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# When Rules Are Made to Be Broken: The Case of Sexual Harassment Law

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# When Rules Are Made to Be Broken: The Case of Sexual Harassment Law

## Abstract

Judicial holdings regarding sexual harassment actions have put judges who want to ensure what they view as a just outcome in the awkward position of having to choose between following precedent or “breaking the rules.” This article presents a theoretical assessment and empirical analysis of judicial rule-breaking with regard to two rules relating to sexual harassment. The first such rule, established in the *Oncale* decision, opened the door to the “equal-opportunity harasser” who treats everyone badly and thus escapes the prohibition on harassment “due to sex.” The other rule, set forth in the *Ellerth* and *Faragher* decisions, establishes a two-prong requirement for companies to demonstrate that they should not be held liable in the case of sexual harassment of an employee. The requirements for the so-called affirmative defense are, first, that the employer acted reasonably in relation to a complaint, and second that the employee acted unreasonably, usually indicated by a tardy complaint. Our analysis of 131 cases finds that the likelihood of rule-breaking increases when judges perceive that an employer that is otherwise meritorious (that is, responds effectively to the complaint) could be held liable (in the case of *Ellerth* and *Faragher*). On the other hand, courts have followed the rule when an unjust outcome has small repercussions (as in *Oncale*). Of interest in this context is how the courts will treat a new sexual harassment rule, as outlined in the Supreme Court’s *Vance* decision.

## Keywords

sexual harassment, judicially created rules, discrimination, *Oncale v. Sundowner Offshore Services*, *Faragher v. City of Boca Raton*, *Burlington Industries, Inc. v. Ellerth*

## Disciplines

Civil Rights and Discrimination | Hospitality Administration and Management | Labor and Employment Law

## Comments

### COMMENTS:

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by David Sherwyn, Nicholas F. Menillo, and Zev J. Eigen

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## EXECUTIVE SUMMARY

Judicial holdings regarding sexual harassment actions have put judges who want to ensure what they view as a just outcome in the awkward position of having to choose between following precedent or “breaking the rules.” This article presents a theoretical assessment and empirical analysis of judicial rule-breaking with regard to two rules relating to sexual harassment. The first such rule, established in the *Oncale* decision, opened the door to the “equal-opportunity harasser” who treats everyone badly and thus escapes the prohibition on harassment “due to sex.” The other rule, set forth in the *Ellerth* and *Faragher* decisions, establishes a two-prong requirement for companies to demonstrate that they should not be held liable in the case of sexual harassment of an employee. The requirements for the so-called affirmative defense are, first, that the employer acted reasonably in relation to a complaint, and second that the employee acted unreasonably, usually indicated by a tardy complaint. Our analysis of 131 cases finds that the likelihood of rule-breaking increases when judges perceive that an employer that is otherwise meritorious (that is, responds effectively to the complaint) could be held liable (in the case of *Ellerth* and *Faragher*). On the other hand, courts have followed the rule when an unjust outcome has small repercussions (as in *Oncale*). Of interest in this context is how the courts will treat a new sexual harassment rule, as outlined in the Supreme Court’s *Vance* decision.

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When Rules Are Made to Be Broken:

## *The Case of Sexual Harassment Law*

by David Sherwyn, Nicholas F. Menillo, and Zev J. Eigen

**T**his article is concerned with addressing the choice that judges face when they are presented with a judicially created rule that would lead to injustice if followed. Such is the case with current holdings in cases relating to sexual harassment. We are particularly interested in the circumstances that encourage judges to follow one particular rule to the letter while bending (or ignoring) another rule. This is the situation with two rules relating to sexual harassment, one established in *Oncale v. Sundowner Offshore Services* and the other in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*.<sup>1</sup> Because no lives hang in the balance and no matters of national security are being weighed in these cases, we can see what judges do with problematic rules in the absence of political and social pressure.

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<sup>1</sup> *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 80–82 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 749–66 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–92 (1998).

Discrimination claims make up close to 40 percent of the federal court docket, and sexual harassment claims make up close to 10 percent of all discrimination charges.<sup>2</sup> In deciding which path to take in these cases, judges are likely to start from a position of preferring the path of applying the rule correctly. The complication to this principle occurs when judges perceive that an unjust outcome is likely. We submit that judges will apply the rule with the unjust outcome under two conditions: first, that neither the Supreme Court nor Congress will adjust the rule any time soon, and, second, that the injustice produced by applying the rule perfectly will not be *too* severe. We believe that the cases we analyze here fit both of those criteria.

The sexual harassment decisions that we examine constitute a body of cases that provides reasonable control of extraneous factors and permits isolated observation of the judicial decision-making process. Our analysis examines why courts tend to follow the *Oncale* test but not the *Ellerth/Faragher* test.

