

3-1-2001

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

David Sherwyn

Michael Heise

Cornell Law School, michael.heise@cornell.edu

Zev J. Eigen

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Labor and Employment Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Sherwyn, David; Heise, Michael; and Eigen, Zev J., "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" (2001). *Cornell Law Faculty Publications*. Paper 475.

<http://scholarship.law.cornell.edu/facpub/475>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

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

David Sherwyn*

Michael Heise**

Zev J. Eigen***

INTRODUCTION

In two recent workplace sexual harassment decisions, *Faragher v. City of Boca Raton*¹ and *Burlington Industries, Inc. v. Ellerth*,² the United States Supreme Court articulated a two-prong affirmative defense that limits employer liability for sexual harassment in certain circumstances. An employer may now avoid vicarious liability for actions of a supervisor that create a hostile work environment by proving that: (1) the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."³

Legal scholars were quick to predict how lower courts would apply this novel affirmative defense.⁴ The tide of academic commentary

* Assistant Professor of Law, Cornell University School of Hotel Administration. B.S., J.D. Cornell University. Jenn Walwyn provided outstanding research assistance.

** Professor of Law, Case Western Reserve University School of Law. A.B., Stanford University; J.D., University of Chicago; Ph.D., Northwestern University.

*** Associate, Littler Mendelson, San Francisco, C.A. B.S., J.D., Cornell University.

1. 524 U.S. 775 (1998).

2. 524 U.S. 742 (1998).

3. *Id.* at 745.

4. Numerous articles came in the wake of the Court's decisions that discuss the implications of its ruling. See, e.g., Steven H. Aden, "Harm in Asking": A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence, 8 Temp. Pol. & Civ. Rts. L. Rev. 477 (1999); Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 Duke J. Gender L. & Pol'y 3 (1999); Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in*

could not, however, fully elucidate the treatment of this defense by the lower courts because academics published most of the existing scholarship before a sufficient number of judicial opinions applying the twin-pronged affirmative defense appeared. Consequently, these scholars based their conclusions on a limited number of decisions, and could not perform statistical analyses of the cases. Eighteen months after the *Ellerth* and *Faragher* decisions, the large number of cases applying the affirmative defense warrants statistical analyses and supports at least preliminary assessments. In this article, we analyze the first seventy-two post-*Ellerth* and *Faragher* opinions involving employers' summary judgment motions that include affirmative defenses in response to allegations of sexual harassment in the workplace. Through our analyses, we aim to shed light on how lower courts thus far have construed the two-pronged affirmative defense. In so doing, we seek to assess the early predictions' accuracy.

After describing the Court's decisions and briefly reviewing the relevant literature, this article unfolds into two parts. In the first, we present statistical analyses of factors that influenced the courts' application of the two-part affirmative defense. In the second, we turn to the courts' decisions and critically examine their practical effects. Our statistical analyses consider employer- and employee-related variables germane to the affirmative defense. They reveal that employer-related factors heavily influence the courts' construction of both the first and second prongs. Somewhat surprising is the degree to which courts look to employer conduct when they characterize employee conduct.

Our content analyses of the opinions reveal that many of the judicial opinions are result-oriented. Simply put, the judicial opinions do not evidence a desire to punish an employer that has acted responsibly and reasonably. Accordingly, to reward an employer who responds adequately to a harassment complaint, courts often find that the complaining employee acted "unreasonably" as a matter of law, even when such a determination may merit a more thorough review of the facts of the case. Indeed, courts have held employees to be unreasonable for failing to report harassment within a month after the allegedly harassing behavior began.⁵ Moreover, employees who do not report are almost always found to have acted unreasonably.⁶

Our analyses of the initial wave of lower court decisions applying the recently articulated affirmative defense raise important legal and policy questions. One question is whether the result-oriented

Responding to Hostile Environment Sexual Harassment—A Proposed Way Out, 67 Fordham L. Rev. 1517 (1999); B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 Wake Forest L. Rev. 1 (1999).

5. See, e.g., *Moore v. Sam's Club*, 55 F. Supp. 2d 177, 186 (S.D.N.Y. 1999).

6. See, e.g., *Kohler v. Inter-Tel Tech.*, No. C98-0378, 1999 U.S. Dist. LEXIS 5425, at *15 (N.D. Cal., Apr. 13, 1999).

holdings establish a perverse incentive for employers seeking to avoid liability, and create unacceptable barriers and requirements for employees who may need to seek redress for compensable behavior at the workplace. Specifically, employers seeking to limit liability in light of lower courts' application of *Ellerth* and *Faragher* should exercise just enough reasonable care to satisfy a court, but not enough to make it easy or comfortable for employees to complain of workplace harassment. Employees, on the other hand, must report harassment before they might be ready to do so, or perhaps, before a claim ripens. Because of the high costs associated with investigating claims and the potentially devastating effects that a premature claim of sexual harassment may have on a supervisor, this affirmative defense generates undesirable incentives. Employers who exercise more care are potentially worse off from a liability perspective than employers who exercise less care. Additionally, in many instances employees must either report earlier than they would prefer or else risk losing their claims entirely.

To minimize these undesirable results, we propose a new standard for the affirmative defense that minimizes the negative incentives and allows employees to take the necessary time before reporting the harassment without fear of forfeiting their claims. We recommend that courts focus exclusively on the employers' actions when they determine whether the employer satisfies the *Ellerth* and *Faragher* affirmative defense. More specifically, this article proposes that employers should be able to avoid liability if they can prove that they exercised reasonable care to prevent and promptly to correct any sexual harassment. In contrast, the court should not consider the employee's reasonableness, or lack thereof, on a motion for summary judgment.

I. *ELLERTH AND FARAGHER*

In the summer of 1998, the Supreme Court articulated new standards for employer vicarious liability in sexual harassment cases. In *Burlington Industries, Inc. v. Ellerth*⁷ and *Faragher v. City of Boca Raton*,⁸ the Court held that employers are liable for actions of supervisors who engage in either quid pro quo sexual harassment or hostile-environment sexual harassment, regardless of whether they knew, or should have known, of the alleged conduct.⁹ Employers cannot, under *Ellerth* and *Faragher*, escape liability in the quid pro quo context. In hostile-environment cases, however, employers can avoid liability created by supervisors if they satisfy a newly created

7. 524 U.S. 742 (1998).

8. 524 U.S. 775 (1998).

9. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

affirmative defense.¹⁰ To satisfy the defense, employers must prove: (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.”¹¹

The legal community reacted swiftly and heatedly to this affirmative defense, and almost all commentators agreed that the holdings were ambiguous because neither *Ellerth* nor *Faragher* defined “reasonable care.”¹² Similarly, the Supreme Court did not articulate the circumstances in which it would be unreasonable for an employee to “fail[] to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹³ Predictably, scholars began to hypothesize about how lower courts would implement this defense.¹⁴ Commentators predicted that: (1) employers would not prevail in summary judgment motions;¹⁵ (2) employees who reported alleged harassment would always prevail;¹⁶ (3) employees who did not report would survive summary judgment;¹⁷ and (4) mere maintenance and promulgation of a sexual harassment policy would be insufficient for employers attempting to meet the “reasonable care” standard.¹⁸ Regrettably, many commentators weighed in before courts had sufficient opportunities to apply the affirmative defense. Consequently, early scholarly commentary, both positive and negative, had little actual case law or empirical evidence on which to ground its theories and predictions. Indeed, much of what these commentators predicted has not come to pass.

By waiting eighteen months before beginning our analyses, our study benefits from a broader and more complete picture to evaluate how courts have applied the affirmative defense. Between June, 1998, and January, 2000, employers filed seventy-two motions for summary

10. See *Faragher*, 524 U.S. at 807-08.

11. *Id.* at 807. The Court explained this defense by asserting that “proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law.” *Id.* The Court did not explain, however, how an employer could satisfy this burden without a policy. With regard to the employee’s actions, the Court again was less than exact:

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

Id. at 807-08.

12. See, e.g., DiLorenzo & Harshbarger, *supra* note 4, at 21-22.

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

14. See, e.g., DiLorenzo & Harshbarger, *supra* note 4, at 13-14.

15. See Franklin, *supra* note 4, at 1548.

16. *Id.* at 1549-50.

17. *Id.*

18. *Id.* at 1554-55.

judgment in which they argued that a hostile-environment case should be dismissed because the employer satisfied, as a matter of law, the affirmative defense.¹⁹ Our study focuses on how courts analyze the standard of reasonableness under both prongs.

We approach this question from an empirical perspective, which allows us to identify behaviors that constitute both reasonable care on an employer's behalf and an unreasonable failure by an employee to report harassment or avoid harm. Our analyses help us identify systematically several approaches taken by courts as they operationalized the affirmative defense. We place the cases into one of several classifications that reflect the various approaches taken by the courts in applying the defense. By examining the frequency and correlative nature of these classifications, we identify the circumstances in which employers successfully raised the defense, as well as instances in which employees successfully defeated it.

Part II of this article provides a general review of the limited literature addressing the affirmative defense and examines various predictions as to how the defense would be applied by the courts. In Part III, we describe our data, methodology, and model. Part IV presents the results from our statistical analyses of the seventy-two cases. In Part V, we discuss results from our content analysis of the post-*Ellerth* and *Faragher* decisions, and their implications.

II. LITERATURE REVIEW

A detailed discussion of the history and development of sexual harassment in the workplace exceeds this article's scope. It is important to note, however, that no federal statute expressly and squarely addresses—let alone prohibits—sexual harassment in the workplace. Moreover, scholars generally agree that when Congress enacted Title VII of the Civil Rights Act of 1964,²⁰ it 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.²¹ Instead, Professor Catherine MacKinnon is credited with originating the legal prohibition against sexual harassment.

19. For a discussion of possible motivations for courts' decisions to grant summary judgment motions, see Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L. Rev. 71, 73 (1999) (identifying a desire to reduce a bulging caseload of hostile environment cases).

20. 42 U.S.C. §§ 2000e-2000e-4.

21. See, e.g., 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); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 Cal. 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 Savings Bank v. Vinson*,

In 1979, Professor MacKinnon coined the term “sexual harassment” with the publication of *Sexual Harassment of Working Women*²² and fueled the creation of a cause of action. In her work, MacKinnon defined sexual harassment, in its broadest sense, as the “unwanted imposition of sexual requirements in the context of a relationship of unequal power.”²³ The influence of her work on both courts and scholars was swift, enduring, and profound.²⁴

In 1980, the Equal Employment Opportunity Commission (“EEOC”) expanded its “Guidelines on Discrimination Because of Sex” under Title VII to include sexual harassment.²⁵ After the EEOC published its guidelines, courts routinely held that hostile-environment sexual harassment did in fact create a cause of action.²⁶ In the 1986 case of *Meritor Savings Bank v. Vinson*,²⁷ the Supreme Court put to rest any lingering questions concerning the legal efficacy of MacKinnon’s hostile-environment theory by ruling that sexual harassment created a Title VII violation and thereby a legal cause of action.²⁸

Even though the *Meritor* Court established the unlawfulness of sexual harassment, its opinion left open questions regarding the definition of the cause of action, and employers’ vicarious liability for

477 U.S. 57, 63-64 (1986)). “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, 760-63 (1998).

22. Catherine A. 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).

23. MacKinnon, *supra* note 22, at 1; see also DiLorenzo & Harshbarger, *supra* note 4, at 4 n.8.

24. See, e.g., Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 Stan. L. Rev. 751 (1989) (reviewing all of Professor MacKinnon’s work and discussing its profound influence on legal doctrine and practice).

