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Comment

MODERNIZING THE WORKPLACE: THE THIRD CIRCUIT PUTS THE *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE IN CONTEXT

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I. ORIENTATION: AN INTRODUCTION TO SEXUAL HARASSMENT LAW AND THE *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE

Imagine a woman struggling to make ends meet.¹ She finds a part-time job working for the county so she can pay for her daughter's cancer treatment.² She starts her new job, but every day when she comes into work her supervisor attempts to kiss her, hug her, and massage her shoulders.³ When she returns from lunch, he questions her about where she went and with whom she was eating.⁴ She wants his actions to stop, but when she protests his conduct, he becomes hostile towards her.⁵ No one else can report his actions because the two work alone in a building sepa-

* J.D. Candidate, Villanova University Charles Widger School of Law; B.A. 2017 Syracuse University. This Comment is dedicated to my parents, Michael and Jackie Venuti, whom I would like to thank for the unwavering support they have provided me throughout law school. I would also like to thank the staff of the *Villanova Law Review* for all of their hard work and thoughtful feedback throughout the process of writing and publishing this Comment.

1. *See Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 314 (3d Cir. 2018) (describing plaintiff's financial circumstances as "pressing"). The hypothetical featured in this introduction is based on the facts of *Minarsky*.

2. *See id.* at 314, 316 (discussing reasons *Minarsky* failed to promptly report harassment). *Minarsky* stated that she feared she could lose her job if she spoke up about the harassment and added that she was amidst a probationary period at work, as every new employee was for the first six months of employment, which heightened this fear. *See id.* at 314, 315 n.14. Her fears of losing her job were aggravated by the cancer treatment her daughter was receiving at the time. *See id.* at 314. *Minarsky* was further discouraged from reporting when her supervisor told her she could not trust the County Clerk, the person to whom she was supposed to report harassment. *See id.* at 316.

3. *See id.* at 306 (describing physical harassment faced by *Minarsky*). *Minarsky* alleged that this conduct was unwelcomed and occurred nearly every week. *See id.* at 306.

4. *See id.* at 307 (stating *Minarsky's* supervisor would ask where *Minarsky* went for lunch "and with whom she was eating"). *Minarsky* further alleged that her supervisor would behave "unpredictably" at times, insisting she take time off and then criticizing her for taking the time off. *See id.*

5. *See id.* (alleging supervisor would become hostile with *Minarsky* if she did not answer his phone calls). Moreover, *Minarsky* described her supervisor as becoming "nasty" when she would assert herself, and that he was generally "unpredictable with his temperament." *See id.* at 314-15.

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rated from the other employees.⁶ She ostensibly has two choices: allow her supervisor to continue acting this way or report him and hope that she does not get fired and lose the essential income from her job.⁷

The situation above is based on a real case, *Minarsky v. Susquehanna County*.⁸ Sheri Minarsky, the employee, chose to remain silent in the face of the ongoing harassment.⁹ The facts of her harassment surfaced only when another supervisor overheard a conversation referencing Minarsky's harassment and filed a report.¹⁰ The case eventually went to court, and the United States District Court for the Middle District of Pennsylvania granted her employer's motion for summary judgment, citing the employer's sexual harassment policy and Minarsky's failure to promptly report her supervisor's conduct.¹¹ Minarsky appealed the decision to the Court of Appeals for the Third Circuit, which found that although her fear of retaliation was subjective, a jury could find that her delay in reporting was reasonable.¹²

Minarsky's case is just one of many that highlight society's growing concern with workplace harassment.¹³ In fact, the phenomenon dubbed the "#MeToo movement" is driven by people who were once reluctant to

6. *See id.* at 314 (finding area in which Minarsky and her supervisor worked was separate from offices of other employees).

7. *See id.* (finding Minarsky's financial situation contributed to her reluctance to report the harassment).

8. 895 F.3d 303 (3d Cir. 2018).

9. *See id.* at 308–09 (noting harassment was only reported after co-worker overheard discussion about supervisor's conduct and reported it himself).

10. *See id.* (stating co-worker reported Minarsky's harassment).

11. *See Minarsky v. Susquehanna Cty.*, No. 3:14-CV-2021, 2017 WL 4475978, at *6 (M.D. Pa. May 5, 2017), *adopting report and recommendation*, 3:14-CV-2021, 2017 WL 4475981 (M.D. Pa. June 28, 2017), *vacated and remanded*, 895 F.3d 303 (3d Cir. 2018) (rejecting plaintiff's purported justification for delay in reporting).

12. *See Minarsky*, 895 F.3d at 317 (holding in favor of Minarsky). The court reasoned that whether Minarsky acted reasonably by failing to report her supervisor's conduct was a question of fact for the jury, and therefore could not be decided as a matter of law. *See id.*

13. *See id.* at 313 n.12 (discussing cultural context of opinion). The Third Circuit remarked that the *Minarsky* case was occurring amidst a "firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims." *See id.* The court went on to note that "sex-based harassment in the workplace [is] pervasive" and that "[n]early one third of American women have experienced unwanted sexual advances." *See id.* (citing Gary Langer, *Unwanted Sexual Advances: Not Just a Hollywood Story*, ABC NEWS (Oct. 17, 2017), <https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721> [<https://perma.cc/2Q4F-YUUQ>]); *see also* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 511 (7th Cir. 1997) (Posner, J., dissenting) ("[E]veryone knows by now that sexual harassment is a common problem in the American workplace . . ."); Brandon L. Morrow & Edward G. Phillips, *The Faragher-Ellerth Framework in the #MeToo Era*, 54 TENN. B.J., Feb. 2018, at 26 (discussing high-profile sexual harassment allegations which have recently come to light).

come forward and report their harassers.¹⁴ There is empirical evidence documenting such reluctance, as one study showed that only 6% of employees subjected to sexual harassment in the workplace filed a formal complaint.¹⁵ Another study showed that only 15% of those who reported did so in what courts consider a timely manner.¹⁶ Yet another study attempted to explain this trend by setting forth a litany of reasons as to why people delay their reporting.¹⁷ Many courts, however, do not consider victims' purported reasons for not immediately reporting harassing behavior when ruling on employers' motions for summary judgment.¹⁸

In *Minarsky*, the Third Circuit Court of Appeals re-worked the standard for assessing whether an employee-plaintiff's subjective fear of retaliation was reasonable by considering the broader context in which the sexual harassment occurred.¹⁹ This standard cuts against the approach taken by other courts, which usually require evidence of a credible threat or fear while not taking into account the circumstances that may have prevented an employee from reporting.²⁰ Specifically, the Third Circuit held that a significant reporting delay may be justified even when the employee-

14. See, e.g., Daniel Wiessner, *3rd Circuit Cites #MeToo in Reviving Secretary's Sex Harassment Claim*, 32 WESTLAW J. EMP'T, July 17, 2018, at 5 (reporting Third Circuit's opinion in *Minarsky* cited #MeToo movement when referencing large numbers of sexual harassment cases that went unreported for years).

15. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 896–98 (2008) (citing U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES 30 (1995), <https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948> [permalink unavailable]) (noting studies showing infrequency of victims filing formal complaints in response to sexual harassment).

16. See *id.* (citing David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1280 (2001)) (discussing studies showing infrequency of filing formal complaints in timely manner).

17. See L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731 n.114 (2007) (citing DEP'T OF DEF., 1995 SEXUAL HARASSMENT SURVEY (1996), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a323942.pdf> [<https://perma.cc/7Z9P-MYXU>]) (concluding courts are mistaken about how women respond to sexual harassment). Hebert noted that "empirical evidence suggests that most women do not react to sexual harassment in the way that courts apparently think that they should." See *id.* at 734. Hebert went on to suggest that women may not report sexual harassment due to "fear of retaliation, concerns about confidentiality and whether any action would be taken, concern about harm to the harasser, and concerns about harm to themselves, including suffering damage to their careers, being blamed for the harassment, and not being believed." See *id.* at 737 (citing U.S. MERIT SYS. PROT. BD. *supra* note 15, at 35).

18. See Brake & Grossman, *supra* note 15, at 883 (citing courts' failure to consider context when assessing reasonableness).

19. For a further discussion on the reasonableness standard set out in *Minarsky*, see *infra* notes 160–63 and accompanying text.

20. For a further discussion of courts requiring evidence of a credible threat or fear to substantiate an otherwise subjective belief, see *infra* notes 118–36 and accompanying text.

plaintiff's fear is largely predicated on a subjective belief.²¹ The *Minarsky* approach provides both employees and courts with more flexibility and is more consistent with the case law and policy underlying the *Faragher-Ellerth* defense.²²

Part II of this Comment provides an overview and background of the *Faragher-Ellerth* defense, including a discussion of the *Faragher v. City of Boca Raton*²³ and *Burlington Industries, Inc. v. Ellerth*²⁴ opinions, as well as an explanation of how lower courts have applied and interpreted the *Faragher-Ellerth* defense.²⁵ Part III discusses the Third Circuit's opinion in *Minarsky*, providing the facts of the case and the Third Circuit's reasoning.²⁶ Part IV analyzes the *Faragher-Ellerth* defense and describes how courts' application of the defense has barred relief for many plaintiffs.²⁷ Part V argues that the Third Circuit's approach in *Minarsky* is more consistent with the language of the *Faragher* and *Ellerth* opinions and policy underlying Title VII.²⁸ Finally, Part VI asserts that the *Minarsky* approach may result in a reduction of instances of workplace sexual harassment.²⁹

II. A LONG CAREER: OVERVIEW AND BACKGROUND OF THE *FARAGHER-ELLERTH* AFFIRMATIVE DEFENSE

Part II.A begins by providing an overview of workplace sexual harassment law.³⁰ Part II.B provides an overview of the *Faragher-Ellerth* defense, and discusses both the *Faragher* and *Ellerth* opinions.³¹ Lastly, Part II.C discuss both prongs of the defense.³²

21. For further discussion on *Minarsky*, see *infra* notes 137–63 and accompanying text.

22. For a further discussion on why the *Minarsky* approach should be viewed as preferable to the approach of most circuits, see *infra* notes 203–09 and accompanying text.

23. 524 U.S. 775 (1998).

24. 524 U.S. 742 (1998).

25. For a discussion on the background of the *Faragher-Ellerth* defense, see *infra* notes 30–136 and accompanying text.

26. For further discussion on the Third Circuit's opinion in *Minarsky*, see *infra* notes 137–63 and accompanying text.

27. For further discussion on the problems associated with the standard adopted by a majority of courts, see *infra* notes 164–90.

28. For further discussion of the *Minarsky* standard, see *infra* notes 191–202 and accompanying text.

29. For further discussion on the benefits offered by the *Minarsky* decision, see *infra* notes 203–09 and accompanying text.

30. See *infra* notes 33–50 and accompanying text.

31. See *infra* notes 51–79 and accompanying text.

32. See *infra* notes 80–136 and accompanying text.

A. *Workplace Sexual Harassment and Defenses: An Overview of Current Law*

There are two primary causes of action employees may bring under Title VII if their supervisors sexually harass them in the workplace.³³ First, there is the hostile work environment claim.³⁴ This cause of action may be available “when an employer’s conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.”³⁵ Second, an employee may allege quid pro quo sexual harassment.³⁶ Quid pro quo sexual harassment occurs when “tangible job benefits are conditioned on an employee’s submission to conduct of a sexual nature and that adverse job consequences result from the employee’s refusal to submit to the conduct.”³⁷ The Supreme Court distinguished these two claims by stating that quid pro quo harassment involves threats that were actually carried out while hostile work environment harassment claims are based on threats that were not.³⁸

33. See, e.g., *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 215 (1st Cir. 2016) (recognizing there are “two primary types of sex-based discrimination claims”). Both types of claims are brought under Title VII. See *id.*

34. See *id.* at 215–16 (describing elements of hostile work environment claim). To succeed in a hostile work environment claim, a plaintiff must establish six elements:

- (1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff’s employment and create an abusive work environment; (5) that sexually objectionable conduct was objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

See *id.* (quoting *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001)).

