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Sexual Harassment: A Doctrinal Examination of the Law, An Empirical Examination of Employer Liability, and A Question About NDAs— Because Complex Problems Do Not Have Simple Solutions

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Sexual Harassment: A Doctrinal Examination of the Law, An Empirical Examination of Employer Liability, and A Question About NDAs— Because Complex Problems Do Not Have Simple Solutions

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The #MeToo movement casts critical light on the pervasive nature of sexual harassment, particularly in the employment context, and continues to motivate a number of initiatives that address important social and workplace ills. The problems this movement has uncovered, however, run much deeper and likely exceed the scope and capacity of many of the proposed "fixes" it has inspired. Worse still, however, is that some of the proposed fixes may prove counterproductive. This Article examines the history and development of the relevant employment laws, empirically assesses judicial holdings on the employers' affirmative defense to liability, and argues that many employees may be better off with a nondisclosure agreement (NDA) in many instances. Our conclusion sketches out the basic contours of an alternative legal standard, a new affirmative defense, and related policy initiatives that call into question the common perception that privacy benefits employers and not employees.

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INTRODUCTION

Prior to October 5, 2017, sexual harassment persisted as just another "employment discrimination issue."[1] Indeed, from 2010 to 2016 the average number of reported sex-based harassment charges equaled 12,526, while the average number of reported retaliation charges and race charges equaled 38,528 and 33,182, respectively.[2] After October 5, 2017, however, sexual harassment, and the resultant employment discrimination, started a movement.[3] At its most basic level, such a movement is necessary and important. Sexual harassment is endemic to the United States workplace and warrants far greater legal and public attention. Unfortunately, the aftermath of the #MeToo revolution has too often been distracted by misinformation and knee-jerk reactions that while, perhaps even well-intentioned, may yet prove, in the end, counterproductive. One particularly critical—indeed, structural—challenge is that one cannot efficaciously engage with the array of problems that flow from sexual harassment in the workplace without first making the relevant legal doctrines and procedures more coherent.

Part I seeks to place workplace sexual harassment claims into some context by reviewing the number of sexual harassment claims filed with the Equal Employment Opportunity Commission (EEOC). In Part II we summarize the relevant legal doctrines. Our focus here is organized into two distinct—though related—subparts. In the first we trace the development of the relevant legal doctrines; the second focuses on employer liability from an empirical perspective. Specifically, we analyze summary judgment motions, drawn from published case reports, from 2010 to 2018. Part III assesses one of the most notable "legal fixes" where employers can no longer deduct expenses from settlements that include nondisclosure agreements (NDAs). We argue that this "fix," paradoxically, likely makes problems worse, not better, for many employees. Finally, in Part IV we propose (1) an alternative definition of sexual harassment; (2) a restructuring of an employer's affirmative defense; and (3) how to operationalize NDAs in a manner that better encourages employees to report and employers to prevent and correct harassment.

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1. *See #MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2021, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma .cc/L9T6-5KPV].

2. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2020,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 [https://perma.cc/BQ36-QJ5X] [hereinafter *Charges Alleging Sex-Based Harassment Filed with EEOC*]; *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 [https://perma.cc/6W9C-P9TS] [hereinafter *Charges Filed with EEOC*].

3. October 5, 2017 was the day the Weinstein accusations became public. *See also #MeToo: A Timeline of Events*, *supra* note 1.

I. SEXUAL HARASSMENT CLAIMS' PREVALENCE

Prior to filing a sexual harassment claim in federal or state court, an employee must first file a "charge" with the EEOC or their state agency (forty-seven states "protect" sex).[4] Of course, employee charges filed with the EEOC systematically undercount the larger universe of employee complaints of work-based sexual harassment, including those issues or matters (1) adjudicated under an in-house dispute resolution system; (2) resolved prior to an employee's EEOC filing; or (3) more troubling, never filed by an employee, who instead endures the odious conduct and/or leaves the company. Still, despite systematically undercounting instances of sexual harassment, EEOC claims data do reflect the number of cases that have been processed in the traditional legal system and provide helpful context with regard to how sexual harassment in the workplace compares to other discrimination claims. Helpful critiques of the adjudication system necessarily rely upon useful measures of the issues' breath, scope, and contour.

Before delving into the relevant data, it is instructive to consider *why* employees file with either the state or federal agencies. In three states, employees have no choice—they must file with the EEOC because their state does not protect against sexual harassment.[5] Other employees can only file with the state because they work for an employer with fewer than fifteen employees, and thus are not covered by the EEOC,[6] but live in a state whose law applies to employers with fewer than fifteen employees.[7] Employees who work for employers covered by relevant federal and state or local law, however, have more legal options. In many cases, the state or local law is more employee friendly with regard to law, damages, and/or adjudication systems. For example, Illinois and California provide strict liability for harassment by supervisors,[8] both California and New York City provide unlimited punitive damages for discrimination,[9] and Illinois provides administrative hearings that are

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4. *Discrimination – Employment Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 27, 2015), http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx [https://perma.cc/EBK3-SY4N] [hereinafter NCSL]. Only Alabama, Georgia, and Mississippi do not protect sex discrimination for private employers. *Id.*

5. Employees in Alabama, Georgia, and Mississippi must file with the EEOC rather than state agencies because their state agencies do not protect discrimination on the basis of sex. *Id.*

6. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (2009). The Act defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." *Id.* § 2000e(b).

7. *See* NCSL, *supra* note 4. For example, New York law applies to employers with four employees or more and Colorado law applies to employers with one or more employee. *Id.*

8. *See* Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n, 908 N.E.2d 39, 44–46 (Ill. 2009) (interpreting Illinois's state version of Title VII as imposing strict liability on an employer for the sexual harassment of an employee by the employee's direct supervisor); *see also* State Dep't of Health Servs. v. Superior Ct., 79 P.3d 556, 563 (Cal. 2003) (holding that "an employer is strictly liable for all acts of sexual harassment by a supervisor" (emphasis omitted)).

9. *Compare* CAL. GOV'T CODE § 12940 (West 2019), *with* Civil Rights Act § 7, *and* Chauca v. Abraham, 89 N.E.3d 475, 480–81 (N.Y. 2017) (holding that punitive damages are

less formal and less restrictive than federal court.[10] Moreover, some plaintiffs' lawyers believe that state court judges and juries are more employee friendly than those in federal court.

The EEOC differentiates sex-based harassment charges and sexual harassment charges. Sexual harassment is defined as conduct of the sexual nature. Sex-based harassment is nonsexual conduct that is motivated by the gender of the victim.[11] As explained more fully below, we contend that after the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*[12] there is no legal basis for the distinction. Regardless, the EEOC statistical reports provide the number of sexual harassment claims, along with the total number of sex-based and sexual harassment charges combined, allowing us to see that sexual harassment cases made up 58% of the total sexual harassment and sex-based harassment charges from 2010 to 2019.[13] The EEOC's resolution data, by contrast, is limited to sexual harassment cases only. Below, we provide numbers of receipts from the larger, inclusive category, and resolutions from the smaller, exclusive category because, as stated above, it is the only set of numbers we have.

From 2010 to 2019, the number of sex-based harassment claims filed with the EEOC averaged 12,627 cases per year.[14] With regard to the percentage of sexual harassment cases relative to all other types of discrimination cases, sexual harassment claims ranged from a low of 12.47% (2011: 12,461 out of 99,947 received) to a high of 17% (2018: 13,055 out of 76,418 received) of the charges the EEOC received.[15] While 12.47% to 17% seems significant, the EEOC percentages do not add up to 100 percent. Because an employee can claim numerous forms of discrimination (e.g., sexual harassment, age discrimination, and retaliation) in a single filing, the percentages exceed 100 percent every year. For example, in 2018 the percentages added up to 188.9%, and the number of retaliation (51.6%), race (32.2%), disability (32.2%) and age (22.1%) claims exceeded that of sexual harassment in 2018 and every other year going back to 2010.[16] Thus, in 2019, the

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appropriate under the New York City Human Rights Law (NYCHRL) where the defendant's actions amount to recklessness or willful or wanton negligence, or where there is "a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard'" (quoting Home Ins. Co. v. Am. Home Products Corp. 550 N.E.2d 930, 934 (N.Y. 1990)). The court's decision in *Chauca* makes clear that the standard for punitive damages under the NYCHRL is broader and more plaintiff-friendly than under Title VII, which requires a showing that the employer had intentionally discriminated with "malice" or with "reckless indifference." *Id.* at 480.

10. For a full discussion of the Illinois Human Rights Commission Process, see David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 (2000).

11. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY 2020*, U.S. EEOC (2020), https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 [https://perma.cc/TP4J-G27V].

12. 523 U.S. 75 (1998).

13. *See Charges Alleging Sex-Based Harassment Filed with EEOC*, *supra* note 2.

14. *Id.*

15. *Id.*; *Charges Filed with EEOC*, *supra* note 2.

16. *Charges Alleging Sex-Based Harassment Filed with EEOC*, *supra* note 2; *Charges*

number of sexual harassment charges were approximately one-third of the number of retaliation claims, around one-half the number of race and disability claims, and three-quarters of the age cases.[17]

In terms of claim resolution, sexual harassment was more "employee friendly" than dispositions for other charges resolved during that same time period. More specifically, from 2010 to 2019, while merit resolutions[18] for sexual harassment claims ranged from 25.9% (2010) to 22.4% (2017) for an average of 24.21%,[19] total EEOC merit resolutions ranged from 19.2 percent (2010) to 14.8% (2017), with an average of 17.22%.[20]

Three reasons may help explain why the percentage of merit resolutions in sexual harassment classes exceeded those for other protected classes. First, sexual harassment claims could be more meritorious. Second, merit resolutions include settlements. Since current employees often bring harassment charges, parties can settle for lower sums of money or no money at all. Additionally, the facts can be so embarrassing that employers will, to avoid publicity, quickly agree to settle at an early stage in the legal process. Third, investigators may be more bothered by sexual harassment allegations than those presented in other cases and systematically preference employee claims over employer defenses. Still, that only, on average, 24.21% of sexual harassment cases warranted a merit resolution raises an important question: Is the EEOC's resolution system systematically skewed against employees or are 75% of the harassment charges truly without merit?

Further empirical investigation does not shed much helpful light. Of all EEOC resolutions, an average of 21.37% over the ten-year period of our study are classified as administrative closings.[21] Administrative closings include those employee claims that contain structural defects (e.g., the employer had fewer than fifteen employees) as well as employee claims that were abandoned (e.g., the process took too long, so the employee got a new job and wanted to put the whole episode in the past). The

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Filed with EEOC, *supra* note 2.

17. *Charges Filed with EEOC, supra* note 2.

18. Merit resolutions consist of "[c]harge[s] resolved with an outcome favorable to charging party or charge with meritorious allegations. These are comprised of negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations." *Definitions of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 2020), https://www.eeoc.gov/statistics/definitions-terms [https://perma.cc/N6FV-3JRJ]. Nonmerit resolutions consist of administrative closures, "[c]harge[s] closed for administrative reasons without a determination based on the merits, which include: lack of jurisdiction due to untimeliness, insufficient number of employees, or lack of employment relationship; charging party requests withdrawal without receiving benefits; or charging party requests the notice of right to sue." *Id.* No reasonable cause is the "EEOC's determination based upon the evidence obtained in the investigation that it believes discrimination did not occur; the determination does not certify that the respondent is in compliance with the statute. The charging party may exercise the right to bring private court action." *Id.*

19. *Charges Alleging Sex-Based Harassment Filed with EEOC*, *supra* note 2.