25. The EEOC Guidelines define quid pro quo harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual

29 C.F.R. § 1604.11(a)(1985).

26. See *Henson v. City of Dundee*, 682 F.2d 897 (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.

Id. at 902; see also *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984).

27. 477 U.S. 57 (1986), *aff’g* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

28. See *Meritor*, 477 U.S. at 64-65.

supervisors' actions.²⁹ *Meritor* holds that sexual harassment manifests itself in two forms: (1) quid pro quo, and (2) hostile environment.³⁰ "Quid pro quo" is readily defined as wages, hours, or other terms and conditions of employment which a supervisor or employer predicates on the acquiescence of unwanted sexual favors.³¹ Quid pro quo harassment occurs when, for example, an employer or supervisor states to an employee, "sleep with me or you are fired."³²

Under the *Meritor* standard, a plaintiff's claim need not be based solely on economic loss to advance a successful sexual harassment complaint.³³ Instead, *Meritor* held that a plaintiff could make out a case of so-called "hostile environment" discrimination if the employee was forced to endure unwelcome sexual conduct sufficiently severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment."³⁴ To clarify this standard, which reflects the EEOC's definition of hostile environment,³⁵ the Court made clear that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."³⁶ For example, the Court explained that a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree [so as] to violate Title VII."³⁷ Unfortunately, these terms remain far from clear, and lower courts struggle to determine what constitutes a hostile environment.³⁸

The Supreme Court took up this issue in *Harris v. Forklift Systems, Inc.*³⁹ The question before the Court in *Harris* was whether a plaintiff had to prove that the harassment seriously affected his or her

29. See generally *id.*

30. *Id.* at 62.

31. See *id.*

32. In *Ellerth*, the Court clarified quid pro quo cases by holding that employees had to prove that they suffered a tangible loss in order to make the claim. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998).

33. See *Meritor*, 477 U.S. at 64-67. The *Meritor* decision differed from prior courts' approaches in this regard. In earlier cases, courts denied recovery to plaintiffs unable to prove any tangible impact on usual terms of employment such as pay or promotions. See, e.g., *Tomkins v. Pub. Serv. & Elec. Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (quoting *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975)) (labeling extension of liability for sexual harassment as "ludicrous"), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

34. See *Meritor*, 477 U.S. at 67 (citing *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971)); *Henson*, 682 F.2d. at 904 (bracketed text in original).

35. See *Meritor*, 477 U.S. at 65-66.

36. *Id.* at 67.

37. *Id.* (quoting *Rogers*, 454 F.2d at 238; *Henson*, 682 F.2d at 904).

38. See *George*, *supra* note 4, at 6-7.

39. 510 U.S. 17 (1993).

psychological well-being.⁴⁰ The Court rejected this proposition, and instead held that while Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, such conduct does not "mark the boundary of what is actionable."⁴¹ Thus, as long as the environment "would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."⁴² The Court continued by acknowledging that "[t]his is not, and by its nature cannot be, a mathematically precise test."⁴³ The Court attempted to clarify its holding by stating that the conduct has to be severe and pervasive from both a subjective and objective perspective.⁴⁴ Nonetheless, in his concurring opinion, Justice Scalia stated that he did not find the Court's standard to be a clear one.⁴⁵ Justice Scalia went on to note, however, that he "know[s] of no alternative to the course the Court today has taken."⁴⁶

Difficulties with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners. This uncertainty helps spawn numerous theories as to what is, and why people engage in, sexual harassment.

Professor Kathryn Abrams outlines two such scholarly treatments in her article, *The New Jurisprudence of Sexual Harassment*.⁴⁷ She explains that prior to 1980, scholars focused on the wrongfulness of sexual harassment.⁴⁸ Between 1980 and the 1986 *Meritor* decision, legal scholarship's focus turned to considering what constitutes sexual harassment.⁴⁹ After *Meritor*, the focus again shifted to explaining how courts and employers should apply the new standards.⁵⁰ More recently, Professor Abrams argues that in the year prior to *Ellerth*, the focus of legal scholarship came full circle and again addressed the "wrongs" of sexual harassment.⁵¹

The work of Professor Abrams and numerous other scholars who focus on the "wrongs" of sexual harassment is extremely helpful, relevant, and provocative. Such work does not, however, constitute

40. *Id.* at 20.

41. *Id.* at 22.

42. *Id.* (citation omitted).

43. *Id.*

44. *See id.* at 23.

45. *Id.* at 24 (Scalia, J., concurring).

46. *Id.*

47. Abrams, *supra* note 22, at 1171.

48. *Id.* at 1169-70.

49. *Id.* at 1170.

50. *See id.*

51. *Id.* at 1171. Professor Abrams addresses the leading scholarship on sexual harassment. Specifically, she analyzes Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 Harv. L. Rev. 445 (1997); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 Stan. L. Rev. 691 (1997); and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (1998). Abrams, *supra* note 22, at 1171 & n.7.

the only current stream of sexual harassment legal scholarship. The *Ellerth* and *Faragher* opinions invigorate those who focus on the “how” of sexual harassment; these new standards, which attempt to clarify *Meritor*, leave many questions unanswered, and there is growing need to explore how the law should be applied.

The *Ellerth* and *Faragher* decisions have already fueled considerable commentary.⁵² As previously described, however, because the affirmative defense has only been in effect since June, 1998, most of the existing scholarship reviews either a small number of cases or no cases at all. Thus, many of the articles that endeavor to explain the courts’ holdings identify questions left unanswered by the rulings and predict legal outcomes within a data vacuum.⁵³

Although the affirmative defense’s first prong pivots on a reasonableness inquiry, it is unclear what constitutes “reasonable care” in the employment context. Is an employer’s maintenance and distribution of a harassment policy enough? Some scholars argue that it is not and propose that to exercise reasonable care employers must also provide, for example, training to both employees and supervisors.⁵⁴ If this is so, however, how much training is sufficient?

52. See, e.g., articles cited in note 4, *supra*.

53. See, e.g., *id.*

54. Paul Buchanan and Courtney Wiswall argue as follows:

Of course, courts will likely require more than the mere existence of a well-drafted and effectively promulgated written policy to support a finding that an employer exercised reasonable care to prevent sexually harassing behavior. Employers should regularly conduct training to educate employees about harassment and company policies. Employers may wish to have live or video presentations regarding harassment for every new employee at the commencement of employment as well as periodic training for employees already working. Training of supervisors is particularly important given the Supreme Court’s clear mandate that employers may be held vicariously liable for the conduct of supervisors. In order to ensure that the employer derives maximum benefit from these efforts, records should be kept that make clear who has received training and when.

Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 Wake Forest L. Rev. 55, 64 (1999). Louis DiLorenzo and Laura Harshbarger have echoed these thoughts:

The recent rulings suggest that training rank and file employees in the use of the complaint procedure may be as critical as training supervisors to refrain from engaging in harassing conduct or to properly responding to complaints or other notice of inappropriate conduct. As noted above, an employer invoking the affirmative defense must be prepared to show that it acted reasonably to prevent and correct harassment and that the plaintiff failed to act reasonably to prevent, correct or otherwise avoid the harassing conduct. An employer who demonstrates that all employees were made aware that the employer had a policy and were also fully informed as to the procedure for reporting harassment is far more likely to successfully demonstrate its own reasonableness in preventing or correcting harassing behavior. Moreover, an employer who actively trains all employees in the use of the policy, and thereby educates its employees in the importance of their role in preventing or correcting the prohibited behavior, will undoubtedly have a

What if a company cannot afford formal training? Will there be an undue-hardship exception to such a requirement for smaller or fledgling employers? Finally, is the combination of implementing a training program and maintaining and enforcing an adequate written policy enough to satisfy the first prong? If not, what else must employers do? Because of these numerous uncertainties, scholars predicted that the question of the employers' reasonable care would be sent to a jury, and accordingly, employers would not prevail on summary judgment motions.

The second prong's requirements are similarly unclear. According to many scholars, this prong's ambiguity benefits plaintiff-employees opposing summary judgment motions.⁵⁵ Two theories moor such a prediction. First, some scholars assert that judges would frequently leave to a jury the assessment of whether the plaintiff-employee acted reasonably by failing to report the alleged harassment (generally, a factual determination).⁵⁶ Second, other scholars argue that employees not only can avoid summary judgment, but can also *defeat* the defense and make the employer liable by reporting the alleged harassment.⁵⁷ Justice Thomas's dissent in *Ellerth* advances the latter proposition. Justice Thomas reads the majority and concurring opinions as holding that an employee who reports sexual harassment cannot, as a matter of law, be found to have failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.⁵⁸ Thus, according to Justice Thomas, an employer loses its affirmative defense to sexual harassment allegations if and when the employee reports the harassment.⁵⁹

persuasive argument that an employee's failure to invoke the reporting procedure was unreasonable, and, therefore, establish its affirmative burden. DiLorenzo & Harshbarger, *supra* note 4, at 19-20.

55. See Beiner, *supra* note 19, at 74-75 (arguing that federal courts are misusing summary judgment in hostile-environment cases brought under Title VII); Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 Yale J.L. & Feminism 75, 109 (1999) (indicating the possibility that "lower federal courts will equate sexual harassment complaint procedures with prevention programs," a consequence that would make it more difficult for employers to win on summary judgment motions).

56. See Dominic Bencivenga, *Looking for Guidance: High Court Rulings Leave Key Terms Undefined*, N.Y. L.J., July 2, 1998, at 5 (discussing how practicing attorneys think that the affirmative defense is not clear enough because the language is ambiguous and the case law provides little guidance).

57. See Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 Yale L. & Pol'y Rev. 813, 846 (1999) (noting that defendants should rarely prevail in summary judgment motions in sexual harassment cases).

58. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766-67 (1998) (Thomas, J., dissenting).

59. See *id.* at 766-67, 773; Buchanan & Wiswall, *supra* note 54, at 64-65 (arguing that summary judgment decisions in favor of employers may decrease); see also Francis Achampong, *Employer Liability for Hostile Environment Sexual Harassment by a Supervisor: A Critical Assessment of The Supreme Court's New Vicarious Liability Standard*, 28 Sw. U. L. Rev. 45, 66-67 (1998).

Professor George, on the other hand, disputes this analysis and instead argues that an employee's Title VII claim will fail if the employer deals promptly and effectively with a victim's complaint.⁶⁰

The arguments advanced in the current literature reflect legitimate hypotheses about a situation in which, at the time academics advanced the arguments, little germane data existed. In the first eighteen months that the new standard was in effect, however, courts decided seventy-two cases in which employers moved for summary judgment based on the affirmative defense. A comparison of the results of these cases with the predictions discussed above reveals that some hypotheses were correct, some were wrong, and that overall they foreshadowed a rift in judicial treatment of the affirmative defense.

