2001

Using Evidence of Women's Stories in Sexual Harassment Cases

Theresa M. Beiner
University of Arkansas at Little Rock William H. Bowen School of Law, tmbeiner@ualr.edu

USING EVIDENCE OF WOMEN'S STORIES IN SEXUAL HARASSMENT CASES

Theresa M. Beiner[*]

I. INTRODUCTION

The legal standards the United States Supreme Court has developed concerning sexual harassment law do not always reflect the reality of how sexual harassment operates in the workplace. In particular, the Court's recent decisions in *Faragher v. City of Boca Raton*[1] and *Burlington Industries, Inc. v. Ellerth*,[2] while creating an affirmative defense for employers in cases of supervisory harassment, result in a significant burden on the harassed employee to come forward and report the harassment as early as possible. While this might make sense in terms of giving the employer the opportunity to nip the harassment in the bud, it does not reflect the manner in which many women[3] respond to harassment. By ignoring or simply disbelieving the explanations of women who try to explain their behavior, the courts have ignored women's stories, which are grounded in the realities of a working woman's life. Instead, the courts have engaged in "assumptions" about the way women "should" or "ought" to behave, creating standards that many women can not meet. The result is that the courts' legal standards and the factual assumptions that underlie those standards, rather than tending to eliminate harassment in the workplace, tend to let it flourish.

The two-pronged defense set up by the Court in these cases has given lower courts the fuel they need to engage in assumptions about the manner in which victims of harassment "should" behave. These "assumptions" all too often do not reflect reality. How do we know this?

---

* Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law. I would like to thank Linda Hamilton Krieger and Susan Bisom-Rapp for their helpful comments on earlier drafts of this article as well as Louise Lowe of the UALR Law Library for tracking down many of the sources cited in this article. Special thanks go to Erin Vinett, a third year student at UALR, for her helpful research assistance. Finally, I must thank Patti Stanley, symposium editor for the UALR Law Review, and the UALR editorial board and staff for their support of the symposium at which this paper was delivered.

1. 524 U.S. 775 (1998).
2. 524 U.S. 742 (1998).
3. In the course of this essay, I will discuss harassment of women and will refer to victims of harassment as "she." This is not intended to suggest that men are not harassed or that harassment of men is not an important issue. Rather, studies suggest that victims of harassment are most often female, and social scientists, the studies of whom are fundamental to many of the positions I take in this paper, have focused on sexual harassment of women by men. Thus, I have chosen to use harassment of women by men as the prototypical form of harassment discussed in this paper.

We know this because just as the courts have sought to address the issue of sexual harassment in the workplace, so too have social scientists over the past twenty years sought to study and offer explanations of how sexual harassment operates in the workplace. It is based on their research as well as some basic medical diagnoses that I suggest the Court did not set the correct standard for assessing when employers should be held liable for harassment by supervisors.

My particular concern is with the increasing obligation the lower courts (after *Ellerth* and *Faragher*) have put on victims of harassment to report the behavior as early as possible. In many cases, as I will describe below, the courts have deemed unreasonable as a matter of law plaintiffs' failure to apprise their employers of harassers' behaviors at the earliest opportunity, thereby supporting the employer's establishment of the second prong of the *Ellerth/Faragher* defense. Yet, a review of the manner in which victims of harassment behave—behavior that is quite understandable after a review of some of the medical evidence and social facts surrounding the responses to the types of behaviors they experience—reveals that it is not unreasonable for victims of harassment to hesitate before reporting harassing incidents. Indeed, from the employer's perspective, it may not be desirable for employees to report relatively minor incidents.

In this essay, I begin by discussing some of the basics of harassment law, in particular, focusing on the second prong of the newly-created defense established in the *Ellerth* and *Faragher* decisions. I then discuss what social science and medical science tell us about how people respond to the types of stresses experienced by victims of sexual harassment. Finally, I explain why the current standards used by the courts in sexual harassment cases fail to reflect the manner in which victims of harassment respond to harassing behaviors, thereby ignoring the stories of women who are harassed.

II. BASICS OF HARASSMENT LAW

Like many other legal claims, there are a number of elements a plaintiff must allege and ultimately prove in order to state a claim and eventually prevail in a sexual harassment (or any other type of harassment) case brought under Title VII. While the eleven federal circuits formulate the elements of the claim with slight variations, I will rely on the United States Court of Appeals for the Eighth Circuit's interpretation, because that is where this symposium is being conducted. In *Davis*

v. City of Sioux City,[4] the Eighth Circuit stated that a plaintiff must allege and prove the following elements: (1) plaintiff is in a protected group; (2) plaintiff was subject to unwelcome harassment; (3) the harassment was based on plaintiff's protected status; (4) the harassment was sufficiently severe or pervasive to affect a term, condition, or privilege of plaintiff's employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.[5] This fifth element has been changed to the vicarious liability standard of *Faragher v. City of Boca Raton*[6] and *Burlington Industries, Inc. v. Ellerth*[7] in cases of supervisor harassment, and is subject to a newly-created affirmative defense. This defense is the focus of my comments today.

The *Ellerth/Faragher* defense consists of two necessary elements that must be proven by the defendant employer by a preponderance of the evidence. First, the employer must show "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[8] Second, the employer must show "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[9] The Court made clear in both opinions that the defense could be used to limit liability or damages.[10]

In addition, the Court also described what evidence might suffice to prove the affirmative defense:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when

4. 115 F.3d 1365, 1367 n.3 (8th Cir. 1997).
5. *Id.* at 1368 n.5.
6. 524 U.S. 775 (1998).
7. 524 U.S. 742 (1998).
8. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
9. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
10. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Few cases have even acknowledged that the defense might merely limit damages. *See, e.g.*, Watkins v. Prof'l. Sec. Bureau, Ltd., No. 98-2555, 1999 WL 1032614, at **5 (4th Cir. Nov. 15, 1999) (per curiam), *cert. denied*, 529 U.S. 1108 (2000); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 296 (2d Cir. 1999); Brown v. Perry, 184 F.3d 388, 397-98 (4th Cir. 1999). Indeed, the general assumption among courts appears to be that it limits liability. *See, e.g.*, *Watkins*, 1999 WL 1032614, at **5; *Caridad*, 191 F.3d at 296; *Brown*, 184 F.3d at 397-98. *But see* Savino v. C.P. Hall Co., 199 F.3d 925, 934-35 (7th Cir. 1999) (including jury instructions that defense might limit damages rather than liability); Phillips v. Taco Bell Corp., 156 F.3d 884, 889 (8th Cir. 1998) (suggesting the defense might be used to limit damages).

> litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[11]

Thus, the existence, use, and effectiveness of an employer's anti-sexual harassment policy can have a significant impact on an employer's ability to establish the defense.

A. Case Law Interpreting the *Ellerth/Faragher* Defense

While the lower courts have just begun to assess the applicability and contours of the *Ellerth/Faragher* affirmative defense, several themes have already begun to emerge. First, although the courts are careful to note that an employer's anti-harassment policy does not, in and of itself, meet the requirements of the defense, as a practical matter, that is the implication of many rulings to date.[12] Second, the courts appear skeptical of plaintiffs' reasons for not reporting harassment at the earliest opportunity, which helps employers maintain the second element of the defense—that the plaintiff unreasonably failed "to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[13] Cases applying the defense generally have used it as a complete defense and not simply as a means of formulating an appropriate remedy.[14] The defense has also been used to take cases away from the jury by the courts granting either summary judgment or judgment as a matter of law.[15] It is the courts' interpretation of the second element of the defense that is of particular relevance for purposes of my comments today.

---

11. *Ellerth*, 524 U.S. at 765; *see also Faragher*, 524 U.S. at 807-08.

12. *See, e.g., Watkins*, 1999 WL 1032614, at **4; *Caridad*, 191 F.3d at 295; *Brown*, 184 F.3d at 398. *But see* Hurley v. Atlantic City Police Dept., 174 F.3d 95, 118 (3d Cir. 1998) (finding that employer could not hide behind anti-harassment policy to assert *Ellerth/Faragher* defense where it clearly failed to implement its own policy).

13. *Ellerth*, 524 U.S. at 765.

14. *See supra* note 10.

15. *See, e.g., Watkins*, 1999 WL 1032614, at **1 (upholding judgment as a matter of law); Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999) (upholding summary judgment on defense). *But see Phillips*, 156 F.3d at 889-90 (reversing district court's grant of summary judgment for jury to consider defense).