35. See RUSSELL J. DAVIS ET AL., 18 N.Y. JUR. § 95 (2d ed. 2019) (defining hostile work environment). In establishing a hostile work environment claim, a plaintiff must show that a reasonable person would believe “the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.” See *id.* Additionally, plaintiffs must establish that they “subjectively perceived [the conditions] as abusive . . . and [the employer] created what a reasonable person would find to be an objectively hostile or abusive environment.” See *id.*

36. See *O’Rourke*, 235 F.3d at 728 (describing quid pro quo sexual harassment). Quid pro quo sexual harassment occurs when “an employee or supervisor uses his or her superior position to extract sexual favors from a subordinate employee, and if denied those favors, retaliates by taking action adversely affecting the subordinate’s employment.” See *id.*

37. See *Pinkerton v. Colo. Dept. of Transp.*, 563 F.3d 1052, 1060 (10th Cir. 2009) (quoting *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1014 (10th Cir. 1987)).

38. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (distinguishing quid pro quo sexual harassment from hostile work environment). The Court in *Ellerth* reasoned the distinction between quid pro quo harassment and hostile work environment was of limited use but nevertheless may assist in differentiating cases in which threats were carried out from those where they were not. See *id.*

When employees allege sexual harassment under one of the two aforementioned theories, they may bring a claim against both the supervisor who committed the alleged acts and their employer.³⁹ Nonetheless, if the employer or supervisor have not taken any tangible employment action against the victimized employee, like demoting or firing the employee, the employer may have a defense to the employee's claims.⁴⁰ That is, the employer can plead an affirmative defense if it (1) has taken reasonable steps to prevent and correct the harassment and (2) can show that the employee failed to avail his or herself of such protections.⁴¹ This defense is commonly known as the *Faragher-Ellerth* defense.⁴² As a general matter, courts have historically ruled in favor of the employer on motions for summary judgment when the employer has (1) created and distributed a sexual harassment policy and (2) the employee either delayed reporting or failed entirely to take advantage of the policy.⁴³

Courts tend to reject the argument that an employee's subjective fear of retaliation is sufficient to justify a significant delay in reporting.⁴⁴ When an employee makes this argument, courts require evidence to substantiate the employee's fear, which often involves the employee showing actual retaliation against the employee by the employer.⁴⁵ Despite the potential reasonableness of waiting weeks, months, or, in extreme cases, even years to report harassment, juries rarely have the opportunity to consider

39. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 781 (1998) (noting plaintiff asserted claims against both her employer and supervisors). Supervisors are sued as agents of the employer. *See id.*

40. *See id.* at 806 (describing availability of affirmative defense).

41. *See id.* at 807 (establishing employer defense to vicarious liability); *see also Ellerth*, 524 U.S. at 765 (same).

42. *See, e.g.*, *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 310 (3d Cir. 2018) (referring to defense created by Supreme Court as *Faragher-Ellerth* defense).

43. *See id.* at 314 (acknowledging previous decisions finding "a plaintiff's outright failure to report persistent sexual harassment is unreasonable as a matter of law, particularly when the opportunity to make such complaints exists"); *see also Faragher*, 524 U.S. at 807–08 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while 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.").

44. For a further discussion on circumstances which justify a plaintiff not reporting due to a subjective fear of retaliation, *see infra* notes 118–31 and accompanying text.

45. *See, e.g.*, *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (reasoning failure to report harassment due to fear of "losing her job or damaging her career prospects" is inadequate justification under *Faragher-Ellerth* defense). For a further discussion on actual instances of retaliation or other credible threats justifying an otherwise subjective fear of retaliation, *see infra* notes 118–36 and accompanying text.

the underlying facts of workplace sexual harassment claims against employers because judges frequently decide these issues on motions for summary judgment.⁴⁶ Thus, waiting as little as three weeks to report harassment may be all it takes for employees to lose their chance to recover from their employer.⁴⁷

To be sure, a plaintiff's failure to make use of workplace safeguards meant to protect against harassment is not itself fatal to his or her claim.⁴⁸ Generally, courts recognize some justifications for delays in reporting and in some instances hold that a delay was reasonable.⁴⁹ These exceptions may bring little comfort to employee-plaintiffs, however, as few are able to produce the required evidence.⁵⁰

B. *History of the Faragher-Ellerth Affirmative Defense*

The *Faragher* and *Ellerth* opinions are companion cases that were decided on the same day.⁵¹ In both cases, the plaintiffs sought to hold their

46. See, e.g., *Minarsky v. Susquehanna Cty.*, No. 3:14-CV-2021, 2017 WL 4475978, at *6 (M.D. Pa. May 5, 2017), *adopting report and recommendation*, 3:14-CV-2021, 2017 WL 4475981 (M.D. Pa. June 28, 2017), *vacated and remanded*, 895 F.3d 303 (3d Cir. 2018) (recognizing case law supporting court's rejection of Minarsky's argument as matter of law based on reporting delay of several years).

47. See, e.g., *Minarsky*, 895 F.3d at 314 (acknowledging previous decisions finding "a plaintiff's outright failure to report persistent sexual harassment is unreasonable as a matter of law, particularly when the opportunity to make such complaints exists"). For a further discussion on the amount of time that constitutes an unreasonable delay, see *infra* notes 104–08 and accompanying text.

48. For a discussion of how an employee's delayed reporting of harassment impacts the second prong of the *Faragher-Ellerth* defense, see *infra* notes 104–17 and accompanying text.

49. See *Baldwin*, 480 F.3d at 1307 (recognizing employee's delay in reporting may be justified in "extreme cases"); see also *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 751 (10th Cir. 2014) (reasoning employee's failure to take advantage of established complaint procedures must be unreasonable "given the totality of the circumstances").

50. See *Brake & Grossman*, *supra* note 15, at 881 (noting difficulty involved in excusing delay and failure to report).

51. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (decided on June 26, 1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (same). In *Faragher*, the plaintiff, Beth Ann Faragher, was a lifeguard employed by the City of Boca Raton. See *Faragher*, 524 U.S. at 780. Faragher alleged that two of her supervisors, Bill Terry and David Silverman, harassed her by "making lewd remarks, and by speaking of women in offensive terms." See *id.* Although the City had a sexual harassment policy in place, it never provided its employees with the policy. See *id.* at 781. Faragher sought to hold the City liable for the acts of her supervisors under a Title VII claim. See *id.* at 780.

In *Ellerth*, the plaintiff, Kimberly Ellerth, was a sales person working for Burlington Industries in a two-person office in Chicago. See *Ellerth*, 524 U.S. at 747. She alleged she was "subjected to constant sexual harassment" by her supervisor, Ted Slowik. See *id.* Specifically, Ellerth claimed Slowik harassed her by repeatedly making comments about her body and implying her job would be a lot easier if she was more sexual with him. See *id.* at 747–48. This behavior prompted Ellerth to quit her job and eventually sue the City of Burlington under Title VII. See *id.* at 748–49.

respective employers liable under a theory of hostile work environment.⁵² Accordingly, the plaintiffs sought relief under Title VII of the Civil Rights Act, which prohibits discrimination on the basis of sex.⁵³ From these two cases, the Court effectively crafted the *Faragher-Elleth* affirmative defense, which employers can raise in response to an employee's attempt to hold them vicariously liable for workplace harassment committed by a supervisor.⁵⁴ To successfully raise the defense, the employer must establish two elements by a preponderance of the evidence: "(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."⁵⁵ The employer bears the burden of establishing the defense by a preponderance of the evidence.⁵⁶ Moreover, employee-plaintiffs can recover only the damages that could not have been avoided through the exercise of their own reasonable

52. See *Faragher*, 524 U.S. at 780 (framing question as when employer may be liable under hostile work environment claim); see also *Elleth*, 524 U.S. at 749 (stating plaintiff's claim was presented under theory of hostile work environment). *Faragher* and *Elleth* can be distinguished on the grounds that *Elleth* involved a supervisor who made comments about how he could make the employee-plaintiff's job more difficult, while *Faragher* did not. See 3 N. PETER LAREAU, ET. AL., LABOR AND EMPLOYMENT LAW § 73.07[2][c] (2019). This difference may have made the underlying conduct in *Elleth* appear as though it were closer to a quid pro quo case than it really was. See *id.* To be sure, the supervisor's threats in *Elleth* were never carried out. See *id.*

53. See *Faragher*, 524 U.S. at 780 (bringing claim under Title VII); see also *Elleth* (claiming employer violated Title VII). Title VII states "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a)(1) (2018).

54. See John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Work Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1403 (2002) (describing *Faragher* and *Elleth*). Prior to these two decisions, an "employer's reasonable efforts to combat harassment" could prevent it from being held liable for any harassment. See *id.* Because the *Faragher-Elleth* defense is an affirmative defense, the employer must raise the defense in its answer to the employee-plaintiff's complaint. See FED. R. CIV. P. 8(c)(1) (providing timing for raising affirmative defenses). "[A]n 'affirmative defense is one that admits the allegations in the complaint, but seeks to avoid liability, in whole or in part, by new allegations of excuse, justification, or other negating manner.'" See Amy St. Eve & Michael A. Zuckerman, *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152, 161 (2013) (quoting *Reimer v. Chase Bank USA*, 274 F.R.D. 637 (N.D. Ill. 2011)). When an employer raises the *Faragher-Elleth* affirmative defense, it may move for summary judgment. See FED. R. CIV. P. 56 (allowing for summary judgment motions). The employer will prevail on its motion for summary judgment where "there is no genuine dispute as to any material fact." See *id.* at 56(a) (providing standard for summary judgment).

55. See *Faragher*, 524 U.S. at 778 (providing elements of *Faragher-Elleth* defense).

56. See Marks, *supra* note 54, at 1403 (discussing burden of proof under *Faragher-Elleth* affirmative defense).

care.⁵⁷ The *Faragher-Ellerth* defense is only available to employers accused of maintaining a hostile work environment, not those accused quid pro quo sexual harassment.⁵⁸

Several Supreme Court cases provided the legal foundation for the *Faragher-Ellerth* defense.⁵⁹ In *Meritor Savings Bank, FSB v. Vinson*,⁶⁰ the Court recognized an actionable claim against an employer for sexual harassment under Title VII.⁶¹ This decision recognized a claim for both quid pro quo sexual harassment and hostile work environment sexual harassment.⁶² Although the *Meritor* decision touched on the issue of employer liability, it did not confront the question of when an employer is vicariously liable for sexual harassment committed by its supervisors.⁶³ The Court subsequently expanded the applicability of the *Meritor* holding to include same-sex harassment in *Oncale v. Sundowner Offshore Services, Inc.*⁶⁴ The question of employer liability under Title VII for a supervisor's actions, however, remained unanswered and consequently became the focus of the *Faragher* opinion.⁶⁵

57. See *id.* at 1403–04 (noting limitations of liability under *Faragher-Ellerth* affirmative defense).

58. See LAREAU, ET. AL., *supra* note 52, § 73.07[2][b] (recognizing limited availability of *Faragher-Ellerth* defense). This limitation is based on agency principles and limits the application of the *Faragher-Ellerth* defense in cases where the supervisors are clearly aided by the supervisor's relationship with the employer, which primarily includes cases where there was a tangible employment action amounting to a quid pro quo claim. See *id.* This is in contrast to hostile work environment claims, where it is less clear whether the supervisor was aided by that same relationship. See *id.* If the plaintiff's claim involves both a hostile work environment and tangible employment actions, the *Faragher-Ellerth* defense is unavailable. See *id.*

59. For a further discussion on the cases leading up to the *Faragher* and *Ellerth* opinions, see *infra* notes 51–58 and *supra* notes 60–79 and accompanying text.

60. 477 U.S. 57 (1986). In *Meritor*, the plaintiff sought to hold the bank, her employer, liable under Title VII of the Civil Rights Act for sexual harassment that occurred during her employment. See *id.* at 64. The Court ultimately found that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII” See *id.* at 73.

61. See *Faragher*, 524 U.S. at 787 (concluding past cases have established theory of liability for sexual harassment under Title VII). In *Meritor*, the Supreme Court held an employer may be liable under Title VII when “‘sexual harassment [is] so severe or pervasive’ as to ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’” See *id.* at 786 (alteration in original) (quoting *Meritor*, 477 U.S. at 67). Prior to the *Meritor* opinion, Title VII had not yet been applied to workplace sexual harassment cases. See Marks, *supra* note 54, at 1409–10 (discussing history of sexual harassment law).

62. See Marks, *supra* note 54, at 1409 (discussing claims established by *Meritor* opinion).

63. See *Meritor*, 477 U.S. at 73 (holding lower court was incorrect in determining employer was absolutely liable for acts of its supervisors).