III. DATA, METHODOLOGY, AND MODEL

Summary judgment permits courts to grant judgments as a matter of law to a party who can establish that its opponent cannot prevail at trial.⁶¹ When it weighs an employer's motion for summary judgment, a court considers the evidence in the light most favorable to the employee, the non-moving party.⁶² Thus, by their very nature, courts' analyses of employers' motions for summary judgment tilt heavily in favor of the employee.⁶³ Our data includes all published judicial opinions (N=72) for cases involving alleged sexual harassment in the workplace between June of 1998 and January of 2000 in which an employer asserted an affirmative defense and advanced a motion for summary judgment. Because our study uses the entire universe of known cases, our sample is not exposed to questions concerning selection bias.⁶⁴

Although any study's reliance on published legal opinions contained in the LEXIS and WestLaw databases imposes some limitations, we nonetheless drew from these two conventional sources of judicial opinions for our case dataset. Also, judicial opinion content-analysis necessarily relies upon published opinions—which account for an incomplete slice of our judicial system—that may or may not represent or closely resemble the entire legal universe. Employment discrimination cases illustrate this point. According to a recent survey by the Administrative Office of the United States

60. See George, *supra* note 4, at 21.

61. Fed. R. Civ. P. 56; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (noting that courts must draw all inferences in favor of the non-moving party).

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

63. For a fuller discussion of the application of summary judgments in the hostile workplace-environment cases, see Beiner, *supra* note 19, at 86-97.

64. 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).

Courts, ninety percent of employment discrimination cases do not go to a trial on the merits.⁶⁵ Because courts do not publish all of their judicial opinions, a further filter is placed on those cases that result in bench or jury verdicts.⁶⁶ Finally, even within the universe of published opinions, not all are “officially” published, and therefore some are not found in familiar legal reporter series.⁶⁷

Our content analysis of each opinion helped generate our variables and data. Numerous factors complicate content-analysis. Regrettably, not all legal opinions are well or clearly written. In addition, changes in statutory interpretation frequently are unannounced or hidden. Although, on occasion, courts expressly articulate a new interpretation, more frequently courts characterize such changes “simply as the application of existing precedent to slightly different factual circumstances.”⁶⁸

Mindful of these difficulties, at least two individuals independently read and coded each opinion in our study. To ensure that our opinion content-analysis was as objective as possible, we constructed a review mechanism involving a third colleague. As it turned out, we had few coding disagreements and we resolved each without difficulty.

A. Variables

Table 1 provides a brief description of the variables included in our study and Table 2 presents a statistical summary of these variables, including their means and standard deviations.

1. Dependent Variables

Our study considers how employers’ affirmative defenses fared at the summary judgment level. Of particular interest is how courts construe the two principal reasonableness requirements embedded within the affirmative defense. To this end, the three dependent variables in our study seek to isolate both prongs of the affirmative defense, as well as the final result for each case. Thus, SATISFY_1 is coded to identify when a court concluded that the employer met the

65. Administrative Office of the U.S. Courts, Report of the Director—1995, at 163 (1995) (noted in Beiner, *supra* note 19, at 120 n.330).

66. We use the term “judicial opinion” loosely in this context. Courts generate a variety of official work products (e.g., judicial orders, memoranda, judgments and opinions).

67. Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-At-Will*, 45 Case W. Res. L. Rev. 999, 1038 n.152 (1995); see also William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 574 (1981) (noting a decline in the rate of published appellate court opinions).

68. Morriss, *supra* note 67, at 1002 (discussing the evolution of common law).

first prong of the affirmative defense. Similarly, SATISFY_2 is coded to identify employers that satisfied the second prong.

Whether an employer's summary judgment motion prevailed pivoted on that court's analysis of "reasonableness" within the specific context of the affirmative defense. To advance a successful affirmative defense in the sexual harassment context, an employer must satisfy both prongs of the affirmative defense. More concretely, the employer must establish that it acted reasonably to satisfy the first prong and that the employee acted unreasonably with respect to the second.⁶⁹ Our third dependant variable, HOLDING, is coded to mark cases where courts concluded that the employer satisfied both prongs of the affirmative defense and granted the employer's motion for summary judgment.

2. Independent Variables

To explore how courts construe reasonableness in the affirmative defense setting, we examine two broad clusters of independent variables. One cluster focuses on the employer, and the other on the employee. Comparisons between the two variable clusters inform how courts construe reasonableness within the larger context of workplace sexual harassment. Moreover, such comparisons permit crude conclusions about whether courts construe reasonableness in terms of how employers or employees (or both) act.

Within the employer context we model satisfaction of the two-prong affirmative defense along two broad axes. One axis relates to whether an employer had a workplace harassment policy in place at the time of the alleged incident and, if so, how the employer structured, disseminated, and administered its policy. A second axis focuses on whether the employer responded appropriately once it became aware of a possible incident.⁷⁰

3. Employer Policy

POLICY is coded to identify those employers that had articulated a formal sexual harassment policy. For those employers who had a workplace harassment policy DISM_POL is coded to signal whether the employer's policy was disseminated to employees. The judicial opinions reveal that employers used various dissemination techniques

69. As discussed above, the affirmative defense includes two elements: the employer must prove that it used reasonable care to prevent and correct the sexual harassment, and that the employee "unreasonably failed" to utilize any of the opportunities that the employer provided for employees to avoid harm. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

70. Employers could become aware of a potentially actionable incident either through a victim report or through other sources.

that ranged from publishing and circulating an employee handbook to having employees sign an acknowledgement form attesting that the employee read and understood the workplace harassment policy. In many employer harassment policies, an employee's supervisor is frequently designated as the proper recipient of sexual harassment complaints. Obvious structural and practical problems arise in those instances where the supervisor is also the harasser. *ALT_CHAN* is coded to identify those employers that designate someone other than the employee's supervisor as the designated recipient of harassment complaints. *GOOD_POL* is a hybrid variable constructed to identify when an employer's overall posture with respect to sexual harassment is at its strongest. Specifically, *GOOD_POL* is coded to signal when an employer: (1) has articulated a policy; (2) disseminated it; (3) made alternative reporting mechanisms available to its employees; and (4) does not have any defects in its workplace sexual harassment policy or practice.

4. Employer Response

The second axis along which decisions about the reasonableness of employer action are plotted involves how employers respond to a sexual harassment allegation once they become aware of it. Of particular import is how the courts themselves characterize an employer's response. *GOOD_RSP* signals when a court deemed an employer to have responded properly to an allegation. Typically, courts characterize responses as "good" when the employer discharged a harassing employee even before a victim officially reported the conduct. *OTH_EFOR* is coded to identify employers that took steps beyond policy development, dissemination, and the establishment of an alternative reporting channel to protect workers from sexual harassment. Examples of such additional steps include the establishment of a sexual harassment reporting "hot-line"⁷¹ and workplace training.

Just as positive employer actions can support efforts to establish that an employer satisfied both prongs of the affirmative defense, negative actions can support adverse judicial conclusions. *OTH_DFCT* is coded to signal employers who exhibited defects in their policies or practices independent of a failure to prevent alleged harassing activity in the workplace. In general, courts appear to look for evidence that the employer simply was not serious about handling or responding to an allegation of sexual harassment. For example, courts typically construed as defective those employers that were aware of harassment, yet did little or nothing to rectify the situation.

71. "Hot-line" refers to a toll-free number that employees can use to report harassment.

5. Employee Action

Our second cluster of independent variables focuses on the employee. *EE_FAIL* identifies when the charging employee failed to report the alleged harassment to the employer. Among those employees who reported to employers, *TIME_RPT* is coded to signal those employees who did so in a timely manner, as determined by the court. Finally, *NATR_RPT* is coded to indicate when an employee's report of workplace harassment was complete.

TABLE 1: DESCRIPTION OF STANDARD VARIABLES

Variable	Definition
<i>Dependent</i>	
SATISFY_1	Employer satisfied first prong (1=yes)
SATISFY_2	Employer satisfied second prong (1=yes)
HOLDING	Court granted summary judgment motion (1=yes)
<i>Employer</i>	
POLICY	Employer had a policy (1=yes)
DISM_POL	Employer disseminated policy (1=yes)
ALT_CHAN	Employer offered other ways to report (1=yes)
GOOD_POL	Employer had a good policy (1=yes)
GOOD_RSP	Employer had a good response (1=yes)
OTH_EFOR	Employer exerted additional effort (1=yes)
OTH_DFCT	Employer had other related defects (1=yes)
<i>Employee</i>	
EE_FAIL	Employee failed to report (1=yes)
TIME_RPT	Employee reported in a timely manner (1=yes)
NATR_RPT	Employee provided a full report (1=yes)

Although dummy variables⁷² possess certain shortcomings,⁷³ their benefits include relatively straightforward interpretability and an ability to capture the potential influence of qualitative data. Table 2 presents summary information on the dependent and independent variables included in our study. Notwithstanding the procedural

72. A dummy variable is binary coding that can be viewed as an electrical switch: a code of "1" signals that a given characteristic is "present" or "on" for a particular case. Conversely, a code of "0" signals that the characteristic is not present.

73. Although dummy variables are quite helpful in signaling when a particular attribute is present, the variables' dichotomous nature (0,1) makes examination of any possible underlying variation more difficult. For a thorough discussion, see Melissa A. Hardy, *Regression with Dummy Variables* (1993).

roadblocks discussed above which are designed to work against parties seeking to prevail on a summary judgment motion, employers' motions in our dataset succeeded in over one-half of the cases. Employers met the first prong of the affirmative defense in almost 60% of the cases. However, a comparison of the means for the HOLDING and SATISFY_1 variables reveals that in a few cases, employers satisfied the first but not the second prong of the affirmative defense, thereby resulting in the court denying the employer's motion for summary judgment.⁷⁴

More than 90% of the employers had articulated a workplace harassment policy, but fewer than 70% of those employers disseminated their policies to the employees. Moreover, 40% provided an alternative channel for employees to report workplace harassment. Finally, 38% of employers possessed the strongest possible combination of positive attributes relating to workplace sexual harassment policies.

B. *Summary of Standard Variables*

1. Employers

Of those employers that responded to employee reports of harassment, only forty-four did so in a manner that courts characterized as "good." To earn judicial approval of their response to harassment complaints, employers typically had to take proactive steps to address a harassment problem. One-quarter of the employers took steps beyond disseminating a harassment policy. Finally, 11% of employers were defective in other related ways that exacerbated the alleged workplace harassment problem. Frequently, such employers failed to respond to harassment complaints despite their knowledge of a potential (or actual) problem.

2. Employees

Among the employees that sued their employers for liability for workplace harassment, 42% did not report the harassment to their employers. Fifteen percent of employees that alleged suffering from sexual harassment in the workplace reported it to their employers in a timely manner, and 39% provided a full report.