20. *All Statutes (Charges Filed with EEOC) FY 1997 – FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/WPF7-QXG8] [hereinafter *All Statutes (Charges Filed with EEOC)*].

21. *Id.*

remaining nonmerit resolutions, an average of 67.04% of the total resolutions over the nine-year period,[22] involve charges where the EEOC investigated and found no reasonable cause. Even more telling is that in cases where the EEOC investigated and made a determination, they found no reasonable cause in approximately 90% of the cases.[23] Again, these data raise more questions than they answer. For example, what are the circumstances behind the cases that result in administrative closings, and is it really the case that 90% of the cases fully investigated had no merit?

II. THE LAW OF SEXUAL HARASSMENT IN THE WORKPLACE

A. Background

The law of workplace sexual harassment pivots on two separate questions. First, *what* is sexual harassment? Second, *when* is an employer liable for the harassment? We briefly take up each question below.

The first step in addressing what is sexual harassment is to acknowledge that there is no federal statute that prohibits or even addresses sexual harassment in the workplace.[24] Moreover, scholars generally agree that when enacting Title VII of the Civil Rights Act of 1964, Congress did not contemplate that the statute's prohibition against discrimination based on sex would create a cause of action for employees who were subjected to unwanted sexual advances without suffering *any tangible loss*.[25] Indeed, it is extremely difficult to ascertain what Congress intended because the "protected class" enunciated as "sex" was added to Title VII of the Civil Rights Act two days before the vote on the bill.[26] Some argue that the amendment was a joke, while others claim it was proposed to kill the bill.[27] Finally, there are those who contend that the proponents sought to protect "poor" (i.e., economically

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22. *Id*.

23. *Id*. We reach this conclusion by adding up all the "reasonable cause findings and the no reasonable cause findings to calculate an "N" which is total findings of cause and no cause. From that number we then determined the percentage each.

24. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986) (holding that sexual harassment in the workplace constituted a violation of Title VII of the Civil Rights Act).

25. *See, e.g.*, Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CALIF. L. REV. 1151, 1166 (1995) (discussing the Supreme Court's interpretation of congressional intent embodied in Title VII's protection against sexual harassment in *Meritor Bank*, 477 U.S. at 64); Michelle Angelone, *Same-Sex Harassment Claims Under Title VII:* Quick v. Donaldson Co. *Breathes New Life into the Post-*Garcia *State of the Law*, 9 U. FLA. J.L. & PUB. POL'Y 61, 76–79 (1997) (discussing several courts' interpretation of congressional intent underlying sexual discrimination). "Tangible losses" occur when there is a material change in employment, such as termination, failure to promote, demotion, or a change in benefits. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

26. *See generally* Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991) (arguing that contrary to popular belief, the addition of "sex" into Title VII was not a joke or an effort to kill the bill, but rather a result of the National Women's Party taking advantage of the opportunity the civil rights movement created for activists).

27. Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 57–59 (2016).

disadvantaged) white women who would be "left behind" by those protected by the new law.[28] Regardless of the possible motivation or motivations, there is little legislative history,[29] other than the "joke" read into the record by Howard W. Smith, a Virginia congressman, Chair of the Rules Committee and, allegedly, a staunch racist.[30] Smith's "joke" constituted a request from women to solve the problem that that the U.S. population had more women than men because god could have not wished for a society where every woman could not find a husband.[31]

Given the legislative history's limited record and the gender composition of the 88th Congress—422 men and thirteen women in the House and ninety-nine men and one woman in the Senate[32]—it is difficult to believe that Congress intended to prohibit what we now refer to as sexual harassment. In fact, the legal theory and concept did not make it into the public discourse until the mid-1970s.

In 1975, journalist Lin Farley, while teaching at Cornell University, handed out a survey to 155 female respondents. According to their responses, 70% had experienced sexual harassment, 92% of the women said it was a serious problem, and more than 50% of the women who complained about the sexual harassment said nothing was done about the behavior.[33] Farley presented her results to the New York City Commission on Human Rights in 1975 and, in 1978, published *Sexual Shakedown: The Sexual Harassment of Women on the Job*.[34] Reaction to Farley's book, however, evidenced the resistance that Farley and other advocates confronted. One review of Farley's book dismissed her concerns about sexual harassment as "often absurdly radical" and claimed "[t]he way Ms. Farley would have it, men are lurching out of every file drawer to lech after women workers."[35] The review referred

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28. *See id*. at 61–63 (arguing that the Working-Class Social and Labor Feminists, who focused on increased protection for low-wage, non-unionized, working-class women, greatly impacted the inclusion of "sex" in Title VII).

29. *See, e.g.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1308 (2012) ("It is a commonplace in employment discrimination law that Title VII's prohibition of sex discrimination has no legislative history").

30. *See* Mary Anne Case, *No Male or Female, in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 83, 90 (Martha Albertson Fineman ed., 2011) (arguing that "Smith was unquestionably a racist").

31. *See, e.g*., HERMA HILL KAY & MARTHA S. WEST, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 578–80 (4th ed., 1996). *But see* CATHARINE A. MACKINNON, SEX EQUALITY 17 (2001) (contesting the idea that Smith's amendment is best characterized as simply a "joke"); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765, 767–69 (2002) ("Smith and other legislators who supported the addition of 'sex' understood what the legal academy has subsequently come to call 'intersectionality.'").

32. *Women Members by Congress, 1917–Present*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress/ [https://perma.cc/JFW2-FYYB].

33. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 20–22 (1975).

34. *See generally id.*

35. Review of *Sexual Shakedown: The Sexual Harassment of Women on the Job*, THE KIRKUS REV. (Oct. 2, 1978), https://www.kirkusreviews.com/book-reviews/lin-farley/sexual-

to the descriptions of workplace abuses as being "ridiculous" and "flabby" and concluded that Ms. Farley was "barking up a very shaky tree."[36]

Ms. Farley's shaky tree, however, grew stronger in 1979 when Professor Catharine MacKinnon published *Sexual Harassment of Working Women.*[37] In it, MacKinnon defined sexual harassment in its broadest sense, as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[38] The influence of her work on both courts and scholars was swift and remains profound.[39]

In 1980, the EEOC expanded its "Guidelines on Discrimination Because Of Sex" under Title VII to include sexual harassment.[40] After the EEOC published its guidelines, courts routinely held that hostile environment sexual harassment did in fact create a cause of action.[41]

In 1986, the Supreme Court's decision in *Meritor Savings Bank v. Vinson*[42] put to rest any lingering questions concerning the legal efficacy of Farley's and MacKinnon's theories that sexual harassment is both a social ill and a Title VII violation. In a relatively short opinion, the *Meritor* Court (1) established sexual harassment as a violation of Title VII;[43] (2) held that there are two types of harassment: quid pro quo (this for that) and hostile environment;[44] and (3) provided a basis for employer liability by "look[ing] to agency principles."[45] The creation of

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shakedown-the-sexual-harassment-of-women/ [https://perma.cc/P8MV-629R].

36. *Id.*

37. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); *see also* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1169–70 (1998) (discussing Professor MacKinnon's influential role in the development of sexual discrimination law).

38. *See* MACKINNON, *supra* note 37, at 1; *see also* Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After* Ellerth *and* Faragher, 6 DUKE J. GENDER L. & POL'Y 3, 4 n.8 (1999).

39. *See, e.g.*, Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. LAW. REV. 751 (1989) (reviewing all of Professor MacKinnon's work and discussing its profound influence on legal doctrine and practice).

40. The EEOC Guidelines define quid pro quo harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." 29 C.F.R. § 1604.11(a) (1985).

41. *See* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."); *see also* Katz v. Dole, 709 F.2d 251, 254–55 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 934–44 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F.Supp. 780, 784 (E.D. Wis. 1984).

42. 477 U.S. 57 (1986), *aff'g sub nom.* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).

43. *Meritor*, 477 U.S. at 66.

44. *Id.* at 65.

45. *Id.* at 70–72.

a completely new cause of action without legislation proved to be problematic. With no definitive statute, legislative history, or any other baseline for courts to turn to, the district and circuit courts were forced to legislate based on one sentence in Title VII and a seven-page Supreme Court decision. Clearly, the lower courts lacked adequate guidance and the decisions that followed reflected that fact.

Although quid pro quo cases initially seemed fairly straightforward, defining "hostile environment" created a divergence of opinions. As hostile environment cases made their way through the courts, different circuits created different rules with regard to hostile environment. Specifically, courts generally held that the conduct must be: (1) sexual, (2) unwelcome, (3) severe or pervasive, (4) abusive or hostile, and (5) because of sex.[46] Some courts applied a sixth standard, holding that the conduct must also cause psychological damage.[47] The first four standards were fairly consistent across appellate courts; standards five and six, however, created problems. As explained below, the Supreme Court has addressed both the fifth and sixth elements listed above. We examine the sixth before the fifth to stay true to the Court's chronology and because the effect of the fifth is much greater.

The requirement that the harassment cause psychological damage divided the circuits. The Sixth Circuit,[48] the Eleventh Circuit,[49] and the Federal Circuit,[50] for example, each held that plaintiffs needed to prove that they suffered psychological damage in order to prove hostile environment. The Ninth Circuit, in contrast, rejected this standard.[51] In *Harris v. Forklift Systems, Inc.*,[52] the Supreme Court rejected the psychological damage requirement and defined sexual harassment as "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment."[53] The Court further defined the standard by holding that severe or pervasive conduct had to create an objectively and subjectively hostile or abusive environment.[54] Thus, the *Harris* Court essentially defined hostile environment as conduct that is severe or pervasive enough to be abusive and/or hostile from an objective and subjective standpoint. In his concurrence, Justice Scalia wrote:

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard -- and I do not think

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46. For a full discussion of the evolution of hostile environment cases, see Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85 (2003).

47. *Compare* Rabidue v. Osceola Refin. Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (requiring serious effect on psychological well-being); *with* Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1510; and Downes v. FAA, 775 F.2d 288, 292 (CA Fed. 1985), with Ellison v. Brady, 924 F.2d 872, 877–78 (rejecting such a requirement).

48. *See Rabidue*, 805 F.2d at 611 (6th Cir. 1986).

49. *See* Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503 (11th Cir. 1989).

50. *See* Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985).

51. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

52. 510 U.S. 17 (1993).

53. *Id.* at 21.

54. *Id.* at 22–23.

> clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness, see *ante*, at 23, but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude. As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. One might say that what constitutes "negligence" (a traditional jury question) is not much more clear and certain than what constitutes "abusiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusiveness" is to be the test of whether legal harm has been suffered, opening more expansive vistas of litigation.
>
> Be that as it may, I know of no alternative to the course the Court today has taken. One of the factors mentioned in the Court's nonexhaustive list -- whether the conduct unreasonably interferes with an employee's work performance -- would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute. Accepting *Meritor*'s interpretation of the term "conditions of employment" as the law, the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court.[55]

In other words, Scalia's concurrence makes clear that he did not know what the standard meant but that he could not think of anything better.