64. See 523 U.S. 75 (1998); Marks, *supra* note 54, at 1411–12 (noting cases decided after *Meritor*).

65. See *Faragher*, 524 U.S. at 780 (“This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 . . . 42 U.S.C. 2000e, *et seq.*, for the acts of a supervisory

In *Faragher*, the Court stated that Title VII was premised upon the “basic policies of encouraging forethought by employers and saving action by objecting employees”—the statute was intended to avoid harm to victims by encouraging employers to take preventative measures and by incentivizing employees to do what they can to mitigate harm.⁶⁶ Citing *Ford Motor Co. v. Equal Employment Opportunity Commission*,⁶⁷ the Court found the employee’s duty to mitigate harm under Title VII to be “imported from the general theory of damages . . . result[ing] from violations of the statute.”⁶⁸ The Court then determined that it is appropriate under Title VII, in at least some instances, to hold an employer liable for acts committed by a supervisor.⁶⁹ This determination was predicated upon agency principles; supervisors have more power to harass employees *because of* their agency relationship with the employer.⁷⁰ The Court explained that the agency relationship delegates more power to supervisors than other employees, and in turn supervisors may use their power to sexually harass subordinates.⁷¹ The Court reasoned that although an employer does not necessarily sanction the supervisor’s conduct, the employer is in the best position to prevent the harassment.⁷²

Adhering to *Meritor*, the Court was careful not to impose a standard that held employers automatically liable for a supervisor’s acts.⁷³ Conse-

employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination.”)

66. *See id.* at 807 (discussing purpose of Title VII). The Court noted that “[a]lthough Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” *See id.* at 806 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

67. 458 U.S. 219 (1982).

68. *See Faragher*, 524 U.S. at 806–07 (citing *Ford Motor Co.*, 458 U.S. at 231) (discussing employee’s duty to mitigate damages). In accordance with this principle, an employee should not be permitted to recover damages where such damages could have been avoided through reporting the conduct in question. *See id.*

69. *See id.* at 807–08 (finding employers may be liable for acts of supervisors in certain circumstances).

70. *See id.* at 802–03 (discussing vicarious liability resulting from agency relationship between employer and supervisor). The Court reasoned that a supervisor’s agency relationship with an employer gives the supervisor power other employees do not possess. *See id.* The Court mentioned that harassment by a co-worker is inherently different because the employee can more readily reject the conduct and push back against the co-worker, but they may be more hesitant to do so where the perpetrator is a supervisor. *See id.* at 803. Employers can more readily protect against harassment by supervisors, as the employer has “greater opportunity and incentive to screen them, train them, and monitor their performance.” *See id.*

71. *See id.* (discussing workplace agency principles).

72. *See id.* (assessing parties in best position to prevent workplace sexual harassment from occurring).

73. *See id.* at 804–06 (discussing *Meritor*). In *Meritor*, the Court held “that an employer is not ‘automatically’ liable for harassment by a supervisor who creates the requisite degree of discrimination.” *See id.* at 804.

quently, the Court reasoned that an affirmative defense could circumvent strict liability, and under proper circumstances, shield employers from vicarious liability.⁷⁴ The Court held that this affirmative defense could be raised only where no tangible employment action had been taken against the complaining employee.⁷⁵ For the purposes of this standard, the Court defined tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassigning with significantly different responsibilities, or making a decision that causes a significant change in benefits.”⁷⁶ Nonetheless, the Court held that where

74. *See id.* at 806 (reasoning affirmative defense adheres to Title VII precedent and principles).

75. *See id.* at 807 (precluding application of affirmative defense where tangible employment action has been taken). If tangible employment action is taken against an employee, then the employer is automatically liable for the acts of its supervisor. *See id.* at 790–91. The Court mentioned three justifications advanced by other courts and approved by the Supreme Court for this imposition of liability. *See id.* First, a theory of proxy which in essence holds “that when a supervisor makes such decisions he ‘merges’ with the employer and his act becomes that of the employer.” *See id.* at 790 (citing *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)). Next, some courts reason that employer liability is appropriate in these instances “because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing, promotion, and the like.” *See id.* at 791 (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990)). Lastly, some courts reason “the supervisor who discriminates [using tangible employment actions] is aided by the agency relation[ship with the employer].” *See id.* The Court recognized that “other courts have endorsed both of the latter two theories.” *See id.* (citing *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997), *vacated sub nom. Eddy Potash, Inc. v. Harrison*, 524 U.S. 957 (1998), *remanded sub nom. to Harrison v. Eddy Potash, Inc.* 158 F.3d 1371 (10th Cir. 1998); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)).

76. *See Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (defining tangible employment action). “When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.” *See id.* at 761–62. Tangible employment action can have economic consequences that are more serious than those resulting from co-worker harassment. *See id.* at 762. For this reason, any tangible employment action taken by a supervisor is effectively taken by the employer, which justifies the imposition of Title VII liability. *See id.*; *see also* 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 5:7 (2018) (“The [*Ellerth*] Court noted that a tangible employment action in most cases inflicts direct economic harm, but it is clear that noneconomic actions may also meet the standard of a tangible employment action.”); Marissa A. Mastroianni & Allan H. Weitzman, *The Faragher Legacy: Still Going Strong After Twenty Years of Attacks and Counter-Measures*, 68 LAB. L.J., Sept. 6, 2017, at 2–5 (noting expansion of tangible employment action definition). Mastroianni and Weitzman argue plaintiffs have been successful in broadening the definition of tangible employment action so that actions like “making an employee’s title less prestigious than it was previously” constitutes tangible employment action. *See id.* at 4. These two commentators also discuss a former circuit split regarding “whether conditioning employment on continued unwelcome sexual acts may be a tangible employment action, even where the supervisor’s behavior was not accompanied by an independent cooperating official act by the employer,” a concept known as constructive discharge. *See id.* (citing *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir. 2003)); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 97 (2d Cir. 2002); *Santiero v. Denny’s Rest. Store*, 786 F. Supp. 2d 1228, 1234–35 (S.D. Tex. 2011);

tangible employment action has been threatened but not actually carried out, those threats are properly considered part of a hostile work environment claim and do not preclude the employer from raising the defense.⁷⁷

If the *Faragher-Ellerth* defense is available, there are two elements that the employer must establish by a preponderance of the evidence: “(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.”⁷⁸ In the Court’s view, this affirmative defense was consistent with both *Meritor*, which cautioned against imposing automatic liability onto an employer, and the basic policies underlying Title VII.⁷⁹

C. Application of the Faragher-Ellerth Affirmative Defense

1. The First Prong

The first prong of the *Faragher-Ellerth* defense requires that employers take reasonable steps to prevent and promptly correct harassment.⁸⁰ For example, courts often find employers acted reasonably when they distribute a written sexual harassment policy to employees.⁸¹ A written pol-

Speaks v. City of Lakeland, 315 F. Supp. 2d 1217, 1224–26 (M.D. Fla. 2004)). “A constructive discharge occurs when an employee’s working conditions are made so intolerable so as to cause a reasonable employee to resign from his or her position.” See *id.* Weitzman and Mastroianni noted the Supreme Court resolved the split in 2004 in Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) by holding “constructive discharge may qualify as a tangible employment action, so long as a supervisor’s official act precipitates the constructive discharge.” See *id.* (internal quotation marks omitted). Constructive discharge is more difficult to prove than hostile work environment. See LAREAU ET. AL., *supra* note 52, § 73.07[1] (noting difficulty in establishing constructive discharge claims); see also Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court than Those Who Say No . . . and Why They Shouldn’t*, 20 YALE J.L. & FEMINISM 25, 33–35 (2008) (noting the Third Circuit’s holding in *Suders v. Easton* split from the Second Circuit’s holding in *Caridad v. Metro-N. Commuter R.R.*).

77. See LAREAU ET. AL., *supra* note 52, § 73.07[1] (clarifying how courts construe unfulfilled threats of tangible employment action). Further, “[t]his means that the *Faragher/Ellerth* defense . . . is available to the employer in the case of unfulfilled threats.” See *id.*

78. See *Faragher*, 524 U.S. at 778 (providing elements of *Faragher-Ellerth* defense).

79. For a further discussion of the policies underlying the *Faragher-Ellerth* defense, see *supra* note 66 and accompanying text.

80. For a further discussion on the steps employers can take to meet the requirements of the first prong of the *Faragher-Ellerth* defense, see *infra* notes 81–99 and accompanying text.

81. See *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (citing *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1287 (11th Cir. 2003); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298–99 (11th Cir. 2000)) (noting “anti-discrimination policy prohibiting harassment, which was effectively communicated to all employees,” with reporting requirements was not at issue and was “substantially similar to others that [the court] has upheld”); see also *Pinkerton v. Colo. Dept. of Transp.*, 563 F.3d 1052, 1062 (10th

icy, however, is not always necessary, and in some circumstances may be insufficient satisfy this prong.⁸² What makes a policy adequate can vary, but the Eleventh Circuit has held that an employer must show “its sexual harassment policy was effectively published, that it contained reasonable complaint procedures, and that it contained no other fatal defect.”⁸³ Still, other courts look for particular factors such as whether employees were aware of the policy, how the employer enforced the policy, and whether the employer provided alternative channels of redress.⁸⁴

Cir. 2009) (finding employer reasonably tried to prevent harassment because it created policy that “prohibit[ed] sexual harassment, identifie[d] the complaint procedure, and inform[ed] employees that disciplinary action might be taken against those who violate that policy”); *Frederick v. Sprint/United Mgmt.*, 246 F.3d 1305, 1314 (11th Cir. 2001) (citing *Madray*, 208 F.3d at 1298–99) (stating employer must show “its sexual harassment policy was effectively published, that it contained reasonable complaint procedures, and that it contained no other fatal defect”); Kunal Bhatheja & Blair T. Jackson, *Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors*, 62 DRAKE L. REV. 653, 656 (2014) (describing steps employers may take to prevent vicarious liability).

82. See *Frederick*, 246 F.3d at 1314 (noting first prong of *Faragher-Ellerth* defense is not necessarily met by presence of sexual harassment policy); see also *Frederick*, 246 F.3d at 1313–14 (citing *Lissau v. S. Food Serv.*, 159 F.3d 177, 183 (4th Cir. 1998)) (“[A]n employer does not always have to show that it has a formal sexual harassment policy to meet its burden of proof on this element.”). Compare *Faragher*, 524 U.S. at 807 (stating dissemination of written sexual harassment policy may not be necessary in every case), with Bhatheja & Jackson, *supra* note 77, at 658–59 (“[A] sufficient policy will permit a court to make a strong presumption in favor of finding that the employer took [reasonable preventative] measures.”). In *Faragher*, the Court suggested that smaller businesses may exercise reasonable care through implementing informal precautions against sexual harassment. See *id.* at 808–09 (recognizing the City was a larger employer, and therefore could not have adequately addressed harassment absent a formal policy). Conversely, the Court indicated that larger employers are far more likely to require formal procedures in order to effectively protect against harassment. See *id.*

83. See *Frederick*, 246 F.3d at 1313–14 (citing *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298–99 (11th Cir. 2000) (providing harassment policy requirements needed to satisfy first prong of *Faragher-Ellerth* defense).

