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MANAGING EMPLOYMENT RISKS IN LIGHT OF THE NEW RULINGS IN SEXUAL HARASSMENT LAW

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INTRODUCTION

In two recent rulings, the United States Supreme Court established new rules for managing risk and defending against sexual harassment claims and liabilities. In *Faragher v. City of Boca Raton*¹ and *Burlington Industries, Inc. v. Ellerth*,² the High Court clarified when employers are liable for sexual harassment committed by supervisors in the workplace. Significantly, these were only two of the four cases heard by the Supreme Court in the 1998 term regarding sexual harassment. Within the four months prior to June 1998, the Court issued two other decisions, *Gebser v. Lago Vista Independent School District*³ and *Oncala v. Sundowner Offshore Services, Inc.*⁴ Of the Court's thirty cases on the docket in 1998, four involved sexual harassment issues.

In a society where sex is at the forefront of the news on an almost daily basis and is an integral part of the most popular television series and movies, the tension between liberal societal attitudes on sex and appropriate workplace behavior poses a conundrum for employers. Providing a harassment-free workplace without being overly paternalistic has become an almost impossible challenge for many employers.

Still, employers who fail to address the challenge of preventing

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1. 118 S. Ct. 2275 (1998).
2. 118 S. Ct. 2257 (1998).
3. 118 S. Ct. 1989 (1998).
4. 118 S. Ct. 998 (1998).

sexual harassment face extremely high stakes. Recently, a jury in Iowa awarded \$80.7 million to a former manager of United Parcel Service after she alleged that the company fostered a sexually hostile work environment and retaliated against her for complaining that a driver poked her breast.⁵ In another recent case, Astra U.S.A. agreed to pay \$10 million to settle allegations of widespread sexual harassment in a consent decree negotiated with the Equal Employment Opportunity Commission ("EEOC").⁶ The allegations specified that top management officials subjected female sales representatives to unwelcome touching and sexual comments.⁷

Despite the potential magnitude of the consequences of sexual harassment, employers are not powerless. Indeed, it has become imperative for employers to undertake risk management and employee education and training programs. Included in such programs should be: (1) a basic overview of sexual harassment law; (2) a discussion of the four sexual harassment cases recently decided by the United States Supreme Court; and (3) an examination of the employer's preventive policies and strategies that are necessary to establish an affirmative defense under the new cases.

I. SEXUAL HARASSMENT AND THE LAW

A. *The Road to Faragher, Ellerth, and Oncale*

In its entire history, the United States Supreme Court has heard only six sexual harassment cases, four of which were heard in the 1998 term. Although sexual harassment issues comprise a significant portion of employment discrimination litigation today, Title VII of the Civil Rights Act of 1964⁸ was not originally drafted to protect individuals on the basis of sex. Rather, sex discrimination was added at the last minute as an attempt by opponents to defeat the bill. Much to their surprise, the amendment passed.⁹ Thus, there was no legislative history pertaining to discrimination based on sex under Title VII until almost a decade later, when it was amended by the Equal Employment Opportunity Act of 1972.¹⁰

In the late 1970's two types of sexual harassment were first

5. See Jordan Lite, *Ex-UPS Manager Awarded \$80M*, AP ONLINE, Feb. 12, 1998.

6. See EEOC v. Astra USA, Inc., No. CIV.A. 98-40014, 1998 WL 80324, at *1 (D. Mass. Feb. 5, 1998); see also EEOC v. Astra USA, Inc., No. CIV.A. 98-40014-NMG, 1999 WL 342043, at *1 (D. Mass. May 20, 1999).

7. See *Astra*, 1998 WL 80324, at * 1.

8. See 42 U.S.C. §§ 2000e to 2000e-17 (1994).

9. See *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) (citations omitted).

10. PUB. L. No. 92-261, § 1, Mar. 24, 1972, 86 Stat. 103.

identified by the academic community: “quid pro quo” and “hostile environment.”¹¹ In 1980, the EEOC issued guidelines specifying that sexual harassment, “whether or not it is directly linked to the grant or denial of an economic quid pro quo, where ‘such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment,’” is prohibited under Title VII.¹² Interestingly, the terms “hostile environment” and “quid pro quo” do not appear in the text of Title VII. Nevertheless, these terms have been used to differentiate the types of misconduct for which employers are increasingly being held liable.

1. The Birth of Sexual Harassment Law

It was not until twelve years after the enactment of Title VII that a court first held that sexual harassment was actionable under the statute. In *Williams v. Saxbe*,¹³ the plaintiff sued her employer for sex discrimination under Title VII, alleging that she was terminated after refusing a sexual advance made by her immediate supervisor. The United States District Court for the District of Columbia held that conditioning job advancement on an employee’s acquiescence to sexual demands constitutes sex discrimination and that the application of an employer’s policy or practice on the basis of gender alone is sufficient to prove sex discrimination.¹⁴ The court also held that a supervisor’s imposition of conditions of sexual favors on female employees was tantamount to the employer doing the same, and that while Title VII is not concerned with monitoring personal disputes between employees, it is intended to prohibit discrimination in the workplace.¹⁵

One year after the *Williams* decision, the United States Court of Appeals for the District of Columbia also recognized quid pro quo harassment as a violation of Title VII. In *Barnes v. Costle*,¹⁶ the court held that a supervisor who terminated an employee because she refused his sexual advances acted in violation of Title

11. See *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2264 (1998) (citing CATHERINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF DISCRIMINATION* (1979)).

12. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1985)).

13. 413 F. Supp. 654 (D.D.C. 1976).

14. See *id.* at 658-59.

15. See *id.* at 660-61.

16. 561 F.2d 983 (D.C. Cir. 1977).