This issue is of particular interest because we also now have a third untenable rule, enunciated recently in *Vance v. Ball State*, which effectively redefines who is a supervisor with regard to sexual harassment.<sup>3</sup> This case has no progeny as yet, so we cannot yet test the *Vance* rule, but our analysis of the older cases can be used to forecast the courts' likely approach to the *Vance* test.

Applying its standard for liability for harassment by a supervisor, the Court in *Vance* held that an employer may be vicariously liable for a supervisor's unlawful harassment only when the "employer has empowered that [supervisor] to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status,' such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>4</sup> One complication relating to this rule is that to comply with an ever-burgeoning array of employment laws, companies were already well advised to make their human resources department the only real decision maker in the firm.<sup>5</sup> Time will tell how the *Vance* rule will interact with that reality.

One clue to how courts will apply the *Vance* rule may be the way the courts have applied two similarly untenable rules, in this case, those created in *Oncale* and in *Ellerth/Faragher*. The *Oncale* rule is, an employer may escape agency-based liability for the actions of a manager who sexually harassed an employee of one gender if the harasser also sexually harassed an employee of the other gender, a rule known as the "equal-opportunity harass-

ment defense."<sup>6</sup> The *Ellerth and Faragher* rule is that an employer (who has otherwise acted reasonably) may avoid liability if the employee-plaintiff behaves unreasonably, which often equates to failing to complain or report the alleged sexual harassment either in a timely fashion or at all.<sup>7</sup> One logical extension of this holding was that employers, no matter how much care they exercised to prevent harassment and no matter how well they responded to harassment complaints, would be liable if the employee complained in a timely manner. As we explain below, this is an outcome that courts have sought to avoid.

The analysis we present in this article finds that almost all judges dutifully applied the *Oncale* rule, but most have not followed the reasonable-employee prong of the rule stemming from *Ellerth and Faragher*. On their face, both are simple rules that are easy to apply and they carry identical penalties. Moreover, both lead to unjust results. The equal opportunity harassment rule allows harassment so long as both male and female victims are harmed, while the reasonable-employee rule ties employers' liability to whether the employee had the wherewithal to make a proper report. We see that liability in either situation has little to do with the employer's actions. Moreover, both rules as applied create perverse incentives, one by promoting universal harassment and the other by encouraging employers to design reporting policies and practices that discourage prompt reporting of harassment.

While it's possible that pro-employer bias may be a factor explaining courts' adherence to *Oncale* and departure from *Ellerth/Faragher*, pro-employer bias does not explain the particular way in which courts have modified *Ellerth/Faragher*. Instead we see three issues: (1) the frequency of *Oncale* cases compared with the number of *Ellerth/Faragher* actions; (2) the likelihood of perverse incentives being actualized by society resulting from holdings properly applying the rules; and (3) the effect on judges' perceived values of issuing abhorrent rulings.

After a brief review of sexual harassment law, we present these two untenable rules in more detail. We then analyze the discrepant outcome of the two rules, and we conclude by discussing the implications of these findings, particularly in regard to the rule promulgated in *Vance*.

## The Origins and Early History of Sexual Harassment Law

As a starting point, we note that there is no federal statute that prohibits or even addresses sexual harassment in the work-

<sup>2</sup> Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. L. STUD. 429 (2004).

<sup>3</sup> 133 S. Ct. 2434 (2013).

<sup>4</sup> *Id.* at 2443.

<sup>5</sup> Kelli F. Robinson, Comment, *Constructive Discharge Is Not a Tangible Employment Action: The Impact of Pennsylvania State Police v. Suders*, 36 CUMB. L. REV. 581, 600 (2006).

<sup>6</sup> *Oncale supra*; see also: Miguel Nieves, *Joseph Oncale v. Sundowner Offshore Services, Inc.: Redefining Workplace Sexual Harassment to Include Same-Sex Sexual Harassment and the Effect on Employers*, 34 NEW ENG. L. REV. 941 (2000) (discussing the use of this term and defense); and Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 719–20 (1997).

<sup>7</sup> *Faragher, supra*; and *Ellerth, supra*.

place.<sup>8</sup> In 1980, however, the Equal Employment Opportunity Commission (EEOC) expanded its guidelines on discrimination because of sex under Title VII of the Civil Rights Act of 1964 to include sexual harassment.<sup>9</sup> After the EEOC published those guidelines, courts routinely held that sexual harassment due to a hostile environment did in fact create a cause of action.<sup>10</sup> In 1986, the U.S. Supreme Court put to rest any lingering questions concerning the legal efficacy of the hostile-environment theory in *Meritor Savings Bank v. Vinson*.<sup>11</sup>

In its relatively brief opinion, the *Meritor* Court: (1) established sexual harassment as a violation of Title VII; (2) held that there are two types of harassment: *quid pro quo* (this for that) and hostile environment; (3) held that the conduct had to be “because of sex”; and (4) provided a basis for employer liability, instructing courts to look to agency principles.<sup>12</sup> In the 1998 *Oncale*, *Ellerth*, and *Faragher* opinions, the Court was forced to revisit the terms “because of sex,” “*quid pro quo*,” “hostile environment,” and “associated agency principles.”<sup>13</sup> The resulting holdings created the untenable rules that are the subject of this article.