84. See *Howard v. City of Robertsedale*, 168 F. App’x 883, 887 (11th Cir. 2006) (citing *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997)) (stating court will look to “whether the employer made [the policy] well-known to employees, vigorously enforced it and included alternate avenues of redress” when determining whether policy is effective); see also *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007) (concluding sexual harassment policy satisfied first prong because it identified multiple individuals whom harassment could be reported to, disseminated to all employees, and contained anti-harassment provision despite not offering “training or counseling with regard to sexual harassment”); *Gordon v. Shafer Constr.*, 469 F.3d 1191, 1195 (8th Cir. 2006) (finding sexual harassment policy that identified three individuals to whom harassment could be reported satisfied first prong); *Brokenborough v. District of Columbia*, 236 F. Supp. 3d 41, 53 (D.D.C. 2017) (citing *Taylor v. Chao*, 516 F. Supp. 2d 128, 134–35 (D.D.C. 2007)) (first prong of *Faragher-Ellerth* defense may be satisfied by employer “maintaining an effective anti-harassment policy that informs employees how to report allegations of harassment and conducting prompt investigations pursuant to that policy”); see also *Hardy v. Univ. of Ill.*, 328 F.3d 361, 365 (7th Cir. 2003) (reasoning neither *Faragher* nor *Ellerth* require sexual harassment policy to provide one specific reporting avenue and holding employer satisfied defense’s first prong by hav-

To determine whether an employer took prompt action to correct workplace harassment, courts first inquire whether the employer had knowledge of the harassment.⁸⁵ This knowledge may be actual or constructive.⁸⁶ Constructive knowledge of sexual harassment exists when the harassment is so pervasive that the employer should have known of its existence, even though the employer was not explicitly made aware.⁸⁷ Moreover, actual knowledge can raise agency questions—the knowledge of one employee does not always constitute knowledge on the part of the employer—as shown in *Weger v. City of Ladue*.⁸⁸ In *Weger*, the Eighth Circuit held that in cases where a sexual harassment policy specifies “the individu-

ing policy permitting employees to report how they felt most comfortable); *Madray*, 208 F.3d at 1298 (“The employer’s size, location, geographic scope, organizational structure, and industry segment are just some of the characteristics that impact the analysis of whether the complaint procedures of an employer’s anti-harassment policy adequately fulfill Title VII’s deterrent purpose.”); Bhatheja & Jackson, *supra* note 81, at 659 (suggesting absence of certain factors may lead to finding that sexual harassment policy is inadequate). Courts have also required policies to include a “provision for the requirement of training” and a “reasonable complaint process” with a statement that “prompt, corrective action will be taken after a complaint is reported.” *See id.* Bhatheja and Jackson suggest that a failure to provide an adequate definition of sexual harassment could also preclude an employer from establishing the second prong of the defense if the employee was unaware that the conduct at issue constituted sexual harassment under the policy. *See id.* at 660. Similarly, if the employer fails to incorporate an anti-retaliation provision into its policy, then employees may be justified in claiming they feared retaliation and therefore did not report the harassment. *See id.* at 661–62. Finally, these two commentators argue that employers can increase the likelihood a court will find a policy adequate if they create “multiple avenues of complaint,” allow for informal complaining, and require that the employee to whom the harassed employee reports is required to pass the information on to someone who may act on it. *See id.* at 662–67.

85. *See Weger*, 500 F.3d at 720–21 (beginning analysis of correction prong with inquiry of whether employer had knowledge of harassment); *see also* Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001) (citing *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000)) (“An employer cannot be held liable for misconduct of which it is unaware.”); *Madray*, 208 F.3d at 1299 (“In applying the *Faragher* affirmative defense, we have noted that ‘the employer’s notice of the harassment is of paramount importance’” (quoting *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 422 (11th Cir. 1999))).

86. *See Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259–61 (11th Cir. 2003) (examining whether employer had constructive knowledge of alleged harassment).

87. *See id.* at 1259 (defining constructive knowledge in context of *Faragher-Ellerth* defense (citing *Miller v. Kenworth of Dothan, Inc.* 277 F.3d 1269, 1278 (11th Cir. 2002))).

88. 500 F.3d 710 (8th Cir. 2007). *But see Kramer v. Wasatch Cty. Sheriff’s Office*, 743 F.3d 726 (10th Cir. 2014) (“In assessing whether an employer was negligent in dealing with known harassment, ‘[a]ctual knowledge will be demonstrable in most cases where the plaintiff has reported harassment to management-level employees.’” (alteration in original) (quoting *Adler v. Wal-Mart Stores, Inc.* 144 F.3d 664, 673 (10th Cir. 1998))).

als to whom notice of harassment must be given, [the awareness of other employees is] not relevant to the actual notice inquiry.”⁸⁹

Once an employer has knowledge of harassment, a duty to promptly correct the harassment arises.⁹⁰ Some initial steps an employer may take to correct harassment include limiting contact between the alleged harasser and reporting employee and beginning an investigation into the alleged misconduct.⁹¹ An employer is deemed to have acted promptly when it “immediately” takes steps to correct harassment, which in some cases may be less than two weeks.⁹² Conversely an employer’s choice to delay an investigation may constitute failure of this requirement, rendering the defense unavailable.⁹³ But an employer’s delay is not always dispositive—an employer who delays beginning an investigation may still prevail so long as it has a legitimate reason for doing so, such as taking time to hire an investigator.⁹⁴

89. *See id.* at 721–22 (citing *Watson*, 324 F.3d at 1259) (deeming knowledge of other employees insufficient to establish employer’s actual knowledge).

90. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (requiring employer to act promptly to correct known harassment).

91. *See Pinkerton v. Colo. Dept. of Transp.*, 563 F.3d 1052, 1057 (10th Cir. 2009) (describing initial steps taken by employer).

92. *See id.* at 1062 (holding immediately beginning investigation into alleged harassment, providing employee-plaintiff with new supervisor, and demoting supervisor about two weeks after investigation concluded was sufficient to satisfy first prong of *Faragher-Ellerth* defense); *see also Mastroianni & Weitzman, supra* note 62, at 8 (“[T]o effectively counter an attack on the obligation to promptly correct harassment, an employer must begin its investigation almost immediately after receiving notice of a harassment complaint.”). In *Perry v. Ethan Allen, Inc.*, the Second Circuit has found an employer acted immediately when it began investigating harassment the day the complaint was made. *See Bhatheja & Jackson, supra* note 81, at 672 (citing *Perry v. Ethan Allen, Inc.* 115 F.3d 143, 154 (2d Cir. 1997)). Moreover, “so long as the plaintiff reported the harassment to a supervisor and the supervisor is required to report the harassment to one of the designated employees, the ‘clock starts ticking’ from the moment the supervisor learns of the harassment.” *See id.* at 672–73.

93. *See Mastroianni & Weitzman, supra* note 62, at 8–9 (citing *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 435 (7th Cir. 2012)) (asserting waiting one month to begin investigation will cause courts to hold employer did not promptly investigate harassment complaint).

94. *See id.* at 9, 19 n.80 (citing INVESTIGATING SEXUAL HARASSMENT: A PRACTICAL GUIDE TO RESOLVING COMPLAINTS, CHAPTER 4: TIMING IS EVERYTHING, 2002 WL 33985522 (2015) [hereinafter, TIMING IS EVERYTHING]) (discussing effects of employer investigations into harassment). An employer may also successfully justify a delay in investigating complaints of sexual harassment by showing the person best equipped to handle the complaint was on vacation or was otherwise unavailable. *See id.* at 9. A delay is more likely to be justified if the allegations were of “non-physical conduct or if the behavior occurred in the past and has stopped.” *See TIMING IS EVERYTHING, supra*. Courts are more likely to find a delay in investigating reasonable if the employer updates the employee who filed the complaint on the status of the employee’s complaint and information on any delays, including the reasons for such delays. *See id.*

In addition to being prompt, an employer's corrective measures must also be adequate.⁹⁵ In making the determination of whether particular actions are adequate, the Eighth Circuit considers various factors including whether the employer's actions actually caused the harassment to cease.⁹⁶ More severe harassment warrants more significant action on the part of the employer, but the employer does not always have to terminate the harasser.⁹⁷ Some appropriate actions may include separating the employee and harasser, requiring the harasser to attend anti-harassment training, or laterally transferring the victim.⁹⁸ Some circuits have found that measures that put plaintiffs in a less favorable position than they were prior to reporting are per se inadequate.⁹⁹

2. *The Second Prong*

The second prong of the *Faragher-Ellerth* defense requires that employers demonstrate victims unreasonably failed to avail themselves of corrective measures.¹⁰⁰ Courts have been consistent in their application of the second prong, embracing the Supreme Court's guidance in *Faragher* that "a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."¹⁰¹ When courts grant summary judgment in favor of an employer after an employee

95. See Mastroianni & Weitzman, *supra* note 62, at 3 (noting *Faragher-Ellerth* "affirmative defense [has been rendered] inapplicable when employers fail to take appropriate preventative and corrective measures").

96. See *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 633 (8th Cir. 2000) (citing *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999)) ("Factors the Court may consider when assessing the reasonableness of [an employer's] remedial measures include the amount of time elapsed between the notice of harassment . . . and the remedial action, and the options available to the employer such as employee training sessions, disciplinary action taken against the harasser(s), reprimands in personnel files, and terminations, and whether or not the measures ended the harassment."); see also Mastroianni & Weitzman, *supra* note 62, at 10 ("Remedial steps that fail to promptly correct and prevent harassment will not withstand a plaintiff's attacks.").

97. See Mastroianni & Weitzman, *supra* note 62, at 10 ("Notably, however, the more severe and/or physically harassing behavior at issue, the more a drastic remedy is required."); cf. *id.* (noting employer may, in some instances, be required to limit interactions between supervisor and employee).

98. See *id.* (discussing remedial measures courts have found appropriate, including anti-harassment training, separating the parties involved, and laterally transferring the victim).

99. See *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 811 (7th Cir. 2000) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective per se." (quoting *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990))); see also *EEOC v. Cromer Food Serv.*, 414 F. App'x 602, 608 (4th Cir. 2011) (holding employer's offer to transfer plaintiff, which came eight months after the employer received the complaint, was per se ineffective).

100. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (defining second prong of *Faragher-Ellerth* defense).

101. See *id.* at 807–08 (providing guidance for application of second prong of *Faragher-Ellerth* defense).

fails to report harassment, they often cite to Title VII's policy of incentivizing employees to mitigate harm.¹⁰² But, if the employer has knowledge of the ongoing harassment, its failure to prevent the harassment will excuse a plaintiff from his or her obligation to mitigate the harm.¹⁰³

a. Delays Put Employees on Thin Ice

If the first prong of the defense is met, an employer can usually establish the second prong if it can show that the employee delayed acting upon an anti-harassment policy.¹⁰⁴ The exact amount of time considered "unreasonable" for taking advantage of a policy varies, but one district court has found a mere seventeen days to be an unreasonable delay.¹⁰⁵ Courts more typically find that delays of several months are unreasona-

102. See, e.g., *Mativa v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001) (reasoning employee's failure to report sexual harassment could lead other employees "to infer that such behavior is acceptable in the workplace").

103. See *Clark v. United Parcel Serv.*, 400 F.3d 341, 349 (6th Cir. 2005) (citing *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1014 (7th Cir. 1997)) ("[R]egardless of whether the victimized employee actively complained, prong one of the defense ensures that an employer will not escape vicarious liability if it was aware of the harassment but did nothing to correct it or prevent it from occurring in the future.").

104. See *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 313 (3d Cir. 2018) (recognizing Third Circuit "has routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable"); see also Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 701 (2000) ("[A] delay in complaining can be just as fatal to a plaintiff's case as a total failure to complain.").

105. See Hebert, *supra* note 17, at 723 (discussing *Conatzer v. Medical Prof'l Bldg. Serv.*, 255 F. Supp. 2d 1259 (N.D. Okla. 2003)). Hebert noted that in *Conatzer*, the Northern District of Oklahoma found the plaintiff acted unreasonably by waiting seventeen days from the first incident of harassment to file a complaint, even though the plaintiff filed a formal complaint within four days of the second incident. See *id.* (citing *Conatzer*, 255 F. Supp. at 1269-70). Hebert also discussed the court's finding that another supervisor witnessing the first incident of alleged harassment was insufficient to put the employer on knowledge of a hostile work environment. See *id.* (citing *Conatzer*, 255 F. Supp. 2d at 1269). But see Brake & Grossman, *supra* note 15, at 880 (citing *Marsciano v. Am. Soc. of Safety Eng'rs*, No. 97 C7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998)) (noting one "extreme" case where court held seven-day delay was too long). In *Marsciano*, the plaintiff alleged she was harassed by her supervisor starting on the second day of her job. See *Marsciano*, 1998 WL 603128, at *1-2. The harassment was largely verbal but included one lunch during which the supervisor touched her hair and face as he helped her put on her coat. See *id.* at *2-3. The supervisor suggested they would be going to more lunches and dinners together despite the plaintiff's discomfort with the experience to the point she felt sick. See *id.* at *3. The plaintiff reported the harassment in compliance with the employer's procedure seven days after the last instance of harassment. See *id.* at *7. The court found the seven-day delay unreasonable because the executive director of the society approached the plaintiff the morning of the lunch, which the court viewed as an informal opportunity to report the harassment and prevent the harassment that occurred during the lunch. See *id.* at *7 (finding "unexpected" instance of director inquiring "how [plaintiff] was settling in . . . presented significant opportunity for preventative action"). The court also reasoned the fact the director initiated the conversation

ble.¹⁰⁶ Whether a delay is justifiable may depend on the severity of the harassment, with more severe harassment typically warranting prompt reporting.¹⁰⁷ Although employers bear the burden of establishing the *Faragher-Ellerth* defense, courts often require the plaintiff who delayed reporting to prove that the delay was reasonable.¹⁰⁸

Almost every circuit has found that where an employee-plaintiff delays reporting sexual harassment due to some subjective fear, such as fear of retaliation, that fear on its own is insufficient to excuse a failure to report sexual harassment.¹⁰⁹ Some courts have categorically rejected the justifications that “generalized fears” or fears of embarrassment are sufficient to explain a delay in reporting.¹¹⁰ Other plaintiffs have attempted to explain

may have made informal reporting at the time “less daunting for [the plaintiff] than instigating a formal complaint of her own motion.” *See id.*

106. *See Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000) (holding employee-plaintiff unreasonably failed to avail herself of preventive or corrective opportunities by waiting three months to report harassment despite most recent instance of harassment occurring just two days prior to her report). *But see Hardy v. Univ. of Ill.*, 328 F.3d 361, 365 (7th Cir. 2003) (finding delay of six weeks not unreasonable where employee attempted to address harassment directly with the harassing supervisor prior to formally reporting).