VII.¹⁷ The court, reversing the lower court's decision that the plaintiff "was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor," explained that the prohibition on discrimination based on sex is not limited to differences based on gender.¹⁸ Rather, it is only necessary that gender be a contributing factor to the discrimination.¹⁹

Although most courts readily recognized quid pro quo harassment as a form of sex discrimination prohibited by Title VII, it took another five years for a court to recognize hostile environment claims under Title VII. In *Henson v. Dundee*,²⁰ the United States Court of Appeals for the Eleventh Circuit relied on the 1980 guidelines issued by the EEOC²¹ to hold that "[a] pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions or privileges of employment."²² The court explained that a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII.²³

In reaching this holding, the *Henson* court also relied upon *Bundy v. Jackson*.²⁴ In *Bundy*, the District of Columbia Circuit held that sexual harassment claims can be established, even without tangible job detriment, where employees are subjected to a discriminatory work environment.²⁵ Although the *Bundy* court did not use the term "hostile environment" in its discussion, the *Henson* court specifically focused on hostile work environment cases and laid out the elements necessary for a hostile environment claim: first, the employee must belong to a protected group; second, the employee

17. *See id.* at 995.

18. *See id.* at 990.

19. *See id.*

20. 682 F.2d 897 (11th Cir. 1982).

21. Through the issuance of its 1980 Guidelines, the EEOC stated its position regarding several issues. First, the EEOC acknowledged that sexual harassment is discrimination based upon sex and is not limited to quid pro quo harassment. Second, the EEOC recognized the hostile work environment theory of sexual harassment. Third, the EEOC suggested that employers implement a sexual harassment policy. Fourth, the EEOC created the "knew/should have known" concept for establishing an employer's liability under the hostile environment theory. *See* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1997) (effective Nov. 10, 1980).

22. *Henson*, 682 F.2d at 902.

23. *See id.*

24. 641 F.2d 934 (D.C. Cir. 1981).

25. *See id.* at 943.

must have been subject to unwelcome sexual harassment; third, the harassment must be based upon sex; and fourth, the harassment must have affected a "term, condition or privilege" of employment.²⁶ The court emphasized that tangible economic harm is not necessary for the fourth element, but the alleged conduct "must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."²⁷

2. *Meritor Savings Bank, FSB v. Vinson*

By the early 1980's, most courts recognized quid pro quo and hostile environment sexual harassment claims. The Supreme Court, however, did not address sexual harassment until 1986 in the landmark case of *Meritor Savings Bank, FSB v. Vinson*.²⁸

Although *Meritor* has often been cited for the proposition that an employer will be strictly liable for the quid pro quo sexual harassment of an employee by a supervisor,²⁹ this language does not appear in the decision. The case itself dealt with employer liability for hostile environment claims premised on the actions of a supervisor; however, implicit in the Court's discussion was the understanding that under the EEOC guidelines employers may be strictly liable for quid pro quo harassment by supervisors.³⁰

The plaintiff in *Meritor* alleged that she had been sexually harassed by her supervisor throughout her four years of employment.³¹ During that time, she had received several merit-based promotions.³² However, she was eventually terminated for excessive use of sick leave, and she subsequently sued her employer for sexual harassment.³³

In holding the employer liable for sexual harassment, the Supreme Court found that economic harm is not required for a plaintiff to assert a sexual harassment claim.³⁴ Rather, the appropriate inquiry is whether the alleged conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment

26. See *Henson*, 682 F.2d at 903-04.

27. *Id.* at 904.

28. 477 U.S. 57 (1986)

29. See, e.g., *Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994).

30. See *Meritor*, 477 U.S. at 71-73.

31. See *id.* at 60.

32. See *id.*

33. See *id.*

34. See *id.* at 67-68.

and create an abusive working environment.’”³⁵ The Court also found that a plaintiff’s admission that she submitted “voluntarily” to her supervisor’s sexual overtures was not a defense to a sexual harassment suit.³⁶ “The correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome.”³⁷ Finally, the Court held that an employer will not be strictly liable for a supervisor’s conduct.³⁸ In a cryptic discussion, the Court noted that the District of Columbia Circuit was incorrect in “concluding that employers are always automatically liable for sexual harassment [committed] by their supervisors,” and added that simply because an employer has not received notice of harassment “does not necessarily insulate that employer from liability.”³⁹

Although the Supreme Court in *Meritor* recognized a hostile environment sexual harassment claim for the first time, it declined to offer a “definitive rule” on employer liability under Title VII.⁴⁰ The federal courts of appeals, however, have consistently held that if a plaintiff establishes a quid pro quo⁴¹ claim, then the employer is vicariously liable.⁴² On the other hand, the courts have set forth various and sometimes conflicting standards for employer liability for hostile environment harassment perpetrated by supervisory employees.⁴³

3. The Aftermath of *Meritor*

Following *Meritor*, the courts were faced with questions concerning: (1) whether a plaintiff could prove quid pro quo sexual harassment where there was no tangible job detriment; (2) whether any circumstances existed that would warrant an employer’s strict liability for a hostile work environment; (3) what conduct would be sufficiently severe to constitute a hostile working environment; and (4) what standards should be used to judge whether the conduct

35. *Id.* at 67 (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

36. *See id.* at 68.

37. *Id.*

38. *See id.* at 72.

39. *Id.*

40. *See id.*

41. To establish a quid pro quo claim, a plaintiff must show that (1) submission to unwelcome advances of a sexual nature was made an express or implied condition of receiving job benefits, or (2) rejection thereof resulted in job detriment. *See* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1997).

42. *See e.g.*, *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

43. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2282 (1998).

created a sexually hostile working environment. One of the first issues that arose was determining when an employer "should have known" about allegedly pervasive sexually harassing conduct. After proving a prima facie case of hostile environment sexual harassment, most circuits required plaintiffs to carry the burden of establishing that the conduct which created the hostile environment should be imputed to the employer.⁴⁴ Under this analysis, plaintiffs needed to prove that the employer either failed to provide a reasonable avenue for a complaint or knew of the harassment but did nothing about it.⁴⁵ Thus, an employer would not be liable if an effective anti-harassment policy existed and the employer investigated the complaint in accordance with that policy.