1. *The Effect of an Anti-Harassment Policy Generally*[16]

Before discussing the lower courts' interpretations of the second element of the defense, it is important to acknowledge the effect of an employer's anti-harassment policy. The Court in *Ellerth* and *Faragher* laid the foundation for an employer's anti-harassment policy to form the building blocks for an employer to establish this defense.[17] The lower courts have picked up on this but have acknowledged that simply implementing an anti-sexual harassment policy may not insulate an employer from liability.[18] However, implementation of such a policy often seems to have the net effect of satisfying the first prong of the defense in many cases.[19] As the United States Court of Appeals for the Fourth Circuit explained in *Watkins v. Professional Security Bureau, Ltd.*,[20] the sexual harassment policy's "existence . . . militates strongly in favor of a conclusion that the employer exercised reasonable care to prevent and promptly correct sexual harassment."[21]

In addition, the employer's anti-harassment policy is also useful in meeting the second prong of the defense—that the employee unreasonably failed to take advantage of corrective opportunities offered by the

---

16. Before going into the application of the defense by the lower federal courts, it is important to note that there are several issues developed by the Court in *Ellerth* and *Faragher* with respect to the application of the defense that will not be discussed because they are beyond the scope of this essay. First, who is a supervisor for purposes of the defense will not be discussed. Also, what constitutes a "tangible employment action" for purposes of quid pro quo liability will not be discussed. Finally, what constitutes sufficiently severe or pervasive harassment will not be covered in this essay. Instead, this essay will focus on lower courts' interpretations and applications of the second prong of the defense.

17. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

18. *See, e.g.*, *Watkins*, 1999 WL 1032614, at **4; *Hurley*, 174 F.3d at 118. For the Fourth Circuit's rule regarding unpublished decisions, see FOURTH CIR. R. 36(c). Recently, the Eighth Circuit held that unpublished opinions were unconstitutional, calling into question the federal courts' use of such dispositions. Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc); *see also* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

19. *See, e.g.*, *Watkins*, 1999 WL 1032614, at *4; *Caridad*, 191 F.3d at 295; *Brown*, 184 F.3d at 395; Shaw v. AutoZone, Inc., 180 F.3d 806, 811 (7th Cir. 1999) ("[T]he existence of an appropriate anti-harassment policy will often satisfy this first prong."). *But see Hurley*, 174 F.3d at 118 (employer could not hide behind anti-harassment policy to assert *Ellerth/Faragher* defense where it clearly failed to implement its own policy).

20. No. 98-2555, 1999 WL 1032614, at **4 (4th Cir. Nov. 15, 1999) (per curiam), *cert. denied*, 529 U.S. 1108 (2000).

21. *Id.* (quoting Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999)) (internal quotations omitted); *see also Caridad*, 191 F.3d at 295 (finding existence of policy and employer's endeavors to investigate and remedy problems reported by employees sufficient).

employer or to avoid harm otherwise. Indeed, in many cases described in more detail below, the courts have placed a significant burden on the plaintiff to report harassment pursuant to such an employer policy, even though the burden of proof for the affirmative defense is on the defendant. As one court put it:

> [T]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists.... In short, Shaw [the plaintiff] acted in precisely the manner that a victim of sexual harassment should *not* act in order to win recovery under the new law.[22]

Bearing the importance of the employer's sexual harassment policy in mind, what follows is an analysis of relevant trends in the circuits in applying the second element of the defense.

2. *Courts Often Reject Employee's "Reasonable" Attempts To Thwart Harassment*[23]

The courts' interpretations of this prong have involved several issues, including: (1) what constitutes a reasonable excuse for not using an employer's anti-sexual harassment policy; (2) how long of a delay in

---

22. *Shaw*, 180 F.3d at 813 (emphasis in original) (internal quotations omitted).

23. At the outset, it is a bit unclear how the two elements of the second prong of the defense interact. The literal language from the Court's decisions is as follows: "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." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Some courts seemingly have assumed that if the employee either takes advantage of the employer's complaint procedure or avoids harm otherwise, the employer will not be able to establish prong two of the defense. *See, e.g.*, Williams v. Multnomah Educ. Serv. Dist., No. 97-1197-ST, 1999 WL 454633, at *9-10 (D. Or. Apr. 14, 1999). On the other hand, some courts have suggested that if the employer can show that the employee either unreasonably failed to use the complaint procedure or failed to avoid harm otherwise, the employer will establish the second element of the defense. *See, e.g.*, *Brown*, 184 F.3d at 397. Given the language of the defense, it appears that the former reading is more likely what the Court intended. The language from *Ellerth* and *Faragher* is that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The disjunctive portion of the sentence appears to go to what the *employee* unreasonably failed to do—not what the employer must show to establish this element of the defense. Thus, the employer must show that the employee unreasonably failed to do *both* in order to establish the defense. This follows from basic rules about parallelism. *See* CLAIRE KEHRWALD COOK, LINE BY LINE: HOW TO EDIT YOUR OWN WRITING 61, 61-69 (1995).

reporting harassment is "unreasonable" along with what kinds of excuses for delaying or not reporting harassment are acceptable; and (3) whether an employee is unreasonable in reporting "improperly" under the employer's policy. Thus, although the defendant has the obligation of proving the defense by a preponderance of the evidence, the cases often focus on the behavior of the victim.

a. What is a reasonable excuse for an employee's failure to use the employer's anti-harassment policy?

There are very few circumstances under which a court will deem an employee's reasons for not using the employer's anti-harassment policy reasonable. The EEOC has explained that an employee is reasonable in not using a policy where: (1) the "complaint mechanism entailed a risk of retaliation," (2) "there were obstacles to complaints," and (3) "the complaint mechanism was not effective."[24] However, the courts have been more narrow in their approach.

A plaintiff's refusal to report harassment because of potential repercussions has met with mixed results in providing a plaintiff with an excuse for not reporting harassment or delaying reporting harassment.[25] In many cases, the courts have held that such fears would not excuse an employee's failure to report harassment early on.[26] The courts

24. *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 3 EEOC Compl. Man. (BNA) N:4075, at 31 (June 18, 1999) [hereinafter *Enforcement Guidance*].

25. *See, e.g.*, Desmarteau v. City of Wichita, Kansas, 64 F. Supp. 2d 1067, 1080 (D. Kan. 1999) (holding fear of repercussions insufficient where "[s]uch a justification lacks any objectively reasonable basis in the record"); Robinson v. Truman Coll., No. 97-C-896, 1999 WL 33887, at *7 (N.D. Ill. Jan. 19, 1999) (finding plaintiff unreasonable in not reporting due to her unsubstantiated fear for her job); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (finding employee unreasonable in failing to complain based on "generalized fear" of repercussions). *But see Caridad*, 191 F.3d at 295 (indicating that reluctance to report based on apprehension of what employer might do may preclude defense); Maple v. Publ'ns Int'l Ltd., No. 99-C-6936, 2000 WL 1029112, at *5 (N.D. Ill. July 25, 2000) (finding plaintiff's reluctance to report reasonable where harasser had threatened plaintiff's job, co-workers told her nothing would be done and retaliation would result); Meng v. Ipanema Shoe Corp., 73 F. Supp. 2d 392, 402 (S.D.N.Y. 1999) (holding issue of fact existed as to reasonableness of failure to report in light of harasser's high status and threats to fire her if she reported); Booker v. Budget Rent-A-Car Sys., 17 F. Supp. 2d 735, 747-48 (M.D. Tenn. 1998) (finding issue of fact as to whether employee was reasonable in not complaining because of feared retaliation in racial harassment context). In *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1032-33 (N.D. Iowa 2000), the court found the employee acted reasonably in reporting harassment to a supervisor who then reported it to someone who could act on behalf of the company.