74. There are four such cases. *See* *Watts v. Kroger Co.*, 170 F.3d 505 (5th Cir. 1999); *Moore v. Sam's Club*, 55 F. Supp. 2d 177 (S.D.N.Y. 1999); *DeWitt v. Lieberman*, 48 F. Supp. 2d 280 (S.D.N.Y. 1999); *Corcoran v. Shoney's Colonial Inc.*, 24 F. Supp. 2d 601 (W.D. Va. 1998).

TABLE 2:
SUMMARY OF STANDARD VARIABLES

Variable	Mean	SD
<i>Dependent</i>		
SATISFY_1	.59	.50
SATISFY_2	.58	.50
HOLDING	.53	.50
<i>Employer</i>		
POLICY	.92	.28
DISM_POL	.69	.46
ALT_CHAN	.43	.50
GOOD_POL	.36	.48
GOOD_RSP	.44	.50
OTH_EFOR	.26	.44
OTH_DFCT	.11	.32
<i>Employee</i>		
EE_FAIL	.41	.50
TIME_RPT	.15	.36
NATR_RPT	.41	.50

Note: Dataset includes 72 cases.

C. Methodology

Our study uses qualitative and quantitative methodologies. The qualitative component involves content analysis of the entire set of judicial opinions. We are thus informed not only by the judicial outcome, but also by the rich information contained in the judicial opinions themselves. The judicial opinions provide invaluable clues about the courts' struggle with implementing the newly articulated affirmative defense, particularly about the difficulty in applying the reasonableness standard. This qualitative aspect supplements and, indeed, complements our quantitative component.⁷⁵

The quantitative component of our study uses both descriptive and inferential statistical techniques. Not only do we believe that multiple methodologies deepen our understanding, but our sample size (N=72) guides our decision to use multiple methodologies. Our sample size is at once large enough to permit cautious use of multivariate techniques, such as multiple regression, yet small enough to permit content analysis of the entire dataset.⁷⁶ By analyzing our data using

75. For more on the benefits of using multiple methodologies in studying legal opinions, see Sisk, Heise & Morriss, *supra* note 64, at 1410-12.

76. For a discussion of sample size in logit models, see Alfred DeMaris, *Logit Modeling: Practical Applications* 41 (1992).

both types of methodologies, we feel more confident with our understanding of the overall picture that emerges.

D. Model

We model whether employers successfully satisfy both prongs of the affirmative defense, as well as the overall judicial holding, as a function of six employer and employee variables. Because we analyze the influence of numerous variables, a multiple regression model was necessary. Multiple regression analyses permit examination of the relation between independent variables and a dependant variable (here, case outcomes relating to the holding and prongs one and two of the affirmative defense) while controlling for all six independent variables entered into the equation. Consequently, we can look to see what independent influence, if any, is exerted by the employer and employee variable clusters on the courts' analyses. Within the array of appropriate regression models, we settled on logistic regression principally because the dependant variables examined are dichotomous.⁷⁷

The nature of the employer's workplace harassment policy, the employer's response to the incident, and other related defects make up the employer variable cluster. Whether the employee reported the alleged harassment, and such a report's timeliness and completeness, constitute the employee variable cluster.

Along with our statistical model, we generated a standard set of independent variables. In addition to the issues previously discussed, multicollinearity issues informed the composition of our standard

77. Our selection of logistic regression warrants some discussion. Our decision flows principally from the dichotomous nature of all three dependent variables—SATISF_A, SATISF_B, and HOLDING—considered in our analyses. As dichotomous variables, they are coded “1” if the relevant condition is present and “0” if not. As a result, the usual linear regression models, such as Ordinary Least Squares (“OLS”), are not appropriate. OLS models, for example, allow the predicted values to fall outside the 0 to 1 range of our dependent variables. Moreover, OLS is relatively less efficient because the error cannot be normally distributed and it cannot have constant variance. For a fuller discussion of these points, see Finkelstein & Levin, *supra* note 64, at 447-52; and John Fox, *Applied Regression Analysis, Linear Models, and Related Methods* 442 (1997).

In logistic regression, the dependent variable is the natural log of the odds ratio of the probability that an event occurs to the probability that it does not occur [$L = \log[p/(1-p)]$]. For more on logistic regression models, see generally John H. Aldrich & Forrest D. Nelson, *Linear Probability, Logit, and Probit Modeling: Practical Applications* (1984) (deriving equations for logit and probit models); Alfred DeMaris, *Logit Modeling: Practical Applications* (1992) (describing use and application of logit models); and Eric A. Hanushek & John E. Jackson, *Statistical Methods for Social Scientists* 179-216 (1977) (explaining discrete variable problems and deriving logit and probit models).

Thus, with logistic regression models, we can assess the independent influence—if any—exerted by our two clusters of six independent variables on each of the three dependent dummy variables.

variable set. We could not, of course, include in a single regression equation independent variables that were highly collinear. Where two (or more) independent variables in a regression equation are highly collinear, the resulting regression coefficients remain unbiased but become increasingly inefficient.⁷⁸ We adopted a conservative approach to this problem.⁷⁹ Notably, for each dependent variable we run three separate versions, each with one variable from the employee cluster. Multicollinearity concerns also led us to exclude a single variable, OTH_EFOR, from our standard model.

IV. RESULTS

A. *First Prong*

To satisfy the first prong of the affirmative defense, an employer must establish that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.⁸⁰ As we previously discussed, what constitutes “reasonable care” is far from clear. We hypothesize that whether employers meet the first prong of the affirmative defense is largely a function of the employer’s conduct rather than that of the employee. An employer’s conduct involves two general factors: one relating to the employer’s policy, and the other to the employer’s response to the sexual harassment allegation.

Results for SATISFY_1,⁸¹ presented in Table 3A, offer general support for our hypothesis. That is, the only variable that achieves statistical significance is GOOD_POL.⁸² All employer-related coefficients point in the expected direction. For example, the positive coefficients for GOOD_POL indicate that employers that benefited

78. For a fuller explanation, see William D. Berry and Stanley Feldman, *Multiple Regression in Practice* 44-45 (1985).

79. No firm rule exists within the literature for guarding against multicollinearity. See, e.g., George W. Bohrnstedt & David Knoke, *Statistics for Social Data Analysis* 407 (2d ed. 1988) (suggesting exclusion of variables where coefficients exceed .5); Finkelstein & Levin, *supra* note 64, at 532 (“A simple (but not foolproof) test for multicollinearity involves looking for high correlations (e.g., in excess of .9) in pairs of variables”); Michael Lewis-Beck, *Applied Regression: An Introduction* 60 (1980) (“For diagnosis, we must look directly at the intercorrelation of the independent variables. A frequent practice is to examine the bivariate correlations among the independent variables, looking for coefficients of about .8, or larger.”). We adopted a two-fold approach to guard against multicollinearity. First, we generated a bivariate correlation matrix for all independent variables included in our model. In every instance, we adopted the more conservative approach. Thus, where two independent variables’ coefficients exceeded .5, we excluded one of the related variables from our model.

80. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

81. The N for SATISFY_1, fifty, is one less than the total number of cases in our dataset. In one case a court reached its conclusion without expressly addressing whether the employer satisfied the first prong of the affirmative defense.

82. This is true for analyses on two of the three dependant variables.

from a good policy were more likely to satisfy prong one. Conversely, the negative coefficients for OTH_DFCT suggest that employers that were defective in some manner that bore on a sexual harassment allegation were less likely to satisfy prong one.

Results for the employee-related independent variable sharply contrast, thereby providing further support for the argument that, in construing the first prong of the affirmative defense, courts are most concerned with employer, rather than employee, conduct. All three employee-cluster coefficients point in the expected direction—negative. Notably, not one employee-related variable correlates at a statistically significant level with SATISFY_1. Although exceptionally little—if anything—properly can be inferred from the absence of statistical significance, the juxtaposition of the results for the employer and employee clusters of independent variables supports the general point that whether an employer successfully satisfies the first prong of the affirmative defense is largely dependent on the employer's conduct, not the employee's.

TABLE 3A
PROBABILITY OF SATISFYING PRONG ONE
(Satisfying Prong One=1)

	(A)	(B)	(C)
<i>Employer</i>			
GOOD_POL	3.60** (1.20)	3.33** (1.20)	11.83 (75.41)
	12.42 (63.88)	18.98 (81.04)	32.26 (165.76)
GOOD_RESP			
OTH_DFCT	-24.11 (135.07)	-30.78 (150.55)	-33.55 (238.73)
<i>Employee</i>			
EE_FAIL	-.04 (.09)	---	---
TIME_RPT	---	-8.23 (57.20)	---
NATR_RPT	---	---	-20.08 (131.44)
Constant	-1.49** (.56)	-1.25* (.57)	-1.10 (.58)
% predicted	92.96	92.65	94.12
McFadden's psuedo R2	.72	.72	.80
(N)	71	68	68

* p < .05; ** p < .01.

B. *Second Prong*

To satisfy the second prong of the affirmative defense, an employer must demonstrate that the employee unreasonably failed to avail himself or herself of any preventive or corrective opportunities provided by the employer to avoid harm.⁸³ In contrast to the first prong, judicial determinations about what constitutes “reasonableness” within the context of the second prong should involve employee-related factors. That is, an employee’s conduct should influence a court’s analysis of whether an employee acted reasonably in this aspect of the affirmative defense.

However, we also predict that employer-related variables will remain relevant and correlative with the dependant variable. One explanation for our counter-intuitive hypothesis pivots on the placement of the affirmative defense’s burden on the employer, as well as the standard of review for summary judgment motions. Where employers assert an affirmative defense and seek a favorable summary judgment, courts appear to allow employers either to make or break their own cases. Another explanation is that courts might conflate employer and employee conduct in their analyses of whether employees acted reasonably. Specifically, employer conduct might partly inform courts’ characterizations of whether an employee acted unreasonably. That is to say, whether an employer consistently had failed to address past harassment might, for example, influence how courts characterize an employee’s incomplete report. If so, the confusion flowing from such a conflation of employer and employee conduct would manifest itself in the courts’ treatment of the second prong.

Results for SATISFY_2,⁸⁴ presented in Table 3B, provide support for the first part of our two-part hypothesis on employee-related variables, but not for the second. In contrast to our prediction, we find that employee-related variables do not influence judicial determinations of whether complaining employees acted reasonably. Indeed, although all the employee variables point in the expected direction—negative—none achieves statistical significance. So, if courts do not look to employee activity when construing whether a complaining employee acted reasonably, to what *do* they look?

As we predicted in the second part of our hypothesis, certain employer-related behaviors emerge as significant. Indeed, the persistent significance of employer-related variables underscores the courts’ orientation around employer actions, even when construing employee reasonableness. Thus, an *employer’s* good policy and, in

83. See *Ellerth*, 524 U.S. at 765.

84. The N for SATISFY_2, forty-five, is less than that of the other two dependent variables considered in this study. In six cases, the courts’ opinions simply do not address whether the employer satisfied the affirmative defense’s second prong.

two of three runs, good response to workplace sexual harassment issues appear to influence a court's determination about whether an *employee* acted reasonably, at least within the context of the affirmative defense. Such factors as whether an employer has a good sexual harassment policy and responds well to an allegation may prove sufficient to satisfy prongs one *and* two, independent of what an employee may or may not do.