Subsequently the Second Circuit, in *Karibian v. Columbia University*,⁴⁶ a decision often quoted as at odds with this analysis, held that the employer could be liable for sexual harassment, even if unreported, when the alleged harasser is a high-level executive.⁴⁷ However, the court did not provide a definition of high-level executive.⁴⁸ The court determined that regardless of notice or the reasonableness of complaint procedures, an employer would be liable if a supervisor used his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship.⁴⁹ In an agency situation such as in *Karibian*, the identity of the supervisor and the employer merge, and the supervisor's knowledge is imputed to the employer, thereby rendering the employer liable for the supervisor's conduct.⁵⁰ If, however, the harasser had been a low level supervisor who did not rely on his supervisory authority to carry out the harassment, the employer would *not* have been liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."⁵¹

Other circuits have adopted a more pro-employer approach to liability in sexual harassment cases. In *Gary v. Long*,⁵² the Circuit Court for the District of Columbia affirmed the dismissal of a plain-

44. See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

45. See *id.*

46. 14 F.3d 773 (2d Cir. 1994).

47. See *id.* at 780.

48. See *id.*

49. See *id.*

50. See *id.*

51. *Id.* (quoting *Kotcher*, 957 F.2d at 63).

52. 59 F.3d 1391 (D.C. Cir. 1995).

tiff's Title VII claims against her employer on the grounds that an employer would escape liability for a supervisor's hostile work environment harassment where the employer could show it had "implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences."⁵³ The court, relying on general principles of agency law, reasoned that the anti-harassment policy should have reasonably put the plaintiff on notice that her supervisor's harassing conduct was in violation of the policy, and therefore was not authorized by the employer.⁵⁴ Thus, the court held that the existence of an effective and publicized anti-harassment policy absolves an employer from Title VII liability.⁵⁵

4. *Harris v. Forklift Systems, Inc.*

After *Meritor* and its progeny, it became evident that the lower courts needed additional guidance in determining what standards should be used to determine the existence of a sexually hostile work environment. For example, a number of courts began to modify the "reasonable person" standard for determining whether an environment was offensive.⁵⁶

In *Harris v. Forklift Systems, Inc.*,⁵⁷ the Supreme Court clarified the standard for determining when a hostile environment exists. This standard examines whether the conduct was both objectively hostile, meaning that a reasonable person would find it hostile, and *subjectively* hostile, meaning that the plaintiff found it hostile.⁵⁸ The Court did not discuss the "reasonable woman" standard. The Court also clarified that a plaintiff need not suffer "tangible" or "economic" discrimination for a Title VII violation.⁵⁹ Specifically, a plaintiff who suffered psychological harm as a result

53. *Id.* at 1398.

54. *See id.*

55. *See id.*; *see also* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 110 (3d Cir. 1994) (holding that an effective grievance procedure that is known to the employee and addresses the alleged harassment in a timely manner shields the employer from liability).

56. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (adopting the "reasonable woman" standard, which considers whether a reasonable woman would find that the accused's conduct was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment").

57. 510 U.S. 17 (1993).

58. *See id.* at 19.

59. *See id.* at 21.

of sexual harassment could still establish an actionable Title VII claim.⁶⁰ However, while psychological harm would be relevant, it would not be required to establish a hostile environment claim.⁶¹

After the Court's reaffirmation in *Harris* that "offensive" conduct should be viewed from the perspective of the reasonable person, the next logical question was to determine the reasonableness of the employer's response. In a widely publicized decision, *Torres v. Pisano*,⁶² the Second Circuit considered the reasonableness of the employer's failure to investigate a sexual harassment claim where the victim requested that her complaint remain confidential. The court held that a supervisor's failure to report the sexual harassment of an employee by another supervisor was reasonable where the employee requested, verbally and in writing, on two separate occasions, that her complaint be kept confidential.⁶³ The court cautioned, however, that "[t]here is certainly a point at which harassment becomes so severe that a reasonable employer simply cannot stand by, even if requested to do so by a terrified employee."⁶⁴

B. *The Supreme Court's Recent Cases*

The courts have been split for over a decade on the applicable standards for employer liability in hostile environment cases. The Supreme Court finally addressed this issue in 1998 in two cases decided on the same day. The holdings of these two cases, coupled with those of two other cases decided in 1997, will substantially change the landscape of sexual harassment law in the United States.

1. Defining Employer Liability

In *Faragher v. City of Boca Raton*⁶⁵ and *Burlington Industries*,

60. *See id.* at 23.

61. *See id.*

62. 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997).

63. *See id.* at 639.

64. *Id.* *But see* *Gallagher v. Delaney*, 139 F.3d 338, 348 (2d Cir. 1998) (reversing grant of summary judgment for defendant where plaintiff, while reporting supervisor's sexually harassing conduct to human resources manager, told manager to handle the matter discreetly); *Wixted v. DHL Airways, Inc.*, No. 95-C-2296, 1998 WL 164922, at *10 (N.D. Ill. Apr. 7, 1998) (holding that summary judgment was not proper where a jury could reasonably find that a supervisor's failure to report the sexual harassment of an employee by another supervisor, despite employee's request to keep the matter confidential, was negligent where there were threats of serious physical harm to the victim if the employer did not act promptly).

65. 118 S. Ct. 2275 (1998).

Inc. v. Ellerth,⁶⁶ the Supreme Court sanctioned the imposition of automatic employer liability where a supervisor engages in sexual misconduct and directly misuses his or her authority to discharge, demote, or cause the employee “tangible” job-related consequences. In so doing, the Court held that when the offending conduct is by a supervisor, the employer’s liability no longer turns on whether the alleged harassment is quid pro quo or hostile environment. Rather, the critical question is whether there was a tangible job detriment. If so, the employer is strictly liable. Where a supervisor’s sexually harassing misconduct does not cause tangible job-related harm to the employee, the employer can avoid liability or reduce damages if it proves, as an affirmative defense, “(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.”⁶⁷

a. *Burlington Industries, Inc. v. Ellerth*

In *Burlington Industries, Inc. v. Ellerth*,⁶⁸ the plaintiff, a sales representative, resigned after allegedly being subjected to repeated sexual advances by a mid-level manager. According to the plaintiff, the manager made sexual advances to her over a period of one year and told her that he “could make [her] life very hard or very easy at Burlington.”⁶⁹ Despite rebuffing his advances, she suffered no retaliation or adverse employment action.⁷⁰ In fact, she was promoted.⁷¹ Furthermore, even though she was familiar with the company’s anti-harassment policy, the plaintiff never reported the harassment to management until after she resigned.⁷² Although the plaintiff allegedly suffered sexual harassment, the facts of her case made it difficult for her to frame a viable sexual harassment claim. She could not prove quid pro quo harassment because she never

66. 118 S. Ct. 2257 (1998).