While Justice Scalia's point is well-taken, the broader sexual harassment jurisprudence did provide guidance to employers and employees by creating clarity based on conduct and motivation. Lawyers analyzing sexual harassment cases could classify the cases by putting them into one of two categories: sexual conduct and nonsexual conduct. In sexual conduct cases, the analysis was comparatively simple. Specifically, if the conduct was either severe or pervasive and the conduct was sexual in nature, the courts presumed that the conduct was "because of sex" and found it unlawful.[56] If the conduct was not sexual in nature, however, the court needed to delve into employer motivation. If the employer was motivated by sex (that is, gender) the employee had a case for "gender harassment."[57] If gender was not the

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55. *Id.* at 24–26.

56. In fact, as the law developed there were cases where the female employees were considered to have suffered harassment if they were exposed to sexual conduct (e.g., conversations, pornographic pictures) that was not directed at them but was so pervasive that the complaining employee could not escape. *See, e.g.*, Petrosino v. Bell Atl., 385 F.3d 210 (2d Cir. 2004).

57. *See* Cline v. Gen. Elec. Cap. Auto Lease, Inc., 757 F. Supp. 923, 931 (N.D. Ill. 1991) (holding that plaintiff stated a cause of action for gender discrimination after her supervisor yelled at her; called her insulting names; hit, pinched, and pushed her; made a variety of rude

motivation, there was no cause of action.[58] Indeed, the "equal-opportunity jerk" became the tongue-in-cheek explanation for finding that a supervisor who created a hostile environment for employees regardless of sex (or any other protected class) did *not*, paradoxically, violate sexual harassment law.

When Professor MacKinnon wrote that sexual harassment violated Title VII, she was focusing exclusively on situations where supervising men harassed subordinate women.[59] The early line of cases, including *Meritor*, were located squarely within that context. Post-*Meritor*, however, a relatively small number of cases involved supervising women accused of harassing subordinate men. Uniformly, courts held that these men also had a cause of action. In the mid-1990s, however, courts were faced with an onslaught of "same-sex" sexual harassment cases (i.e., a man harassing a man or a woman harassing a woman).

B. Same-Sex Sexual Harassment and the "Because of Sex" Problem

Between 1992 and 1997, four different appellate courts faced the question of whether plaintiffs could make out a cause of action in same-sex cases. The four circuits produced four different legal conclusions, prompting the Supreme Court to address the issue in *Oncale v. Sundowner Offshore Services, Inc.*.[60] Before examining *Oncale*, a brief description of the four circuit court opinions that motivated the Court's *Oncale* decision is warranted.

The Fourth Circuit held that a same-sex sexual harassment claim would lie under Title VII if the harasser was homosexual. In *Wrightson v. Pizza Hut of America, Inc*., the plaintiff alleged that his supervisor graphically described homosexual sex acts to Wrightson and pressured him to engage in sex.[61] The supervisor also rubbed his genital area against Wrightson's buttocks and often groped him in the workplace.[62] In finding for Wrightson, the Fourth Circuit held that same-sex Title VII claims were actionable only when the alleged harasser is homosexual and therefore presumably motivated by sexual desire.[63]

The Eighth Circuit held that a cause of action could proceed if an employer's conduct targeted an employee of one gender but not *both* genders. In *Quick v. Donaldson Co.,* the employees engaged in an activity they described as "bagging."[64] Bagging consisted of one employee hitting and grabbing another employee in the crotch.[65] The plaintiff alleged that at least twelve different male coworkers assaulted him.[66] Important to the Eighth Circuit, however, was that there was no evidence that

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and boorish comments to her; and asked her offensive questions, when he did not act similarly to male employees).

58. *See id.*
59. *See* MACKINNON, *supra* note 37, at 29.
60. 523 U.S. 75 (1998).
61. 99 F.3d 138, 139 (4th Cir. 1996).
62. *Id.* at 140.
63. *Id.* at 143.
64. 90 F.3d 1372, 1378–79 (8th Cir. 1996).
65. *Id.*
66. *Id.* at 1374.

any female employees were assaulted in such a manner.[67] The Eighth Circuit found for the plaintiff, reasoning plaintiffs may make out a claim for same-sex sexual harassment so long as only one of the genders suffered the conduct alleged.[68] If, however, there was no disparate treatment (i.e., if both male and female employees were treated similarly, even if poorly), then there was no cause of action.[69]

The Seventh Circuit held that there was a cause of action if an employee was treated poorly for failing to live up to a particular sexual stereotype. In *Doe v. City of Belleville*, two brothers, J. and H. Doe, alleged that they were physically threatened and verbally harassed on a construction site.[70] J. was called "fat boy" by his coworkers because he was overweight.[71] The employees, including a supervisor, referred to the "effeminate" H. as "fag" or "queer" on a daily basis.[72] The threats soon escalated and became physical when a former marine grabbed H. by his testicles and announced: "Well, I guess he is a guy."[73] Fearing even further escalation, the brothers quit their jobs.[74] The Seventh Circuit rejected the argument that the sexual orientation of the harasser was determinative and instead focused on the conduct endured by the plaintiffs. The court cited, seemingly with approval, cases holding that conduct with sexual overtures is "because of sex" and thus, if severe and pervasive, is unlawful.[75]

In contrast with the court's language throughout the opinion, the circuit court's actual holding is comparatively narrower, owing in part to its reliance on (and deference to) *Price Waterhouse v. Hopkins.*[76] In *Price Waterhouse*, the Supreme Court held that an employer violates Title VII when an employee is denied a term or condition of employment because his or her appearance or conduct does not conform to stereotypical gender roles.[77] Similar to the plaintiff in *Price Waterhouse*, the Seventh Circuit concluded in *Doe* that H. was harassed because he did not conform to his coworkers' archaic stereotypical perceptions of "maleness."[78]

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67. *Id.* at 1376.
68. *Id.* at 1379.
69. *Id.*
70. 119 F.3d 563, 570 (7th Cir. 1997).
71. *Id.* at 567.
72. *Id.*
73. *Id.*
74. *Id.*
75. *See id.* at 576–77; *see also* Andrews v. City of Philadelphia*,* 895 F.2d. 1469 (3d Cir. 1990) (holding that while explicit sexual advances would constitute harassment, harassment can exist without said advances if the conduct is discriminatory).
76. 490 U.S. 228 (1989).
77. *Id.* at 250–51. Hopkins was a senior manager at Price Waterhouse, a professional accounting partnership. After she was denied partnership, she sued Price Waterhouse, charging that it had discriminated against her on the basis of sex. The Court ruled in Hopkins's favor, holding that Price Waterhouse had unlawfully discriminated against her on the basis of sex by when the firm applied different standards of behavior acceptable for men and women. Specifically, the Court held that telling a woman to wear make-up, get her hair done, stop cursing, and to act like women was discriminatory because the firm was applying sexual stereotyping to women that it would never apply to a man. *Id.*
78. *Doe*, 119 F.3d at 580.

Finally, the Fifth Circuit concluded that same-sex claims were *never* actionable under Title VII. In *Garcia v. Elf Atochem North America*, a male plaintiff alleged that on several occasions his male supervisor approached him from behind, grabbed him, and engaged in simulated sexual activity.[79] Garcia complained to his employer who informed the harassing supervisor that any further incidents would result in termination.[80] After the supervisor was reprimanded, no further incidents occurred between Garcia and his supervisor.[81] Shortly thereafter, Garcia filed a charge of employment discrimination with the EEOC, alleging that he had been sexually harassed in violation of Title VII.[82] The Fifth Circuit affirmed the defendant's summary judgment motion for four different reasons. First, the harm was not repressible because the damages provisions of the Civil Rights Act of 1991 would not retroactively apply to the conduct, and equitable relief would be moot because Garcia still had his job.[83] Second, the plaintiff failed to prove that any defendant was his "employer" for Title VII purposes.[84] Third, even if one of the defendants was his employer for purposes of Title VII, the defendant took prompt remedial action calculated to end the harassment and could thus avoid liability.[85] Finally, the court flatly stated, "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones."[86]

C. Oncale *Defines the Law*

Two years later the Fifth Circuit, in *Oncale v. Sundowner Offshore Services*,[87] once again faced a same-sex sexual harassment case. This time, the plaintiff's case did not feature the defects that hamstrung the plaintiff in *Garcia*. In *Oncale*, the requested relief was available, the plaintiff named the proper employer, and the employer did not respond to the complaints.[88] Moreover, because the employer's conduct was severe or pervasive enough to withstand summary judgment,[89] the court was forced to reach the issue of whether same-sex sexual harassment would support a claim under Title VII.[90] Bound by its earlier decision in *Garcia*, the Fifth Circuit dismissed the plaintiff's case in *Oncale*.[91] Despite dismissing the plaintiff's case,

79. 28 F.3d 446, 448 (5th Cir. 1994).
80. *Id.*
81. *Id.* at 448–49.
82. *Id.* at 449.
83. *Id.* at 450.
84. *Id.* at 450–51.
85. *Id.* at 451.
86. *Id.* at 451–52.
87. 83 F.3d 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).
88. *Id.* at 118–19.
89. According to his lawyer, Nick Canady, Oncale's coworkers, including supervisory personnel, grabbed him, held him, unzipped their trousers and exposed themselves, and threatened to have sex with him. Oncale claimed he was in a shower when these same men got in the shower stall with him, restrained him, and sexually assaulted him using a bar of soap.
90. *Oncale*, 83 F.3d at 120.
91. *Id.* at 120–21.

however, the Fifth Circuit was troubled enough by its precedent to send up a judicial flare:

> This panel, however, cannot review the merits of Appellant's Title VII argument on a clean slate. We are bound by our decision in *Garcia v. Elf Atochem*, and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts, we cannot overrule a prior panel's decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court.[92]

Oncale provided the U.S. Supreme Court an opportunity to resolve the circuit split on the issue of same-sex harassment in the workplace. Confronted with an array of legal approaches across various circuit courts, the Supreme Court faced three basic choices: (1) judicially modify Title VII by holding that sexual conduct was *per se* unlawful regardless of the sex of the parties; (2) conclude that Congress never intended to prohibit such sexual harassment and that such conduct did not violate Title VII; or (3) adhere to Title VII's text which prohibits "discrimination"—with "discrimination" itself understood as disparate treatment. While option two may strike some as horrific at first blush, it would have plausibly prompted Congress to immediately pass a new sexual harassment law. The Court, however, rejected the first two options, as well as the holdings by the Fourth, Fifth, and Seventh Circuits and, instead focused Title VII's "discrimination text" (i.e., disparate treatment) and held that a same-sex plaintiff could make out a claim for sexual harassment as long as the harassing conduct was "because of sex."[93] Importantly, the Court did not hold that sexual conduct presumptively meets this element. Instead, the Court concluded that the key issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[94] Thus, unlike what had been the generally accepted theory, the employee had to prove that the harasser's motivation for the conduct was the employee's sex regardless of how overtly sexual the conduct. This standard had previously applied only to conduct of a non-sexual nature, but the *Oncale* decision meant that *all* sexual harassment claims would need to pass this "motivation" test, even those where the conduct was clearly of a sexual nature.