26. *See, e.g., Caridad*, 191 F.3d at 295 (noting that reluctance to report based on

in these cases characterized the victim's fears as "unsubstantiated,"[27] too "generalized,"[28] or lacking in "any objectively reasonable basis."[29] In *Fierro v. Saks Fifth Avenue*,[30] the court explained the reasons for its reluctance to allow the threat of repercussions to justify an employee's failure to report:

> [E]very employee who feels harassed by a supervisor will at some level fear the inevitable unpleasantness which will result from complaining to the employer. Confrontation is by its very nature unpleasant. However, to allow an employee to circumvent the reasonable complaint requirements of *Faragher* and *Burlington*, by making conclusory allegations of feared repercussions would effectively eviscerate an affirmative defense which the Supreme Court clearly went to great effort to craft in order to stem the tide of unwarranted lawsuits.[31]

As social science tells us, however, the fear for their jobs, for their families (and their reactions), of embarrassment, and of not being believed are not fears of mere "unpleasantness." They are supported by the impact of harassment on those who report harassment—impacts that result in lost jobs and discord at home. If the plaintiff can come up with "objective" evidence, courts have been more likely to allow the issue to go to the jury.[32] However, many plaintiffs' lawyers would tell you that once an employee complains about discrimination on the job, he or she

---

apprehension of what employer might do may preclude defense); *Desmarteau*, 64 F. Supp. 2d at 1080 (finding fear of repercussions insufficient where "[s]uch a justification lacks any objectively reasonable basis in the record"); *Robinson*, 1999 WL 33887, at *7 (finding plaintiff unreasonable in not reporting due to her unsubstantiated fear for her job); *Fierro*, 13 F. Supp. 2d at 492 (finding employee unreasonable in failing to complain based on "generalized fear" of repercussions).

27. *Robinson*, 1999 WL 33887, at *7 (holding that plaintiff was unreasonable in not reporting due to her unsubstantiated fear for her job).

28. *Fierro*, 13 F. Supp. 2d at 492 (holding that employee was unreasonable in failing to complain based on "generalized fears" of repercussions).

29. *Desmarteau*, 64 F. Supp. 2d at 1080 (finding fear of repercussions insufficient where "[s]uch a justification lacks any objectively reasonable basis in the record").

30. 13 F. Supp. 2d 481 (S.D.N.Y. 1998).

31. *Id.* at 492.

32. *See generally Maple*, 2000 WL 1029112, at *5 (finding plaintiff's reluctance to report reasonable where harasser had threatened plaintiff's job, co-workers told her nothing would be done, and retaliation would result); *Meng*, 73 F. Supp. 2d at 402 (holding issue of fact existed as to reasonableness of failure to report in light of harasser's high status and threats to fire her if she reported); *Booker*, 17 F. Supp. 2d at 747-48 (finding issue of fact as to whether employee was reasonable in not complaining because of feared retaliation in racial harassment context); *Fierro*, 13 F. Supp. 2d at 492-93 (noting that plaintiff did not specify repercussions he feared or other employees who were subject to retaliation for complaining).

can usually consider that employment relationship over.[33] Thus, these fears are rarely, if ever, erroneous.

Even in cases in which an employee knows nothing about the employer's policy, the court may deem her failure to use the policy unreasonable.[34] In *Watkins v. Professional Security Bureau, Ltd.*,[35] the plaintiff testified that she was unaware of the employer's anti-harassment policy. The court held that she could be found "constructively aware" based on the employer's placing the policy in the employee handbook (which the plaintiff stated she never received), posting the policy in an area frequented by employees, and placing the employee handbook at work sites.[36] "Under these circumstances, a reasonable jury could only conclude that Watkins was at least constructively aware of the policy."[37] This, in part, formed the basis for granting judgment for the defendant in this case.[38]

---

33. *See* E. RICHARD LARSON, SUE YOUR BOSS: RIGHTS AND REMEDIES FOR EMPLOYMENT DISCRIMINATION XVIII (1981) (noting that victims of discrimination "must evaluate the risk of retaliation versus [their] courage to seek [their] federal rights to non-discrimination"); Dominic Bencivenga, *Retaliation Claims: Employers Face Charges of Unfair Treatment*, N.Y. L.J., Nov. 14, 1996, at 5 (noting rise in retaliation claims); Teresa L. Butler & A. Michael Weber, *Retaliation Lawsuits Are Increasing Rapidly*, 20 NAT'L L.J. B5 (1999) (same). *See generally* Valerie Harris, Note, *Front Pay and Sexual Harassment Cases: What It Is, Why It Is Important and How To Make It Better*, 7 WM. & MARY J. WOMEN & L. 217, 224-25 (2000) (explaining why reinstatement is rarely an appropriate remedy in these cases).

34. *See, e.g.*, Watkins v. Prof'l. Sec. Bureau, Ltd., No. 98-2555, 1999 WL 1032614, at **5 (4th Cir. Nov. 15, 1999) (per curiam), *cert. denied*, 529 U.S. 1108 (2000); Shaw v. AutoZone, Inc., 180 F.3d 806, 811 (7th Cir. 1999). *But see* Brandrup v. Starkey, 30 F. Supp. 2d 1279, 1289 (D. Or. 1998) (finding employee reasonable in not reporting when she knew nothing about policy).

35. No. 98-2555, 1999 WL 1032614, at **5 (4th Cir. Nov. 15, 1999) (per curiam), *cert. denied*, 529 U.S. 1108 (2000).

36. *Id.* at **5 n.15.

37. *Id.* Apparently, the jury that heard and initially decided this case was not so "reasonable." The actual jury found for the plaintiff on her hostile environment claim and awarded Watkins $63,000 in damages. *Id.* at **2. The district court ultimately granted a motion for judgment as a matter of law or in the alternative a new trial on the hostile environment claim, which was upheld by the Court of Appeals. *Id.* In *Shaw*, 180 F.3d at 811, where plaintiff signed an acknowledgment that stated "I understand it is my responsibility to read and learn the policies and procedures contained in the AutoZone Handbook and Safety Booklet," which contained anti-harassment policy, the court held that the plaintiff had "constructive knowledge" of the policy. *Compare Brandrup*, 30 F. Supp. 2d at 1289 (holding that plaintiff was reasonable in not using a policy that she knew nothing about).

38. *Watkins*, 1999 WL 1032614, at ** 5.

b. The effect of an employee's delay in using the policy

If a plaintiff delays in reporting harassment pursuant to an employer policy, many courts appear to find that the employee has acted unreasonably as a matter of law in failing to report the harassment sooner. Courts have held employee delays from three months to two years unreasonable.[39] As the court in *Savino* explained, "unreasonable foot-dragging will result in at least a partial reduction of damages, and may completely foreclose liability."[40] The showing of plaintiffs' delay helps defendants establish the second element of the defense.

While the plaintiffs in these cases tried to explain their reasons for delaying reporting the harassment, many courts have been unreceptive to such explanations. As the court in *Caridad* explained:

> We do not doubt that there are many reasons why a victimized employee may be reluctant to report acts of workplace harassment, but for that reluctance to preclude the employer's affirmative defense, it must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers.[41]

In *Desmarteau v. City of Wichita, Kansas*[42] to whom the plaintiff asserted that she feared retaliation from the supervisor she was reporting and therefore delayed reporting.[43] The court held her delay unreasonable as a matter of law, stating that "[s]uch a justification lacks any objectively

---

39. *See, e.g.*, Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 643 (7th Cir. 2000) (finding that plaintiff did not take advantage of corrective opportunities by writing anonymous letter and letter signed by fictitious person; she did when she finally wrote and signed a letter under her own name complaining about the behavior); Casiano v. AT&T Corp., 213 F.3d 278, 287 (5th Cir. 2000) (granting summary judgment where plaintiff "suffered at least fifteen propositions yet never reported any of the incidents until months after the last of them"); Savino v. C.P. Hall Co., 199 F.3d 925, 933 (7th Cir. 1999) (four month delay); *Watkins*, 1999 WL 1032614, at *1 (four month delay in reporting rape); Montero v. AGCO Corp., 192 F.3d 856, 863 (9th Cir. 1999) (two year delay unreasonable); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 290 (2d Cir. 1999) (several month delay); Desmarteau v. City of Wichita, Kansas, 64 F. Supp. 2d 1067, 1080 (D. Kan. 1999) (finding delay of five months unreasonable); Mandy v. Quad/Graphics, Inc., 49 F. Supp. 2d 1095, 1111 (E.D. Wis. 1999) (holding delay of two years unreasonable in light of anti-harassment procedure's inclusion of anti-retaliation provision and confidential nature).

40. *Savino*, 199 F.3d at 935.

41. 191 F.3d at 295; *see also Shaw*, 180 F.3d at 813 (plaintiff's excuse for not reporting that she did not feel "comfortable enough" with anyone at the employer to discuss the harassment with them was not reasonable).

42. 64 F. Supp. 2d 1067, 1080 (D. Kan. 1999).