## Same-Sex Sexual Harassment and the “Because of Sex” Problem

At its inception, sexual harassment focused exclusively on male supervisors harassing subordinate women, as occurred in the

<sup>8</sup> For example, see: Gillian 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, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); and 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 J. LAW. & PUB. POL’Y 61, 76–79 (1997) (discussing several courts’ interpretations of Congressional intent underlying sexual discrimination). “Tangible losses” occur when there is a material change in employment, such as termination, failure to promote, demotion, or a change in benefits. See: *Ellerth*, at 761.

<sup>9</sup> 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).

<sup>10</sup> See: *Henson v. Dundee*, 682 F.2d 897, 902 (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.”); *Katz v. Dole*, 709 F.2d 251, 254–55 (CA4 1983); *Bundy v. Jackson*, 641 F.2d 934, 934–44 (D.C. App. 1981); and *Zabkowitz v. West Bend Co.*, 589 F.Supp. 780 (E.D. Wis. 1984).

<sup>11</sup> *Meritor*, 477 U.S. 57, *supra*.

<sup>12</sup> *Id.* at 72.

<sup>13</sup> *Ellerth*, *supra*; *Faragher*, *supra*; and *Oncale*, *supra*. See: Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL’Y 307 (1998); and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

*Meritor* case.<sup>14</sup> Eventually, though, courts were confronted with male plaintiffs alleging hostile environment harassment by female supervisors, and upheld that cause of action.<sup>15</sup> When circuit courts were faced with an onslaught of “same-sex” sexual harassment cases, between 1992 and 1997, they produced four different legal standards, prompting the Supreme Court to address the issue in *Oncale v. Sundowner Offshore Services*.<sup>16</sup>

Let’s briefly look at the four diverse cases that led to the *Oncale* ruling. The Fourth Circuit, in *Wrightson v. Pizza Hut of America, Inc.*, held in 1996 that a same-sex sexual harassment claim would lie under Title VII if the harasser was gay. Just before that, in 1995, the Eighth Circuit, in *Quick v. Donaldson Co., Inc.*, held that plaintiffs could maintain a claim for same-sex sexual harassment so long as employees of only one gender suffered the alleged conduct.<sup>17</sup> Note in this holding that if both men and women were treated similarly, even if poorly, then there was no cause of action.<sup>18</sup> Then, in 1997, the Seventh Circuit, in *Doe v. City of Belleville*, held that an employee could maintain a claim of same-sex sexual harassment if the employee was treated poorly for failing to live up to a sexual stereotype.<sup>19</sup> Finally, the clearest, but probably most troublesome holding had already occurred in 1994, in the case of *Garcia v. Elf Atochem North America*, where the Fifth Circuit Court flatly stated: “[H]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.”<sup>20</sup>

The Supreme Court took the opportunity to resolve this split among the circuits when it reviewed the *Oncale* case, which had also been heard by the Fifth Circuit. That court had dismissed petitioner *Oncale*’s action because it was bound by its decision in *Garcia*.<sup>21</sup> However, in its *Oncale* decision, the Court created one of the bad rules we are examining.

The second bad rule arose as a result of the problem of determining when an employer should be held vicariously liable

<sup>14</sup> MACKINNON, *supra*; and Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 292 (1996).

<sup>15</sup> See, for example: *Egli v. Stevens*, No. Civ.A. 93-157, 1993 WL 153141, at \*5-6 (E.D. Pa. May 11, 1993), *aff’d*, 17 F.3d 1429 (3d Cir.1994); and *Showalter v. Allison Reed Grp., Inc.*, 767 F. Supp. 1205 (D.R.I. 1991); *cf. Carter v. Caring for Homeless of Peekskill, Inc.*, 821 F. Supp. 225 (S.D.N.Y. 1993) (acknowledging that the same cause of action is available for male as for female victims of harassment by applying the same standard, but ultimately finding that the evidence was insufficient to support male employee’s claim of hostile environment). Compare to: *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, n.15 (3d Cir. 1990) (explaining in dicta that while *quid pro quo* claims were available to male plaintiffs against their female supervisors, it would require a higher standard of proof to sustain a male plaintiff’s claim of hostile environment sexual harassment against a female supervisor)

<sup>16</sup> 523 U.S. 75 (1998).

<sup>17</sup> *Wrightson*, 99 F.3d 138; and *Quick*, 90 F.3d at 1378–79.

<sup>18</sup> *Id.* Compare to *Oncale*.

<sup>19</sup> *Doe v. City of Belleville*, 119 F.3d 563, 570 (7th Cir. 1997).

<sup>20</sup> *Garcia v. Elf Atochem North America*, 28 F.3d 446 (1994).