The Supreme Court's unanimous decision in *Oncale* revealed both an understandable adherence to the statute as well as an alarming lack of understanding of the law of sexual harassment. Instead of attempting to use the same-sex conundrum as a means for a meaningful analysis and a subsequent creation of logical and effective standard for this non-legislative cause of action, the Court's opinion provides a solution in search of a problem. The mantra of the *Oncale* decision is to seemingly ensure that sexual harassment law does not create a general code of civility for the American workplace. As the Court wrote:

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92. *Id.* at 119 (citation omitted).
93. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).
94. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)).

> The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.'[95]

Fearing that a focus on an employer's conduct would somehow alter the purpose of, and theory behind, Title VII, the Court instead focused on the statute's "because of sex" requirement. In so doing, the Court made an employer's motivation the key element of a case and, without admitting as much, fundamentally changed sexual harassment law.

After *Oncale*, the motivation behind employer conduct became vital as the employee now had to establish that the employee's gender motivated the harassment. Oddly, the plaintiff bars immediately celebrated the *Oncale* decision as a key victory for all workers, and specifically for homosexuals in the workplace. Indeed, the American Civil Liberites Union (ACLU) hailed *Oncale* as an important holding "for all Americans, gay or straight, male or female."[96] The ACLU and others who celebrated *Oncale* in this manner, however, missed a key—admittedly subtle—point.

To be sure, while *Oncale* stayed true to *Meritor* and Title VII by articulating the "because of sex" standard, at the same time the Court's opinion fundamentally altered how the requirement is operationalized. As stated above, courts in opposite-sex harassment cases before *Oncale* presumed that conduct was "because of sex" when the conduct was sexual in nature.[97] In operationalizing the "because of sex" requirement, the *Oncale* opinion, and subsequent lower court opinions, made clear that the harasser's motivation was critical to motivating the "because of sex" element. Instead of simply proving that the conduct was (1) quid pro quo or (2) severe or pervasive and sexual in nature—primarily objective inquiries—plaintiffs after *Oncale* also had to establish the harasser's subjective state of mind. Indeed, the Court's opinion provides three examples which would allow fact-finders to infer that the harassers motivation was "because of sex":

> The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by

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95. *Id.* at 81 (quoting *Harris*, 510 U.S. at 21).

96. Jan Crawford Greenburg, *Sex Suit Fallout Alarms Its Advocates*, CHI. TRIB. (Aug. 2, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-08-02-9908020053-story.html [https://perma.cc/RPS8-ZQJ4].

97. *E.g.*, Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996) (noting that "even if the motivation behind plaintiff's mistreatment was gender neutral," it could still form a basis for a claim of sexual harassment because the conduct itself was "sexually harassing behavior"); Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) ("[T]he harassment, because of its sexual nature, was based on [plaintiff's] sex.").

> another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimination* . . . because of . . . sex." [98]

It is difficult to overstate the importance of this change to Title VII. First, it effectively ended a viable legal theory of sexual harassment in the workplace as sexual conduct demeaning to women. Prior to *Oncale,* employer conduct that sexually demeaned women and was severe or pervasive was considered sexual harassment. For example, in *Robinson v. Jacksonville Shipyards, Inc.*, the court held that a workplace plastered with pornographic pictures of women created a hostile environment even though those posting the pictures had no intent to offend female employees.[99] *Oncale*'s focus on employer motivation means that cases like *Robinson* can no longer be considered unlawful harassment. Instead, if the motivation behind the conduct is not to demean either sex, the conduct, regardless of its severity, pervasiveness, or result, does not itself constitute sexual harassment.

For example, in *Ocheltree v. Scollon Productions, Inc.*,[100] the plaintiff testified, and the court accepted, that some of the primarily male staff engaged in open conversations about sex, made comments about the sexual habits of others on the staff, used foul and profane language, told sexually oriented jokes, and pretended to perform oral sex and other sexual acts on a mannequin.[101] In addition, "the shop supervisor showed a photograph of a nude woman around the shop and engaged in several sexually explicit conversations with Ocheltree's male coworkers."[102] In dismissing the case, the court held that while the conduct was disgusting and vulgar, it was not directed at Ocheltree *because* she was a woman and that, in any event, she would have been exposed to the conduct even if she were a man.[103] Thus, after *Ocheltree* and *Oncale,* sexually explicit discussions between two men or displayed pornography that was not directed only at women would not be unlawful if the conduct was not motivated by the plaintiff's sex. Moreover, the all-male workplace where the men displayed pornography and routinely discussed sexual acts would not be unlawful when women entered the job site because the conduct could not have been motivated by the plaintiffs' sex.[104] Such judicial outcomes conflict with original

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98. *Oncale,* 523 U.S. at 80–81. The tone deafness of that paragraph is incredible by today's standards. A woman, according to Justice Scalia, might have "general hostility to the presence of women in the workplace." *Id.* at 80. Of course, men would never feel that way about other men.

99. 760 F. Supp 1486, 1523 (M.D. Fla. 1991).

100. 308 F.3d 351 (4th Cir. 2002)

101. *Id.* at 359–60.

102. *Id.* at 364.

103. *Id.* at 358–59.

104. *Id.* at 357.

sexual harassment jurisprudence, run up against the weight of academic commentary,[105] and, of course, likely offend many.

Second, to make matters worse, the "because of sex" requirement creates situations, similar to those found in *Oncale* and *Doe*, where threats of, and even actual, sexual assaults are not necessarily unlawful sexual harassment. That is, how could Oncale, a male working on an all-male oil rig, prove that he was sodomized with a bar of soap because he was a man? As it is a functionally impossible evidentiary burden to meet, Oncale's employer would likely confront no meaningful prospect of sexual harassment liability.[106] Finally, the Court's logic in *Oncale* created a new defense for employers: the equal opportunity harasser.

D. Equal Opportunity Harasser Defense

In *Holman v. Indiana*, a husband and wife alleged that the same supervisor sexually harassed them.[107] The wife alleged that the male supervisor sexually harassed her by touching her body, standing too close to her, asking her to go to bed with him, making sexual comments, and otherwise creating a hostile work environment based on her sex.[108] In addition, owing to her refusal to perform sex acts requested by her supervisor, the supervisor negatively altered Mrs. Holman's job-performance evaluations and otherwise retaliated against her for protesting his harassing behavior.[109] The Holmans' complaint further alleged that the supervisor harassed the husband by "grabbing his head while asking for sexual favors."[110] When the husband refused such requests, the supervisor retaliated by opening the husband's locker and throwing away his belongings.[111]

Predictably, the couple's sexual harassment complaint set forth all the relevant facts with regard to the humiliating "sexual in nature" conduct to which both Mr. and Mrs. Holman were subjected.[112] The employer responded by focusing on the fact that since the supervisor harassed and demanded sex from both a man and woman, the conduct could not be "because of sex."[113] The court dismissed the case based on the equal opportunity harasser defense. To support its decision, the court stated that "the equal opportunity harasser does not treat plaintiffs differently than members of the opposite sex . . . [and] under current sex-discrimination theories, there is no discrimination when something happens to both sexes and not simply to one."[114] The court concluded by stating: "Simply put, the court concludes that, under current Title

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105. *See, e.g.*, Abrams, *supra* note 37; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

106. Of course, the perpetrators could be arrested and sued in tort, but they likely would not have the money to make such a case viable.

107. 24 F. Supp. 2d 909, 911 (N.D. Ind. 1998).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 911.

113. *Id.* at 912.

114. *Id.* at 912.

VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination 'because of sex'" and is therefore not unlawful.[115]

In *Romero v. Caribbean Restaurants, Inc*., the court likewise dismissed the plaintiff's sexual harassment case because the supervisor imposed the same harassing conduct upon men and women.[116] Landrau, the plaintiff, alleged his supervisor made an explicitly sexual comment to him. The supervisor then repeated the comment to a female employee shortly thereafter.[117] Similar to *Holman*, the *Romero* court dismissed the case pursuant to the equal opportunity harasser defense.[118] To support its decision, the court stated, "[T]he record clearly shows that Figueroa [the supervisor] did not reserve his tasteless comportment for male employees, or that he treated male employees differently from female employees. In fact, it appears that Figueroa directed his most outlandish behavior, grabbing his genitals, as an insult to female employees."[119] The court concluded: "While Figueroa's behavior and comments were often sexual in nature, and may have created an undignified or even unpleasant working environment, they were not discriminatory and thus not actionable under Title VII."[120] In fact, according to both *Holman* and *Romero*, the equal-opportunity-harasser defense defeats both quid pro quo and hostile environment cases.[121]

By orientating the "because of sex" element to pivot on a harasser's motivation, the *Oncale* decision inadvertently created a safe haven for objectionable conduct that strikes many as odious. One paradigmatic fact pattern often presented to the EEOC and state agencies is the "consensual affair gone sour" (CAGS). Prior to *Oncale,* the law of CAGS was clear: a party to a consensual affair was not a member of a protected class, and thus a supervisor could terminate or harass an ex-lover—as long as the conduct was not sexual in nature.[122] In other words, the supervisor could demote, terminate, and demean the ex, but could not demand that the ex-lover resume the affair or engage in sexually charged conduct.[123] The putative logic is that such a supervisor is not acting because the employee is a man or a woman. Instead, it is because she is *that* man or woman. If the conduct was sexual in nature or constituted a quid pro quo, however, that was per se unlawful, and the "that woman" argument would provide no defense because such conduct was unlawful regardless of motivation.

Post-*Oncale*, however, the "that woman" argument works for *all* conduct—nonsexual conduct, conduct of a sexual nature, and even quid pro quo. One can see the logic, for example, in arguing: "I did not make suggestive statements because she was a woman, it was because she was the person who, for example, broke my heart, broke my friend's heart, beat me out for class valedictorian … and I want her to

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115. *Id.* at 916.
116. 14 F. Supp. 2d 185, 190 (D.P.R. 1998).
117. *Id.* at 187.
118. *Id.* at 190.
119. *Id.*
120. *Id.*
121. Holman v. Indiana, 24 F. Supp. 2d 909, 912, 913 (N.D. Ind. 1998); *Romero*, 14 F. Supp. 2d at 189, 192.
122. *Holman*, 24 F. Supp. 2d at 912; *Romero*, 14 F. Supp. 2d at 192.
123. *See, e.g.*, Huebschen v. Dep't of Health & Soc. Servs., 716 F.2d 1167 (1983).

quit." Such logic, however, begs a critical question: Does the motivation of the perpetrator of a sexual assault, a quid pro quo demand, or the pervasive sexually based demeaning comments and actions matter to a victim?

E. Liability: The Run- Up to Ellerth/Faragher

As #MeToo-motivated issues swarmed cable news networks, many commentators invested substantial amounts of time discussing company reactions to sexual harassment claims by focusing on NDAs and the true motivations of human resource departments.[124] The driving motivational force behind employers' reactions—employer liability—is, of course, too nuanced and, arguably, complex for the soundbites that festoon much of current popular discourse. Indeed, some states and a number of scholars have legislated or argued that employers are, or should be, strictly liable for sexual harassment.[125] The relevant legal terrain and doctrine, however, are far more nuanced, granular, and, too often, unclear as the lower courts' efforts to operationalize *Oncale* (and other Court decisions in this space) illustrate. Below we provide a brief history of employer liability law and present empirical analyses on how courts operationalize the Court's vicarious liability standards.