43. *Id.*

reasonable basis in the record."[44] Instead, the employer's policy allowed the plaintiff to bypass her supervisor in making the complaint. There also was no evidence that the employer's policy was somehow inadequate or unenforced.[45]

Watkins v. Professional Security Bureau, Ltd.,[46] provides another example of such a case. In *Watkins*, the plaintiff delayed four months (from May to September) before reporting a rape by her supervisor.[47] In July and mid-August, she did inform her employer of an incident involving the same supervisor during which he fondled her breasts and put his hands down her pants as she was changing into her uniform for work.[48] The plaintiff, at that time, indicated that she did not want to pursue the matter.[49] She eventually did inform her employer about the rape as well.[50] The court concluded this evidence was sufficient to support the defendant's burden on the second element of the defense as a matter of law:

> Here, there is no dispute that Watkins did not report the rape by Kelley [the harasser] pursuant to PSB's anti-harassment policy, which required that she contact the director of human resources. And, while Watkins told Dowling [the site supervisor] that Kelley had fondled her breasts and placed his hands down her pants, she repeatedly expressed her unwillingness to pursue the matter. Watkins testified that her failure to report the incident promptly and fully resulted from embarrassment and fear of reprisal. This evidence, however, is insufficient as a matter of law to establish that Watkins acted reasonably in failing to report Kelley according to the anti-harassment policy .... Accordingly, we hold that no reasonable jury could have concluded that PSB failed to establish the second prong of the affirmative defense.[51]

In spite of the court's assumption about the manner in which Watkins should have responded to these very disturbing acts of

---

44. *Id.*

45. *Id.*; *see also Caridad*, 191 F.3d at 290 (finding plaintiff's belief that pressing complaint would not "improve matters" insufficient); *Shaw*, 180 F.3d at 813 ("[A]n employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment.").

46. No. 98-2555, 1999 WL 1032614 (4th Cir. Nov. 15, 1999) (per curiam), *cert. denied*, 529 U.S. 1108 (2000).

47. *Id.* at **1.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at **5 (citations and footnotes omitted).

harassment, there may be a very reasonable explanation for why she delayed reporting the rape and why she was reluctant to have the employer pursue her claim, as I explain below.

Some courts have been a bit more lenient in their interpretation of the second element and employee excuses for delays, at least under the right circumstances. In *Johnson v. West*,[52] the court remanded to the district court, holding that a trier of fact could find that the employer failed to meet the second element of the defense even where the employee delayed a year in reporting the harassment.[53] In that case, there was evidence that the plaintiff had been threatened and intimidated by the harasser.[54] The court noted that there was evidence that the plaintiff was under "severe emotional and psychological stress as a result of the harassment."[55] Under these circumstances, an issue of fact remained as to the reasonableness of the plaintiff's failure to take advantage of corrective opportunities.[56] In *Maple v. Publications International, Ltd.*,[57] the court ruled that the plaintiff's reluctance to report harassment was not unreasonable as a matter of law where the plaintiff expressed fear of retaliation.[58] The harasser had threatened the plaintiff's job when she refused his advances. In addition, other employees told her human resources would do nothing and she would be retaliated against if she reported the harassment.[59] Thematically, these cases involved some proof of threats. But should a plaintiff be required to show evidence of an overt threat to her job in order to be excused in not reporting harassment? Or should the potential for a bad outcome be assumed until the employer proves otherwise?

A more reasonable approach was used by a court in the District of Columbia Circuit. In *Greene v. Dalton*,[60] the court recognized that "[t]he

52. 218 F.3d 725 (7th Cir. 2000).
53. *Id.* at 732.
54. *Id.*
55. *Id.*
56. *Id.*
57. No. 99-C-6936, 2000 WL 1029112 (N.D. Ill. July 25, 2000).
58. *Id.* at *5.
59. *Id. But see* Robinson v. Truman Coll., No. 97-C0896, 1999 WL 33887, at *7 (N.D. Ill. Jan. 19, 1999) (holding plaintiff unreasonable in waiting three months to report harassment allegedly due to her unsubstantiated fear for her job); Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (finding conclusory assertions of fear of repercussions insufficient to justify employee's failure to complain and support summary judgment for defendant on defense); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 491 (S.D.N.Y. 1998) ("[G]eneralized fears [of repercussions] can never constitute reasonable grounds for an employee's failure to complain to his or her employer.").
60. 164 F.3d 671 (D.C. Cir. 1999).

'failure to avail' standard is not intended to punish the plaintiff merely for being dilatory."[61] The court reasoned that the employee's delay must be considered in light of when the harassment reached an actionable level:

> In order for the Navy to avoid all liability based upon its *Faragher* defense, therefore, it must show not merely that Greene inexcusably delayed reporting the alleged rape—which is what it emphasizes on brief—but that, as a matter of law, a reasonable person in Greene's place would have come forward early enough to prevent Clause's [the harasser's] harassment from becoming "severe or pervasive."[62]

Because there was little evidence regarding the harasser's behavior toward the plaintiff during her first ten days of work at the Navy, the court could not decide as a matter of law that the plaintiff's delay was unreasonable.[63] Likewise, in *Watts v. Kroger Co.*,[64] the Fifth Circuit reversed in part the granting of summary judgment because a jury could find that waiting a couple months to report the harassment was not unreasonable, where the supervisor's harassment intensified in the Spring of 1994, and she reported the harassment in July of 1994.[65] The courts in these cases appeared to understand why a plaintiff might not report the first incidents and conceded that it might be reasonable to delay until the harassment reaches an actionable level.

3. *An Employee's Failure To Use the Policy Precisely*

There is also a developing split about the reasonableness of an employee complaining outside the "official" employer's policy dictates (for example, complaining to a union representative). In *Madray v. Publix Supermarkets, Inc.*,[66] the court held that the plaintiffs failed to avoid harm otherwise by complaining "informally" to mid-level managers who were not designated in the policy to receive complaints.[67] Likewise, in *DeCesare v. National Railroad Passenger Corp.*,[68] the court held that plaintiff's informing her union representative (because she was

61. *Id.* at 674.
62. *Id.* at 675.
63. *Id.*
64. 170 F.3d 505 (5th Cir. 1999).
65. *Id.* at 510.
66. 208 F.3d 1290 (11th Cir. 2000).
67. *Id.* at 1302.
68. No. CNA 98-3851, 1999 WL 330258 (E.D. Pa. May 24, 1999).

more comfortable doing so) was insufficient notice to the employer.[69] While her subsequent grievance did put the employer on notice of the harassment, the court still held that she failed to "take advantage of any preventive or corrective opportunities provided by the employer" because she did not use the employer's anti-harassment policy.[70]

Other courts have responded more sympathetically to plaintiffs. In *Williams v. Multnomah Education Service District*,[71] a district court decided there was an issue of fact as to whether an employee's failure to use an employer's grievance system was reasonable, given that the employee notified his supervisor and union representative.[72] Similarly, in *Gordon v. Southern Bells, Inc.*,[73] an issue of fact existed as to the second prong of the defense where the employee did not fill out the appropriate form dictated by the employer's policy or complain to a "manager" as provided in the policy.[74] Instead, the plaintiff reported the harassment to a co-owner of the company.[75] Some courts have characterized this as the plaintiff's attempt to "avoid harm otherwise."[76]

These cases reveal that many courts are engaging in pro-employer readings of the *Ellerth/Faragher* defense and are making assumptions about how a plaintiff should or should not behave. This is typical of standards that involve "reasonableness" determinations about the victim's actions. The court will substitute its own judgment of what is

---

69. *Id.* at *5.

70. *Id. But see* Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64 (2d Cir. 1998). There, the judge stated:

> While the fact that a complaint was unreported may be relevant in considering whether an employer had knowledge of the alleged conduct, an employer is not necessarily insulated from Title VII liability simply because a plaintiff does not invoke her employer's internal grievance procedure if the failure to report is attributable to the conduct of the employer or its agent.

Id.

71. No. 97-1197-ST, 1999 WL 454633 (D. Or. Apr. 14, 1999).

72. *Id.* at *9-10.

73. 67 F. Supp. 2d 966 (S.D. Ind. 1999).

74. *Id.* at 983.