<sup>21</sup> 83 F.3d 118 (5th Cir. 1996), *rev’d*, 523 U.S. 75 (1998).

for sexual harassment committed by an employee. This issue arose directly out of the *Meritor* Court's failure to clearly define *quid pro quo*, hostile environment, and agency principles.<sup>22</sup> As the lower courts sought to define each of these terms, they regularly commingled the concepts in determining employer liability for sexual harassment, as we explain next.

### Determining Employer Liability: What Preceded *Ellerth* and *Faragher*

After *Meritor*, lower courts were required to look to agency principles to determine employer liability for employees' bad conduct.<sup>23</sup> By 1998, the circuits had agreed that employers were always liable for *quid pro quo* harassment, while liability for hostile environment harassment fell under either of two theories.<sup>24</sup> The minority of courts held that if a supervisor acted within the "scope of employment" to create a hostile environment, then the company would be held liable.<sup>25</sup> Conversely, the majority of circuits held that the employer was liable if it knew or should have known about the alleged harassment (the so-called "negligence standard").<sup>26</sup> That the labels were both unclear and overlapping likely contributed to the substantial increase in sexual harassment litigation throughout the 1990s.<sup>27</sup> The complaints involved diverse scenarios, including, for example: (1) an employee who refused to sleep with the supervisor and was not fired; (2) an employee who did sleep with the supervisor and was not fired; (3) an employee who quit, with the supervisor later claiming the purported threat was a joke; and (4) an unclear threat, such as, "things would go better for you here if you wore more provocative clothes and were a little more accommodating," after which the employee quit, acquiesced, or ignored the supervisor (depending on the case), but was not disciplined. There are cases in which each of these scenarios has been labeled *quid*

<sup>22</sup> For example, see: Katherine Philippakis, Comment, *When Employers Should Be Liable for Supervisory Personnel: Applying Agency Principles to Hostile-Environment Sexual Harassment Cases*, 28 ARIZ. ST. L.J. 1275 (1996) (illustrating the ambiguity brought on by the Court's failure to precisely define "agency principles" by pointing out the confusion among lower courts).

<sup>23</sup> *Meritor*, 477 U.S. at 72.

<sup>24</sup> For examples of findings that employers are vicariously liable for *quid pro quo* harassment, see: *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols*, 42 F.3d at 513–14; *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106–07 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994); *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185–86 (6th Cir. 1992); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). See also: *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106–07 (3d Cir. 1994) (requiring use of actual authority to hold employer vicariously liable for hostile work environment); and *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 493–94 (7th Cir. 1997) (requiring negligence to hold employer vicariously liable for hostile work environment).

<sup>25</sup> For example, see: *Kauffman*, 970 F.2d at 183.

<sup>26</sup> For example, see: *Jansen*, 123 F.3d at 493–94; and *Philippakis, supra*, at 1282–1283.

<sup>27</sup> Ann Juliano and Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 551 & n.7 (2001).

*pro quo* harassment, hostile environment harassment, both, and neither.<sup>28</sup> We suggest that the diverse opinions in these cases are the product of results-oriented adjudication that led to the split in the circuits that the Supreme Court addressed in *Ellerth* and *Faragher*.

### The Two Bad Rules

#### Rule One: "Because of Sex"

In *Oncale*, the U.S. Supreme Court decided that a plaintiff could make out a claim for sexual harassment as long as the harassing conduct was "because of sex."<sup>29</sup> "Because of sex," however, does not mean that the conduct is sexual in nature, given that the Court further held that making conduct of a sexual nature *per se* unlawful would create a general civility code for the American workplace and would ignore the differences in the ways men and women routinely interact with members of the same and opposite sex. The Court said:

The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.<sup>30</sup>

Removing the requirement that the conduct be sexual in nature created an unjust result by opening a new door, which was subsequently used by the so-called equal opportunity harasser. The Court stated that a man could prove same-sex harassment if men were subjected to some form of harassing conduct and women were not.<sup>31</sup> However, the obvious logical extension of this argument is that if women were subjected to the same conduct as men then there is no actionable harassment for either the men or the women. As we explain in the next section, the courts followed this rule, despite its undesirable results.

<sup>28</sup> For examples of conflicting findings, see: *Holly D. v. California Inst. of Tech.*, 339 F.3d 1158, 1181 (9th Cir. 2003) (classifying an implied threat as a hostile work environment); *Gregory v. Daly*, 243 F.3d 687, 700 (2d Cir. 2001) (suggesting that an implied demand for sex could be considered hostile work environment); *Estes v. Illinois Dept. of Human Services*, 05 C 5750, 2007 WL 551554 (N.D. Ill. Feb. 16, 2007) (defining hostile work environment cases as ones in which no tangible action was taken); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 512 (7th Cir. 1997) (stating that cases in which an employer "fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company's rules entitle her to receive" are *quid pro quo* and not hostile work environment); and *Quantock v. Shared Mktg. Services, Inc.*, 312 F.3d 899, 904 (7th Cir. 2002) (stating that a supervisor's direct request for sex qualified as a hostile work environment).