The *Meritor* Court instructed the lower courts to determine liability by looking to "agency principles."[126] With no statute and little guidance, this was another recipe for confusion and perverse incentives. By 1998 there was some degree of both agreement *and* disagreement across the circuits when it came to employer liability. The circuits agreed, for example, that employers were always liable for quid pro quo harassment, but could avoid liability for hostile environment cases.[127] The theory behind this distinction was that in quid pro quo cases, the supervisor truly acted as an agent in the company because the threatened actions (e.g., hiring, firing, promoting, demoting, etc.) were company actions that could only be accomplished

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124. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/DJ4P-GZMN]; Monica Torres, *What Exactly Is An NDA? Here's What Workers Need To Know Before They Sign*, HUFFINGTON POST (Feb. 20, 2020, 6:14 PM), https://www.huffpost.com/entry/what-is-an-nda-nondisclosure-agreement_l_5e4ea360c5b6a-7bfb4c21e7b [https://perma.cc/7LHZ-S27M].

125. *See, e.g.*, CAL. GOV'T CODE § 12940(j)(1) (West 2021) (stating that an employer is strictly liable for acts of harassment committed by an agent or supervisor); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995); Floeting v. Grp. Health Coop., 434 P.3d 39, 44 (Wash. 2019) (adopting the strict liability test for employers in sexual harassment cases); Sangamon County Sheriff's Dep't v. Ill. Human Rights Comm'n, 233 Ill. 2d 125 (2009); Zakrzewska v. New Sch., 14 N.Y.3d 469 (2009).

126. Meritor Savings Bank v. Vinson, 477 U.S. 57, 70–72 (1986).

127. *See* Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 142 (4th Cir. 1996) (explaining that to prevail on a hostile work environment harassment claim, the employee must prove, inter alia, that some basis exists for imputing liability to the employer); *see also* Ellert v. Univ. of Tex. at Dall., 52 F.3d 543, 545 (5th Cir. 1995) (explaining *respondeat superior* as part of quid pro quo claims); Pfau v. Reed, 125 F.3d 927, 936–37 (5th Cir. 1997); Jansen v. Packaging Corp. of Am., 123 F.3d 490, 495 (7th Cir. 1997); Davis v. City of Sioux City, 115 F.3d 1365, 1367–68 (8th Cir. 1997).

in the course of employment with the express or implied consent of the employer.[128] Alternatively, a hostile environment could be created without any use of "company power."[129] The supervisor could make comments or touch employees without engaging in an official company action.[130] This is why circuits agreed that employers were liable for quid pro quo but not always for hostile environment.[131]

With regard to hostile environment, however, circuit courts split over two competing theories. A minority of circuits applied the quid pro quo reasoning and held that if the supervisor used agency power to create the hostile environment, then the company was liable.[132] As an example, a company would be liable for the actions of a supervisor who used the power of the job to call a daily meeting with a subordinate and during the meeting commented on the employee's body, touched the employee, or required the employee to watch pornography. A majority of circuits, however, employed the so-called negligence standard.[133] Under the negligence standard, the employer was liable if it knew or should have known about the harassment. Thus, in the example above, the employer would not be liable if it had a policy against sexual harassment informing the employees to complain and the employee did not.[134]

As to be expected, plaintiffs' lawyers had a huge incentive to have their cases labeled as quid pro quo as opposed to hostile environment. The fact that the labels were both unclear, elastic, and not mutually exclusive helped fuel substantial litigation. The differences between the theories are substantial at the extreme but not at the margins. For example, a supervisor who tells an employee, "sleep with me or you are fired," and then fires the employee who does not acquiesce has clearly engaged in quid pro quo harassment. However, the issue is not so clear when, for example: (1) the employee refuses to sleep with the supervisor and does not get fired; (2) the employee sleeps with the supervisor and does not get fired; (3) the employee quits and the supervisor now claims it was a joke; or (4) the threat is not as clear (e.g., "things would go better for you here if you wore more provocative clothes and were a little more accommodating"), and the employee quits, acquiesces, or ignores the supervisor but is not disciplined. Are any or all of the scenarios listed above quid pro quo? Are any or all of the scenarios a hostile environment? There are cases where each of these scenarios has been labeled quid pro quo, hostile environment, both, and neither.[135]

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128. *See* Karibian v. Columbia Univ., 14 F.3d 773, 777–81 (2d Cir. 1994).

129. *Karibian*, 14 F.3d at 777–81.

130. *Id.* at 780 (explaining that an employer is liable for a discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, in contrast to the situation where a low-level supervisor does not rely on his supervisory authority to carry out the harassment).

131. *See supra* note 127.

132. *Karibian*, 14 F.3d at 780.

133. *See, e.g.*, Davis v. City of Sioux City, 115 F.3d 1365, 1368 (8th Cir. 1997); *see also* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 498 (7th Cir. 1997).

134. *See Jansen*, 123 F.3d at 498.

135. *See, e.g.*, Carrero v. N.Y.C. Hous. Auth., 890 F.2d 569, 574 (2d Cir. 1989) (responding to allegations of, among other things, touching and attempting to kiss an employee, and then giving her a bad review and then transferring her, the court stated, "Hostile

In *Burlington Industries, Inc. v. Ellerth*[136] the question before the Court was:

> Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?[137]

The Court addressed the quid pro quo-hostile environment distinction, but not in the way the parties intended. First, the Court defined quid pro quo when it concluded: "Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment."[138] Arguably, then, the Court's view was that quid pro quo harassment requires that a threat must be carried out. If a threat were carried out, employees who acquiesced or were not disciplined for rejecting the advances could not make out a case of quid pro quo harassment. Thus, all cases with threats but no discipline would be hostile environment cases.

After acknowledging the quid pro quo-hostile environment distinction, the Court rejected the theory that this distinction determined employer liability.[139] The Court instead held that the key issue was whether the employee suffered a tangible loss.[140] If yes, the employer was liable;[141] if no, the employer was liable but could escape liability if it could prove an affirmative defense.[142] If the Court's statement, "Cases based on threats which are carried out are referred to often as *quid pro quo cases*,"[143] accurately defines quid pro quo, then all quid pro quo cases result in strict vicarious liability for employers. In addition, employers would face the specter of liability even

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environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate. The discrimination which gives rise to them is not neatly compartmentalized but, as this case demonstrates, the two types of claims may be complementary to one another."); Giordano v. William Paterson Coll. of N.J., 804 F. Supp. 637, 640–44 (D. N.J. 1992) (denying motion for summary judgment on quid pro quo but granting motion on hostile environment when employment was conditioned on acquiescing to sexual demands but harassing conduct stopped after complaints); Simmons v. Miami Valley Trotting, Inc., No. 1:04-CV-478, 2006 WL 1000076, at *3, *7–8 (S.D. Ohio, Apr. 14, 2006) (holding that requests for sexual favors, inappropriate touching, and groping hostile environment are not quid pro quo); Misas v. N. Shore-Long Island Jewish Health Sys., No. 14-CV-08787, 2017 WL 1535112, at *3–7 (S.D.N.Y. Apr. 12, 2017) (finding a hostile environment and not quid pro quo despite the employee being fired for complaining about the harassing conduct).

136. 524 U.S. 742 (1998).

137. Petition for Writ of Certiorari at i, *Burlington*, 524 U.S. 742 (No. 97-569) (emphasis in original) (citation omitted); *see also* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (expanding on *Ellerth* in a situation where the employer failed to satisfy the defense because its policy was not disseminated).

138. *Ellerth*, 524 U.S. at 751.

139. *Id.* at 753–54.

140. *Id.* at 764–65.

141. *Id.*

142. *Id.* at 765.

143. *Id.* at 751.

when employees were not threatened but still suffered tangible losses arising out of hostile environment. Thus, only hostile environment employees who did *not* suffer a tangible loss were subject to an affirmative defense.

The so-called *Ellerth*/*Faragher* employer defense consists of two prongs: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," *and* (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[144] Upon any fair reading of this language, employers cannot avoid liability simply by proving that they acted reasonably, or even with the utmost care.[145] They must also prove that the employee was unreasonable in some way. A fortiori, if an employee behaves properly—that is, they report the harassment and accept the employer's reasonable corrective action—the employer should never be able to establish prong two and will always be vicariously liable.[146]

F. Empirical Analyses of the Ellerth/Faragher *Defense*

Commentators' reactions to *Ellerth* and *Faragher* were swift and strong: many hypothesized that employers would never be awarded summary judgment because (1) whether an employer exercised reasonable care in prong one would be a jury question regardless of whether or not the employee reported, (2) whether an employee was "unreasonable" in prong two would be a jury question if the employee failed to report, and (3) the employer could not prevail if the employee reported.[147] To assess the efficacy of these reactions, we consider how employees' affirmative defenses fared at the summary judgment level. Of particular interest is how courts construe the core reasonableness requirements embedded within the affirmative defense. What we find, once again, is that many conventional wisdoms are not borne out by data.[148]

Findings from our earlier analyses of summary judgment decisions between 1998 and 2000 first revealed that employers satisfied the first prong in forty-two of the seventy-two cases.[149] Second, employers prevailed in every one of the twenty cases where they satisfied prong one and the employee did not report the harassment.[150] Third, employers prevailed in eighteen of the twenty-two cases where the employer satisfied the first prong and the employee *did* report.[151] Thus, instead of summary judgment motions becoming a relic of legal history, employers *prevailed* in thirty-

144. *Id.*

145. *See, id.* at 773 (Thomas, J., dissenting).

146. *Id.*

147. David Sherwyn, Michael Heise & Zev J. Eigen, *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, 1288–89 (2001).

148. *Id.*

149. *Id.* at 1284.

150. *Id.*

151. *Id.*

eight of their seventy-two summary judgment motions in our sample.[152] Our prior study also identified two notable factors: First, contrary to conventional wisdom, employers only needed to have a "good" or "credible" policy[153] to satisfy prong one.[154] In fact, only one court held that employers might need to have something more (e.g., training, a 1-800 hotline number, etc.).[155] Second, even though Justice Thomas's dissent in *Ellerth* correctly contends that a technical reading of the defense would result in the employer failing to prevail under the affirmative defense if the employee reported, employers prevailed in eighteen of the twenty-two cases where the employer satisfied the first prong *and* the employee reported.[156] These outcomes imply that courts were reluctant to penalize employers who did "everything right."[157]

Our current study both revisits and extends our earlier study of summary judgment outcomes in the workplace discrimination context. Similar to our prior effort, our new data set includes all published judicial opinions between 2010 and 2018 for cases involving alleged sexual harassment in the workplace where an employer asserted an affirmative defense and advanced a motion for summary judgment (N=157). A summary judgment motion permits a court to grant a judgment as a matter of law to a party that can establish that its opponent cannot prevail at trial.[158] When a court weighs an employer's motion for summary judgment, it considers the evidence in a light most favorable to the employee, the nonmoving party.[159] Thus, by their very nature, motions for summary judgment tilt heavily in a direction favoring the employee.[160] Because we include all known published opinions within this time period, our study sidesteps many (but not all) technical sampling issues.[161]

Before discussing results from our new study, however, we want to (re)empathize a few cautionary points. Empirical legal studies inevitably confront various structural research design limitations that limit, in sometimes important ways, results'

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152. *Id.* at 1288.