107. *See Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 22 (2003) (noting severity of harassment may affect reasonableness inquiry). Grossman stated that “[c]ourts have not been sympathetic to claims that the victim was waiting to see if the behavior continued or to gather more evidence of harassment.” *See id.*

108. *See, e.g., Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (stating employer “bears the ultimate burden of persuasion to prove that [the employee] acted unreasonably in failing to avail herself of the company’s internal complaint procedures”). Despite stating the employer bears the burden of sustaining the *Faragher-Ellerth* defense, the court continued:

Once an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedures, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

Id.

109. *See IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 6:19 (2018) (“Several courts have reasoned that subjective fear of retaliation is not an excuse for failing to report sexual harassment.”). Bodensteiner and Levinson cite cases from the First, Second, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits that have held subjective fears of retaliation do not excuse a delay in reporting. *See id.*; *see also Harper v. City of Jackson Mun. Sch. Dist.*, 149 F. App’x 295, 302 (5th Cir. 2005) (holding plaintiff’s fears of retaliation were unsubstantiated); *Jernigan v. Alderwoods Grp.*, 489 F. Supp. 2d 1180, 1198 (N.D. Or. 2007) (holding plaintiff acted unreasonably by failing to report harassment at meeting with both regional manager and harassing supervisor because she felt intimidated by supervisor’s presence at meeting).

110. *See Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003) (citing *Mativa v. Bald Head Island Mgmt.*, 259 F.3d 261, 270 (4th Cir. 2001)) (“In short, for policy reasons representing a compromise, more than ordinary fear or embarrassment is needed.”); *see also Minarsky*, 895 F.3d at 315 (citing *Pinkerton v. Colo.*

delays by claiming fear of retaliation, but absent a “credible threat,” courts have rejected this argument as well.¹¹¹ Still, some plaintiffs argue they were afraid that if they complained, then their complaint would have not been taken seriously; however, courts seek evidence that this fear was credible.¹¹²

At least the Second and Seventh Circuits have found that plaintiffs have acted unreasonably when their reporting delay was caused by a subjective fear of discomfort or embarrassment.¹¹³ Accordingly, employee-plaintiffs cannot escape their obligations under this prong simply by arguing they were concerned about their co-workers perceiving them negatively for reporting the harassment.¹¹⁴ In a similar vein, at least seven circuits have held that a “generalized fear” of retaliation is insufficient to overcome the second prong of the *Faragher-Ellerth* defense.¹¹⁵ A generalized fear of retaliation is one not supported by objective evidence in the

Dep’t of Transp., 563 F.3d 1052, 1063 (10th Cir. 2009)) (“Several courts have held that a generalized fear of retaliation is insufficient to explain a long delay in reporting sexual harassment.”).

111. For a further discussion on credible threats of retaliation justifying a delay in reporting, see *infra* notes 118–36 and accompanying text.

112. For a further discussion of courts finding fears that reporting harassment would be futile do not excuse a delay in reporting, see *infra* notes 132–36 and accompanying text.

113. See *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (reasoning victim’s failure to report sexual harassment cannot be justified by concerns regarding how co-workers would react); see also Hebert, *supra* note 17, at 724 (“Courts tend to reject employee’s claims that they did not report sexual harassment because of the discomfort and embarrassment associated with talking about the sexual conduct to which they have been subjected.” (citing *Shaw v. AutoZone, Inc.*, 180 F.3d 806 (7th Cir. 1999))).

114. See *Caridad*, 191 F.3d at 295–96 (citing finding employee-plaintiff acted unreasonably in delaying reporting delay over fears of co-workers’ reactions).

115. See *Minarsky*, 895 F.3d at 315 (“We distinguish this situation from one in which the employee’s fear of retaliation is generalized and unsupported by evidence.” (citing *Pinkerton v. Colo. Dept. of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009))); see also *Pinkerton*, 563 F.3d at 1063 (stating “many of our sister circuits have stated that a generalized fear of retaliation simply is not sufficient to explain a long delay in reporting sexual harassment” (citing *Thornton v. Fed. Ex. Corp.*, 530 F.3d 451 (6th Cir. 2008))); *Thornton*, 530 F.3d at 351 (ruling in favor of employer where employee’s fears were unsubstantiated by evidence).

Courts often use the terms generalized fear, subjective fear, and nebulous fear interchangeably in this context. See *Taylor v. Solis*, 571 F.3d 1313, 1328 (D.C. Cir. 2009) (Rogers, J., dissenting) (reasoning plaintiff’s fear was “not merely ‘generalized,’ . . . ‘nebulous,’ . . . or ‘subjective’” because plaintiff presented evidence showing her fear was credible (citation omitted) (citing *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003))). Accordingly, the term “generalized fear” can be conflated with “subjective fear,” which a majority of circuits have also rejected as being sufficient to overcome the second prong of the *Faragher-Ellerth* affirmative defense. See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (rejecting plaintiff’s argument that delay in reporting was reasonable in light of fact “she feared retaliation and doubted her complaints would be taken seriously”); see also *Shaw v. Autozone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (reasoning plaintiff’s subjective fear of retaliation is insufficient to excuse her duty to promptly report under *Faragher-Ellerth* defense).

record.¹¹⁶ Therefore, courts may require plaintiffs to produce evidence to substantiate their fear such as testimony or other indications that an express threat has been made.¹¹⁷

b. Good Enough to Get the Job Done: Credible Threats of Retaliation May Justify an Employee's Delay in Reporting

In situations where plaintiffs assert that a subjective fear prevented them from promptly reporting harassment, courts typically seek evidence of a "credible threat."¹¹⁸ A credible threat is one that is supported by evidence in the record, such as the threat of physical harm or termination.¹¹⁹ A credible threat can effectively make an otherwise subjective fear into an objective one.¹²⁰ While an express threat is often considered credible, an employee's feeling of fear may still be credible even absent an actual threat.¹²¹ For example, in *Burns v. Johnson*,¹²² the Court of Appeals for the First Circuit found the employee-plaintiff's coworkers' fears of "participat[ing] [in] the [employer's] investigation" added credibility to the employee-plaintiff's otherwise subjective fear.¹²³

In contrast, the Court of Appeals for the Eleventh Circuit in *Walton v. Johnson & Johnson Services, Inc.*¹²⁴ seemed to actually require an express

116. See *Barrett*, 240 F.3d at 267 (categorizing plaintiff's fear as generalized when she failed to promptly report harassment because she "feared [her supervisor] would find out and retaliate against her" and because her supervisor was friends with the company's president).

117. See *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35–36 (1st Cir. 2003) (finding several other courts require "concrete" or "credible" reason to believe employer would not take complaint seriously or retaliation would be suffered as result of complaining (citing *Caridad*, 191 F.3d at 295)).

118. See, e.g., *Walton*, 347 F.3d at 1290–91 (refusing to find plaintiff's failure to report harassment reasonable without evidence of credible threat).

119. See *Mastroianni & Weitzman*, *supra* note 62, at 13 n.126 (interpreting *Walton* as reasoning that termination or physical harm would constitute a credible threat).

120. See *id.* at 13 ("The alleged victim must establish a credible fear of retaliation." (citing *Walton*, 347 F.3d at 1291)); see also *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (requiring "truly credible threat of retaliation" to excuse delay in reporting (internal quotation marks omitted) (quoting *Reed*, 333 F.3d at 36 (1st Cir. 2003))); *Reed*, 333 F.3d at 36 (stating credible fear of adverse employment action stemming from filing of complaint is needed to excuse significant delay in reporting (citing *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999))); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (stating "[a] credible fear must be based on more than . . . [a] subjective belief").

121. See *Burns v. Johnson*, 829 F.3d 1, 19 (1st Cir. 2016) (finding plaintiff's fear of retaliation enough to overcome employer's motion for summary judgement because others also had fear of retaliation for mere participation in harassment-investigation).

122. 829 F.3d 1 (1st Cir. 2016).

123. See *id.* at 6–7 (finding support for plaintiff's assertion that her acts were reasonable).

124. 347 F.3d 1272 (11th Cir. 2003).

threat of retaliation in order to find the employee's fear credible.¹²⁵ In that case, Luanne Walton was employed as a pharmaceutical sales representative by Ortho-McNeil Pharmaceutical, and George Mykytiuk was her supervisor.¹²⁶ Mykytiuk sexually assaulted Walton twice after making several failed advances on her.¹²⁷ The record revealed that prior to sexually assaulting her, Mykytiuk brandished a gun when alone with Walton on at least one occasion, which Walton claimed intimidated her.¹²⁸ Despite these facts, the court found there was no credible threat of retaliation because Mykytiuk never expressly stated that he would shoot Walton if she reported his conduct.¹²⁹ Therefore, the Eleventh Circuit held that Walton's failure to report the harassment was unreasonable.¹³⁰ Thus, while courts assess what constitutes a "credible threat" differently, they often require objective evidence to corroborate the victim's fear.¹³¹

In some cases, a failure to report sexual harassment may be excused when the employee reasonably believes such efforts would be futile.¹³²

125. See Hebert, *supra* note 17, at 727 (discussing *Walton* in context of reasonable delays in reporting).

126. See *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1274–75 (11th Cir. 2003) (discussing factual background of case). Ortho-McNeil Pharmaceutical is owned by Johnson and Johnson. See *id.* at 1277.

127. See *id.* at 1276 (discussing factual background). Specifically, Mykytiuk tried to kiss the plaintiff and physically grabbed her several times; Walton responded by verbally rejecting him. See *id.*

128. See *id.* at 1291 n.17 (stating plaintiff's assertion "that the gun 'intimated her'"); see also *id.* at 1275–76 (discussing facts surrounding cause of plaintiff's purported fears of intimidation). The Eleventh Circuit's opinion is not entirely clear on what Mykytiuk did with the gun; it only says he "showed" her the gun on one occasion and removed it from a box and talked about it with her on another. See *id.* She provided no indication that Mykytiuk expressly threatened her with the gun. See *id.* at 1296 n.17.

129. See *id.* at 1290 (finding no evidence to support reasonableness of plaintiff's fear of retaliation). The court held "Walton's subjective fears of reprisal do not excuse her failure to report Mykytiuk's alleged harassment." See *id.* at 1290–91 (citing *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999)).

130. See Hebert, *supra* note 17, at 727 (discussing *Walton* court's reasoning and holding). Hebert argued that the court conceded the alleged harassment was "particularly traumatic" and acknowledged the supervisor's brandishing of the gun in her presence yet dismissed her concerns as "unsupported subjective fears." See *id.* Hebert points out that a court could view the first instance of rape as evidence that Walton would suffer future physical harm if she reported the conduct. See *id.*; see also *Walton*, 347 F.3d at 1291 (reasoning supervisor "never told Walton that her job was in jeopardy, nor did he threaten her with physical harm").

131. Compare *Burns v. Johnson*, 829 F.3d 1, 6–7, 19 (1st Cir. 2016) (finding evidence of credible threat based on co-workers' fears of participating in harassment investigation), with *Walton*, 347 F.3d at 1276 (requiring express threat of retaliation for threat to be credible).