<sup>29</sup> *Oncale, supra*.

<sup>30</sup> *Id.* at 81.

<sup>31</sup> *Id.* at 80–81.

## The Equal-Opportunity Harasser Defense

In *Holman v. Indiana*, a husband and wife, both employed by the Indiana Department of Transportation, alleged that the same male supervisor sexually harassed each of them.<sup>32</sup> The wife alleged that when she refused the supervisor's overtures, he negatively altered her job-performance evaluations and otherwise retaliated against her for protesting his harassing behavior. The supervisor also grabbed the husband, who also refused his requests, and the supervisor retaliated by opening the husband's locker and throwing away his belongings.

The District Court for the Northern District of Indiana dismissed the case based on the equal-opportunity harasser defense, on the grounds that the harasser had treated the plaintiffs equally badly.<sup>33</sup> The court concluded: "Simply put, . . . under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination "because of sex" and is therefore not unlawful."<sup>34</sup>

Similarly, in *Romero v. Caribbean Restaurants, Inc.*, the District Court in Puerto Rico dismissed the plaintiff's sexual harassment case because the supervisor, Figueroa, exhibited the same harassing conduct to both men and women.<sup>35</sup> The court stated: "While Figueroa's behavior and comments were often sexual in nature, and may have created an undignified or even unpleasant working environment, they were not discriminatory [between men and women] and thus not actionable under Title VII."<sup>36</sup> Further, the *Romero* court stated that the equal-opportunity harasser defense defeats both *quid pro quo* and hostile environment cases.<sup>37</sup>

If two principal functions of judicial decisions are to allocate justice to the parties and to impose rules that incentivize good behavior, the equal-opportunity harasser defense undermines both of those goals.<sup>38</sup> The *Holmans*, for example, suffered tremendous injustice, and together with *Romero* experienced the same type of conduct as any sexual harassment claimant. Yet they all were denied redress under Title VII solely because they were harassed by someone who harassed members of both genders—a fact that in no way reduces the degree of harm they suffered. The courts in *Holman* and *Romero* accurately applied *Oncale*, but doing so deprived the plaintiffs of justice.

<sup>32</sup> *Holman v. Indiana*, 24 F. Supp. 2d 909, 911 (N.D. Ind. 1998).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 916.

<sup>35</sup> *Landrau Romero v. Caribbean Rests., Inc.*, 14 F. Supp. 2d 185, 190 (D.P.R. 1998).

<sup>36</sup> *Id.* at 190.

<sup>37</sup> *Id.*

<sup>38</sup> See: Jeffrey Evans Stake, *Status and Inventive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447 (1991) (discussing the incentive and status effects of judicial opinions). Also see: Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (providing an overview of various positive and normative scholarship concerning motivations of judicial decisionmaking).

Moreover, this rule creates incentives that are downright bizarre. Managers learn that they have *carte blanche* to sexually harass employees so long as they conduct themselves the same way with both sexes. Despite these abhorrent results, courts follow this rule even when they would be justified in ignoring it. In *Oncale*, the defense was neither raised nor discussed.<sup>39</sup> Judges could, therefore, cite that distinction as a basis for refusing to validate the defense. But judges do not do this and instead uniformly follow this rule. Next, we examine the converse situation, when courts generally ignore a clear rule.

## The Second Bad Rule

### *Ellerth and Faragher. The Two-Prong Test*

In *Burlington Industries, Inc. v. Ellerth*, which was decided on the same day as *Faragher v. City of Boca Raton*, the Supreme Court reconsidered the definition of *quid pro quo* sexual harassment, effectively concluding that the "this for that" threat must be carried out for a complainant to demonstrate this type of harassment.<sup>40</sup> That is, the Court held that the key issue was whether the employee suffered a tangible loss.<sup>41</sup> If so, the employer would be strictly liable. However, the Court opened another door under which the employer could still be liable in a hostile environment case, but could also escape liability using an affirmative defense with two prongs, as we explain next.

### The Affirmative Defense

As explained in the decision by Justice David Souter, the affirmative *Ellerth/Faragher* defense has two prongs: **(1)** "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" (the "reasonable employer" prong), 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" (the "unreasonable employee" prong).<sup>42</sup> Upon any fair reading of this language, employers cannot avoid liability simply by proving that they acted reasonably or even with

<sup>39</sup> 523 U.S. 75.

<sup>40</sup> *Ellerth, supra; Faragher, supra*. We say arguably because the contrast that the Court used is a false dichotomy: "as opposed to bothersome attentions or sexual remarks that are severe or pervasive." The former has never been considered unlawful harassment and the latter is about as clear a definition of hostile environment as we have. The true dichotomy would be: Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as opposed to cases where an employee is not disciplined after either: **(1)** acquiescing to, or **(2)** rejecting a supervisor's advances. Despite the Court's lack of clarity, one could argue that *Ellerth* stands for the proposition that in order for there to be *quid pro quo* harassment the employee must suffer the discipline threatened. If this is the case, then all cases with no discipline would be hostile environment cases.