75. *Id*; *see also* Cadena v. Pacesetter Corp., 224 F.3d 1203, 1214 (10th Cir. 2000) (holding that evidence of plaintiff's only female supervisor's sexual relationship with harasser relevant to whether plaintiff's decision not to report harassment to that supervisor was reasonable); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1178 (N.D. Iowa 2000) (finding an issue of fact as to whether employee "avoided harm otherwise" by making a complaint to a friend who was a manager as well); Miller v. Woodharbor Molding & Millworks, Inc., 80 F. Supp. 2d 1026, 1032 (N.D. Iowa 2000) (finding that plaintiff was reasonable in reporting to a supervisor who was her friend because of her concern over the friendship between harasser and ultimate supervisor).

76. *See, e.g.*, *Watts*, 170 F.3d at 511; *Miller*, 80 F. Supp. 2d at 1033; *Williams*, 1999 WL 454633, at *10; *see also Enforcement Guidance*, *supra* note 24, at 32 (supporting this interpretation).

reasonable under the circumstances even though case after case and study after study reveal that victims do not behave consistently with the court's notion of reasonableness.

III. IMPLICATIONS OF SCIENTIFIC FINDINGS ON HARASSMENT LAW

There are two types of evidence that should be helpful in explaining women's responses to incidents of harassment. One comes from medical science. As I explain below, plaintiffs should use evidence of post-traumatic stress disorder (PTSD) to explain why they do not report harassment or delay in reporting harassment. Evidence of PTSD is especially helpful in cases of extreme harassment—incidents involving rape or physical abuse—in which it is more likely than not that the victim will experience PTSD. Another helpful form of evidence comes from traditional social science—what I will refer to as "social context" evidence. This evidence is useful to explain why victims of harassment might not complain in situations where the harassment is less extreme than those that would normally trigger PTSD. The combination of the findings from medical science as well as social science provides a reasonable explanation of victims' responses to harassment.

A. Medical Evidence

PTSD provides a viable evidentiary explanation for the reluctance of victims of harassment to report that behavior. Medical science tells us that women or men who have been physically or sexually assaulted in the course of being sexually harassed may suffer from post-traumatic stress disorder. While the common perception of sexual harassment among the public is that it involves fairly "minor" conduct, such as commenting on someone's dress or asking someone out on a date, many cases do contain allegations of physical or sexual assault.[77] In addition, PTSD can be triggered by less severe incidents for persons who have suffered from PTSD in the past (for example, have been sexually or physically assaulted or sexually or physically abused as a child).[78]

77. *See, e.g.*, Gretzinger v. Univ. of Haw., No. 97-15123, 1998 WL 403357 (9th Cir. July 7, 1998) (plaintiff sexually assaulted on numerous occasions); Nichols v. Am. Nat'l Ins. Co., 154 F.3d 875, 881 (8th Cir. 1998) (attempted rape); Nichols v. Frank, 42 F.3d 503, 507 (9th Cir. 1994) (plaintiff forced to perform oral sex on supervisor) *abrogation on other grounds recognized in* Burrell v. Star Nursery, Inc., 170 F.3d 951, 955 (9th Cir. 1999); Townsend v. Ind. Univ., 995 F.2d 691, 692 (7th Cir. 1993) (plaintiff claimed PTSD as a result of two sexual assaults by her supervisor).

78. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF

Medical studies show that more than half of victims of rape experience PTSD.[79] Thus, it is more likely than not that a victim of sexual harassment who is raped during the harassment will experience PTSD. As I explain below, evidence of PTSD should be admissible to explain the plaintiff's behavior. Indeed, many cases mention that the victim has been diagnosed as suffering from post-traumatic stress disorder.[80] Yet, few cases outside of the damages phase[81] discuss how PTSD might

---

MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM-IV]; *see also* Jessica Wolfe, et al., *Sexual Harassment and Assault as Predictors of PTSD Symptomatology Among U.S. Female Persian Gulf War Military Personnel*, 13 J. INTERPERSONAL VIOLENCE 40, 54 (1998) (reporting results of study of female Gulf War Veterans that "suggest[s] that the frequency of less severe events (i.e., physical sexual harassment) has the greatest impact on women who also experience more severe forms of sexual victimization"). *But see* Louise F. Fitzgerald et al., *Junk Logic: The Abuse Defense in Sexual Harassment Litigation*, 5 PSYCHOL. PUB. POL'Y & L. 730 (1999) (arguing there is no scientific evidence supporting hypersensitivity of all sexual abuse victims). Prior exposure to traumatic events that create PTSD is quite high among women in the United States. *See* Heidi S. Resnick et al., *Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women*, 61 J. CONSULTING & CLINICAL PSYCHOL. 984, 988 (1993) (finding that seventy percent of respondent women had experienced one or more traumatic criminal victimization experiences, such as rape or physical assault). Indeed, one study showed that "a substantial proportion of people with a history of PTSD experience multiple episodes of the disorder associated with different traumas." Ronald C. Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 J. CLINICAL PSYCHIATRY 4, 7 (Supp. 5 2000). With respect to PTSD specifically, studies have shown a range of 7.8% to 12.3% (study of women) of the United States population have experienced PTSD under the DSM-III standard. *Id.* at 6. For an example of a case in which PTSD was triggered by lesser incidents of harassment due to prior abuse, see *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 267 (8th Cir. 1993).

79. *See* Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 17 (2001).

80. *See, e.g.*, Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1152 (9th Cir. 1999); Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1240 (10th Cir. 1999); Reinhold v. Virginia, 135 F.3d 920, 928 (4th Cir. 1998), *vacated on rehearing*, 151 F.3d 172 (4th Cir. 1998); *Nichols*, 42 F.3d at 507; *Townsend*, 995 F.2d at 692.

81. For examples of cases using PTSD at the damages phase, see O'Rourke v. City of Providence, 235 F.3d 713, 733-34 (1st Cir. 2001); *Gotthardt*, 191 F.3d at 1152, 1155; Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 612, 614 (5th Cir. 1999); *Baty*, 172 F.3d at 1244; Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1068 (10th Cir. 1998); *Reinhold*, 135 F.3d at 928. It is not surprising that PTSD gets mentioned in the damages phase. Persons suffering from PTSD often take a long time to recover and some never recover. In addition, persons suffering from PTSD are five times more likely to be unemployed than those who are not suffering from the disorder. B. Kathleen Jordan et al., *Problems in Families of Male Vietnam Veterans with Posttraumatic Stress Disorder*, 60 J. CONSULTING & CLINICAL PSYCHOL. 916, 919 (1992); *see also* Kessler, *supra* note 78, at 9 (citing study showing that the odds that respondents with PTSD were currently unemployed was 150% compared to those without PTSD).

affect the victim's response to harassment.[82] Even in the damages context, plaintiffs have had some trouble with the admissibility of PTSD evidence.[83]

In particular, evidence of PTSD would be useful in understanding why a victim might delay reporting harassment. Victims who suffer from PTSD will avoid any reference to the stressor, which can result in a delay in reporting harassment. Yet, as we have seen in recent case law on the subject, the courts often deem such delays unreasonable as a matter of law in assessing the second prong of the *Ellerth/Faragher* affirmative defense.[84] Examining how PTSD affects victims of harassment shows that their behavior is not "unreasonable," but instead consistent with a person who is suffering from the disorder.

PTSD is a medical diagnosis contained in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.[85] As such, it is a diagnosis that is generally accepted by the medical community and, as others have argued, should be accepted as a matter of scientific evidence by courts in appropriate cases.[86] Looking at the requirements for the diagnosis and symptoms associated with PTSD makes it obvious how it might help explain the actions of victims of sexual harassment.

First, PTSD is experienced by individuals in situations "following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity."[87] Specifically included in the types of threats or injuries that can lead to PTSD are

---

82. Indeed, the only employment discrimination case I could find where PTSD was used as a reason for delay pre-dates *Ellerth* and *Faragher*. *See* Campbell v. Ingersoll Milling Mach. Co., 893 F.2d 925 (7th Cir. 1990). In *Campbell*, the plaintiff alleged discrimination based on race and sex in her firing. *Id.* at 926. She later tried to amend her complaint three weeks before trial to add a claim for intentional infliction of emotional distress based on a sexual assault by her supervisor. *Id.* at 927. The plaintiff argued that she delayed in amending her complaint due to PTSD. *Id.* at 928. Indeed, she argued that she couldn't even bring herself to tell her attorney about the assault until it was discussed by one of her doctors during his deposition. *Id.* The court concluded that it was within the discretion of the trial court to forbid amendment at that late time, even considering Campbell's condition. *Id.*

83. *See, e.g.*, Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1295-99 (8th Cir. 1997).

84. *See supra* notes 39-51 and accompanying text.