132. See *Douyon v. New York City Dep't of Edu.*, 665 F. App'x 54, 58 (2d Cir. 2016) (explaining that evidence of similar complaints being "ignored or resisted" may justify delay in reporting (citing *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2d Cir. 2001))); see also *Harvill v. Westward Commc'ns*, 433 F.3d 428, 437 (5th Cir. 2005) (conceding employee's failure to bring complaint may be justified when "employee believes that bringing a subsequent sexual harassment complaint would

Even in these situations, the First and Second Circuits have required the plaintiff's fear of not being taken seriously to be credible.¹³³ The Court of Appeals for the Second Circuit held that a credible fear may be established if the "employer has ignored or resisted similar complaints" in the past.¹³⁴ In some cases, the employee may be required to give the employer multiple chances to correct the harassment before a court will determine that further reporting was objectively futile.¹³⁵ Lastly, a social relationship between the supervisor and entity or individual to whom the plaintiff would report is insufficient to justify a fear that reporting sexual harassment would be futile.¹³⁶

III. REVISITING WORKPLACE POLICIES: *MINARSKY V. SUSQUEHANNA COUNTY*

Breaking from the fairly consistent pattern requiring credible threats, the Third Circuit in *Minarsky* held a jury could find the employee-plaintiff acted reasonably even though her fear of retaliation was subjective.¹³⁷ Before the case reached the Third Circuit, the district court granted summary judgment in favor of the employer-defendant after determining that

be futile, or 'it becomes objectively obvious that the employer has no real intention of stopping the harassment, the harassed employee is not obligated to go through the wasted motion of reporting the harassment' (quoting *Woods v. Delta Beverage Grp.*, 274 F.3d 295 (5th Cir. 2001)); *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 36 (1st Cir. 2003) (acknowledging credible fear that plaintiff's complaint would not be taken seriously may excuse delay in reporting). *But see* *Hebert*, *supra* note 17, at 724–25 ("Courts have . . . been unreceptive to employees' claims that they believed that reporting would be futile-even when employees have some justification for that belief, such as information obtained from other employees.").

133. *See* *Szwalla v. Time Warner Cable, LLC*, 670 F. App'x 738, 740 (2d Cir. 2016) (stating plaintiff "did not demonstrate that she had a credible fear that a complaint would be ignored . . ."); *see also* *Reed*, 333 F.3d at 36 ("Claims of futility or adverse consequences have to be 'credible.'" (quoting *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999))); *Caridad*, 191 F.3d at 295 (finding plaintiff's delay in reporting "was not based on a credible fear that her complaint would not be taken seriously").

134. *See* *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (quoting *Caridad*, 191 F.3d at 295) (providing circumstances in which credible fear may exist). The *Leopold* court also recognized that evidence of "adverse actions against employees in response to [complaints of harassment]" may be sufficient to establish a credible fear. *See id.* The Second Circuit reasoned the plaintiff's argument, that the plaintiff did not report the harassment in part because another "co-worker's vague and ambiguous complaint was not taken seriously," was insufficient to establish a credible fear. *See id.*

135. *See* *Woods v. Delta Beverage Grp.*, 274 F.3d 295, 301 (5th Cir. 2001) (finding plaintiff was obligated "to give the company another opportunity to remedy the problem before deciding that she could not work there anymore").

136. *See* *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (rejecting "argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends").

137. *See* *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 306 (3d Cir. 2018) (holding jury could find plaintiff's subjective fear of retaliation reasonable).

it met both prongs of the *Faragher-Ellerth* defense.¹³⁸ The Third Circuit reversed, ultimately holding a plaintiff's failure to promptly report sexual harassment is not per se unreasonable.¹³⁹

A. *A Difficult Job: The Facts of Minarsky*

Sheri Minarsky worked for the Susquehanna County Department of Veterans Affairs as a part-time secretary.¹⁴⁰ Minarsky alleged her supervisor, Thomas Yadlosky, sexually harassed her throughout the course of her employment.¹⁴¹ The alleged harassment included Yadlosky's attempts to kiss her, along with him "approach[ing] her from behind and embrac[ing] her," massaging her shoulders, touching her face, questioning her about where she went for lunch and with whom she was eating, calling her to ask her personal questions when she was not at work, and sending sexually explicit emails to her at work.¹⁴² Minarsky further alleged that the conduct became worse as time went on.¹⁴³

The County Clerk reprimanded Yadlosky when he became aware of other incidents of harassment, specifically, after another female employee complained Yadlosky harassed her.¹⁴⁴ These incidents culminated in verbal reprimands, but the County took no subsequent action against Yadlosky.¹⁴⁵ Minarsky was aware that the County Clerk reprimanded Yadlosky on one of these two occasions.¹⁴⁶ According to Minarsky, Yadlosky attempted to harass several other women as well.¹⁴⁷

The County had a sexual harassment policy in place and Minarsky admitted she read the policy on her first day of work.¹⁴⁸ The policy required employees to report sexual harassment to their supervisor, unless

138. See *Minarsky v. Susquehanna Cty.*, No. 3:14-CV-2021, 2017 WL 4475978, at *8 (M.D. Pa. May 22, 2017), *adopting report and recommendation*, 3:14-CV-2021, 2017 WL 4475981 (M.D. Pa. June 28, 2017), *vacated and remanded*, 895 F.3d 303 (3d Cir. 2018) (recommending ruling in favor of employer).

139. See *Minarsky*, 895 F.3d at 306 (reversing district court's decision).

140. See *id.* (stating Minarsky worked "Mondays, Wednesdays, and Fridays").

141. See *id.* at 306, 316 (noting this harassment continued for three and a half years).

142. See *id.* at 306–07 (describing specific harassment Minarsky faced both at and away from work).

143. See *id.* at 307 (pointing to Minarsky's assertion that Yadlosky's harassment intensified over time).

144. See *id.* at 307 (discussing County's response to Yadlosky's alleged harassment of another employee).

145. See *id.* (stating no follow-up action was taken by County after verbal reprimands).

146. See *id.* (describing Yadlosky's reprimands and whether Minarsky knew about them).

147. See *id.* at 307–08 (noting Minarsky's knowledge of Yadlosky making unwanted advances on two other co-workers).

148. See *id.* at 308 (describing sexual harassment policy). The County's policy prohibited "harassment based upon 'sex, age, race, religion, national origin, ethnicity, disability, sexual preference and any other protected classification . . .'" See *id.* Employees "could report any harassment to their supervisor; if the supervi-

the supervisor was the source of the harassment, in which case the employees were to report to the Chief County Clerk or a county commissioner.¹⁴⁹ Despite her awareness of the policy, Minarsky never reported the harassment to the County Clerk or a county commissioner in part because Yadlosky told her she could not trust those individuals.¹⁵⁰

Minarsky eventually sent an email to Yadlosky, in which she confronted him about his continuously subjecting her to harassment.¹⁵¹ Though this effort did not yield any results, another supervisor reported Yadlosky's conduct to the Chief County Clerk after overhearing other employees discussing Yadlosky's treatment of Minarsky.¹⁵² The Chief County Clerk subsequently interviewed Yadlosky, and Yadlosky was ultimately terminated after admitting to the allegations against him.¹⁵³

B. *She Kept Her Head Down, and Lost: The District Court Found
Minarsky Acted Unreasonably*

Minarsky filed a complaint against both Yadlosky and the County.¹⁵⁴ Among other claims, Minarsky alleged sexual harassment through a hostile work environment.¹⁵⁵ The County asserted the *Faragher-Ellerth* affirmative defense and moved for summary judgment.¹⁵⁶

The district court held the County satisfied its burden under the first prong of the *Faragher-Ellerth* defense, finding the County had a reasonable policy in place and that it reasonably responded to reported incidents of

sor [was] the source of the harassment, the employee could report this to the Chief County Clerk or a County Commissioner." *See id.*

149. *See id.* at 308 (describing reporting procedures).

150. *See id.* (discussing comments made by Yadlosky to Minarsky discouraging her from reporting). Yadlosky also allegedly told Minarsky "to look busy or else [the County] would terminate her position." *See id.*

151. *See id.* (quoting text of Minarsky's email to Yadlosky). In short, Minarsky's email to Yadlosky addressed Yadlosky's conduct that she found bothersome and requested that she and Yadlosky resolve it amongst themselves to avoid the involvement of the County. *See id.*

152. *See id.* at 308–09 (describing events causing Yadlosky's harassment of Minarsky to come to light).

153. *See id.* at 309 (describing events leading to Yadlosky's termination).

154. *See* Minarsky v. Susquehanna Cty., No. 3:14-CV-2021, 2017 WL 4475978, at *1 (M.D. Pa. May 22, 2017), *adopting report and recommendation*, 3:14-CV-2021, 2017 WL 4475981 (M.D. Pa. June 28, 2017), *vacated and remanded*, 895 F.3d 303 (3d Cir. 2018) (stating Minarsky sought to hold Susquehanna County liable under Title VII).

155. *See id.* (noting claim brought by Minarsky). Minarsky brought a hostile work environment claim in her second amended complaint alleging "that the County discriminated against her on the basis of sex or gender and otherwise permitted a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964" *See id.* Additionally, Minarsky "alleged violations of state law for discrimination and negligent hiring and supervision." *See id.*

156. *See id.* (noting defendant's motion for summary judgment on both of Minarsky's claims for violations of Title VII and state law).

sexual harassment by Yadlosky.¹⁵⁷ As for the second prong, the court found that Minarsky was familiar with the sexual harassment policy and that she unreasonably failed to report the harassment.¹⁵⁸ Citing Yadlosky's explanation that she could not trust those to whom she would report as the only purported explanation for the delay, the court held Minarsky's failure to make a complaint was unreasonable.¹⁵⁹

C. *The Third Circuit Saw Things Differently*

The Third Circuit reversed the district court's decision and ruled in favor of Minarsky.¹⁶⁰ Specifically, it held "a mere failure to report one's harassment is not *per se* unreasonable" and that "the passage of time is just one factor in the analysis."¹⁶¹ The court went on to clarify that if "a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable," then an employer's motion for summary judgment should be denied.¹⁶² The court considered several factors in reaching this conclusion, including Minarsky's pressing financial circumstances, her supervisor's hostility, her fear of retaliation, and her fear that her complaint would not be taken seriously.¹⁶³

157. *See id.* at *6 (finding that the County acted reasonably). The district court stated that "[t]here is no dispute that the County maintained an anti-harassment policy, and that the plaintiff was familiar with it . . ." *See id.* The court also noted that the County "acted swiftly and effectively" when two prior incidents of harassment involving Yadlosky were brought to its attention. *See id.*

158. *See id.* (assessing Minarsky's actions relating to second prong of *Faragher-Ellerth* defense).

159. *See id.* (reasoning Minarsky's explanation for her delay in reporting was unconvincing).

160. *See Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 317 (3d Cir. 2018) (holding in favor of Minarsky).

161. *See id.* at 314 (reasoning the circumstances surrounding sexual harassment should factor into the determination of whether the victim acted reasonably).

162. *See id.* (clarifying standard for summary judgment on issue of *Faragher-Ellerth* defense).

163. *See id.* (considering context in which harassment occurred). Minarsky had a daughter who was sick with cancer, which she claimed contributed to her fear of reporting because she needed the income from her job to pay her medical bills. *See id.* The court considered the fact that Minarsky's supervisor became hostile when she would try to stand up for herself, which she argued added to her fear of reporting. *See id.* at 314–15. The court also considered Yadlosky's assertion that Minarsky could not trust those to whom she would report the harassment as evidence she acted reasonably. *See id.* at 316. The court held that when considering the circumstances surrounding the harassment, a jury could find Minarsky's actions reasonable. *See id.* at 314.

IV. POOR PERFORMANCE REVIEW: COURTS PLACE PLAINTIFFS
UNDER A MICROSCOPE

Rather than fully considering the context in which harassment occurs, many courts focus on evidence, or a lack of evidence, of a credible threat of retaliation before determining whether an employee-plaintiff's delay in reporting or failure to report was reasonable.¹⁶⁴ This narrow focus routinely leads courts to grant motions for summary judgment against employees who delayed reporting because of fears courts categorize as subjective or general.¹⁶⁵ Accordingly, employee-plaintiffs who waited a few weeks to file a formal complaint may be unable to establish the reasonableness of their acts.¹⁶⁶ This application of the *Faragher-Ellerth* defense can reward ineffective harassment policies and punish employees that delay reporting for reasons that many may find reasonable.¹⁶⁷

A. *Watching Employees Through a Narrow Lens*

Most courts do not consider the circumstances surrounding instances of workplace sexual harassment when assessing whether an employee acted reasonably.¹⁶⁸ This means that courts may not consider factors relevant in determining whether an employee-plaintiff acted reasonably, such as how new an employee is to a workplace or whether the employee actually knew that an initial instance of harassment would be the first of many.¹⁶⁹ Further, other factors, such as pressing financial circumstances,

164. For a further discussion on credible threats excusing a delay in reporting, see *supra* notes 117–30 and accompanying text.