67. *Faragher*, 118 S. Ct. at 2293. The distinction between eliminating liability or reducing damages, a question not answered by the High Court, is a significant one from a practical standpoint. Once there is a finding of liability, no matter how small, the employer is also liable for the plaintiff’s attorneys fees, which in many cases can be substantial.

68. 118 S. Ct. 2257 (1998).

69. *Id.* at 2262.

70. *See id.*

71. *See id.*

72. *See id.*

submitted to her supervisor's alleged advances, nor did she suffer a job detriment. Further, she could not establish a hostile environment claim because she could not prove her employer knew or should have known of the harassment.

The question presented to the Court was whether a claim of quid pro quo sexual harassment is viable when the alleged harasser makes unfulfilled threats and no tangible employment action is taken against the employee. The Court, however, reframed the plaintiff's claim as a hostile work environment claim since it involved only unfulfilled threats.⁷³ It held that employers will be vicariously liable for actionable hostile environments created by supervisors with immediate or successively higher authority over victimized employees.⁷⁴ "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages"⁷⁵ This affirmative defense is the same one set forth in *Faragher*, requiring the employer to prove, first, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and second, "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁷⁶ As in *Faragher*, the Court in *Ellerth* emphasized that no affirmative defense is available when the supervisor takes a tangible employment action against the employee.⁷⁷ Because no tangible employment action was taken against the plaintiff, the Court remanded the case to give Burlington the opportunity to prove the affirmative defense.⁷⁸

73. *See id.* at 2265. In reframing the plaintiff's claim as a hostile environment claim, the Court removed the plaintiff's lawyers' incentive to frame claims as quid pro quo claims so that the employers would be held to a vicarious liability standard. *See id.* at 2264-65. The Court explained that the labels "quid pro quo" and "hostile environment" are not controlling for purposes of employer liability. *See id.* at 2265. Rather, the inquiry relevant to employer liability is whether the supervisor took any tangible employment action against the employee. *See id.* The Court explained, however, that the terms are relevant "[t]o the extent that they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general" *Id.*

74. *See id.* at 2270. The Court's analysis in both *Ellerth* and *Faragher* applied only to sexual harassment perpetrated by a *supervisor*. Accordingly, the standards for judging harassment perpetrated by a co-employee (i.e., was the harassment sufficiently severe or pervasive, did the employer know of the conduct and fail to reasonably respond, should the employer have known about the conduct), remain unchanged.

75. *Id.*

76. *Id.*

77. *See id.*

78. *See id.* at 2271.

b. *Faragher v. City of Boca Raton*

In *Faragher v. City of Boca Raton*,⁷⁹ the plaintiff, a female lifeguard, sued the City of Boca Raton ("City") on a hostile environment claim. She alleged that her supervisors created a sexually hostile work environment by repeatedly subjecting her and other female lifeguards to uninvited and offensive touching and lewd and offensive remarks.⁸⁰ Although she told another supervisor about the offensive behavior, the supervisor did not report the alleged misconduct to his superiors.⁸¹

Shortly before the plaintiff resigned, another female lifeguard wrote to the City's personnel director and complained about harassing conduct by the same supervisors.⁸² The City investigated the report and reprimanded the supervisors.⁸³ Subsequently, even though the plaintiff had not complained to City officials, she filed suit claiming the City was liable for the harassment she allegedly suffered.⁸⁴

Thus in *Faragher*, the Supreme Court faced the issue of whether an employer could be liable for a first-line supervisor's sexually harassing behavior of which it was not officially aware and which did not result in a tangible adverse employment action.⁸⁵ Relying on traditional agency principles, the Court sought to resolve the conflict between an employee's right to be free of sexual harassment and the limits on employer liability for an "agent's" misconduct.⁸⁶

The Court held that while an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee, the employer is allowed to present an affirmative defense when no tangible employment action is taken.⁸⁷ The Court cited

79. 118 S. Ct. 2275 (1998).

80. *See id.* at 2280.

81. *See id.* at 2281.

82. *See id.*

83. *See id.*

84. *See id.* at 2280.

85. In other words, the Court had to determine whether the City "should have known" about the conduct.

86. *See id.* at 2282.

87. *See id.* at 2292-93. Interestingly, as an appellate judge on the Court of Appeals for the District of Columbia Circuit, Justice Scalia dissented from the court's en banc decision denying a rehearing of *Vinson v. Taylor*. *See Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985), *aff'd*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The dissenters rejected a standard of vicarious liability for a "supervisor's alleged sexual harassment when the employer was not even made aware of and given the chance to

discharge, demotion, and undesirable reassignment as examples of tangible employment actions.⁸⁸

The Court found that the City's sexual harassment policy had never been effectively disseminated among the beach employees and the internal complaint procedure did not provide a mechanism for by-passing the offending supervisors.⁸⁹ On that basis, the Court found that the City could not have exercised reasonable care to prevent the harassing behavior as a matter of law and remanded the case to the district court for reinstatement of the judgment in favor of the plaintiff.⁹⁰

2. *Gebser v. Lago Vista Independent School District*

In *Gebser v. Lago Vista Independent School District*,⁹¹ a case decided only a few days before *Faragher* and *Ellerth*, the Supreme Court limited a school district's liability for the alleged sexual harassment of a student by a teacher.⁹² The plaintiff, a high school student, had engaged in a sexual relationship with one of her teachers.⁹³ The relationship ended when a police officer discovered them having intercourse, and the district immediately terminated the teacher.⁹⁴ The student had never reported the teacher's conduct while she maintained the sexual relationship with him, and there was no evidence that the district was aware of the relationship.⁹⁵ The plaintiff subsequently sued the school district under Title IX of

rectify the consequences of the harassment alleged." *Id.* at 1333 (Bork, J., dissenting). In *Faragher*, Justice Scalia joined with Justice Thomas in dissent and once again expressed disapproval of vicarious liability in the absence of adverse employment action. *See Faragher*, 118 S. Ct. at 2294 (Thomas, J., dissenting). Justices Thomas and Scalia argued that an employer should not be held vicariously liable if a supervisor creates a hostile work environment absent an adverse employment consequence, for the same reason expressed in Scalia's dissent in *Ellerth*. *See id.* (Thomas, J., dissenting). Under such circumstances, the untenable result would be that "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm In practice, therefore, employer liability very well may be the rule." *Id.* (Thomas, J., dissenting) (citing *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2274 (1998) (citations omitted)).