The fact that employee-related conduct does not prevent employers from prevailing does not mean that employee conduct has no effect on the outcome of cases. While there is no employee action that significantly affects an employee's ability to prevent summary judgment, employees can almost guarantee a victory for the employer if they fail to report. Employees failed to report harassment in twenty-eight of the seventy-two cases studied. In twenty of those cases the employer prevailed. This is not a striking number on its face. Additional analysis, however, reveals a very telling result. In the eight cases in which courts denied summary judgment despite the fact that the employee failed to report, the employer did not satisfy the first prong of the two-step test.⁸⁵ Alternatively, courts granted an employer's motion for summary judgment in each of the twenty cases in which employers satisfied the first prong and the employee failed to report. Accordingly, in the first seventy-two reported cases, employees who failed to report were deemed to have acted unreasonably, and could not avoid summary judgment as long as their employers satisfied the first prong.

85. See *Sims v. Health Midwest Physician Servs. Corp.*, 196 F.3d 915 (8th Cir. 1999); *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587 (D.S.C. 1999); *Meng v. Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999); *Early v. Morris Newspaper Corp.*, 54 F. Supp. 2d 1261 (M.D. Ala. 1999); *Matute v. Hyatt Corp.*, No. 98 CIV 1712, 1999 U.S. Dist. LEXIS 2873 (S.D.N.Y. Mar. 11, 1999); *Vandermeer v. Douglas County*, 15 F. Supp. 2d 970 (D. Nev. 1998); *Alverio v. Sam's Warehouse Club*, 9 F. Supp. 2d 955 (N.D. Ill. 1998); *Dull v. St. Luke's Hospital of Duluth*, 21 F. Supp. 2d 1022 (D. Minn. 1998).

TABLE 3B
 PROBABILITY OF SATISFYING PRONG TWO
 (Satisfying Prong Two=1)

	(A)	(B)	(C)
<i>Employer</i>			
GOOD_POL	2.97** (.92)	2.77** (.98)	2.97** (.97)
	2.75**	11.06	3.87**
GOOD_RESP	(.83)	(41.46)	(1.24)
OTH_DFCT	-9.02 (45.20)	-19.06 (112.16)	-8.48 (46.04)
<i>Employee</i>			
EE_FAIL	-.02 (.06)	---	---
TIME_RPT	---	-11.84 (41.48)	---
NATR_RPT	---	---	-2.30 (1.21)
Constant	-1.53** (.56)	-1.29* (.58)	-1.11 (.58)
% predicted	89.06	90.48	90.48
McFadden's psuedo R2	.49	.65	.54
(N)	64	63	63

* p <.05; ** p <.01.

C. *Holding*

Employers that satisfied the requirements of both prongs of the affirmative defense and established that they were entitled to judgment as a matter of law succeeded in their summary judgment motions. As such, what we expect to find for HOLDING builds on what we found for SATISFY_1 and SATISFY_2. Tables 3A and 3B illustrate the importance of employer conduct and the comparative lack of importance of employee conduct. Because the satisfaction of prongs one and two drives a court's conclusion about whether an employer's motion for summary judgment should succeed, then logically it should follow that only employer-related variables should correlate with HOLDING.

The results for HOLDING, presented in Table 3C, confirm our expectation. Similar to our results for prong two, none of the employee-related variables achieve statistical significance. The same two employer-related variables—GOOD_POL and GOOD_RESP—

emerge as important. Also similar to the earlier tables, all coefficients in Table 3C point in the expected directions.

TABLE 3C
PROBABILITY OF AFFIRMING SUMMARY JUDGMENT HOLDING
(Affirming Summary Judgment=1)

	(A)	(B)	(C)
<i>Employer</i>			
GOOD_POL	3.04** (.92)	2.71** (.95)	3.03** (.97)
GOOD_RESP	2.93** (.82)	11.10 (40.08)	4.06** (1.25)
OTH_DFCT	-11.13 (28.76)	-21.23 (88.06)	-10.60 (30.74)
<i>Employee</i>			
EE_FAIL	-.03 (.06)	---	---
TIME_RPT	---	-10.65 (40.09)	---
NATR_RPT	---	---	-2.15 (1.21)
Constant	-1.62** (.55)	-1.37* (.56)	-1.26* (.57)
% predicted	90.28	89.86	91.30
McFadden's psuedo R2	.54	.64	.57
(N)	72	69	69

*p <.05; ** p <.01.

V. CONTENT ANALYSIS: WHAT THE LAW IS AND WHAT IT SHOULD BE

Results from the quantitative analyses of summary judgment motions yield several surprises. First, in contrast to numerous commentators' predictions,⁸⁶ employers won in a majority of the cases. The source of both the inaccurate predictions and the unanticipated results revolves around three different hypotheses that commentators

86. See George, *supra* note 4, at 17-18 (predicting difficulty for employers that attempt to establish the affirmative defense when plaintiffs can posit facts alleging fear of retaliation as an underlying justification for failing to promptly report the harassing behavior); Jonathan W. Dion, Note, *Putting Employers on the Defense: The Supreme Court Develops a Consistent Standard Regarding an Employer's Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 34 Wake Forest L. Rev. 199, 221-22 (1999).

believed would prevent courts from finding, as a matter of law, in favor of employers. These hypotheses are: (1) "reasonable care" requires more than maintenance and enforcement of a policy against sexual harassment, and courts will let juries determine if employers meet the standard; (2) the question of whether employees acted unreasonably because they failed to report alleged harassment will be sent to juries; and (3) employees who report harassment can never be considered unreasonable as a matter of law, and thus when plaintiff-employees do report the alleged harassment, employers cannot prevail.⁸⁷

In fact, our analyses reveal that courts are prepared to conclude that a good policy constitutes "reasonable care," and that employers can prevail regardless of whether plaintiffs reported harassment.⁸⁸ Our next step is to assess whether our empirical findings comport with results from our qualitative content analysis of the published judicial opinions.

A. *What Is Reasonable Care?*

Prior to *Ellerth* and *Faragher*, courts generally did not impose vicarious liability on employers that did not know or could not have known that a supervisor created a hostile environment. That is, courts generally imposed a negligence standard upon employers.⁸⁹ To meet the "reasonable care" requirement, employers typically distributed written harassment policies and were confident that this immunized them from liability unless the employee reported the harassment and the employer subsequently failed to address the conduct. Following the *Ellerth* and *Faragher* decisions, however, a quick consensus emerged among employers, their consultants, and attorneys that the earlier "reasonableness" requirement had changed, and that the mere creation and dissemination of policies would not suffice.⁹⁰ One perception was that employers would need to police the work environment more thoroughly by providing training and ongoing sensitivity workshops.⁹¹ However, our analyses of the post-*Ellerth* and *Faragher* cases do not support the argument that the duty owed by the employer had changed in any material manner.

87. See *Ellerth*, 524 U.S. at 773 (Thomas, J., dissenting); see also Bencivenga, *supra* note 56.

88. See *infra* notes 134-35, 146, 148 and accompanying text.

89. See, e.g., *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987).

90. Numerous management-side law firms and human resource consulting firms began aggressively marketing sexual harassment training. See also *supra* note 4.

91. Numerous law firms specialize in providing employers with this type of training.

As explained previously, the overwhelming majority of cases holds that an employer exercises reasonable care when it has a policy that is disseminated to all employees, and it provides employees with an opportunity to report the harassment to someone other than a harassing supervisor.⁹² In fact, we found only one case holding that “reasonable care” requires more than such a policy.⁹³ Thus, at this time, the law is relatively clear: a so-called “good policy” constitutes “reasonable care.”

B. *Employees Who Do Not Report*

Many of the commentators who addressed the impact of employees' failure to report argued that employers would not prevail on the affirmative defense in such situations because courts would allow juries to determine whether it is reasonable for employees to fail to report sexual harassment.⁹⁴ Michael Harper sets forth a rationale to support this prediction in *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*.⁹⁵ Harper argues that employees who fail to report harassment should be deemed “unreasonable” only if their employers prove that they provided adequate assurances against retaliation.⁹⁶ Absent such proof, Harper contends, employers should not be able to prevail on the affirmative defense even when their employees fail to report.⁹⁷

In contrast to the predictions and the policy arguments, courts found employees to be unreasonable in any instance where the employer satisfied the first prong and the employees failed to report harassment.⁹⁸ Based on this fact, it seems that failure to report is tantamount to per se “unreasonable” behavior. There is some legal support for such an inference. For example, the court in *Kohler v. Inter-Tel Technologies*⁹⁹ held that an employee who failed to report had acted unreasonably, but did not explain why this was so.¹⁰⁰ Contrary legal authority exists also, however. Other decisions finding a failure to report to be unreasonable support the proposition that facts could arise which would send such a question to a jury.

92. See *supra* text accompanying notes 84-85.

93. *Lancaster v. Sheffler Enters.*, 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998).

94. See, e.g., *Lawton*, *supra* note 55; *Scheindlin & Eloffson*, *supra* note 57.

95. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 San Diego L. Rev. 41 (1999).

96. *Id.* at 77-78.

97. *Id.* at 48. It should be noted that Harper does not predict what courts *would* do. Instead, Harper focuses on what courts *should* do. This distinction is important because Harper never predicts that courts will, in fact, follow his prescriptions.

98. That is, in twenty cases out of twenty.

99. No. C98-0378 MJJ, 1999 U.S. Dist. LEXIS 5425 (N.D. Cal. Apr. 13, 1999).

100. The court explained that “plaintiff acted unreasonably by never reporting any harassment and choosing not to cooperate in Inter-Tel’s investigation.” *Id.* at *15.

In *Shaw v. AutoZone, Inc.*,¹⁰¹ the plaintiff argued that she did not complain about being harassed because “she didn’t feel comfortable enough with anyone at AutoZone to speak with them about the . . . conduct.”¹⁰² In finding such fear to be unreasonable the court stated: “we conclude that an employee’s subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee’s duty under *Ellerth* to alert the employer to the allegedly hostile environment.”¹⁰³ One can infer from the court’s holding that if subjective evidence is insufficient to justify a failure to report, then objective evidence would, in fact, create a jury question.

Such an inference is made stronger by the *Kibby v. Chief Auto Parts Inc.* decision.¹⁰⁴ The court in *Kibby* found the employees’ actions to be unreasonable because the plaintiffs failed to “[identify] any material fact issue regarding their failure to use the process set up by Chief to protect them from sexual harassment or to show lack of reasonable care.”¹⁰⁵ Again, this case implies that certain material facts could potentially justify a plaintiff’s failure to report. This is important because it is likely that plaintiffs’ lawyers, relying on the early predictions spurred by the *Faragher* and *Ellerth* decisions, as well as on the general rule that questions of reasonableness go to juries, did not create a record of the type of factual disputes that would satisfy the courts. Now, plaintiffs’ lawyers will know that in order to reach a jury, a plaintiff must provide objective evidence to prove that he or she was reasonable in not reporting. This conclusion is further supported by the court in *Vandermeer v. Douglas County*,¹⁰⁶ which stated that:

[D]efendants will have to show that the plaintiffs *unreasonably* failed to report [the harasser’s] behavior pursuant to the sexual harassment policy, and not merely that they failed to report it. . . . Since the plaintiffs have argued that they had legitimate reasons for not reporting [the harasser’s] behavior . . . it will be up to the trier of fact to determine whether or not the plaintiffs did act reasonably.¹⁰⁷

101. 180 F.3d 806 (7th Cir. 1999).