153. We defined a good or credible employer policy as one that was written, disseminated, and did not force the employee to report to the harassing supervisor, instead having "alternative channels." *Id.* at 1278.

154. *Id.* at 1282–84.

155. *Id.* at 1290.

156. *Id.* at 1292.

157. *Id.* at 1294.

158. *See* FED. R. CIV. P. 56; s*ee also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (noting that courts must draw all inferences in favor of the nonmoving party).

159. *See Anderson*, 477 U.S. at 255.

160. For a fuller discussion of the application of summary judgments in the hostile workplace environment cases, see Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 86–97 (1999).

161. That is to say, because our study uses the entire universe of known published cases, our sample is not exposed to standard questions concerning sample selection bias. *See, e.g.*, Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1409 n.147 (1998); *see also* MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 262 (1990). Insofar as not all judicial summary judgment rulings are published, however, our sample remains exposed to a potential threat posed by so-called "publication bias." *See, e.g.*, Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. LEGAL STUD. 151 (2018).

generalizability, and our studies of summary judgment outcomes are not immune from these limitations. One such limitation involves selection bias.[162] The decisions in our studies, drawn from conventional sources of published judicial decisions (e.g., LEXIS and Westlaw), are not a random sample of *all* employment-related disputes as those culminating in published judicial decisions represent only a small fraction of cases where motions are decided and judicial outcomes emerge.[163] Thus, we are not certain if our results can be generalized to the broader universe of nonpublished judicial decisions or, frankly, to the much broader universe of employee disputes that do not initiate or culminate in formal legal proceedings.

Another limitation involves missing data. We sought data on an array of variables, including, but not limited to: (1) employer win rate, (2) employer satisfaction of prong one, (3) the type of preventative measures employers engaged in, (4) the type of reactions to complaints the employer engaged in, (5) employer satisfaction of prong two, (6) whether the complaining employee reported, (7) if the employee's report was timely, and (8) the types of conduct alleged. Unsurprisingly, not every judicial opinion addressed each of our variables and therefore we have to suffer with some missing data.

Similar to our initial effort in 2001, our latest study sets out to analyze every summary judgment motion based on the *Ellerth*/*Faragher* defense from 2010 to 2018 publicly available in the standard legal reporters. Because we self-consciously sought to "update" our earlier work, we also facilitate, where possible, comparisons across time and consider: (1) what employers needed to do to satisfy prong one (e.g., training, 1-800 numbers, etc.); (2) the effect of the type of response on prong one; (3) the failure-to-report effect on prong two; (4) the influence of an employee's timeliness on prong two; (5) the effect of the type of conduct on the win/loss record; and (6) the overall win/loss record. To "expand" upon and "update" our prior work, we also explore one key additional new variable: (7) the possible effect of the emerging #MeToo context on the employers' overall win/loss record.

Overall, employers prevailed in 68 out of 157 cases (or 43% win rate). In eighty cases (51% of the total) the employer was found to satisfy prong one, and in all but twelve of those cases, the employer also satisfied prong two. Thus, *conditional* on successfully satisfying prong one, employers' win rate increased from 51% to 85% of cases.

1. Prong One

We examine whether there is any relationship between the employer's policies related to sexual harassment and the outcome of prong one. In 141 cases we have sufficient information to determine whether the employer had a good policy;[164] for smaller subsets of cases, we know whether the employer offered training (88 cases) or had a 1-800 number (71 cases). Among the cases where this information is known,

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162. *See, e.g.*, Sisk et al., *supra* note 161, at 1409 n.147; *see also* FINKELSTEIN & LEVIN, *supra* note 161, at 262.

163. *See* Cheng, *supra* note 161, at 152.

164. A "good" policy is written, disseminated, and has alternate channels of reporting from only the supervisor. Sherwyn et al., *supra* note 147.

82% of employers had a good policy, 63% offered training, and 42% had a 1-800 number.

As expected, employers that implement a good policy, offer employee training, and operate a 1-800 number increased their probability of satisfying prong one. Employers that had a good policy,[165] for example, satisfied the first prong 63% of the time. In contrast, in the twenty-five cases where the employer did *not* have a good policy, prong one was never satisfied. Those employers that offered training satisfied the first prong in 69% of cases, compared to 24% for those without training. And employers with a 1-800 number satisfied the first prong in 73% of the cases, compared to 42% for those without a 1-800 number.

For most of our cases, we have information on the employer's response to the alleged workplace discrimination, including whether the court found the employer's response credible and whether the alleged harasser was disciplined, trained, or fired by the employer.[166] Employer responses were found credible in 48% of the cases. The alleged harasser was disciplined in 37% of cases, trained in 26% of cases, and fired in 24% of cases. While all of these employer responses correspond with a higher probability of an employer satisfying prong one, formal statistical significance at the traditional threshold was achieved for only two specific employer responses (employer credible response and employee disciplined).

While our descriptive results, briefly summarized above, imply helpful insights into how various factors may inform the probability that an employer will satisfy prong one, we now turn to whether some of these descriptive findings survive regression models that simultaneously account for more than one factor. Insofar as our data set is dominated by federal district court decisions, we clustered at the circuit level owing to uncertainty about the independence of district court outcomes within a circuit.[167] In general, results in Table 1 emphasize overall stability and robustness across the various alternative specifications as well as the persistent influence of an employer having a good sexual harassment policy and the credibility of the employer's response on the likelihood that an employer will satisfy prong one. Also notable in Table 1, Model D (and discussed further below), is that employees who reported in a timely manner systematically reduced the likelihood of an employer satisfying prong one.

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165. Meaning that the court deemed the policy acceptable.

166. This information is not available for all cases. We know whether the response was credible for 127 cases, whether the employee was disciplined for 129 cases, whether the employee was trained for 113 cases, and whether the employee was fired for 124 cases.

167. In our various models, standard errors were adjusted for fourteen clusters. While we feel clustering on judicial circuits is warranted in this context, as a robustness check in unreported alternative analyses, we reran our models without clustering and no material substantive changes in our results emerged.

Table 1: Logistic Regression Models of Employer Satisfying Prong One

	(A)	*(B)*	*(C)*	*(D)*
Employer factors:				
Good employer policy	4.08**	4.13**	4.12**	4.26**
	(1.04)	(1.33)	(1.03)	(1.17)
Employer training	0.99	1.23	1.07	1.22
	(0.75)	(0.65)	(0.90)	(1.24)
Employer 1-800 number	1.28	0.91	1.43**	0.48
	(0.51)	(0.69)	(0.54)	(1.02)
Employer's response credible	5.63**	5.26**	5.57**	4.85**
	(1.04)	(1.22)	(1.05)	(1.15)
Employee factors:				
Employee disciplined	---	1.42	---	---
		(0.84)		
Employee trained	---	-0.26	---	---
		(0.86)		
Employee fired	---	-1.40	---	---
		(0.86)		
Employee failed to report	---	---	0.14	---
			(0.91)	
Employee's report timely	---	---	---	-2.41*
				(1.10)
Constant	-6.26**	-6.14**	-6.30**	-4.85**
	(1.10)	(1.34)	(1.17)	(1.09)
R^2 (pseudo)	0.68	0.69	0.67	0.75
Log likelihood	-28.71	-19.57	-27.66	-14.31
N	129	91	123	84

Note: Robust standard errors, clustered on circuit, in parentheses. * $p < 0.05$, ** $p < 0.01$. The models were estimated using the "logit" command in Stata (v.16.1).

2. Prong Two

We also consider how an employee's reporting of a complaint affects an employer's probability of satisfying prong two. Among the 146 cases where reporting status is clear, the employee reported in 79% of cases, including in 75% of the cases where the first prong was satisfied. Conditional on satisfying prong one, employers were more likely to win in cases where the employee did not report at all about the alleged conduct. Among the eighty cases where the first prong was satisfied, there were twenty cases where the employee did not report and sixty cases where the employee did. Of the twenty cases where the employee did *not* report, the employer satisfied prong two in nineteen of them (95%). Of the sixty cases where the employee reported, the employer satisfied prong two in forty-nine of them (82%). These results generally comport with the findings from our 2001 study.

Aside from whether an employee reported at all, a determination of the "timeliness" of the employee report appears to play an important role as well. When we examine cases where the employee reported and the employer prevailed, the

employee's report was deemed untimely 91% of the time.[168] Conditional on satisfying prong one and the employee reporting, the determination of timeliness of the employee's report systematically corresponds with prong two's outcome. Overall, our sample includes fifty-five cases where information on the timeliness of an employee's report is known. In ten of these cases, the employee's report was ruled timely, and the employer satisfied prong two in only four of them (40%). In forty-five cases, the employee's report was ruled *not* timely, and by contrast, the employer satisfied prong two in forty-one of them (91%).

Table 2 presents results from selection models assessing the probability of an employer satisfying prong two (conditioned on the employer satisfying prong one). Similar to what the descriptive results hint at, and as the results in Model B illustrate, employees who reported in a timely manner systematically reduced the probability that the employer would satisfy prong two. While an employee's failure to report at all did not achieve statistical significance in Table 1 Model C (above), that it achieves significance in our selection models (Table 2 Model A) implies that the subpool of cases where an employer satisfies prong one systematically differs from the subpool of cases where the employer fails to satisfy prong one.[169] Consequently, and conditional on an employer satisfying prong one, an employee who failed to report a workplace sexual harassment complaint to the employer at all systematically increased the probability of the employer satisfying prong two.

Table 2: Selection Models of Employer Satisfying Prong Two
(Conditioned on Employer Satisfying Prong One)

	(A)	*(B)*
Employer Satisfies Prong Two:		
Employee failed to report	5.73**	---
	(0.24)	
Employee's report timely	---	-1.63**
		(0.36)
Constant	1.02**	1.44**
	(0.20)	(0.24)
Employer Satisfies Prong One:		
Good employer policy	2.07**	2.10**
	(0.47)	(0.57)
Employer training	0.39	0.49
	(0.37)	(0.39)
Employer 1-800 number	0.72**	0.15
	(0.25)	(0.39)
Employer's response credible	3.08**	3.35**
	(0.44)	(0.50)
Constant	-3.28**	-3.63**
	(0.54)	(0.65)

168. There are forty-five cases where the employee reported, the employer won, and the timeliness is known. In forty-one of the forty-five cases, the report was ruled not timely.

169. Further support for our use of selection models is provided by results for the Rho test statistic reported in Table 2.

Log likelihood	-54.25	-37.33
Rho	4.13*	4.20*
N	129	112

Notes: Robust standard errors, clustered on circuit, in parentheses. * $p < 0.05$, ** $p < 0.01$. The models were estimated using the "heckprobit" command in Stata (v.16.1).