<sup>41</sup> *Ellerth*, at 764–65.

<sup>42</sup> *Id.*

the utmost care.<sup>43</sup> They must also prove that the employee was unreasonable in some way.

That reading does not square with the actuality, though, as courts have routinely permitted well-behaved employers to avoid liability even when employees also behaved entirely reasonably by any measure.<sup>44</sup> To investigate this issue, the study we present in this article examines plaintiffs' appeals of 131 summary judgment motions in which the defendant employer prevailed.

## Methodology, Descriptive Statistics, and Inferential Model

This study aimed to evaluate as closely as possible all federal appellate court opinions evaluating the merits of the *Ellerth/Faragher* defense in connection with summary judgments. We searched on Thomson Reuters Westlaw<sup>45</sup> in the “Federal Courts of Appeal[s]” database using search terms that we believe captured every case that cites or mentions *Ellerth* or *Faragher* and uses the terms “summary judgment” and “sexual harassment” (or variations on these phrases). Intended to be overbroad, the search returned 644 results. After we discarded irrelevant cases, 131 cases remained.<sup>46</sup>

**Coding method.** A primary question of interest in this study is how five independent variables affect the success of the two prongs of the *Ellerth/Faragher* defense and the overall affirmative defense. Two variables represent whether the employer satisfied the reasonable employer and unreasonable employee prongs, a third confirms whether the employer satisfied both prongs, and the others account for the employer's and employee's characteristics. Overall, our study looked at five aspects of each case: (1) employer behavior, (2) employee behavior, (3) employer characteristics, (4) employee characteristics, and (5) other case characteristics.

## Employer Behavior

Employer behavior concerns employers' efforts to prevent and correct harassment insofar as they are relevant to the reasonable-employer prong of the affirmative defense. First, we assessed whether an employer had a good anti-harassment policy in place. A good policy in this instance is one that has been disseminated to employees and provides channels other

than the supervisor to report.<sup>47</sup> Of the 131 cases, 110 employers had a policy (84%), and 69 (63%) of those were considered good policies by the court. Second, we determined whether an employer took preventive efforts beyond maintaining a good policy (e.g., establishing a toll-free hotline or conducting harassment training). Forty-nine (37.4%) employers were described as having taken other such efforts. Only one of the employers that did not have a harassment policy in place took “other efforts,” as tracked by this variable.<sup>48</sup>

Two elements related to the correction portion of the reasonable employer prong. The first is whether an employer responded to a harassment allegation in a way the court characterizes as good. Courts are surprisingly deferential in this inquiry, and accepted employer responses in about three-quarters of the cases. Acceptable responses included promptly firing a harasser, transferring an alleged harasser or even an alleged victim to a different department, or, in a few cases, simply performing an investigation that did not culminate in discipline.<sup>49</sup> The second correction issue was whether an employer's general behavior (other than its response to the specific complaint) suffered some defect, such as failing to enforce its sexual harassment policy when there was a complaint or failing to make a good-faith investigation.<sup>50</sup>

## Employee Behavior

The other prong of the affirmative defense rests on employee behavior; that is, whether the employee reported the harassment, whether that complaint was timely, and whether the report was made in good order. In 113 of the 131 cases (86%), the employee-plaintiff reported the alleged harassment, and the report was deemed timely in 77 of those cases. Where available we

<sup>47</sup> This definition embraced a variety of dissemination approaches, such as including the policy in the employee handbook, requiring employees to sign an attestation that they received and understood the policy, and posting the policy in a break room or other employee area. These differences were not sufficient to affect our analysis.

<sup>48</sup> *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 337 (4th Cir. 2010) (harassment training).

<sup>49</sup> *Valentine v. City of Chicago*, 452 F.3d 670, 677 (7th Cir. 2006) (finding that transferring the harasser was an appropriate response); *Harmon v. Home Depot USA Inc.*, 130 F. App'x 902, 905 (9th Cir. 2005) (suggesting that transferring the employee would have been an appropriate response); *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1300 (11th Cir. 2007) (suggesting that offering to transfer the employee was an acceptable response). Also see, for example: *McCurdy v. Arkansas State Police*, 375 F.3d 762, 767–68 (8th Cir. 2004) (finding that the employer's investigation, which resulted in the harasser's termination, shielded it from liability). In nine cases, we could not determine with certainty whether the employer responded at all, leaving 122 for this part of the analysis.

<sup>50</sup> For example, see: *Mosby-Grant*, 630 F.3d at 337 (employer had a “history of sexual harassment”); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 (2d Cir. 2010) (several of the avenues for reporting harassment “appeared to be ineffective or even threatening”); and *Donaldson v. CDB, Inc.*, 335 F. App'x 494, 505 (5th Cir. 2009) (prior complaints concerning non-harassment issues had proven ineffective).