102. *Id.* at 813.

103. *Id.*

104. No. 3:97-CV-2180-D, 1999 U.S. Dist. LEXIS 2894 (N.D. Tex. Mar. 3, 1999).

105. *Id.* at *20.

106. 15 F. Supp. 2d 970, 981 (D. Nev. 1998).

107. *Id.* In addition to holding that the reasonableness of the employee was a jury question, the court also denied the employer’s motion for summary judgment because: (1) the employee claimed that the employer knew of the harassment so there was no need to report; and (2) the employer failed to satisfy the first element of the defense by proving that it had exercised reasonable care to prevent and correct harassment. *Id.*

C. *Employees Who Do Report*

It is clear—and arguably understandable—that a plaintiff-employee’s failure to report alleged harassment may have extremely adverse repercussions for the plaintiff’s case. The result when a plaintiff-employee does lodge an appropriate complaint is less clear. Justice Thomas argued in his *Ellerth* dissent that an employer cannot possibly prevail on a summary judgment motion in a case in which the employee reported the alleged harassment.¹⁰⁸ Thomas predicates this argument on the theory that, as a matter of law, an employee cannot unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer when that employee did in fact make the employer aware of the alleged harassment.¹⁰⁹

Some courts have agreed with Justice Thomas by mechanically applying the defense. These courts deny summary judgment to defendant-employers even when the employers did all that they could have done to prevent and correct harassment. For example, in *Moore v. Sam’s Club*,¹¹⁰ the plaintiff alleged that the co-manager of the store harassed and then raped her.¹¹¹ The conduct occurred either in late March or early April.¹¹² The plaintiff complained on April 25.¹¹³ On May 1, the employer asked the plaintiff to provide a detailed statement.¹¹⁴ The company then investigated and suspended the harasser on May 3.¹¹⁵ The suspension ended on June 15, and the company then demoted and transferred the harasser.¹¹⁶ The plaintiff then requested a transfer from New York to Florida, and the company consented.¹¹⁷ The plaintiff moved to Florida but did not report to work, choosing instead to sue.¹¹⁸

In addressing the summary judgment motion, the court first held that Sam’s Club had exercised reasonable care both in formulating its policy and in responding to the complaint.¹¹⁹ The court then held, however, that Sam’s Club could not prevail on the second prong of the defense because the plaintiff took full advantage of the preventative measures provided, and therefore had not acted unreasonably.¹²⁰

108. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting).

109. *Id.*

110. 55 F. Supp. 2d 177 (1999).

111. *Id.* at 180-85.

112. *Id.*

113. *Id.* at 179.

114. *Id.* at 180.

115. *Id.* at 182.

116. *Id.* at 192.

117. *Id.*

118. *Id.*

119. *Id.* at 191.

120. The court noted that the second prong of the *Ellerth/Faragher* defense “does not apply here.” *Id.* at 192. The court also noted that “[i]t is thus unclear how the [*Ellerth*]/*Faragher* defense, on its own terms, would apply here” because the factual

Thus, Sam's Club did everything it could have, but lost because the plaintiff also had acted appropriately.¹²¹

To some, perhaps, this case's outcome is just. The employee suffered a horrible experience, and the company compensated her for it. It is problematic, however, when a court bases an employer's liability on the employee's actions, and not on the actions of the company. This problem can lead to inconsistent and sometimes inexplicable results that create an incentive for employers to refrain from doing all they can to prevent and correct harassment. A hypothetical scenario illustrates this problem.

Assume that there are two chain restaurants located across the street from each other, Company A and Company B. Both companies have well-drafted policies against sexual harassment. Both restaurants distribute the policies to all employees, and both require that all employees sign forms that acknowledge their receipt and comprehension of the policies' contents. In addition, Company B has a "1-800" number for employees to report harassment twenty-four hours-a-day. Company A has no such hotline. The night-managers of the stores are best friends who share the odious belief that one of their jobs' "benefits" includes the license to sexually harass their respective employees. Despite corporate policy strictly and clearly prohibiting such behavior, each manager sexually harasses one employee for one month. Both employees are equally upset by the harassment, but fear reporting it. The employee from Company A sees no way to address the problem, so she quits. The employee from Company B also contemplates quitting. She then realizes, however, that there is another option: Company B employee calls the "1-800" number and files a complaint. The company representative who receives the call promises to investigate. Company B conducts a thorough investigation and fires the manager. Two months later, the Company B employee quits. The two employees each subsequently file lawsuits. Under the vast majority of lower courts' interpretation of *Ellerth* and *Faragher*, Company A would be able to satisfy the new affirmative defense because the employee *never complained*. It would escape liability entirely. Under the *Moore* court's interpretation, however, Company B would be liable.¹²²

One conclusion from this scenario is clear: employers should exercise reasonable care by instituting a policy, and then hope that no

scenario of those cases are distinct from those in *Moore. Id.* at 193.

121. The Court may have been penalizing Sam's Club because of the relatively minor punishment that the company meted out on a supervisor who raped an employee. If so, the case is even more problematic because other courts could follow the stated rationale—that employers cannot prevail when the employee reports—even when the employer provided the utmost care and gave out appropriate discipline.

122. The employer would not be able to assert the affirmative defense, and would therefore be liable, because there would be clear evidence of sexual harassment.

one uses it. Moreover, employers attempting to limit their liability should exercise reasonable care, but not *too much* care because employers can be punished when employees feel comfortable enough to use the procedures.¹²³ Thus, employers should not provide “1-800” numbers to give their employees an impersonal, twenty-four hours-a-day avenue for reporting supervisor misconduct because such employers are worse off than those who provide a more restrictive—yet reasonable—means for reporting harassment. Under this interpretation of the law, extra effort by the employers to prevent harassment (such as elaborate and expensive so-called “sexual-harassment training” for employees) might work against companies under the affirmative defense because employees at those companies may have a greater propensity to report, which will preclude the employer from satisfying the defense. Unfortunately, a standard that provides an incentive for employers to devise a subtle system that satisfies the courts but discourages complaints, does not, we believe, effectively lead to the ultimate goal of eliminating sexual harassment in the workplace.

Most courts that have interpreted the affirmative defense have refused to hold employers who responded properly to complaints of sexual harassment liable for the actions of their supervisors. Instead, most courts wish to reward employers for doing what they should to prevent and correct harassment, and do not want their holdings to be based solely on whether the employer fortuitously employed someone who failed to act reasonably by not reporting. Thus, judges are drafting result-oriented opinions in which they must comport their conclusions, which are based exclusively on the employer’s actions (i.e., prevention and response to harassment), with the language of *Ellerth* and *Faragher*. The majority of courts does just that, and justifies this seemingly anomalous result in one of two ways.

First, several courts created what arguably amounts to new legislation. In *Indest v. Freeman Decorating, Inc.*,¹²⁴ the Fifth Circuit distinguished *Ellerth* and *Faragher* from cases in which an employee

123. One’s judgment of this result depends on his or her perspective as to what constitutes the best outcome of a sexual harassment case. If one believes that the best result is that a plaintiff who is harassed receives compensation, then *Moore*’s result is appealing. Reporting harassment is simply a procedural hoop (like filing with the EEOC) that guarantees a damage award for those who have been subjected to such treatment.

Alternatively, if one believes that the best result is to eliminate the harassment, to punish the harasser, and to let the plaintiff keep her job and receive damages *only if* the company fails to properly respond, then *Moore*’s result is problematic. If the plaintiff in *Moore* had not reported the harassment, Wal-Mart would not have known of the harassment, the harasser would not have been demoted, the plaintiff most probably would not have been granted a transfer to the store of her choice, and Wal-Mart would not have been found liable. Thus, not reporting, which is the only way for employers to prevail, results in three objectively undesirable outcomes.

124. 164 F.3d 258 (5th Cir. 1999).

utilized an employer's policies and procedures, and held that the affirmative defense created by the Supreme Court does not apply in such situations.¹²⁵ The court then created what essentially amounts to a new defense for employers: employers who swiftly respond to complaints of sexual harassment are not liable for the actions of their supervisors.¹²⁶ Applying this standard, the court held:

[B]ecause she promptly complained of Arnaudet's harassing conduct, and because the company promptly responded, disciplined Arnaudet appropriately and stopped the harassment, the district court properly granted judgment as a matter of law to Freeman. Even if a hostile work environment claim had been stated, which is dubious, Freeman's prompt remedial response relieves it of Title VII vicarious liability.¹²⁷

Despite what seems to be a rejection of *Ellerth* and *Faragher*, the *Indest* court stated that it relied on the principles of these two cases along with *Meritor*¹²⁸ to formulate its holding.¹²⁹ The court explained that when a plaintiff promptly complains, both the employee and the employer could thwart harassment before it becomes actionable.¹³⁰ This result, according to the court, effectuates the purposes of Title VII because the employee receives the benefit of having the harassment stopped, and the employer is rewarded for its swift response.¹³¹ Moreover, this standard comports with *Meritor*, which held that an employer is not liable automatically for the actions of its supervisors.¹³²

Indest supports what could be seen as a departure from *Ellerth* and *Faragher* by arguing that a prompt report and timely response will prevent the conduct from being severe or pervasive enough to be actionable. This may be true, but it does not reflect the facts of this case because the *Indest* court did not hold that the conduct was not severe or pervasive. Instead, the court noted that it need not address that issue because the company promptly responded to the harassment complaint, and thus satisfied the affirmative defense.¹³³ Hence, in the Fifth Circuit, an employer who exercises reasonable care in responding to a complaint of sexual harassment will be able to

125. *Id.* at 265 (noting that "*Ellerth* and *Faragher* do not, however, directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to Freeman's policy and grievance procedure against sexual harassment, and the employer took prompt remedial action").

126. *Id.* at 266.

127. *Id.* at 267.

128. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

129. *Indest*, 164 F.3d at 266.

130. *Id.*

131. *Id.*

132. *Meritor*, 477 U.S. at 72.

133. *Indest*, 164 F.3d at 267.

prevail on the affirmative defense and avoid liability even if the conduct was severe or pervasive.

