a hostile environment claim. Thus, a submission plaintiff must first demonstrate that she was subjected to an actionable hostile environment. If she makes the necessary showing, her employer can then assert and prove the two-prong affirmative defense. Under the second prong as currently, and incorrectly, applied by many lower courts, most employers would likely prevail on a summary judgment motion regarding submission claims. This leaves submission plaintiffs without vindication of their rights or compensation for their injuries in circumstances where the submission was not unreasonable.

Under the approach to the second prong advanced in this Article, the result may be dramatically different if juries are permitted to consider the submission plaintiff's unique circumstances in light of the harm-avoidance principles of the avoidable consequences doctrine. While not exhaustive, the critical factors in the harm-avoidance analysis include an assessment of whether the victim possessed a credible fear of harm, the victim's working environment, and the perceived consequences of the victim's refusal to submit. Following *Ellerth* and *Faragher*, the jury should be permitted to consider these and any other relevant factors presented by the circumstances to determine whether the plaintiff's

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<sup>469</sup> 524 U.S. 742 (1998).

<sup>470</sup> 524 U.S. 775 (1998).

submission was unreasonable in light of the surrounding circumstances. Put in harm-avoidance terms, the jury should be given an opportunity to assess whether the victim faced two competing harms and to further assess the reasonableness of the submission victim's actions in light of those competing harms.

As Judge Reinhardt aptly stated in *Nichols v. Frank*: "[N]othing is more destructive of human dignity than being forced to perform sexual acts against one's will."<sup>471</sup> While this is undoubtedly true, being forced to perform sexual acts against one's will is even more destructive when the employer avoids liability altogether because the jury is not permitted to hear evidence regarding why the decision to submit was not unreasonable under the circumstances. Under the approach to the second prong advanced in this Article, such a result is far less likely to occur.

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<sup>471</sup> 42 F.3d 503, 510 (9th Cir. 1994).