85. DSM-IV, *supra* note 78, at 424.

86. *See* Garcia-Rill & Beecher-Monas, *supra* note 79, at 29-30.

87. DSM-IV, *supra* note 78, at 424. PTSD can also be experienced in response to other forms of stress. However, this seems to be the scenario most likely to be experienced by sexual harassment victims.

sexual assault and physical attack,[88] both of which are experienced by sexual harassment victims.[89] This diagnosis becomes significant because of what it tells us about the manner in which people who suffer from the disorder respond to stimuli associated with the traumatizing event. As the DSM-IV explains, "The person commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event ... and to avoid activities, situations, or people who arouse recollections of it."[90] As will become apparent after review of the studies of social scientists, victims of sexual harassment frequently go into "avoidance" mode. This is consistent with the symptoms of persons experiencing PTSD. Another facet of PTSD is that it frequently has a delayed onset. In other words, persons who experience the stress will often have a delay in experiencing the symptoms of PTSD.[91] In addition, the duration of the symptoms can last anywhere from within three months of the onset to over a year.[92] The upshot is that a victim may be in avoidance mode for quite some time and therefore be unable to report severe harassment as early as the courts are demanding.

The *Watkins* case described above provides an example of how PTSD evidence might be used to explain the victim's behavior. In *Watkins*, the victim delayed reporting a rape for four months.[93] In addition, she did not want to pursue instances of "lesser" forms of harassment involving the same person in the interim.[94] Though no medical diagnosis appears in the court's decision in that case, it is more likely than not that Watkins was suffering from PTSD following the rape. If that was indeed the case, her reasons for delaying report of the rape as well as her avoiding further trauma with respect to the other incidents by being reluctant to have them pursued, are entirely reasonable given that medical diagnosis. She was behaving like persons

---

88. *Id.*

89. *Id.*; *see* cases cited *supra* note 77.

90. DSM-IV, *supra* note 78, at 424-25.

91. *Id.* at 426. As the manual provides, "[s]ymptoms usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before symptoms appear." *Id.*

92. *Id.* It can also be much longer. Studies show the median duration of PTSD for the worst sorts of trauma range from three years (for those being treated for the disorder) to five years (for those who are not being treated). Kessler, *supra* note 78, at 7 (citing Ronald C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES GEN. PSYCHIATRY 1048 (1995)).

93. Watkins v. Professional Sec. Bureau, Ltd., No. 98-2555, 1999 WL 1032614, at *1 n.2 (4th Cir. Nov. 15, 1999).

94. *Id.* at *1. The "lesser" form of harassment included fondling the plaintiff's breasts and the harasser's putting his hands down her pants. *Id.*

suffering from PTSD behave when confronted with the stressing incident. In this context, her behavior was reasonable and a result of the misconduct of the harassing supervisor. Yet, the court in that case found no liability as a matter of law.[95]

The strength in using PTSD evidence to explain a sexual harassment victim's behavior lies in the credibility that a scientifically-based explanation has in the courts. It should be difficult for a court to discount or find inadmissible such a medical diagnosis in the appropriate case. Attorneys representing victims of sexual harassment should consider using PTSD evidence to support explanations of their clients' behaviors. In addition, the courts should re-assess the assumptions they make about the manner in which "reasonable" victims behave.

B. Social Science Evidence[96]

Unlike PTSD, which has long been acknowledged as a legitimate psychiatric diagnosis, the effects of sexual harassment as a psychological and social phenomenon have only recently been studied. Sexual harassment on the job was not specifically studied as a workplace phenomenon until the late 1970s.[97] Over the last twenty years, social scientists have studied it extensively. In particular, sociologists, psychologists, psychiatrists, behavioral studies and organizational theorists, and women's studies academics all began to look closely at this disturbing workplace behavior. Now, over twenty years later, we finally have some social scientific research on the phenomenon of harassment in the workplace. This research, however, is still admittedly in its infancy.[98] And when it comes to the psychological effects, findings are clearly preliminary. Still, social science can provide valuable observations about the manner in which victims of sexual harassment

---

95. *Id.* at *5.

96. For a thorough analysis of how social science might affect this defense, see 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 (2001); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000).

97. Two popularly read books, Lin Farley's *Sexual Shakedown* and Catherine MacKinnon's *Sexual Harassment of Working Women*, gave the phenomenon a wider acknowledgment and interest. *See generally* LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB (1978); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

98. *See* Sandy Welsh, *Gender and Sexual Harassment*, 25 ANN. REV. SOC. 169, 169, 184-86 (1999).

respond as well as provide social context evidence that might explain a victim's failure to report harassment.

There are limits to the use of social science evidence in the courts. Social science studies suffer from several methodological problems. One main problem is definitional. There is no agreed upon definition of sexual harassment among these academics and clinicians, and often social scientists are using different terminology than the courts.[99] Also, many studies use students, rather than working populations or people who actually have been sexually harassed.[100] The use of undergraduate students is especially problematic as many test subjects have little or no work experience. One study that provides an exception to some of these methodological difficulties is the United States Merit Systems Protections Board's (USMSPB) periodic studies of sexual harassment of federal employees.[101] The federal government has been studying harassment of federal employees since 1983, and has had fairly consistent findings. I will endeavor to use the government's study as well as studies that focus on actual victims of harassment and working populations in assessing how victims respond.

1. *What Social Science Tell Us About Application of Prong Two of the* Faragher/Ellerth *Defense*

In looking at how victims of harassment respond to this behavior, I'd like to begin with a rather famous example. When Anita Hill was questioned by the Senate Judiciary Committee regarding her allegations of sexual harassment leveled at then Supreme Court nominee Clarence Thomas, the questions of the Committee typified the discrepancy between how the courts think victims of sexual harassment should respond and how sexual harassment victims actually respond to incidents of harassment. Here are some examples from the hearings:

---

99. *See, e.g.*, Richard D. Arvey & Marcie A. Cavanaugh, *Using Surveys To Assess the Prevalence of Sexual Harassment: Some Methodological Problems*, 51 J. SOC. ISSUES 39, 42 (1995); Welsh, *supra* note 98, at 171.

100. *See, e.g.*, Patricia A. Frazier et al., *Social Science Research on Lay Definitions of Sexual Harassment*, 51 J. SOC. ISSUES 21, 22-23, 25 (1995); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 41, 43-44 (1993); James M. Wilkerson, *The Impact of Job Level and Prior Training on Sexual Harassment Labeling and Remedy Choice*, 29 J. APPLIED SOC. PSYCHOL. 1605, 1605-06 (1999).

101. *See, e.g.*, UNITED STATES MERIT SYSTEM PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1994) [hereinafter USMSPB].

Senator Specter: . . . And my question is, understanding of the fact that you're 25 and that it's your—you're shortly out of law school and the pressures that exist in this world . . . . But even considering all of that, given your own expert standing and the fact that here you have the chief law enforcement officer of the country on this subject and the whole purpose of the civil rights law is being perverted right in the office of the Chairman with one of his own female subordinates—what went through your mind, if anything, on whether you ought to come forward at that stage, because if you had you'd stop this man from being head of the EEOC perhaps for another decade. What went on through your mind? I know you decided not to make a complaint, but did you give that any consideration, and if so how could you allow this kind of reprehensible conduct to go on right in the headquarters without doing something about it?[102]

. . . .

Senator Deconcini: . . . [I]f you wouldn't mind repeating to me what went through your mind, why, number one, you would stay there after this happened several times, and number two, even though it ceased for a few months, why you would proceed on to another job with someone that hadn't just asked you out and pressed you, but had gotten into the explanations and—expletives and the anatomy and what have you that you pointed out to us today.[103]

. . . .

Senator Simpson: But let me tell you, if what you say this man said to you occurred, why in God's name, when he left his position of power or status or authority over you, and you left it in 1983, why in God's name would you ever speak to a man like that the rest of your life?[104]

Ms. Hill: That's a very good question. And I'm sure that I cannot answer that to your satisfaction. That is one of the things that I have tried to do today. I have suggested that I was afraid of retaliation. I was afraid of damage to my professional life. And I believe that you have to understand that this response—and that's one of the things that I have come to understand about harassment—this response, this kind of response, is not atypical. And I can't explain. It takes an expert in psychology to explain how that can happen. But it can happen, because it happened to me.[105]

---

102. *Clarence Thomas Confirmation: Hearing of the S. Judiciary Comm.*, 102d Cong. (Oct. 11, 1991) (question from Sen. Arlen Specter to Professor Anita Hill) (LEXIS Federal News Service).