Indest was not the only case in our sample to depart somewhat from the affirmative defense. Like the *Indest* court, the court in *Whitaker v. Mercer County*¹³⁴ was faced with a situation in which the employee reported the harassment, and the employer responded appropriately. As the court noted, there was “no dispute that [defendant] afforded the plaintiff a complaint procedure through which to report [the supervisor’s] assault, nor is there any dispute that the plaintiff availed herself of that procedure.”¹³⁵ Instead of following *Indest* and expressly stating that the affirmative defense does not apply in such situations, the court simply ignored the defense and focused on a seemingly ancillary issue. According to the court, the sole issue in that case was “whether the County Defendants had any prior knowledge of [the supervisor’s] proclivity to commit the sexual assault, and if so, whether they took reasonable steps to protect the plaintiff from him.”¹³⁶ The court then granted the defendant’s motion based on satisfaction of these criteria.¹³⁷

Evidently, the courts in *Indest* and *Whitaker* were loath to rule against “good actor” employers, so they distinguished the cases from *Ellerth* and *Faragher*. Like *Indest* and *Whitaker*, other courts have delivered result-oriented opinions. In fact, at least one court may have followed the *Indest* standard. In *Hammonds v. Fitzgerald’s Mississippi, Inc.*,¹³⁸ the plaintiff alleged that she was subject to unwanted sexual advances by her supervisor, but failed to report or use any of the remedies provided by the defendant’s sexual harassment policy.¹³⁹ Nine months later, according to the plaintiff, the same supervisor raped her.¹⁴⁰ She filed a report with the Human Resources Department three weeks after the incident.¹⁴¹ After the plaintiff reported the rape, the defendant thoroughly investigated the incident, and the harasser resigned under threat of termination.¹⁴² In granting the defendant’s summary judgment motion, the court referenced two different rationales that could form the basis for the holding: (1) the employer’s response and (2) the fact that the employee did not report the conduct that preceded the rape.¹⁴³ The court did not, however, state which rationale was dispositive. If it relied on the employer’s response, then the court applied the rationale

134. 65 F. Supp. 2d 230 (D.N.J. 1999).

135. *Id.*

136. *Id.*

137. *Id.* at 246-47.

138. No. 2:98CV204-B, 1999 U.S. Dist. LEXIS 19548 (N.D. Miss. Dec. 8, 1999).

139. *Id.* at *8-9.

140. *Id.* at *3.

141. *Id.* at *4.

142. *Id.* at *10.

143. *See id.*

set forth in *Indest*. While this may be problematic to some, it is not nearly as objectionable as relying on the employee's "late" or defective report. Unfortunately, most courts presiding over cases in which the employee reported harassment and the employer responded properly have granted the employer's motion for summary judgment by evaluating the plaintiff's report and concluding it to be untimely or otherwise defective.¹⁴⁴

In twelve cases from our sample, courts found plaintiffs to have acted unreasonably because they delayed reporting the harassment.¹⁴⁵ In some cases, there was a delay of one year or more between the first harassing action and the report.¹⁴⁶ In other cases, however, the delay was a matter of months or even weeks. For example, in *Nuris Guerra v. Editorial Televisa-USA, Inc.*,¹⁴⁷ the plaintiff, who began working on May 28, 1996, was harassed every day from her first week of work until she complained on June 20, 1996.¹⁴⁸ In dismissing the case, the court held that the delay, combined with the employer's prompt and proper response, satisfied the second prong of the defense.¹⁴⁹ Similarly, in *Mirakhorli v. DFW Management Co.*,¹⁵⁰ it was unclear if the harassment began either two or eight months before the plaintiff complained.¹⁵¹ The court was unconcerned with the discrepancy because it found a delay of either two or eight months to be unreasonable as a matter of law.¹⁵² Finally, in *Dedner v. Oklahoma*,¹⁵³ the plaintiff waited three months to report the harassment because she did not think the employer's procedures would be effective and

144. Reports are defective because they are either untimely or reported to the wrong party. A defective report, according to numerous courts, indicates an unreasonable employee response. *See infra* notes 145, 146, and 149.

145. It must be noted that in each of these cases the employer responded with reasonable care according to the court. *See* *Montero v. Agco Corp.*, 192 F.3d 856, 863 (9th Cir. 1999); *Wright v. Anixter, Inc.*, No. 98-17164, 1999 U.S. App. LEXIS 19962, at *6 (9th Cir. Aug. 12, 1999); *Desmarteau v. Wichita*, 64 F. Supp. 2d 1067, 1079-80 (D. Kan. 1999); *Mandy v. Quad/Graphics, Inc.*, 49 F. Supp. 2d 1095, 1111 (E.D. Wis. 1999); *Guerra v. Editorial Televisa-USA, Inc.*, No. 97-3670-CIV-UNGARO-BENAGES, 1999 U.S. Dist. LEXIS 10082, at *32-33, *38 (S.D. Fla. June 2, 1999); *Mirakhorli v. DFW Mgmt. Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344, at *24 n.16, *25 (N.D. Tex. May 24, 1999); *EEOC v. Barton Protective Servs., Inc.*, 47 F. Supp. 2d 57, 61 (D.D.C. 1999); *Hetreed v. Allstate Ins. Co.*, No. 96 C 2021, 1999 U.S. Dist. LEXIS 7219, at *16-18 (N.D. Ill. May 11, 1999); *Dedner v. Oklahoma*, 42 F. Supp. 2d 1254, 1259-60 (E.D. Okla. 1999); *Madray v. Publix Super Markets, Inc.*, 30 F. Supp. 2d 1371, 1375 (S.D. Fla. 1998); *Montero v. Agco Corp.*, 19 F. Supp. 2d 1143, 1146 (E.D. Cal. 1998); *Marsicano v. Soc'y of Safety Eng'rs*, No. 97C 7819, 1998 U.S. Dist. LEXIS 14314, at *21-23 (N.D. Ill. Sept. 3, 1998).

146. *See, e.g., Hetreed*, 1999 U.S. Dist. LEXIS 7219, at *3.

147. No. 97-3670-CIV-UNGARO-BENAGES, 1999 U.S. Dist. LEXIS 10082 (S.D. Fla. June 2, 1999).

148. *Id.* at *5-6, *12.

149. *Id.* at *32-38.

150. No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344 (N.D. Tex. May 24, 1999).

151. *Id.* at *24 n.16.

152. *Id.*

153. 42 F. Supp. 2d 1254 (E.D. Okla. 1999).

because she thought the supervisor would stop the harassing behavior.¹⁵⁴ Again, the court found the delay unreasonable and granted summary judgment.¹⁵⁵

Delay is not the only rationale that courts use for finding that employees who reported harassment nonetheless acted unreasonably. Several decisions hold that reporting to the wrong party constitutes an unreasonable failure to take advantage of the employer's policies and procedures. In *DeCesare v. National Railroad Passenger Corp.*,¹⁵⁶ the plaintiff complained by mentioning the sexual harassment to her union representative instead of using the company's procedures.¹⁵⁷ The court found this to be unreasonable.¹⁵⁸ In *Masson v. School Board*,¹⁵⁹ an employee filed multiple complaints to people who were not designated to hear sexual harassment complaints.¹⁶⁰ Moreover, she complained of being replaced, not sexually harassed.¹⁶¹ The court dismissed the case.¹⁶² In *Powell v. Morris*,¹⁶³ however, the court held that a jury should decide whether a report that did not follow procedures was unreasonable.¹⁶⁴

Judging the reasonableness of a complainant's actions creates numerous problems. In certain circumstances, it makes little sense to hold that an employee's waiting several months to report harassment is unreasonable. Pursuing a sexual harassment complaint can be difficult. Regardless of the company's procedures, employees may wonder if they are being overly sensitive by misinterpreting innocent banter, or if they can resolve the issue without the angst and difficulty associated with pursuing a formal complaint. As both the *Indest* court¹⁶⁵ and Professor Harper¹⁶⁶ point out, early complaints may pare

154. *Id.* at 1260.

155. *Id.* While a delay may be unreasonable as a matter of law to some courts, others have denied summary judgment motions so that a jury could decide if the plaintiffs' delays were reasonable. *See Watts v. Kroger Co.*, 170 F.3d 505, 507-08 & n.1, 510 (5th Cir. 1999) (noting that reasonableness of plaintiff's one-and-a-half month delay was a question for the jury); *Fall v. Indiana Univ. Bd. of Trs.*, 12 F. Supp. 2d 870, 884 (N.D. Ind. 1998) (noting plaintiff's three month delay).

156. No. 98-3851, U.S. Dist. LEXIS 7560 (E.D. Pa. May 24, 1999).

157. *Id.* at *3.

158. The court noted that the "[p]laintiff acknowledge[d] that defendant issued a paper to everybody regarding its sexual harassment policy," that plaintiff made no attempt to look for any personnel manual or policies regarding sexual harassment, and that she consciously opted not to look for any such policy because she preferred to go through the union. *Id.* at *19. The court held as unreasonable this "failure to take advantage of any preventive or corrective opportunities provided by the employer." *Id.* at *19-20. *But see Watts*, 170 F.3d at 510-11 (holding that the filing of a grievance was reasonable as a matter of law).

159. 36 F. Supp. 2d 1354 (S.D. Fla. 1999).

160. *Id.* at 1359.

161. *Id.*

162. *Id.* at 1359-60.

163. 37 F. Supp. 2d 1011 (S.D. Ohio 1999).

164. *See id.* at 1020.

165. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 266 (5th Cir. 1999).

the harassment before it blooms to an unlawful level; therefore such early, non-litigation activity should be encouraged. Early reporting of claims should not, however, be *required* in order to sustain a plaintiff's case through a defendant's summary judgment motion. Employees should not have to endure the stress of what results in, for all intents and purposes, a two-month statute of limitations on harassment.

Moreover, such a short time frame will stimulate negative workplace repercussions. Employers should take complaints seriously and may need time to determine all relevant facts. A short "statute of limitations" will force employees to complain of harassment before they are sure that the conduct is, or soon will be, unlawful or even inappropriate. Alternatively, what is more likely to result is that employees will not report soon enough, and lose more sexual harassment cases on summary judgment.¹⁶⁷ This will lead to more complaints that may be dismissed as harmless. Such a scenario has two negative results: first, a harassment complaint can harm an alleged harasser's career and adversely impact his or her family life; second, a proliferation of unsubstantiated harassment complaints could fuel resentment and more discrimination in the workplace.

Based on the courts' treatment of employees reporting and failing to report sexual harassment, it seems clear that the current affirmative defense does not accomplish the goals and principles set forth by *Ellerth* and *Faragher*. It makes little sense that employers whose employees fail to report are entitled to the windfall benefit of the affirmative defense, while employers who do more to encourage complaints and respond properly to such allegations are denied the defense. In addition to this anomalous result, such a policy encourages the undesirable behavior of trying to prevent employees from using reporting procedures. Equally troubling is the courts' practice of deciding against victims who delay their reports because they attempted to resolve a situation informally or because they needed time to work through such an undesirable workplace situation.

One way to encourage employers to eliminate sexual harassment is to change the nature of the affirmative defense by eliminating its second prong. The affirmative defense should focus exclusively on employer conduct. To avoid vicarious liability, employers must exercise reasonable care to prevent and to stop sexual harassment. Employers should not have to prove that the employee acted unreasonably. "Reasonable care" should consist of proscriptive measures that both prevent sexual harassment and encourage—or, at the very least, do not discourage—its reporting. In addition,

166. Harper, *supra* note 95, at 79.

167. An obvious potential domino effect is that courts might start requiring handbooks and other personnel policies on sexual harassment reporting procedures to specify that all reporting must be made within a certain number of weeks, or else employees risk losing their claims based on *Ellerth* and *Faragher*.