88. *See Faragher*, 118 S. Ct. at 2293.

89. *See id.*

90. *See id.* The district court awarded the plaintiff one dollar in nominal damages on her Title VII claim. *See id.* at 2281.

91. 118 S. Ct. 1989 (1998).

92. *See id.* at 2000.

93. *See id.* at 1993.

94. *See id.*

95. *See id.* at 1993-94.

the 1972 Education Amendments,⁹⁶ which prohibits sex discrimination by educational institutions receiving federal financial assistance.⁹⁷

While the Supreme Court in the *Faragher* and *Ellerth* cases increased the protection provided to employees against sexual harassment in the workplace, ironically, it narrowed the protection provided to students at school. The Court in *Gebser* distinguished Title IX's implied private cause of action and lack of legislative history and Title VII's express private cause of action.⁹⁸ The Court held that a school district would not be liable under Title IX for a teacher's sexual harassment of a student where the district did not have *actual notice* of the harassment and did not *display deliberate indifference towards* the harassment.⁹⁹

While it may seem that the Court's result in *Gebser* conflicts with its decisions in *Faragher* and *Ellerth*, Justice Ginsburg's dissenting opinion, joined by Justices Souter and Breyer, foreshadowed the subsequent holdings of those cases by recognizing that an effective anti-harassment policy would be an affirmative defense.¹⁰⁰ At the same time, however, these three justices, along with Justice Stevens in a separate dissenting opinion, criticized the Court's holding and argued that "[a]s a matter of policy, the Court ranks protection of the school district's purse above the protection of immature high school students"¹⁰¹

3. *Oncale v. Sundowner Offshore Services, Inc.*

Oncale v. Sundowner Offshore Services, Inc.,¹⁰² a case involving same-sex sexual harassment, is the only co-worker sexual harassment case that the Supreme Court has heard.¹⁰³ In *Oncale*, a male employee brought a Title VII action against his former employer, a male supervisor, and two male co-workers, alleging that he had been sexually harassed.¹⁰⁴ Specifically, the plaintiff alleged that he had been sexually assaulted by his supervisor and co-work-

96. PUB. L. NO. 92-318, § 901, June 23, 1972, 86 Stat. 373 (codified as amended in 20 U.S.C. §§ 1681-88 (1994)).

97. *See id.*

98. *See id.* at 1997-98.

99. *See id.* at 2000.

100. *See id.* at 2007 (Ginsburg, J., dissenting).

101. *Id.* (Stevens, J., dissenting).

102. 118 S. Ct. 998 (1998).

103. *See id.*

104. *See id.* at 1001.

ers and threatened with homosexual rape.¹⁰⁵ Although the plaintiff had reported numerous incidents of harassment to supervisory personnel, no remedial action was ever taken.¹⁰⁶ The Supreme Court, in a unanimous opinion, held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.¹⁰⁷

The Court allayed fears that liability for same-sex sexual harassment will transform Title VII into a “general civility code for the American workplace” by emphasizing that the crucial inquiry is still whether “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹⁰⁸ Thus, the standard under which sexual harassment cases are evaluated remains unchanged, regardless of whether one alleges same-sex sexual harassment or opposite-sex sexual harassment. The Court, however, did caution that careful consideration of the social context in which particular behavior occurs is always required. For example:

[A] professional football player’s working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.¹⁰⁹

In advising courts to examine the context of any alleged inappropriate behavior, the Court reaffirmed that actionable hostile environment claims will exist only where the conduct is severe or pervasive.¹¹⁰ This leaves room for courts to examine the alleged harasser’s behavior, determine that the alleged conduct is not sufficiently severe as a matter of law, and decide cases on summary judgment.

Additionally, *Oncale* provides a uniform standard for lower courts regarding the viability of same-sex sexual harassment claims that previously did not exist. For example, prior to *Oncale* some jurisdictions, such as the Fourth Circuit, required the plaintiff to show that his harasser was homosexual,¹¹¹ while the Fifth Circuit

105. *See id.*

106. *See id.*

107. *See id.* at 1002.

108. *Id.* (internal quotations omitted).

109. *Id.* at 1003.

110. *See id.*

111. *See id.* at 1002 (citing *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996)).

rejected *all* same-sex sexual harassment claims.¹¹² By contrast, the Seventh Circuit held that sexual harassment was “always actionable, regardless of the harasser’s sex, sexual orientation or motivations.”¹¹³ With *Oncale*, the Supreme Court ensured that same-sex sexual harassment would be actionable under Title VII regardless of any of these considerations.

C. *Post-Faragher and Ellerth: The Unanswered Questions*

The EEOC, as well as the courts, have consistently counseled employers about the need to promulgate policies prohibiting sexual harassment and providing effective complaint investigation procedures. The Supreme Court’s decisions in *Faragher* and *Ellerth* elevate these basic precautions to a mandate, providing an affirmative defense for employers to avoid *all* liability where the harassing supervisor’s misconduct causes no tangible job-related harm to the employee and the employer proves both elements of the affirmative defense. The first element requires an employer to: (1) prevent *and* (2) promptly correct any sexually harassing behavior. The second element requires the employer to prove that the employee: (1) failed to take advantage of any preventive or corrective opportunities provided by the employer *or* (2) failed to avoid harm otherwise.