103. *Id.* (question from Sen. Dennis Deconcini to Professor Anita Hill).

104. *Id.* (question from Sen. Alan Simpson to Professor Anita Hill).

105. *Id.* (testimony of Professor Anita Hill).

Several themes emerge from these exchanges. Why didn't she come forward earlier? How could she continue to work for him? Why did she remain friendly to him? Studies show that Professor Hill's reply to this interrogation was consistent with what social science tells us about harassment: her response to the incidents of harassment was typical of women harassed. Unfortunately, the attitude of the members of the Senate Judiciary Committee all too often mirrors the attitude of judges who hear these cases. Many judges simply fail to hear and understand the stories of victims of sexual harassment. Yet, the social context in which harassment occurs supports the stories of women like Professor Hill.

Harassment is underreported on two levels. First, women do not identify their circumstances as harassing. And, even when they do, they do not report for fear of many bad career and personal ramifications (ramifications, by the way, that are not unfounded).

There is a gap between what is harassment and employees believing that their experiences are harassment.[106] Studies show that particularly in traditionally female-dominated occupations, where sexual harassment can be the norm, women do not even identify harassing behaviors as sexual harassment. One example comes from the nursing profession. In a study of nurses, a sociologist found that they frequently experience harassment by doctors and patients, but don't identify it as such.[107] Studies of female graduate students[108] and temporary clerical workers[109] have shown similar results. These individuals appear to see harassment as part of their job.

Even employers who seemingly take harassment seriously find it difficult to get employees to report harassment. The federal government makes significant efforts to inform its employees about its sexual harassment policy.[110] Yet, the latest USMSPB study shows that while

---

106. *See* Azy Burak et al., *Individual Difference Correlates of the Experience of Sexual Harassment Among Female University Students*, 22 J. APPLIED SOC. PSYCHOL. 17, 19-20 (1992) (describing studies showing this).

107. *See, e.g.*, Patricia M. Hanrahan, *How Do I Know If I'm Being Harassed or If This Is Part of My Job?*, 9 NWSA J. 43, 43 (1997) (study of nurses).

108. Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152 (1988) (study of female graduate students).

109. Jackie Krasas Rogers & Kevin D. Henson, *"Hey, Why Don't You Wear A Shorter Skirt?" Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment*, 11 GENDER & SOC'Y 215, 231-32 (1997) (study of temporary workers).

110. *See* USMSPB, *supra* note 101, at vii (87% of supervisors and 77% of

44% of women and 19% of men reported being harassed, only 12% of those harassed reported such behavior.[111] Indeed, this statistic is higher than what other studies have found. Some have found the reporting rate as low as 2%.[112] The federal government found that rather than reporting harassment, the most frequent response of victims of harassment is to ignore it (44%) or engage in other avoidance behavior (avoid harasser—28%; make a joke of it—15%; go along with the behavior—7%).[113] Only 35% told the harasser to stop.[114] Further, only 1% of those filing charges of harassment with the government resorted to lawsuits. These findings are fairly consistent with other studies.[115]

Generally, women who are sexually harassed go into avoidance mode. Not only do they not report it, they avoid the entire situation—often laughing it off, walking away, etc. Unfortunately, these approaches all too often are seen as "doing nothing" by the courts, and ultimately hurt victims of harassment in court. But avoidance is not the equivalent of "doing nothing." In fact, these victims are engaging in a very active process of avoidance: they often modify their behavior, including where they go and what they do, in order to avoid confronting the harasser or the incident.

In addition, there are very good reasons victims do not report harassment. Studies suggest a number of reasons women fail to report harassment, including: "[T]hey believe nothing can or will be done, and many are reluctant to cause problems for the harasser. The most common reason, however, is fear—fear of retaliation, of not being believed, of hurting one's career, or of being shamed and humiliated."[116]

---

nonsupervisory federal employees were trained on the government's sexual harassment policy; 78% knew the reporting channels; 92% were aware of the sexual harassment policy).

111. *Id.* at 14, 30.

112. Sharyn A. Lenhar & Diane K. Shrier, *Potential Costs and Benefits of Sexual Harassment Litigation*, 26 PSYCHIATRIC ANNALS 132, 132-33 (1996).

113. USMSPB, *supra* note 101, at 29-30.

114. *Id.* at 30.

115. *See* Lenhard & Shrier, *supra* note 112, at 132-33; *see also* James E. Gruber & L. Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 287 (1982) (reporting results of study of autoworkers showing 23% ignored harassment, 22% responded mildly, 10% made light of it).

116. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES, 117, 122 (1995); *see also* AMY L. CULBERTSON ET AL., NAVY PERSONNEL RESEARCH & DEVELOPMENT CENTER, ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 17 (1992) (indicating that common negative reaction reported by women who complained of harassment was humiliation in front of others–33% of enlisted women and 34% of officers); Louise F. Fitzgerald, *Examining*

Studies show that these fears are not unfounded. In a study of eighty-eight claims filed with the California Fair Employment and Housing Department, nearly half of the victims of harassment lost their jobs and an additional 25% quit due to "fear and frustration."[117] So, the fear of a bad job outcome from pursuing a claim is not unfounded. Other studies show that up to 10% of women quit their jobs due to sexual harassment.[118] Even the USMSPB study supports this. Only 32% of victims who filed complaints or grievances with the government found that it made things better; 47% found that it made things worse.[119] In addition, victims report deterioration of their inter-personal relationships at work after reporting harassment.[120] Victims are also concerned with the potential effects on their families—their spouses and children.[121]

(and Eliminating) the Consequences of Sexual Harassment: An Integrated Model, *in* SEX AND POWER ISSUES IN THE WORKPLACE 61, 63 (Northwest Women's Law Center ed., 1992); Gutek & Koss, *supra* note 100, at 30; Rebecca A. Thacker, *A Descriptive Study of Situational and Individual Influences upon Individuals' Responses to Sexual Harassment*, 49 HUM. REL. 1105, 1116 (1996).

117. Frances S. Coles, *Forced To Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986). *But see* Gutek & Koss, *supra* note 100, at 31 (noting the percentage of women who quit, transfer, or are fired due to sexual harassment at 10%).

118. BARBARA A. GUTEK, SEX AND THE WORKPLACE: IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS 54 (1985); Barbara A. Gutek et al., *Sexuality in the Workplace*, 1 BASIC & APPLIED SOCIAL PSYCHOL. 255, 264 (1980). Interestingly, this corresponds with the rate of reporting. *See supra* notes 111-12 and accompanying text. The original 1981 United States Merit Systems Protection Board study showed similar results. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981). Later studies show an improvement in this statistic. *See* USMSPB, *supra* note 101, at 26.

119. USMSPB, *supra* note 101, at 30.

120. *See, e.g.*, GUTEK, *supra* note 118, at 70; Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment*, *in* THE SEXUALITY OF ORGANIZATIONS 71 (J. Hearn et al. eds., 1989).

121. *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 75, 88 (1999). The narrative of the plaintiff in *Nichols v. Frank* provides a chilling example:

> I tried to kill myself because I just didn't know how to tell my husband, you know, what was going on . . . . I was afraid that he would take my children and divorce me. And so I was just stuck. I was stuck between the two [the harasser and her husband] and there was no one I could talk to. I was afraid other people wouldn't believe me, so I was really stuck with both. Say, if I went and I told anybody on him, on the supervisor I would lose my job. My husband and I had just recently bought a house and that house depended on my earnings, and I didn't want to lose everything. And that job was so important to the support of my family, so I was just stuck with the two.