<sup>43</sup> This was the concern highlighted in the dissent by Justice Clarence Thomas. *Id.* at 773.

<sup>44</sup> See: *Id.* at 1266.

<sup>45</sup> Formerly known as WestlawNext.

<sup>46</sup> For example, we eliminated cases that did not involve Title VII, did not involve supervisor harassment, presented insufficient facts to evaluate the new standard, or merely cited *Ellerth/Faragher* for procedural or other reasons not involving harassment. For an earlier iteration of this study, see: David Sherwyn, Michael Heise, and Zev J. Eigen, *Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORD. L. REV.* 1265, 1292 (2001).

## Employer and employee characteristics

### Employer Characteristics

Variable	Percentage
<b>Employer Sector</b>	
Private	71%
Public—Federal	5%
Public—State or Local	24%
<b>NAICS Number</b>	
21-Mining, Quarrying, and Oil and Gas Extraction	2%
31 to 33-Manufacturing	13%
44/45-Retail Trade	11%
48/49-Transportation and Warehousing	5%
51-Information	8%
52-Finance and Insurance	6%
53-Real Estate and Rental and Leasing	2%
54-Professional, Scientific, and Technical Services	2%
56-Administrative/Support and Waste Management/Remediation	3%
61-Educational Services	8%
62-Health Care and Social Assistance	8%
71-Arts, Entertainment, and Recreation	1%
72-Accommodation and Food Services	9%
92-Public Administration	21%

### Employee Characteristics

Variable	Percentage
<b>Sex</b>	
Male	5%
Female	95%
<b>O*NET Job Zone Number</b>	
Level 1	15%
Level 2	37%
Level 3	27%
Level 4	14%
Level 5	5%
<b>Employer Tenure</b>	
0-6 months	19%
6 months-1 year	8%
1-5 years	43%
5-10 years	19%
>10 years	11%
<b>Other Case Characteristics</b>	
EEOC Was a Party	4%
Multi-Plaintiff Lawsuit	8%

collected the length of the delay in months. Although the length of delay was not part of the model of the defense prongs, it turns out that the length of any delay is a point of interest with regard to the courts' disregard of this prong.<sup>51</sup> Nine of the cases involved reporting defects, such as assertions being too vague<sup>52</sup> or the employee requesting that the employer not pursue action against the harasser.<sup>53</sup>

We also separately examined whether the employee failed to cooperate with the employer's corrective efforts. In seven

<sup>51</sup> This was, however, included in the model of *Timely* because of its theoretical importance to whether a delay is reasonable, as discussed in the results of the study.

<sup>52</sup> For example, see: *Episcopo v. Gen. Motors Corp.*, 128 F. App'x 519, 523 (7th Cir. 2005);

<sup>53</sup> For example, see: *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005); and *Benfield v. Fulton Co., GA*, 130 F. App'x 308, 312 (11th Cir. 2005), abrogated on other grounds by *Crawford v. Carroll*, 529 F.3d 961, 971 (11th Cir. 2008).

cases, the employer offered to move the employee to a new department without any reduction in pay, but the employee refused or resigned.<sup>54</sup>

### Employer Characteristics

The employer characteristics involved whether the employer was private (divided into one of twenty categories by the NAICS classification) or a branch of government. We were able to identify 128 out of 133 employers in this way. As shown in Exhibit 1, the great majority of defendants represented a broad spectrum of private sector businesses (with the largest representation in manufacturing and retail), with a small cluster of state or local government employers.

<sup>54</sup> For example, see: *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18, 27 (3d Cir. 2006)

Nature of alleged harassing conduct

Variable	Percentage
<b>Location of Harassment</b>	
Workplace Only	84%
Workplace & Work Events	4%
Workplace & Social Events	7%
All Three	6%
<b>Duration</b>	
One or More Isolated Incidents	12%
<1 month	1%
1-6 months	42%
6 months-1 year	21%
1-5 years	31%
>5 years	5%
<b>Length of Reporting Delay</b>	
<1 month	1%
1-6 months	48%
6 months-1 year	19%
1-5 years	28%
>5 years	3%

Variable	Percentage
<b>Conduct Alleged</b>	
Derogatory Names Generally	11%
Insults Directed to Plaintiff	17%
Comments About Appearance	38%
Sexually Charged Comments, Generally	73%
Sexual Gestures	16%
Written Sexual Comments	3%
Love Letters to Plaintiff	3%
Sexual Contact	54%
Nonsexual Contact	37%
Requests for Dates	19%
Requests for Sexual Favors	37%
Displaying Pornographic Materials	7%
Sexual Assault	9%
Nonsexual, Gender-Related Behavior	8%

Employee Characteristics

We started with eight characteristics to classify employees, but we soon dropped plaintiffs’ gender, race, and sexual orientation because of widespread unavailability. We did code the Standard Occupational Classification (SOC) number,<sup>55</sup> using two digits to make broad categories, and the O\*NET Job Zone number, which categorizes occupations by education, training, and experience needed.<sup>56</sup> We had the SOC for 95 of the cases and the O\*NET number for 91 cases.<sup>57</sup>

<sup>55</sup> *Standard Occupational Classification*, Bureau of Labor Statistics, <http://www.bls.gov/SOC/> (last visited Feb. 16, 2013). Like NAICS, SOC is a federal standard classification system developed by the Bureau of Labor Statistics.