Although the Supreme Court’s decisions in *Faragher* and *Ellerth* provide some clarity in determining when an employer will be liable for its supervisors’ misconduct, the decisions leave unresolved a number of questions for the lower courts to answer. These unanswered questions, in conjunction with the higher burden of proving the affirmative defense discussed above, will make it much more challenging for employers to win sexual harassment cases on summary judgment.

1. When is the Employer’s Failure to Prevent Harassment Actionable?

In applying the affirmative defense, it is difficult, if not impossible, to determine whether an employer will be liable where it thoroughly investigates an employee’s allegations that a supervisor created a hostile work environment and takes steps to end the offending conduct. Imagine the following scenario. The employer

112. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev’d*, 118 S. Ct. 998 (1998).

113. *Doe ex rel. Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 118 S. Ct. 1183 (1998).

maintains a “zero tolerance” policy prohibiting sexual harassment. The employee appropriately follows the employer’s guidelines on filing a sexual harassment complaint. Accordingly, the employer conducts a detailed investigation, follows up with the appropriate documentation of the incident(s), and takes disciplinary action, if necessary. No tangible adverse consequences have been taken against the employee.

From these facts, it appears that both employer and employee have taken measures, to the best of their ability, to prevent and correct any sexually harassing behavior. However, because the second element of the affirmative defense set forth in *Faragher* and *Ellerth* requires that the employer prove that the employee did not “take advantage of any preventive or corrective opportunities provided by the employer,” or failed to avoid harm otherwise, the defense appears to be unavailable to the employer that *did* respond to an employee’s complaint. Consequently, the employer will be liable for its supervisor’s conduct, despite having followed the Supreme Court’s mandate to prevent and promptly correct any sexually harassing behavior.

In this scenario, the employer finds itself in a conundrum. It is unclear whether an employer’s prompt and thorough investigation of a sexual harassment complaint will serve as a bar to liability or simply be a means of reducing potential liability. Once the employer learns of an employee’s sexual harassment complaint, the employer has little incentive to investigate the complaint if the employer will be liable regardless of its response. From a purely economic standpoint, employers may wonder why they should terminate or discipline high-level executives or “rainmaking” supervisors who have been accused of sexual harassment, if the ultimate outcome of the complaint will be that the employer is found liable regardless of its actions.

2. How May an Employee “Fail to Avoid Harm Otherwise”?

As discussed earlier, an employer proves the second element of the affirmative defense by showing either that the employee failed to take advantage of any preventive or corrective opportunities provided by the employer *or* that the employee failed to avoid harm otherwise. It is fairly easy to determine whether the employee took advantage of the employer’s preventive or corrective opportunities. The employer need only ask such questions as

whether the employee complained about the harassment or whether the employee participated in a subsequent investigation.

A more challenging question arises in determining whether the employee failed to avoid harm. It is precisely this question, however, that may provide an avenue for the employer to prove the employee did not meet his or her burden in preventing the sexual harassment.¹¹⁴ Moreover, the Court provided virtually no guidance regarding the circumstances under which an employee will be considered to have failed to avoid harm. The Court's only mention of this element of the affirmative defense consists of one sentence:

[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an 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.¹¹⁵

The Court's discussion leaves open to interpretation what an employer must prove to satisfy the second element of the affirmative defense.

3. What is a "Tangible Adverse Employment Action"?

In the *Ellerth* case, the Supreme Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."¹¹⁶ As the Court acknowledged, where an employee has not suffered direct economic harm, it is unlikely that the employer's behavior constitutes a tangible employment action.¹¹⁷ For example, in *Crady v. Liberty National Bank & Trust Co.*,¹¹⁸ the Seventh Circuit found no adverse employment action where the branch manager of a bank was transferred to a collections officer position at another branch and retained the same salary and benefits.¹¹⁹

114. For example, one possible scenario may exist where an employer's policy provides a number of supervisors to whom employees may report complaints of sexual harassment, but the employee fails to report the harassment to any of the listed supervisors.

115. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998) (emphasis added).

116. *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

117. *See id.* at 2269.

118. 993 F.2d 132 (7th Cir. 1993).

119. *See id.* at 135-36.

However, it should be noted that whether the employee suffered direct economic harm may not be the only factor examined by a court in determining whether the employer took a tangible employment action against the employee. In *Crady*, the court acknowledged that the unique circumstances of each case must be examined, including whether an employee's duties were "significantly diminished" or an employee's title was changed to one that is "less distinguished."¹²⁰ Precisely such an assessment was made by the Sixth Circuit in *Kocsis v. Multi-Care Management, Inc.*¹²¹ The court held that the plaintiff did not suffer a materially adverse employment action when she was transferred to a new position and her rate of pay and benefits did not change, her duties were not substantially modified, and she did not lose any prestige in her position due to a change in working conditions or a change in title.¹²²

Conversely, other courts have found an adverse employment action regardless of the fact that the plaintiff did not suffer direct economic harm. In *Collins v. Illinois*,¹²³ the Seventh Circuit explained that "adverse job action is *not* limited solely to loss or reduction of pay or money benefits," and held that a plaintiff who was transferred away from a job she enjoyed and was deprived of her office, telephone, and business cards suffered adverse action sufficient to state a claim for retaliation under Title VII.¹²⁴ Similarly, in *Dahm v. Flynn*,¹²⁵ the Seventh Circuit, reversing summary judgment for the defendant, held that demoting an employee from an "intellectually stimulating" job to a routine job, even without a loss in benefits or salary, may constitute adverse employment action.¹²⁶

Clearly, courts have been forced to consider what constitutes a tangible adverse employment action. At least one commentator has stated that future litigation will focus on the situation where an employee believes his or her "status" has been diminished as a result of some employment action taken by the employer.¹²⁷ Given

120. *See id.* at 136.

121. 97 F.3d 876 (6th Cir. 1996).

122. *See id.* at 886-87.

123. 830 F.2d 692 (7th Cir. 1987).

124. *See id.* at 703-04 (emphasis added).