42 F.3d 503, 507 (9th Cir. 1994), *abrogation on other grounds recognized in* Burrell v. Sar Nursery, Inc., 170 F.3d 951, 955 (9th Cir. 1999). The plaintiff was seeking to explain why she endured six months of forced sexual conduct with her supervisor. *Id.* She was

Even after quitting, victims of harassment face retaliation in the form of bad references.[122] Harassment has other significant effects too numerous to detail here on the victims themselves that are not directly related to work, but often have an effect on their work.[123]

IV. CONCLUSION: ACKNOWLEDGING WOMEN'S STORIES IN THE LEGAL STANDARD

Many courts are engaging in assumptions about the manner in which sexual harassment victims behave.[124] Indeed, in *Shaw v. Autozone, Inc.*, the Seventh Circuit was blatant about it, stating "[i]n short, Shaw [the plaintiff] acted in precisely the manner that a victim of sexual harassment should not act in order to win recovery under the new law."[125] The plaintiff in *Shaw*, like the plaintiff in many cases, failed to apprize her employer of the harassment in a swift enough manner.[126] The courts in cases such as this, like members of the Senate Judiciary Committee during the Clarence Thomas nomination hearings, often make factual and social assumptions about the appropriateness of the conduct of the victim. What factual support they have for these assumptions is a mystery. The irony of the federal court's position in

---

ultimately diagnosed with post-traumatic stress disorder as a result of these incidents. *Id.*

Sexual harassment has other effects on its victims. Victims experience a decline in productivity and the quality of their work. USMSPB, *supra* note 101, at 25-26. They become disillusioned with their jobs and their employers. David N. Laband & Bernard F. Lentz, *The Effect of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594, 602 (1998). Indeed, the USMSPB has estimated that harassment costs the federal government $327 million in a two year period. USMSPB, *supra* note 101, at 23.

122. *See, e.g.*, Lerond v. Ray F. Weston, Inc., No. CIVASA-99-CA-0521EP, 2000 WL 1707970 (S.D. Ind. Oct. 20, 1999) (granting summary judgment for employer where employee alleged retaliation based on bad reference due to reporting sexual harassment); Ford v. Rigidply Rafters, Inc., 984 F. Supp. 386 (D. Md. 1997) (discussing plaintiff's allegations of bad references due to reporting sexual harassment). *See generally* Matthew J. Cleveland, Comment, *Title VII and Negative Job References: Employees Find Safe Harbor in* Robinson v. Shell Oil Co., 31 J. MARSHALL L. REV. 521 (1998).

123. Women report not only workplace effects, but also psychological and somatic effects based on harassment. *See* Gutek & Koss, *supra* note 100, at 32-35 (detailing studies and effects).

124. While it is not true of every court considering prong two of the *Ellerth/Faragher* defense, it is certainly true of enough of them to reveal a significant problem entering in the courts' interpretation of the defense. *See supra* notes 39 to 51 and accompanying text.

125. 180 F.3d 806, 813 (7th Cir. 1999) (internal quotations omitted).

126. *See id.* at 810, 812-13.

this regard should not be lost on us today. It was Alexander Hamilton who acknowledged the reason for the federal judiciary's guaranteed salary and life tenure as "a power over a man's subsistence amounts to a power over his will."[127] Yet, women and men who are sexually harassed are supposed to bravely report such behavior even though it jeopardizes their job, stand up to their harasser even though they risk retaliation, and weather the resulting storm like troopers while risking their psychological well-being. In this essay I have endeavored to deal with the reality of the experience of harassment and the manner in which victims respond.[128] It is time for the courts to listen to the stories of these women and understand the predicament in which sexual harassment places them.

This is possible under the current affirmative defense standard that comes out of *Ellerth/Faragher*. The medical and social context information discussed above could be used to explain the victim's behavior, revealing that it is not unreasonable under prong two of the defense. This requires practitioners to use these stories effectively, either by seeking the admission of evidence of PTSD in the appropriate case or furnishing the courts with the social science testimony necessary to understand and put in context the victim's response. It also requires the courts to listen to the stories and understand the context in which sexual harassment takes place. This should lead to far fewer summary judgment and judgment as a matter of law motions being granted in the defendant employer's favor based on the *Ellerth/Faragher* affirmative defense.

Of course, even if the court allows in evidence regarding a victim's response to sexual harassment, there is no guarantee that a jury will understand or believe the story that the victim is attempting to tell.[129] The Senate Judiciary Committee certainly had a hard time believing Anita Hill. It stands to reason that, if the judiciary is acting on precon-

---

127. THE FEDERALIST NO. 78 (Alexander Hamilton).

128. Aside from the portion of the paper on PTSD, I have not attempted to give an actual cause of the failure of women to report harassment quickly, although I have suggested some potential reasons why they might be reluctant to do so. *See supra* notes 106-22 and accompanying text. The actual causes of this behavior are still being studied. *See, e.g.*, Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC'Y 139 (1990); Barbara A. Gutek & Bruch Morasch, *Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOCIAL ISSUES 55 (1982); Margaret S. Stockdale et al., *Acknowledging Sexual Harassment: A Test of Alternative Models*, 17 BASIC & APPLIED SOC. PSYCHOL. 469 (1995).

129. Hopefully, at least some jurors will comprehend a victim's story because it is consistent with their experience in seeing or being victims of harassment in the workplace.

ceived notions regarding the way victims should behave, then jurors may as well. This calls for more sweeping reform that shifts the focus of sexual harassment law away from the acts of the victim and to the acts of the harasser. Indeed, the themes of these cases often resonate with those of rape cases prior to rape shield laws. The victim ends up on trial. A way to avoid this would be to eliminate any affirmative defense for the employer in cases of supervisor harassment. Indeed, application of a traditional vicarious liability standard would likely dictate such a result.[130]

While the Court has expressed a clear interest in encouraging employer compliance, it is not obvious that encouraging employers to set up policies and thereby avoid liability in the face of an employee not using such a policy really furthers the overall goal of Title VII: to eliminate discrimination in the workplace. Instead, it appears to create a safe haven for employers in which half-hearted attempts at anti-sexual harassment policies and training might be the likely result.[131] Wouldn't an employer have even more incentive to train its supervisors and monitor their conduct for discriminatory practices if it knew it would be liable in all cases for such acts by its supervisors? Would this discourage an employer from creating and enforcing such a policy? It seems unlikely. What it certainly would do is encourage employers to create an effective policy that actually goes as far as possible to eliminate discriminatory harassment in the workplace.

---

130. The Court suggested as much in *Ellerth*: "On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided in the agency relation." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998). In deciding to adopt the affirmative defense, it sought to balance conflicting principles brought about by its decision in *Meritor* and its interpretation of congressional intent. As the Court explained: "In order 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 action by objecting employees, we adopt the following holding in this case." *Id.* at 764. For an analysis of how the Court in *Ellerth* misapplied agency principles, see 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, 320-23 (1999).

131. *See* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 163 (2001) (arguing that there is little to no factual support for the effectiveness of training in deterring sexual harassment); 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 (2001) (same).

There are several responses to doing away with the affirmative defense entirely. One is that this would make employers liable for situations over which they have no control. Essentially, they are "blind-sided" by allegations of sexual harassment they know nothing about. There are several problems with this argument. First, it leaves the victim of harassment—the person who is the real victim here (not the employer)—with no remedy for wrongdoing that clearly occurred and affected her ability to do her job. Why shouldn't the cost of supervisory sexual harassment be treated the same as other costs of doing business that involve employee misconduct, for example, a supervisor who fires someone based on race? Second, it is questionable whether employer training and policies are really effective to eliminate harassment. Thus, the courts are giving employers "credit" for actions the results of which currently are highly questionable. And yet, there is a victim whose life has been turned upside down based on the actions of a supervisor employed by that company or business. Her injuries go uncompensated; her rights go unenforced.

Another response to this is to question where consensual relationships fit into the calculus. The argument seems to be that not all sexual harassment is non-consensual. This is oxymoronic and based on a stereotype that is not borne out by any statistical study. If the actions are sexual harassment, they are, by definition under the legal standard, unwelcome. There is no such animal as welcome sexual harassment; unwelcomeness is built into the definition of the claim. Thus, a consensual relationship will not be viewed as sexual harassment. Indeed, why would a woman in a consensual relationship bring such allegations?

The idea seems to flow from a paranoid notion that women will bring sexual harassment claims based on failed consensual relationships. This idea is unsupported by any study of the phenomenon of sexual harassment in the workplace. It is also counterintuitive. To bring a claim and go through the hassle of a lawsuit, including suffering through discovery, in an effort to extort a settlement or to get back at an ex-paramour seems highly unlikely. First, there is ample evidence that women encounter resentment at work and risk their jobs by bringing such claims. As I have noted above, most women who are harassed do not even complain, let alone bring lawsuits. Second, even if this did occur in the rare case, legal standards should not be set based on a rare exception. Instead, the standard should be set based on what happens in most cases. Most cases of sexual harassment are brought by women who believe they have been legitimately wronged.

Instead, the courts should treat supervisor sexual harassment like any other supervisor misconduct—as a cost of doing business. In this manner, victims will be made whole and employers will be encouraged to adopt policies that are more likely to be effective.