165. For a further discussion on general threats being dismissed, see *supra* notes 114–16 and accompanying text.

166. See Brake & Grossman, *supra* note 15, at 881 (discussing consequences of employees' failure to complain of harassment). Brake and Grossman believe the consequences of failing to complain are so severe in part because "courts have been relatively unwilling to accept excuses and tend, instead, to assume that such a failure is always 'unreasonable.'" See *id.* They further note "courts tend to equate an employer's formal policy against retaliation with the actual absence of retaliation." See *id.* at 881–82; see also Stone, *supra* note 76, at 54 (reasoning "a plaintiff will often not be able to produce" evidence necessary to overcome second prong of defense).

167. See Stone, *supra* note 76, at 52 ("Policies pass muster despite having flaws that, it was argued, rendered them overly onerous, if not impossible, to use.")

168. See Brake & Grossman, *supra* note 15, at 883 (discussing trends in courts requiring evidence of credible fear). Brake and Grossman write that cases in which courts require credible threats of retaliation "reflect a widespread refusal by courts to consider context when making determinations about the reasonableness of the plaintiff's behavior." See *id.* They further argue this approach acts to "[bar] employees [sic] access to the law's substantive protections against harassment." See *id.* Stone, another commentator, has argued that some courts do not factor in the circumstances causing a victim to not report, "[s]pecifically, the fear that accompanies reporting harassment in an environment in which support and success is uncertain is typically given no weight, absent explicit evidence that a plaintiff will often not be able to produce." See Stone, *supra* note 76, at 53–54.

169. See Brake & Grossman, *supra* note 15, at 883 (mentioning factors courts do not consider in assessing reasonableness of delay in reporting). Brake and

which can enhance an employee's fear of being fired, are often beyond the scope of courts' consideration as well.¹⁷⁰ Context becomes more important in situations where the harassed employee has very little power in the workplace, does not fully understand the complaint process, or has heightened concerns over retaliation.¹⁷¹ There is good reason to consider such factors, but some courts are not fully weighing their importance.¹⁷²

The failure to consider context has diminished the importance of the second prong of the *Faragher-Ellerth* defense.¹⁷³ Two commentators argued that some courts use any delay in reporting to justify allowing an employer who took both reasonable steps to prevent and promptly cor-

Grossman write that the court "expect[ed the] plaintiff to complain even before realizing the misconduct would recur and escalate." *See id.* at 882 n.119 (citing *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000)). These commentators also discuss *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405 (5th Cir. 2002), where the employee-plaintiff complained to a supervisor that she was being harassed, and that supervisor started to harass her as well. *See id.* at 882–83. In *Wyatt*, the employee-plaintiff was being harassed by her supervisor, who would refer "to her in vulgar terms and continually [ask] her to have sex with him." *See Wyatt*, 297 F.3d at 407. The plaintiff reported this conduct to the supervisor's supervisor, and that individual responded by taking part in the harassing conduct. *See id.* The court found the plaintiff did not act unreasonably by reporting her supervisor's harassment, but she was acted unreasonably in failing to escalate her complaints higher up the chain after the supervisor's supervisor started harassing her. *See id.* at 414.

170. *See Minarsky v. Susquehanna Cty.*, No. 3:14-CV-2021, 2017 WL 4475978, at *6 (M.D. Pa. May 22, 2017), *adopting report and recommendation*, 3:14-CV-2021, 2017 WL 4475981 (M.D. Pa. June 28, 2017), *vacated and remanded*, 895 F.3d 303 (3d Cir. 2018) (holding employer met its burden under second prong of *Faragher-Ellerth* defense despite financial pressures making plaintiff feel as though she could not leave her job).

171. *Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention: Before the EEOC* (June 17, 2015) (statement of Daniel Werner, Senior Supervising Attorney, Southern Poverty Law Center), <https://www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm> [<https://perma.cc/QT5C-XW83>] (discussing fears of reporting for low-status employees and harassment). This testimony specifically mentions that employees such as undocumented workers may be more fearful of the consequences of reporting harassment as they could face deportation. *See id.*

172. *See Hebert, supra* note 17, at 728 (arguing courts fail to give adequate weight to particular factors when assessing employee's reasonableness). Hebert has asserted that courts have not considered whether an employee is new or if they are on probation when determining whether they acted reasonably in failing to report or delaying reporting. *See id.* She believes these employees may be more concerned than others in reporting because "those on probation do not have the credibility and 'value' of longer-term employees and because their jobs are presumably less secure in the first place." *See id.* Additionally, Hebert discusses *Reed v. MBNA Marketing Systems*, 231 F. Supp. 2d 363 (D. Me. 2002), a case where a supervisor forced a seventeen-year-old employee to perform oral sex on him on two separate occasions, and then implicitly threatened her with retaliation. *See id.* The court granted summary judgment in favor of the employer and stated, "the plaintiff had not even produced any evidence that she had behaved reasonably under the circumstances." *See id.*

173. *See Zev J. Eigen, et al., When Rules are Made to Be Broken*, 109 Nw. U. L. REV. 109, 164 (2014) (arguing courts focus almost exclusively on first prong rather than second prong of *Faragher-Ellerth* defense).

rected harassment to avoid liability, meaning courts effectively focus exclusively on the employer's actions.¹⁷⁴ These commentators suggest that in doing so, courts scrutinize the actions of the plaintiff, leading to holdings such as a seventeen-day delay being unreasonable.¹⁷⁵ Similarly, another commentator has argued that courts have effectively read the reasonableness requirement of the second prong out of the defense.¹⁷⁶ If true, these observations suggest courts have not been advancing one of the two primary policies of the *Faragher-Ellerth* defense—to incentivize employees to act reasonably to mitigate future harm.¹⁷⁷

Confining employee-plaintiffs to the bounds of a formal reporting system is yet another unfortunate result of this approach.¹⁷⁸ Employees commonly delay reporting or completely fail to formally report harassment, yet courts often require employees to follow the exact procedures established by an employer.¹⁷⁹ The least likely action of an employee who is the victim of harassment is to file a complaint, therefore, expecting that a reasonable person would follow the formal reporting system creates an apparent paradox.¹⁸⁰ While context may explain why employees so often do

174. *See id.* (“[C]ourts looked to employer behavior to determine whether the employee’s behavior was reasonable . . . [and] to employer behavior in determining whether the reports were timely.”). Eigen, Menillo & Sherwyn have argued that courts have “effectively eliminate[d] the Unreasonable Employee Prong of the defense” *See id.*

175. *See id.* at 156 (citing *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276, 281 (10th Cir. 2004)) (“The result we have observed suggests that, when confronted with an employer who corrects well, courts scrutinize the employee’s conduct to find it unreasonable.”).

176. *See* Hebert, *supra* note 17, at 720 (“Although the second prong of the affirmative defense requires the employer to establish that any failure on the part of the employee to take advantage of the employer’s preventive or remedial actions was ‘unreasonable,’ some courts appear to be quite literally reading that requirement out of the defense.”). *But see* *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 311 (3d Cir. 2018) (“The cornerstone of this analysis is reasonableness: the reasonableness of the employer’s preventative and corrective measures, and the reasonableness of the employee’s efforts (or lack thereof) to report misconduct and avoid further harm. Thus, the existence of a functioning anti-harassment policy *could* prove the employer’s exercise of reasonable care so as to satisfy the first element of the defense.” (emphasis in original) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998))).

177. *See Faragher*, 524 U.S. at 806 (reasoning Title VII is intended to prevent harm).

178. *See, e.g.*, Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 251 (2004) (“The Eleventh Circuit’s decision in *Madray* allows an employer to sit passively by until an employee files a formal complaint using the employer’s designated complaint channels.”).

179. *See* *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 313 n.12 (citing EEOC study finding employees frequently fail to report harassment); *see also* Grossman, *supra* note 15, at 896 (citing David Sherwyn et al., *supra* note 16, at 1280) (discussing study finding “only fifteen percent [of victims] reported . . . harassment to their employers in a timely manner”).

180. *See id.* at 209 (“Thus, the empirical evidence on reporting raises an interesting question: if the vast majority of harassment victims do not report harass-

not immediately resort to filing formal complaints, any such facts are beyond the scope of consideration.¹⁸¹ Some courts go even further and essentially require employee-plaintiffs who failed to promptly report harassment to establish the reasonableness of their delay.¹⁸² Courts typically reason that employee reporting is necessary to prevent future harm when ruling in favor of an employer in these situations.¹⁸³ This require-

ment, then the reasonable response is *not* to report harassment.” *See id.* (emphasis in original) (citing Patricia A. Frazier, *Overview of Sexual Harassment from the Behavioral Science Perspective*, 1998 A.B.A. CTR. FOR CONTINUING LEGAL EDUC., NAT’L INST. ON SEXUAL HARASSMENT, B16, B-21 (1998)); *see also* Brake & Grossman *supra* note 15, at 896 (noting infrequency of formal reporting by victims of sexual harassment). A study found that “filing a complaint with an employer sexual is the least likely response to harassment.” *See id.* (citing Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1155 (2000)). A 1995 study found “only six percent of employees who had experienced sexual harassment filed a formal complaint, while forty-four percent took no action at all.” *See id.* (citing U.S. MERIT SYS. PROT. BD., *supra* note 15, at 30)).

181. *See* Stone, *supra* note 76, at 53–54 (“Similarly, courts’ analyses of the second prong of the affirmative defense evince a reluctance to take into account circumstances that might have coerced a harassment victim into failing to utilize a reporting mechanism. Specifically, the fear that accompanies reporting harassment in an environment in which support and success is uncertain is typically given no weight, absent explicit evidence that a plaintiff will often not be able to produce.”).

182. *See* Hebert, *supra* note 17, at 715–16 (criticizing perceived burden shifting by courts when applying the *Faragher-Eltherth* defense). Hebert believes that some courts have required the “plaintiff to establish the reasonableness of his or her actions” in the context of the *Faragher-Eltherth* defense. *See id.* at 716. Hebert went on to argue that other courts have continued to place the burden on the employer but have placed a burden of production on the plaintiff as well. *See id.* She wrote:

“[i]n these courts, after the employer has shown that the employee completely failed to use a complaint process, the plaintiff has been required to come forward with reasons for the failure to use that process, and the courts have considered the adequacy of those reasons in determining whether the employer’s burden of persuasion has been carried.”

See id. Ultimately, Hebert believes the *Faragher-Eltherth* defense has been applied as a pro-employer standard. *See id.* at 715.

183. *See* Stone, *supra* note 76, at 57–58 (discussing *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1289 (11th Cir. 2003)). Stone acknowledged the *Walton* court’s explanation for holding the plaintiff unreasonably failed to follow the sexual harassment policy, specifically that requiring employees to report harassment through established channels is essential to correcting the problem of workplace discrimination. *See id.* at 58–59 (disagreeing with the reasoning of the *Walton* court). Nevertheless, Stone believes that the court failed to appropriately weigh the reasonableness of such a delay in light of the realities of the workplace that employee-plaintiffs often face. *See id.* at 59 (discussing workplace conditions that discourage employees from reporting harassment). Stone points out that an “unspoken code of conduct” may act to “chill reporting,” pointing out one instance where a plaintiff who was successful in court still faces problems such as her workers refusing to look at her or talk to her, even five or six years later. *See id.* Stone added “courts often adhere rigidly to the requirement that plaintiffs follow the exact course of action prescribed by a defendant’s policy.” *See id.* at 58.

ment does very little, if anything, to prevent workplace sexual harassment from occurring.¹⁸⁴

B. *Throwing Away the Handbook: Applying the Faragher-Ellerth Defense Contrary to the Policy of Title VII*

Courts granting summary judgment in favor of an employer without fully considering the context that may cause a reporting delay is contrary to the purpose of Title VII.¹⁸⁵ As discussed in Part II, the primary objective of Title VII is to avoid harm.¹⁸⁶ The *Faragher-Ellerth* defense seeks to further this policy by encouraging employers to prevent harm and by encouraging employees to mitigate damages by reporting harassment.¹⁸⁷ In failing to consider context, courts are not accounting for the very conditions that have prevented employees from reporting harassment time and time again.¹⁸⁸ Oddly enough, courts have given great deference to written sexual harassment policies despite their apparent ineffectiveness.¹⁸⁹ This approach of not considering context represents a trend in which courts

184. See Lawton, *supra* note 180, at 198 (addressing shortcomings of *Faragher-Ellerth* defense). Lawton has argued that “[t]he success of the affirmative defense as a means to increase deterrence of workplace harassment rests in part on behavior that occurs infrequently—formal reporting of sexual harassment.” See *id.* Further, according to Lawton, this very premise has made it unlikely from the start that the *Faragher-Ellerth* defense would succeed in its goal of deterring workplace harassment. See *id.* at 198–99. Lastly, the *Faragher-Ellerth* defense does little more to further the goal of the defense on the employer’s end, because “many federal courts have interpreted the Court’s decisions in *Ellerth* and *Faragher* to require little more than what the Court in *Meritor* commanded: promulgate an anti-harassment policy that specifically addresses sexual harassment and a grievance procedure that allows an employee to bypass a harassing supervisor.” See *id.* at 210.