125. 60 F.3d 253 (7th Cir. 1994).

126. *See id.* at 257; *see also* McGrenaghan v. Saint Denis Sch., 979 F. Supp. 323, 326 (E.D. Pa. 1997) (holding that a job transfer with significantly diminished responsibility constitutes adverse job action even though there was no change in salary or benefits).

127. *See* Dominic Bencivenga, *Looking For Guidance, High Court Rulings Leave Key Terms Undefined*, 220 N.Y.L.J. 5 (1998).

the Supreme Court's failure to provide a framework for what constitutes a tangible adverse employment action, substantial litigation regarding this issue will certainly arise.

4. In What Contexts Will the Affirmative Defense be Applied in the Future?

Nowhere in *Faragher* and *Ellerth* did the Supreme Court limit the application of the affirmative defense to sexually hostile work environments. The Court specifically stated that "[a]n 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."¹²⁸ Conceivably, the affirmative defense is available whenever a plaintiff alleges a hostile work environment perpetrated by a supervisor, whether that environment is the result of discrimination based on the individual's race, religion, national origin, sex, color, age, or disability.

Since the *Faragher* and *Ellerth* decisions, many courts have had the opportunity to apply the affirmative defense to hostile environment claims. In *Fierro v. Saks Fifth Avenue*,¹²⁹ the United States District Court for the Southern District of New York applied the affirmative defense to a claim brought by an employee who alleged a hostile environment based upon his national origin. The employee, who was terminated for petty embezzlement, sued the company for national origin discrimination based upon his allegations that a supervisor had made derogatory comments about his national origin (Italian American) and the national origin of his wife (Hispanic).¹³⁰ At trial, the plaintiff testified that he never complained about these comments because he was "'afraid of repercussions'" and believed that filing a complaint would only bring about an "'[un]pleasant outcome.'"¹³¹

In granting summary judgment to the employer, Judge Briant, writing for the court, stated that an employee's fear of repercussions or conflict does not excuse the employee from making full use of an employer's complaint procedures.¹³² Focusing on the second element of the affirmative defense, which requires that the employer prove the employee unreasonably failed to take advantage

128. *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) (emphasis added).

129. 13 F. Supp. 2d 481 (S.D.N.Y. 1998).

130. *See id.* at 485-86.

131. *Id.* at 487.

132. *See id.* at 492.

of its complaint procedures, the court emphasized that employees must accept responsibility for reporting harassment because employers cannot combat harassment of which they are not aware.¹³³

Interestingly, it appears that fear of retaliation may not excuse an employee from failing to follow an employer's complaint procedures, even where the supervisor threatens to terminate the employee for reporting the discriminatory conduct. For instance, in *Sconce v. Tandy Corp.*,¹³⁴ the United States District Court for the Western District of Kentucky applied the affirmative defense and found the employer not liable where an employee who alleged hostile environment sexual harassment never reported her supervisor's behavior to the employer.¹³⁵

In *Sconce*, the plaintiff alleged that her supervisor groped her, made sexual innuendos, and threatened to terminate her if she told anyone.¹³⁶ She refused his advances; and although she was aware of the employer's policy against sexual harassment, she failed to file a complaint in accordance with that policy, and instead requested a transfer to a lower paying position at another location.¹³⁷ Applying the affirmative defense set forth in *Ellerth*, the court found that the employer's comprehensive policy against sexual harassment, combined with the employee's failure to report the harassment, precluded the employer's liability for the supervisor's alleged behavior.¹³⁸ Like the court in *Fierro*, the *Sconce* court stated that an employee's fear of retaliation does not excuse his or her failure to follow the employer's procedures for filing a sexual harassment complaint. The court stated, "[A] threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection. To hold otherwise would render the affirmative defense meaningless."¹³⁹

The plaintiff in *Sconce* also alleged quid pro quo sexual harassment.¹⁴⁰ However, because the plaintiff never submitted to her supervisor's alleged sexual demands, was never denied a promotion, and voluntarily requested a transfer, the employer had not taken any specific job action against the employee and was not held

133. *See id.*

134. 9 F. Supp. 2d 773 (W.D. Ky. 1998).

135. *See id.* at 778.

136. *See id.* at 775.

137. *See id.*

138. *See id.* at 777-78.

139. *Id.* at 778.

140. *See id.* at 775.

strictly liable.¹⁴¹ Other courts which have addressed sexual harassment claims since the Supreme Court's decisions in *Faragher* and *Ellerth* have similarly denied employers' motions for summary judgment.¹⁴²

II. THE KEY TO AVOIDING LIABILITY: PREVENTIVE POLICIES AND TRAINING FOR MANAGERS AND SUPERVISORS¹⁴³

A. *Two Critical Words: Prevention and Response*

In the *Faragher* and *Ellerth* decisions, the Supreme Court issued two clear mandates to employers. First, take immediate, bold, and continuing steps to prevent harassment from occurring. Prevention is the only "no liability" option since any tangible adverse employment action flowing from harassment automatically results in liability for the employer. Second, use prompt "reasonable care" to prevent and correct any sexually harassing behavior. If an employer does so and an employee unreasonably fails to take advantage of those preventive or corrective opportunities, an employer will not be liable for the harassment absent tangible adverse employment action. Consequently, an employer's efforts at prevention and response are critical.

B. *Ten Steps to Take Immediately*

To enhance their ability to prevent sexual harassment claims and to maximize the likelihood of an effective response to a complaint, employers should consider implementing the following workplace measures:¹⁴⁴

141. *See id.* at 775-76.

142. *See Alverio v. Sam's Warehouse Club*, 9 F. Supp. 2d 955, 961 (N.D. Ill. 1998) (denying defendant's summary judgment motion and holding defendant vicariously liable for the sexually hostile environment created by one of its supervisors but stating that defendant may raise the affirmative defense as to liability or damages); *Hill v. Gateway Reg'l Health Sys.*, No. 97-CA-1130-MR, 1998 WL 412623, at *1 (Ky. Ct. App. July 24, 1998) (holding that supervisor's conduct, consisting of at least twelve offensive comments over a period of fourteen months, could rise to the level of a sexually hostile work environment and remanding for defendant to raise affirmative defense at trial).