“reasonable care” should also be measured by how an employer reacts to complaints of sexual harassment.¹⁶⁸

On its face, our proposed standard raises several questions that warrant attention. What happens to the employee who waits three months or even three years to complain? Under current law, the employer’s liability¹⁶⁹ is based on a determination by a judge or jury as to whether such a delay is reasonable.¹⁷⁰ Alternatively, Professor Harper argues that an employer should not be liable for conduct that, if reported earlier, could have been prevented, but should be liable for that which could not have been prevented under any circumstances.¹⁷¹ We advance a different approach and contend that employers should be held liable for all harassment—whether the employee complained after three days or even three years—if the employer failed to respond to the complaint properly. Conversely, employers that properly respond to complaints should be able to avoid liability. Thus, employees would be under no undue time pressure to report harassment before they were ready, and an employer’s liability would not be determined by an employee’s decision whether to report.

Of course, our standard is far from perfect. It does, however, improve the current rule, and it does so in a manner that satisfies the broader goals expressed in the *Ellerth* and *Faragher* decisions. First, our proposed approach eliminates the problem of rewarding employers for employing individuals who are reluctant to report harassment and penalizing employers for employing individuals that report harassment promptly. This is particularly significant because there is a strong argument, based on careful review of the cases applying *Ellerth* and *Faragher*, that employers aiming to avoid liability would be best served by not offering a hotline or other similar methods of reporting harassment that are easy and anonymous.¹⁷² Along similar lines, a careful analysis of the case law reveals that employers would be well-advised not only to scrap the anonymous reporting mechanisms, but also to eliminate or discontinue so-called “sexual harassment training” programs for employees (but obviously

168. See *Indest*, 164 F.3d at 266.

169. This scenario assumes, of course, that the employer’s proscriptive measures constitute “reasonable care.”

170. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

171. Harper, *supra* note 95, at 80-81. Hypothetically, according to Professor Harper’s theory, an employee who suffers an assault and is then subjected to comments for the next three months before complaining would be able to recover for the assault, but not the comments.

172. Anecdotal evidence suggests that such hotlines connect callers to a human-resources specialist working in an office not associated with the reporting employee’s office. This alleviates the fear that rumors will circulate about the harassee’s report, and generally reduces the fear that other co-workers in the harassee’s office will know of his or her complaining. In turn, the *anonymous* nature of such hotlines makes them extremely well-received, and they are generally an excellent avenue for employees to report alleged harassment.

not for managers)¹⁷³ that go above and beyond the reasonableness necessary to win on an *Ellerth*- or *Faragher*-based motion. Moreover, the *Ellerth* and *Faragher* progeny create an incentive for employers to hire individuals who are unlikely to report harassment. In this era of advanced personality testing and increasingly easy access to personal background information, employers could invest in software programs aimed at screening out potential reporters. This is an undesirable use of resources that would be eliminated by our proposed standard.

Second, employees would not unintentionally undermine their claims when they, in good faith, delay reporting or inadvertently report to the wrong person. Instead, after employees report harassment, only two facts would matter: (1) whether the employer was notified of the alleged harassment, and, if so, (2) whether the employer took the necessary and appropriate steps to correct the behavior. Employers would not have to fear that sexual harassment reports would automatically make their companies liable, and employees would not feel pressured to report before they are ready. Simply put, there are few logical reasons for courts to have to determine what constitutes a “reasonable” delay.

There are two major problems with our proposed standard. The first concerns an aspect of its application, while the second concerns its viability. Neither problem, however, strikes us as insurmountable.

The first problem with such a standard lies in redress for victims. A proper and timely employer response would, in some instances, exonerate employers from certain forms of harassment that exposed plaintiffs to an unconscionable amount of suffering. Thus, employees raped by managers might not have a case under sexual harassment laws. However, such aggrieved employees would still be able to file a civil action for battery or emotional distress against an attacker. Moreover, as the *Indest* court noted, employers are not strictly liable for supervisors’ actions.¹⁷⁴ Under the proposed standard, employers would only be responsible if they unreasonably fail to prevent harassment. Thus, employers would have a strong incentive to do everything they could to ensure that harassment did not occur. In addition, they would no longer have the negative incentive to exercise a minimal amount of care that satisfies the judicial standard but nonetheless results in an atmosphere that ultimately discourages complaints.

The second problem involves how best to implement the standard. Of course, the Supreme Court could refine *Ellerth* and *Faragher*, or Congress could enact a statute. Until either event occurs, however, there needs to be a rational justification for lower courts to apply our

173. Training managers should have no effect on the likelihood of employees reporting, but may prevent unlawful conduct.

174. *Indest v. Freeman Decorating, Inc.*, 164 F.3d. 258, 266 (5th Cir. 1999).

proposed standard under the present law. One rationale is lodged within the cases themselves, as we believe our standard follows from a plausible reading of *Ellerth* and *Faragher*.

As the *Indest* court noted, in both *Ellerth* and *Faragher*, the employees did not report the harassment to their employers before they quit their jobs.¹⁷⁵ Moreover, neither opinion directly addresses or even alludes to the applicability of the defense when the employee does in fact report.¹⁷⁶ Thus, because neither *Ellerth* nor *Faragher* applies the two-prong affirmative defense in a situation where the employee reported, there is no reason for lower courts to be bound by these decisions in such circumstances. Accordingly, lower courts are free to apply a standard that best effectuates the purposes of Title VII and other discrimination laws as set forth in the *Ellerth* and *Faragher* opinions. Because both *Faragher* and *Ellerth* contend that Title VII is supposed to encourage compliance, it makes sense to conclude that the Court would never have enacted a defense that discourages employers from enacting policies and procedures that would encourage reporting and thus, help eliminate harassment.

At first glance, distinguishing cases in which an employee reports harassment from the *Ellerth* and *Faragher* cases might resemble hair-splitting. However, when one considers the legal consequences that result from either applying or not applying the two-prong defense to cases in which employees do file a report, it is clear that the Supreme Court's holdings in *Ellerth* and *Faragher* were meant to apply only in cases in which the employee did not file a report.

Applying the affirmative defense to cases in which the plaintiff reports the harassment creates a perverse incentive for employers to expend a limited amount of effort to combat sexual harassment. This contradicts the Court's own conclusion that Title VII seeks to encourage employers to comply with and enact policies and procedures that help achieve this goal. Moreover, the logical extension of this reading of *Ellerth* and *Faragher* suggests that the existence of a policy satisfies the first prong, and an employee's failure to report satisfies the second prong. We contend that the defense should not apply to cases in which the plaintiff does report because (1) the Court would never render a holding that creates perverse incentives and compromise that which the court seeks to encourage, and (2) the logical extension of such a holding contradicts the opinions in the two cases.

In *Faragher*, the employer had a policy, but did not disseminate it.¹⁷⁷ The Court held that this failure prevented the employer from proving

175. *See id.* at 265.

176. Justice Thomas's *Ellerth* dissent, however, does address this issue, and argues that in such cases the employer would lose. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting).

177. *Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998).

both that it exercised reasonable care and that the plaintiff was unreasonable.¹⁷⁸ In *Ellerth*, however, the company had a policy and disseminated it.¹⁷⁹ Despite this fact, the plaintiff failed to report the harassment.¹⁸⁰ According to the vast majority of lower courts applying the defense, these two facts would result in satisfaction of the defense and dismissal of the case. The Court did not, however, dismiss Ellerth's case. Instead, it remanded the case so that the lower court could determine if the employer's policy constituted reasonable care, and if the plaintiff's failure to report was unreasonable. The remand suggests that the majority of courts misinterprets the defense by holding that a policy and a failure to report amount to a victory for employers as a matter of law. Instead, this holding implies (1) that the first prong of the affirmative defense may require more than the mere existence of a policy, and (2) that employees who do not report may not always be unreasonable. If this is true, our reading of the Court's opinions makes sense. The Court developed this defense for situations in which an employee did not report; the Court did not contemplate a situation in which the plaintiff-employee had reported. Accordingly, lower courts are free to develop a new defense that effectuates the purposes of both the discrimination laws and the *Ellerth* and *Faragher* defense. The standard proposed here does just that.

CONCLUSION

If employers did everything in their power to prevent sexual harassment, would such harassment still persist? Regrettably, it probably would. Should employers who do everything in their power to prevent sexual harassment be held vicariously liable for the wholly inappropriate conduct of a "cowboy" supervisor with an out-of-control libido? Maybe, maybe not. It would not be in society's best interest to hold employers strictly liable for such conduct, or to place a greater burden on employers to screen out supervisors with potentially harassing tendencies. This would be a logistical nightmare, trigger undue costs, and still might not eliminate harassment. Simply put, it would be impossible to systematically screen out such individuals, and employers should not be held responsible to pay for all the ills of society.

Assuming that employers should not be strictly liable, but unwilling to follow a negligence standard, the Supreme Court arguably created a regrettable situation when it articulated its two-prong affirmative defense. Employers are held liable when they do all that they can to prevent sexual harassment, but it nonetheless occurs and the

178. *Id.* at 808.

179. *Ellerth*, 524 U.S. at 748.

180. *Id.*

employee reports it. They are liability-free, however, when they do a lesser job of preventing harassment, and they happen to be fortuitous enough to employ someone who fails to take reasonable steps to report his or her claim.

As this article demonstrates, this dilemma leaves employers trying to avoid liability with some rather uncomfortable guidance on how to do so. First, it appears that an employer's entire effort to prevent sexual harassment should be limited to enacting and disseminating an anti-harassment policy. Employers should not engage in or should eliminate extensive preventative efforts such as expensive sexual harassment sensitivity training, or more particularly, harassment-reporting hotlines. While such measures may have positive effects such as reducing incidents of harassment, they could render unavailable the affirmative defense if such measures encourage employees to report. Because an employee's failure to report harassment is considered to be "unreasonable," and because some courts hold that employers cannot prevail if the employee reports, employers seeking to limit liability have an incentive to do anything lawful to discourage employees from reporting. This incentive contradicts the purpose of the affirmative defense, which is to encourage employers to take measures to discourage harassment and to encourage employees to report all such incidents.

Second, employers now have an incentive to hire and retain unreasonable employees. A prudent employer should invest the money saved by eliminating harassment sensitivity training and the harassment hotline into extensive background checking and personality screening of applicants. Another problem with the holding is that employees must report harassment before they are comfortable doing so because a delay may extinguish their claims.

These incentives are clearly undesirable if the ultimate goal is to eliminate or reduce sexual harassment in the workplace. This Article's proposal of a revised standard for the affirmative defense places greater emphasis on the employer's actions. This is one way to avoid creating perverse employer incentives, and simultaneously to increase prophylactic efforts to curb workplace harassment. Perhaps most importantly, the proposed standard complies with a plausible reading of *Ellerth* and *Faragher*, and better achieves the Supreme Court's goals.