185. See Stone, *supra* note 76, at 49–50 (“[T]he current state of the law permits little to no acknowledgement of the realities that often permeate a workplace in which harassment occurs. These realities both discourage a victim from reporting a hostile environment and unfulfilled threats and force her to quit her employment.” (citing Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 461 (2002))). “West argues “[e]nough opinions have been issued under the [*Faragher-Ellerth*] structure, however, to raise serious questions about the viability of the affirmative defense in actually preventing hostile environment sexual harassment.” See West, *supra*, at 461.

186. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998) (discussing Title VII). The Court specified that “like that of any statute meant to influence primary conduct, [Title VII] is not to provide redress but to avoid harm.” See *id.* at 806.

187. For a further discussion on the policy behind the *Faragher-Ellerth* defense and how the policy was incorporated into the defense, see *supra* notes 66–72.

188. See West, *supra* note 187, at 461 (“Courts are dismissing women’s complaints under prong two of the affirmative defense without examining the facts underlying women’s hesitation to file an internal complaint prior to suing in federal court.”).

189. See Stone, *supra* note 76, at 52 (“Policies pass muster despite having flaws that, it was argued, rendered them overly onerous, if not impossible, to use.”); see also West, *supra* note 185, at 461 (“[Courts] are interpreting ‘reasonable care’ in the first prong of the [*Faragher-Ellerth*] affirmative defense to require only minimal prevention efforts by the employer.”).

have attempted to mitigate harm to employees by rewarding ineffective sexual harassment policies and punishing those who act as 94% of people who experience workplace sexual harassment do.¹⁹⁰

V. REWRITING THE RULES OF THE WORKPLACE: THE THIRD CIRCUIT PUTS THINGS INTO PERSPECTIVE

In *Minarsky*, the Third Circuit set out a standard that gives courts more flexibility when determining whether a plaintiff acted reasonably, and this standard is more consistent with the language of *Faragher* and *Ellerth* opinions, as well as the policy underlying Title VII.¹⁹¹ The Third Circuit accomplished this, in part, by holding a delay in reporting was just one factor in assessing the reasonableness of a plaintiff's actions, which effectively diminishes the importance of prompt employee reporting.¹⁹² In reaching this holding, the court deviated from its own precedent, which often required evidence of a credible threat.¹⁹³ This deviation may be explained by societal change, which is suggested by a footnote in *Minarsky* that discusses the “#MeToo” movement.¹⁹⁴ *Minarsky* applied a reasonableness standard that gives greater weight to the most common response to

190. For a further discussion on the frequency of employees reporting harassment, see *supra* note 16 and accompanying text.

191. For a further discussion on the Third Circuit's reasoning in *Minarsky*, see *supra* notes 137–63 and accompanying text.

192. See *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 314 (3d Cir. 2018) (“[T]he passage of time is just one factor in the [reasonableness analysis under the second prong of *Faragher-Ellerth*].”).

193. See *Cardenas v. Massey*, 269 F.3d 251, 267 (3d Cir. 2001) (holding plaintiff did not act unreasonably despite four-year reporting delay because plaintiff informally complained of harassment to harassing supervisors and two others prior to filing formal complaint); see also *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 329 (3d Cir. 2015) (holding no reasonable jury could find employer liable where plaintiff failed to report alleged harassment for ten years); *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18, 26 (3d Cir. 2006) (finding four month delay in reporting not unreasonable); *Newsome v. Admin. Office of the Courts of N.J.*, 51 F. App'x 76, 80–81 (3d Cir. 2002) (finding plaintiff's failure to file complaint for two years unreasonable in part because of plaintiff's failure to file informal complaint).

194. See *Minarsky*, 895 F.3d at 313 n.12 (discussing *Minarsky*'s claim in cultural context). In a footnote, the Third Circuit discussed the series of formerly undisclosed allegations of sexual harassment that have come to light recently. See *id.* The court also cited several studies documenting the failure of many women to come forward to report their harassment, as well as several proposed explanations for this phenomenon. See *id.* The court further noted “[i]n nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred.” See *id.* Further, “there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it.” See *id.* Finally, the court stated “[v]ictims do not always view it in this way. Instead they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.” See *id.*

sexual harassment, in contrast to other cases which hold a delay in reporting is per se unreasonable.¹⁹⁵

The approach taken by the Third Circuit in *Minarsky* draws on how people actually respond to harassment.¹⁹⁶ Considering most people do not formally report harassment, and very few employees immediately resort to formal reporting, whether an employee promptly files a formal complaint should not be the sole focus of the reasonableness inquiry.¹⁹⁷ The Third Circuit's reasonableness inquiry takes into account the employee's fear of retaliation, confidentiality, harm, impairment of career prospects, blame for the supervisor's conduct, and even the financial distress that may result from the employee losing their job.¹⁹⁸ The prevalence of these beliefs among victimized employees, and the frequency with which they cause those employees to delay reporting, suggests that a jury should have the opportunity to weigh whether or not the plaintiff acted reasonably.¹⁹⁹

Taking context into consideration may lead to employers being more proactive in preventing sexual harassment in the workplace.²⁰⁰ Rather

195. Compare, e.g., *id.* at 314 (holding delay in reporting is just one factor in *Faragher-Ellerth* analysis), with *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000) (finding employee-plaintiff unreasonably failed to avail herself of preventive or correct opportunities by waiting three months to report harassment).

196. See Hebert, *supra* note 17, at 734–35 (discussing victims' responses to harassment). Hebert stated that “relatively few women subjected to sexual harassment make formal complaints about that behavior.” See *id.* at 734 (citing Sandy Welsh & James E. Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, 36 CANADIAN REV. OF SOC. & ANTHROPOLOGY 559, 559–60 (1999)). Hebert argued that courts holding plaintiffs act unreasonably by failing to report their harassers is concerning, as not formally reporting is the most common response to sexual harassment. See *id.* at 735. Hebert took further issue with judges making this determination despite being far less likely to be subjected to harassing conduct in light of their positions. See *id.* Hebert proposed the reason that judges view the prompt reporting requirement as the ideal method of addressing harassment is “because formal procedures are seen as the most effective manner in which sexual harassment can be prevented before it occurs, becomes serious, or otherwise corrected after it occurs.” See *id.*; see also *Minarsky*, 895 F.3d at 314 (holding jury could find plaintiff's actions despite plaintiff never formally reporting supervisor's harassment).

197. See Lawton, *supra* note 178 at 209 (asserting it is reasonable for victims to not report harassment considering most victims fail to do so).

198. See Hebert, *supra* note 17, at 737 (“These reasons include fear of retaliation, concerns about confidentiality and whether any action would be taken, concern about harm to the harasser, and concerns about harm to themselves, including suffering damage to their careers, being blamed for the harassment, and not being believed.”); see also *Minarsky*, 895 F.3d at 307 (stating *Minarsky* relied on income from her job to pay for her daughter's cancer treatment).

199. See Hebert, *supra* note 17, at 742–43 (asserting most women act reasonably by not immediately filing a formal complaint in light of “the likely consequences that they would face if they made such a formal complaint”).

200. See Brake & Grossman, *supra* note 15, at 883 (reasoning courts fail to consider context causing them to consider plaintiffs' delays in reporting or failure to report unreasonable). Failing to fully consider the circumstances in which har-

than implementing policies that fit minimal requirements and have no real impact on rates of workplace harassment, holding employers to a higher standard would create an incentive to develop effective procedures that could prevent the harassment from ever occurring.²⁰¹ This outcome is possible, given employers are often in the best position to prevent harassment.²⁰²

VI. CREATING A LESS HOSTILE WORK ENVIRONMENT

The *Minarsky* approach advances the policy underlying the *Faragher-Ellerth* defense while acknowledging that in some circumstances it is understandable why employees do not immediately report harassment.²⁰³ The *Minarsky* opinion represents an approach to the *Faragher-Ellerth* defense that deviates from that of nearly every other circuit, but is still consistent with the case law and policy underlying the defense.²⁰⁴ If followed by other courts, the added flexibility provided by the *Minarsky* approach may lead to decisions that many regard as fairer to plaintiffs.²⁰⁵ But based on the long-established precedent of other circuits, any change is likely to be incremental.²⁰⁶

assment occurs results in more plaintiffs losing on motions for summary judgment. *See id.* By plaintiffs overcoming the obstacle of summary judgment, employers will have increased pressure to settle claims to avoid further litigation, which may prompt them to be more proactive in the prevention of sexual harassment. *See* Robert R. Graham III, *Two Wrongs Do Not Make a Right: The Need to Revisit the Ellerth/Faragher Affirmative Defense*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 442–43 (2016) (reasoning sexual harassment cases put pressure on employers to settle); *see also* Grossman, *supra* note 104, at 71 (noting “employer exercise [significant control] over the workplace and their ability to establish norms of respect and equality, to respond to problems in a manner that both resolves them and encourages future victims to come forward, and to discipline offenders.”).

201. *See* Grossman, *supra* note 104, at 71 (arguing potential costs of sexual assault claims incentivize employers to prevent harassment); *see also* West, *supra* note 185, at 461 (“[Courts] are interpreting ‘reasonable care’ in the first prong of the new affirmative defense to require only minimal prevention efforts by the employer.”).

202. *See* *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (reasoning employers are in best position to prevent harassment from occurring).

203. For a further discussion of the Third Circuit’s holding in *Minarsky*, see *supra* notes 137–63 and accompanying text.

204. *Compare* *Minarsky v. Susquehanna Cty.*, 895 F.3d 303, 311 (3d Cir. 2018) (finding reasonableness of both employer and employee to be at center of inquiry), *with* Hebert, *supra* note 15, at 720 (“Although the second prong of the affirmative defense requires the employer to establish that any failure on the part of the employee to take advantage of the employer’s preventive or remedial actions was ‘unreasonable,’ some courts appear to be quite literally reading that requirement out of the defense.”).

205. For a further discussion of the Third Circuit’s holding in *Minarsky*, see *supra* notes 137–63 and accompanying text.

206. For a further discussion on the approach to the *Faragher-Ellerth* defense taken by other courts, see *supra* notes 80–136 and accompanying text.

Such incremental change can already be seen in at least one Pennsylvania decision, and other courts should follow suit.²⁰⁷ The consequences of this shift will likely be two-fold: more plaintiffs will survive motions for summary judgment, and employers may be incentivized to take more reasonable measures to prevent sexual harassment from occurring in the first place.²⁰⁸ If this proves to be true, the modified application of the defense will surely prevent future harm, which is what the defense set out to do at its inception over twenty years ago.²⁰⁹

207. See *Kastanidis v. Pa. Dep't of Human Servs.*, No. 1:16-CV-1548, 2018 WL 3584976, at *10 (M.D. Pa. July 26, 2018) (“The mere failure to report sexual harassment ‘is not *per se* unreasonable.’”). In *Kastanidis*, the plaintiff never actually used the formal reporting procedure established by the employer. See *id.* at *10.

208. For a further discussion of the potential for the *Minarsky* approach to prevent future instances of harassment, see *supra* notes 203–09 and accompanying text.

209. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (reasoning Title VII is intended to prevent harm).