143. The following discussion is borrowed from *The Jackson Lewis Ten Step Response to the New Rules on Workplace Sexual Harassment* ("Jackson Lewis Ten Step Response"), with the permission of Jackson Lewis Schnitzler & Krupman.

144. The Jackson Lewis Ten Step Response is not an exhaustive list. Because all items on this list may not be appropriate for every employer, each sexual harassment program should be tailored to the employer's culture and resources.

1. Review Your Sexual Harassment and Anti-Retaliation Policy

A strong sexual harassment policy is the linchpin in the prevention and defense of sexual harassment claims. The policy should be written in plain language—defining the types of conduct which potentially violate the policy and stating that sexual harassment and retaliation for complaints of harassment are prohibited and will not be tolerated by the employer. To develop an effective policy, an employer should consider incorporating some, if not all, of the following suggestions:

- offer examples of potentially violative conduct with statements that the examples are not intended to be all-inclusive;
- provide employees with convenient and reliable mechanisms for reporting incidents of sexual harassment and retaliation and for participating in related investigations;
- post the name, work location, and telephone number of employer representatives—both male and female—to whom employees are to make complaints of harassment and retaliation;
- ensure that at least one employer representative is at the employer's facility whenever it is in operation;
- encourage employees to report incidents promptly either verbally or in writing;
- provide a timetable for reporting harassment, beginning and completing an investigation, and responding to a complaint;
- inform employees of the potential consequences of failing to take advantage of the employer's preventive or corrective opportunities;
- inform employees—supervisors and non-supervisors alike—of disciplinary action that may be taken if they are found to have violated the employer's policy.

2. Identify All Supervisors and Make Them Accountable for Compliance with the Employer's Sexual Harassment and Anti-Retaliation Policy

The Supreme Court held that employers are liable when a "supervisor" harasses an employee over whom the supervisor has immediate (or successively higher) authority. Take steps immediately so that the employer, rather than a jury, determines who is and who

is not a "supervisor." Include "commitment to equal employment opportunity" as a qualification for every supervisory position.

3. Train All Supervisors on Sexual Harassment Prevention

To take advantage of the Supreme Court's new affirmative defense, an employer must prove that it took "reasonable care" to prevent harassment and to promptly correct any sexually harassing behavior. Providing effective sexual harassment prevention training for all supervisors enhances an employer's ability to take advantage of this defense. Additionally, effective training will increase the likelihood that a supervisor will not engage in sexually harassing conduct in the first place and will respond appropriately to a complaint of harassment. All supervisors should be required to attend such training. To emphasize its importance, a senior manager should introduce the training.

4. Train Non-Supervisory Employees on the Sexual Harassment Policy and the Procedures to Follow if They Experience Sexual Harassment

By educating non-supervisory employees, an employer breathes life into its sexual harassment prevention policy. The training further enhances an employer's ability to establish that it took reasonable steps necessary to prevent sexually harassing behavior. It also can help establish that an aggrieved individual unreasonably failed to take advantage of the employer's preventive and corrective opportunities.

5. Obtain a Signed Receipt When Distributing the Sexual Harassment Policy

Sometimes an employee does not remember, or denies receiving a copy of a sexual harassment prevention policy. As a result, a jury must determine whether the employer actually communicated the policy. To remove any doubt about dissemination of the policy, an employer should obtain and retain a signed receipt from every employee to whom the employer distributes a sexual harassment prevention policy.

6. Periodically Redistribute the Sexual Harassment Policy and Obtain Updated Receipts

Remind employees periodically of the employer's policy prohibiting sexual harassment by redistributing the policy and ob-

tain a receipt each time. This should be done at least annually. By showing that the employee must have been aware of the policy, the employer enhances its ability to prove that an employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer.

7. Instruct Appropriate Managers on the Guidelines for Conducting Investigations of Sexual Harassment Complaints

While it is unlikely that an employer can prevent all conduct which might give rise to a complaint of sexual harassment, in some cases an employer may avoid liability if it promptly and effectively investigates the harassment complaint. Because investigations into allegations of sexual harassment are often difficult, an employer should give managers who are responsible for conducting and documenting such investigations as much guidance as possible before complaints are filed. However, an employer should make *all* managers responsible for notifying human resources or the general counsel if any allegations are brought to their attention and warn supervisors that disciplinary action will be taken if a supervisor fails to do so.

8. Incorporate the Sexual Harassment Policy into New Employee Orientation

With each new hire, an employer has an opportunity to establish a record of taking reasonable care to prevent sexual harassment. By distributing the policy and incorporating sexual harassment prevention into new employees' orientation programs, employers may reduce sexual harassment claims and strengthen their defenses if such claims are brought.

9. Document Efforts to Prevent and Correct Harassment and Any Employee's Failure to Take Advantage of the Opportunities Provided by the Employer

An employer can eliminate disputes about its efforts to prevent and respond to sexual harassment claims by documenting those efforts. An employer should keep a complete record of its preventive programs, publications to employees, training for managers and employees, all complaints received and investigated, and any remediation efforts taken. It would also serve the employer's best

interests to document any failure by an employee to take advantage of the corrective opportunities provided by the employer.

10. **Assert the New Affirmative Defense in Pending or Future Sexual Harassment Lawsuits**

While the Supreme Court's decision provides employers with a new defense for sexual harassment claims, employers must affirmatively present and prove it. Employers should take steps to ensure that all pending sexual harassment litigation is reviewed immediately to determine whether this affirmative defense, if available, has been presented and pursued. Amending court papers or requesting additional discovery may be appropriate. Also, it may be beneficial for an employer to consider raising this defense in other types of employment discrimination cases, especially those involving harassment.

CONCLUSION

Recent Supreme Court cases have resolved a number of questions regarding the law of sexual harassment. Employers must take definite action to ensure that they can utilize the new affirmative defense to employer liability. The Supreme Court has made it clear that employers must adopt preventative policies and strategies if they are to avoid the significant risks posed by sexual harassment claims.