3. Employer Success Rate at Summary Judgment

We do not find a strong relationship between the outcome of an employer's summary judgment motion and the type (or types) of conduct the employee complained of. We categorize the type of conduct in four (non-mutually-exclusive) ways: sexual conduct, sexual comment, sexual touching, and sexual assault.[170] Most cases in our sample involved sexual conduct (94%) or sexual comments (93%); 87 of 152 cases involved sexual touching (57%) and 26 of those involved sexual assault (17% of the total). Employer win rates are lower for cases involving sexual touching or sexual assault, but these differences do not achieve statistical significance.[171]

As noted above, over the full nine-year period of our study, employers prevailed in 43% of cases. When we isolate at the most recent cases, we do not detect any significant effect attributable to the influence of the #MeToo movement on the employer's overall win rate. Insofar as only twenty cases in the sample were decided after the emergence of the #MeToo movement, the statistical power available to detect any such influence is low. Overall, the employer win rate is slightly lower for 2018 than for 2010–2017: the employer prevailed in 35% of the cases (seven out of twenty) decided in 2018, compared to 45% for 2010–2017. Thus, to the extent that the #MeToo movement may systematically increase the likelihood of employer liability, it is likely that not enough time has passed to statistically detect any such potential influence.

To better isolate the potential independent influence of the various types of odious workplace conduct on an employer's prospects for prevailing at summary judgment, after controlling for various employer and employee factors, Table 3 presents results from our model. Consistent with what we find descriptively, none of the various types of conduct systematically vary with the summary judgment's outcome.

170. There are some missing values, but this information is available for most cases. Two cases (out of 157) are missing information for sexual conduct, and there are three missing values each for sexual comments, sexual touching, and sexual assault.

171. We did find a lower employer win rate for cases involving sexual comments than those that did not. This difference was statistically significant, but there were only eleven cases that did not involve sexual comments.

Table 3: Logistic Regression Model of Employer Prevailing at Summary Judgment

	(A)
Employer factors:	
Good employer policy	3.26*
	(1.30)
Employer training	-0.24
	(0.98)
Employer 1-800 number	1.02
	(0.76)
Employer's response credible	3.88**
	(0.54)
Employee factor:	
Employee failed to report	0.96
	(1.12)
Nature of complaint:	
Conduct	0.55
	(0.62)
Comment	-2.29
	(1.20)
Touching	0.89
	(0.81)
Assault	0.14
	(0.91)
Atmosphere	-0.82
	(0.87)
Constant	-4.15**
	(1.56)
R^2 (pseudo)	0.53
Log likelihood	-33.86
N	104

Notes: Robust standard errors, clustered on circuit, in parentheses. * $p < 0.05$, ** $p < 0.01$. The model was estimated using the "logit" command in Stata (v.16.1).

As noted above, Justice Thomas' dissent in *Ellerth* warned that employers will never prevail when an employee reports sexual harassment in the workplace to their employer.[172] Our study, in contrast, finds that employers prevailed in their motions for summary judgment in 82% of the cases where the employer satisfied prong one of the *Ellerth*/*Faragher* defense and the employee reported the sexual harassment. We conclude that judges remain disinclined to find against employers who "do the right thing." As stated above, one way for courts to justify such holdings is to construe the employee's response as "unreasonable" by focusing on employee reporting timeliness. Indeed, what we find is that in the vast majority of the reported cases where the employer prevailed, the courts found the employee's report to be untimely. Thus, courts appear to be functionally imposing a very short statute of limitations on sexual harassment cases. This statute of limitations is dependent,

172. *See supra* text accompanying note 145.

however, on the employer's prevention and response efforts. A deeper dive into the cases suggests that the definition of timeliness ranges substantially from case to case.[173] In fact, we found cases where employees who waited two weeks to report were deemed untimely and, thus, unreasonable.

III. PROBLEMS WITH CURRENT PROTECTIONS IMPLEMENTED TO PROTECT SEXUAL HARASSMENT VICTIMS

A. Current Climate

The #MeToo movement positively changed the national discourse on sexual harassment. As stated above, instead of being just another "cause of action under title VII, sexual harassment is now correctly regarded as a national epidemic.[174] Two of the main protections recently implemented are the tax code penalties for NDAs and the effort to eliminate predispute mandatory employment arbitration. A discussion of the latter would entail a full analysis of the arguments for and against arbitration and is thus beyond the scope of this Article. We do, however, address the limitations on NDAs for the purpose of showing that the unintended consequences of what seems like a relatively simple and cost-free "fix" could result in a standard that perpetuates and exacerbates the conduct it sought to prevent.

B. Privacy and Non-Disclosure Agreements

In the aftermath of the #MeToo movement, employee advocates identified NDAs and other attempts to keep allegations and settlements private as negatives for both employees and society.[175] The theory behind such a push for greater transparency is that allowing employees to air their experiences and shame employers engaged in

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173. *Compare* Finnegan v. Washoe County, No. 3:17-cv-00002-MMD-WGC, 2017 WL 3299040, at *3 (D. Nev. Aug. 2, 2017) (holding that when the harassment began in 2010 and plaintiff did not report until 2015, the report was untimely), *with* Benson v. Solvay Specialty Polymers USA, LLC, No. 1:16-cv-04638-CAP-RGV, 2018 WL 5118615, at *18–19 (N.D. Ga. July 3, 2018) (holding that although plaintiff complained numerous times and frequently, it was unreasonable for plaintiff to think anything would come of the complaints after the company took no remedial action, and therefore plaintiff should have taken her complaints another route).

174. *See* Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR: THE TWO-WAY (Feb. 21, 2018, 7:43 PM), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/UHT5-BCHY]; Jillian Berman, *Sexual Harassment is Learned Long Before the Perpetrators Enter the Workforce,* MARKETWATCH (Dec. 2, 2017, 6:33 AM), https://www.marketwatch.com/story/colleges-have-a-role-to-play-in-curbing-workplace-harassment-epidemic-2017-11-09 [https://perma.cc/8SWV-VR9S]; *see generally* Jennifer Rubin, *The Sexual Assault Epidemic is Real*, WASH. POST (Dec. 7, 2017, 10:30 AM), https://www.washingtonpost.com/blogs/right-turn/wp/2017/12/07/the-sexual-assault-epidemic-is-real/ [https://perma.cc/2CR4-M8DB].

175. *See generally* Vasundhara Prasad*, If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018).

actionable conduct creates an additional deterrent to future harassment. The law seemingly supports this theory because under the Internal Revenue Code, after 2018, employers can no longer deduct legal fees and settlements if the resolution includes an NDA.[176] The anti-NDA theory seemingly gained momentum when Mayor Michael Bloomberg's bid for the 2020 Democratic nomination for President was derailed, in part, by the two debates where Senator Elizabeth Warren made the case that NDAs are a net negative for society as she insisted that Mayor Bloomberg release all of his former employees from NDAs that they signed. Based on the law, Senator Warren's NDA questions, and the public's reaction, one should infer that NDAs are one-sided agreements that only benefit the employer and provide nothing of value for the employee or anyone else. We contest that narrative and contend that NDAs can benefit the employer, the employee, the accused, and society.

Employers settle cases with an NDA for a number of reasons including, but not limited to: (1) the employer or its supervisor violated the law, and the employer wishes to avoid publicity for actions that did occur; and (2) neither the employer nor the supervisor violated the law, and the employer wants to avoid publicity, avoid the cost of defense (including fees and time), and protect or placate a falsely accused supervisor who demands vindication.[177]

We contend that many (but, to be sure, not all) sexual harassment victims want their claims to be resolved quickly and privately so that they can get on with their lives because, except in a few cities and states, the prospect for lucrative damage awards is remote, and even prevailing plaintiffs typically need (or want) to secure new employment.[178] An NDA promotes most employees' desired outcomes by incentivizing employers to settle and by making it possible for claimants to get new jobs.

An NDA allows a claimant to find a new job. There is no dispute among people knowledgeable about the hiring process that employers perform various levels of background checks on some job applicants. Indeed, the *Ellerth*/*Faragher* defense requires as much by requiring that employers exercise reasonable care to prevent sexual harassment.[179] For example, an employer who failed to conduct a background check before hiring a supervisor who had been found to have sexually harassed an employee would certainly fail to satisfy the first prong of the defense. Moreover, an employer who hired an employee who posed an unreasonable risk to the public (e.g., hiring a convicted pedophile to work with children) would be guilty of negligent hiring and/or negligent retention. It simply cannot be argued that employers do not perform extensive background checks. Since litigation is public, employers can easily discover if an applicant has brought an action against an applicant's former

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176. I.R.C. § 162 (2018). Many states have also adopted laws the prohibit NDAs in sexual harassment contexts. *E.g.*, S.B. 121, 2018 Sess., 218th Sess. (N.J. 2019); S.B. 820, 2017–2018 Sess. (Cal. 2018); N.Y. GEN. OBLIG. LAW § 5-336 (2020); H.B. 2020, 53d Leg., 2d Reg. Sess. (A.Z. 2018).

177. The author bases this assertion on his 5 years of full-time practice, his fifteen years of being Of Counsel to a labor and employment firm, and the more than fifty labor and employment roundtables he has hosted.

178. *Id.*

179. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998).

employer. Further, while human resource (HR) professionals are typically loath to admit as much publicly, common sense and experience imply that HR professionals are very reluctant to hire applicants who have brought actions against their former employer.[180] Thus, while politicians and academics may push for greater transparency regarding sexual harassment claims, many employees will likely push equally hard *against* calls for increased disclosures. Indeed, the *Bloomberg Daily Labor Report* published a study showing an increase in the number of employees wishing to file their cases as John or Jane Doe.[181] Moreover, even the EEOC's policy tilts toward privacy when it comes to resolved EEOC harassment charges and settlements.[182]

The absence, or increased cost of, NDAs is a disincentive to settle. The tax code change reduces the likelihood of settlements by increasing the costs of settlements that include NDAs and, on balance, discouraging employers from settling at the margin. An employer who sees the cost of a settlement rising because of the NDA, or fears that any settlement implies an admission, may refuse to settle and instead pursue a summary judgment motion. Thus, the parties will endure all forms of discovery—depositions, interrogatories, document requests, etc.—and will have to stay in a case longer than most employees might otherwise prefer. Reluctance to settle on the part of employers increases the litigation costs for employees. If employees see their reports of harassment turning, literally, into public federal cases, they may be incentivized to not report workplace harassment and to either endure the conduct or simply walk away and look for a new job. Thus, as a society, this "fix" to the problem of employers sweeping allegations of or, worse, actual sexual harassment under the rug is actually a cost/benefit analysis. Is the benefit of increasing the expense of privacy for employers worth the cost of employers refusing to settle and/or employees being reluctant to report, pursue, and litigate claims of harassment?

Thus, while the increased transparency debate is relatively simple to articulate, it remains comparatively difficult to resolve. While employees[183] and employers are often better off if they can resolve the case with limited publicity, broader social

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180. Although it is unlawful retaliation to refuse to hire an applicant because he or she filed an action against a former employer, failure to hire suits are difficult to win, and HR professionals are rarely concerned that a current or past litigant will file another lawsuit for failure to hire.

181. *Anonymous Workplace Harassment Suits Double in the #MeToo Era*, BLOOMBERG L.: DAILY LAB. REP. (July 29, 2019, 6:30 AM), https://news.bloomberglaw.com/daily-labor-report/anonymous-workplace-harassment-suits-double-in-metoo-era [https://perma.cc/BWB4-KTAB].

182. *Questions and Answers – Freedom of Information Act (FOIA) Requests*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/foia/qanda_foiarequest.cfm [https://perma.cc/KP9Y-Y7QX]. The EEOC clearly states that they "will not disclose to the public charged of employment discrimination, charge conciliation information, and unaggregated EEO survey data." *Id.*

183. Some plaintiffs lawyers argue would argue that privacy impedes the employees' abilities to prove their cases. Doug Wigdor at the Cornell ADR Roundtable November 2019 in NYC. We contend that a policy that will not allow employees to investigate the elements of their cases (past actions at the company included) or use their coworkers as witnesses and resources would violate due process protocols and will not, and should not, be enforceable.

interests may be served by increased transparency.[184] Of course, if increased transparency results in more victims walking away because of fear of publicity, then social interests are defeated.

The NDA discussion raises the question—what is the better way to eliminate harassment: (1) make sure all harassment allegations are public; or (2) reduce actual or perceived disincentives to report and pursue claims of sexual harassment in the workplace? The question begs for empirical study and not legislation based on either assumption or, worse, lack of thought.

C. Defining Sexual Harassment and Liability

While clear answers to persistent problems relating to workplace sexual harassment are few and far between, what does emerge with greater comparative clarity are a few key issues that would benefit from focused study. These issues include a need to gain greater clarity on how best to legally define sexual harassment and a move to a better standard for liability for employers. While we hope future research will take a deeper dive into these issues, we have a proposal for each.

Legally actionable sexual harassment is presently defined to include only conduct that is severe or pervasive enough to create an abusive or hostile environment.[185] In the workplace context, such conduct must be motivated by the victim's gender.[186] In the last several years numerous jurisdictions have attempted to clarify the law by addressing the severe or pervasive standard.[187] For example, a New York state law enacted in 2019 changed the standard to "something less than severe or pervasive that is more than a trivial slight or inconvenience."[188]

Efforts, such as those in the New York General Assembly, that tinker with various components—such as the severe and pervasive element—while remaining moored in Title VII risk missing a broader and possibly more important point. And this missing point is aptly illustrated by the facts in *Oncale*, where the employee was sodomized with a bar of soap on a regular basis. Despite such outrageous factual findings, the Supreme Court's unanimous opinion in *Oncale* remanded the case back

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184. *See* Prasad, *supra* note 175, at 2509 ("[F]irst . . . courts should take on a heightened role in determining whether NDAs in such cases are unconscionable, made under duress, or unenforceable as against public policy, and; second . . . states, instead of passing laws that prohibit these NDAs altogether, should pass anti-secrecy laws that would provide the required deterrence to serial offenders and their lawyers who protect them through the use of these pernicious contracts.").

185. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

186. *Id.* at 751–52.

187. *See, e.g.*, Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 36–41 (N.Y. App. Div. 2009).

188. Alkida Kacani and Gregory Green, *Governor Cuomo Proposes to Strengthen Protections Against Harassment in the Workplace*, EPSTEIN BECKER GREEN ANNOUNCEMENTS, https://www.retaillaborandemploymentlaw.com/sexual-harassment/governor-cuomo-proposes-to-strengthen-protections-against-harassment-in-the-workplace/ [https://perma.cc/6TH2-28AG].

to the trial court for greater factual clarity on the employer's motivation for the assaults.[189]

Perhaps it is time to consider an alternative definition of "sexual harassment" that dispenses with the need for any factual inquiry into employer motivation for the alleged conduct and simply holds that severe or pervasive conduct that is sexual in nature is unlawful. Under such a definition, the *Oncale* victim would prevail, the "equal opportunity sexual harasser defense" is no longer viable,[190] the cause of action for sexually charged atmosphere is resurrected, and employees who engage in consensual affairs are not lawfully subjected to harassment because they were "that woman" or "that man" as opposed to a woman or a man.

Operationalizing this standard creates two questions that need to be addressed. The first question is, will it be too difficult to define what is sexual as opposed to nonsexual conduct? While determining whether conduct is sexual or not will be difficult in some cases, it will never be as difficult as ascertaining intent. Determining the nature of the conduct is an objective standard. The judge or jury will not have to figure out why the alleged harasser engaged in the conduct in question. Instead, the jury will be asked whether a reasonable employee would find this conduct to be of a sexual nature.[191]

An instructive case is *Johnson v. Hondo, Inc.*,[192] where two employees, Johnson and Hicks, who had a personal dispute, argued with each other using graphic sexual terms.[193] Specifically, Hicks told Johnson, "I am going to make you suck my dick" and would make Johnson's girlfriend "suck [Hick's] dick because she's got a nice ass."[194] In return, Johnson called Hicks a "punk," "faggot," "fag" and "s.o.b."[195] The Court found the conduct could not be sexual because despite the graphic nature of the words, the two men were simply insulting, and not propositioning, each other.[196] We contend that any fact finder would come to the same conclusion. Moreover, while sometimes difficult, it is always possible to make the judgment as to whether something is sexual or not. Also, over time legal precedent will result in a body of law that can advise courts and juries. Alternatively, trying to figure out why the men in *Oncale*, or in other cases, acted the way they did is often impossible. As previously stated, trying to understand what a person is thinking is not objective, and precedent would simply not be helpful as each decision would be limited to the actors and their specific mindsets in the case.

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189. *See supra* notes 92–95 and accompanying text.

190. Of course, the equal opportunity "jerk defense" survives because, to quote a phrase, "Title VII is not a code of civility." Yuknis v. First Student, Inc., 481 F.3d 552, 556 (7th Cir. 2007).

191. Of course, one could also lobby for the reasonable man, woman, or trans standard. We do not endorse this approach only because we question how, assuming men and women would label conduct that could be considered sexual differently, a man could determine what a reasonable woman would find sexual or not. Thus, we propose the reasonable victim or employee standard.

192. 125 F.3d 408 (7th Cir. 1997).

193. *Id.* at 410–11.

194. *Id.* at 411.

195. *Id.*

196. *Id.* at 413.

Assuming our standard is easier to understand and apply, the second question is whether the logical extensions of this standard will have a positive effect on the workplace. We contend it will because overtly sexual conduct that is not motivated by the employee's gender, conduct directed at an ex-lover, and sexually charged conduct will all, if severe or pervasive, be unlawful regardless of why the harasser engaged in such actions. Thus, people who work will no longer have to fear sexual assaults in the workplace based on factors other than their gender, will no longer have to fear that if they engage in a workplace romance that they will be "fair game" for their ex-lovers and their ex-lover's colleagues and friends, and will no longer have to deal with porn or other sexually explicit material in the workplace. While Justice Scalia may conclude that we have made Title VII into a code of civility,[197] we believe that our standard provides employees with a basic, albeit low, level of professionalism and decorum that will allow people to perform their jobs without fearing that their most private thoughts and actions will be exploited. We argue that severe or pervasive sexual conduct has no place in the workplace.

With regard to liability, there is a need to study the effects of imposing a strict liability standard on employers for workplace sexual harassment. Such calls are not mere "abstractions" as states such as New York, Illinois, and California have already implemented such a change.[198] While the impulse towards a strict liability regime is perhaps understandable, careful attention to the possibility of motivating perverse employer incentives is warranted. The creation of strict liability for employers risks providing a perverse incentive for employers responding to allegations of harassment. If employers are strictly liable, then the only way to avoid liability is to make it more difficult to report harassment and then, if reported, "fix" the investigation to conclude that the unlawful conduct never occurred. Instead, we propose eliminating the second prong of the *Ellerth*/*Faragher* defense. In so doing, those employees who wait months or even years to report will not be penalized, and employers will have every incentive to fully investigate, find the truth, and take the appropriate action in response to the allegations without fear of such being an admission of guilt.

Once again, this standard needs further explanation. The best way to explain our concept is with a hypothetical. Suppose an employee is subjected to a series of propositions from a supervisor. The supervisor is of similar age and believes that there may be a connection between the two of them. The employee at first is marginally interested, but soon decides not to pursue a relationship. The supervisor persists even after being told to please stop—three weeks later, the employee cannot take it any longer and thus, pursuant to a comprehensive sexual harassment policy and training, lodges a complaint. Under a technical reading of *Ellerth* and *Faragher*, the question would be whether the employee's complaint was "unreasonable" because of their initial marginal interest. If not, the next question would whether the employee was unreasonable for waiting three weeks to report the harassment. The employer would have the perverse incentive to either argue that there was no

197. *See* Harris v. Forklift Sys., 510 U.S. 17 (1993) (Scalia, J., concurring).

198. *See* Zakrzewska v. New School, 928 N.E.2d 1035, 1040 (N.Y. 2010); Myers v. Trendwest Resorts, Inc., 56 Cal. Rptr. 3d 501, 512–13 (Ct. App. 2007); Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rights Comm'n, 908 N.E.2d 39, 45 (Ill. 2009).

harassment because of the interest or to attack the victim for not reporting soon enough. Under our standard, there would be no reason (1) to vilify the employee for being initially interested in the supervisor; (2) to vilify the employee for waiting a few weeks to report in the hope that the harassment goes away; and (3) to "cover up" the harassment because if it occurred, the employer is liable. Instead, the employer would have two obligations: (1) to make the conduct stop, and (2) to invoke the appropriate form of discipline to make sure that it does not happen again. If the employer satisfies its obligations, there is no liability. If the employer does not satisfy these two obligations, then the employee will be entitled to damages.

Some may argue that our standard is problematic because it would reduce the employer's incentives to prevent harassment. We reject that criticism. The first prong of the *Ellerth*/*Faragher* defense requires that the employer exercise reasonable care to prevent and correct workplace harassment. Employers who do not prevent harassment because, for example, they do not have a sexual harassment policy, do not train their employees, do not do background checks during the hiring process, or, worst of all, knowingly hire or allow harassers to work will always be liable. It's those employers who do everything right but still have supervisors engage in reprehensible behavior that will be able to use our defense. Furthermore, if the second prong of the *Ellerth*/*Faragher* defense is eliminated, it may make sense to put more of a prevention obligation on employers. We would encourage such a change.

There is one problem with our standard. Again, it is best to use a hypothetical. Assume that the worst type of harassment has occurred: a supervisor raped an employee. The employer, however, has been as vigilant as possible (e.g., training its employees and having a sexual harassment policy), but a supervisor still committed an unspeakable act. Pursuant to the policy, the employee immediately complains to the employer about the conduct. The employer then questions the supervisor who admits the crime, The employer fires the supervisor and gives the employee a month off, and then offers the employee a promotion. The employee sues. Should the employee be entitled to remuneration from the employer? If one believes the employee should, then strict liability (with its perverse incentives), and not our standard, is what one would support. However, if one is willing to live with employees who suffer from rogue supervisors' horrific actions being unable to obtain relief in order for employers to have the motivation to find the truth and then do the "right" thing, then we contend our standard is best.

CONCLUSION

The law of sexual harassment in terms of what the definition of "sexual harassment" is, when the employer is liable, and whether NDAs should or should not be allowed suffers from the fact that it was created by the courts and not Congress. Now, almost thirty-five years after *Meritor*, courts have continued to try to shoehorn their creation into matching with Title VII, resulting in further uncertainty and a multitude of unacceptable results. Rather than continuing to make an uneasy fit of court-created sexual harassment law and Title VII, we need research-based legislation that is grounded in a goal of eliminating sexual harassment.