<sup>56</sup> Alissa Emmel and Theresa Cosca, *The 2010 SOC: A Classification System Gets An Update* 15 (2010), available at [www.bls.gov/opub/ooq/2010/summer/art02.pdf](http://www.bls.gov/opub/ooq/2010/summer/art02.pdf). See also: [www.onetcenter.org/about.html](http://www.onetcenter.org/about.html).

<sup>57</sup> Determining the occupational classification was often challenging. Appellate courts have little use for specifics about employers’ business models or employees’ job duties, except insofar as they inform whether the harasser was a supervisor or coworker. Often the only information provided is the name of the business and the employee’s job title. Where possible, we supplemented the information with research conducted on the internet. We urge caution is urged in interpreting the findings with respect to NAICS, SOC, and Job Zone numbers.

As shown in Exhibit 1, plaintiffs were overwhelmingly female (95%), and two-thirds worked in O\*NET job zones two and three, comprising jobs that require either high school or vocational training and a reasonable amount of experience. According to O\*NET, zone two jobs include orderlies, customer service representatives, security guards, and tellers, while typical zone three jobs are food-service managers, electricians, barbers, nannies, and medical assistants.

We calculated 79 employees’ tenure at the company in months (from start date to the time of the complaint if the employee was still employed when the lawsuit was filed). The mean was 53.8 months (but the standard deviation was considerable, at 59.3 months), with a minimum of two months and maximum of 264. Only about one-quarter of employees had been at their company for less than one year before filing the discrimination lawsuit. We found that the EEOC was a party in five lawsuits, and ten cases involved a group or class of plaintiffs.

Other Case Characteristics

Finally, we compiled information regarding which court of appeals decided the case and whether the opinion was published. Mainly for descriptive purposes, we also coded details about the

nature of the harassment, including the specific behavior; the duration of the harassment, whether the harassment took the form of a pattern of behavior or involved isolated instances, whether the plaintiff was harassed by only supervisors or both supervisors and coworkers, where the harassment took place, and the nature of the alleged harassing behavior.

As shown in Exhibit 2, sexually charged comments and sexual contact were the most frequently alleged behaviors, though these are also two of the less-specific categories. Comments about the plaintiff's appearance, nonsexual contact, and requests for sexual favors were also common. Less common were things like love letters, written comments to the plaintiff, displaying pornographic materials, and outright sexual assault. We found that 84 percent of cases involved workplace-only harassment, and in no case was the harassment relegated to non-work-related areas, though courts frequently explain that harassment need not occur within the workplace to be actionable.<sup>58</sup>

About half of the cases involved harassment that lasted up to six months, and roughly half of the cases involved harassment that lasted between six months and five years, with a few cases of harassment lasting longer than that.

With regard to timeliness, some opinions expressly specified how long the plaintiff delayed before complaining. Other opinions did not specify the delay, but otherwise indicated how long the harassment lasted; we used the length of the harassment in these cases unless there was some indication that the plaintiff complained earlier. The trend in the length of time it took the plaintiff to report the harassment is similar to that of the length of the harassment. This confirms the intuition that harassment, in the vast majority of cases, does not last long after an employee reports it to the employer. It also lends some support to the proposition that employers' corrective efforts were generally efficacious.

### Effectiveness of the Affirmative Defense

Overall, the employer was able to establish the affirmative defense in 70 percent of cases. Out of the 131 cases, the court addressed the merits of both prongs in 119 cases (91%). In eight additional cases the court addressed only the reasonable employer prong, and in the four remaining cases the court addressed only the unreasonable employee prong.

In the 127 cases where the court addressed the merits of the reasonable employer prong, 78 percent of employers were found to have satisfied that test. When courts tested for unreasonable employees, employers prevailed on that prong in 75 percent of cases where that part of the defense was considered. When employers lost for a second time on appeal, which

<sup>58</sup> *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 137 (2d Cir. 2001). See also: Douglas R. Garmager, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a "Hostile Work Environment" Claim Under Title VII*, 85 CHL-KENT L. REV. 1075, 1076 (2010).

## EXHIBIT 3

### Employer efforts to prevent harassment

Preventive Measure	Percentage
Had a policy	84%
Disseminated the policy	73%
Policy provided alternative channels of redress	54%
Court considered it a "good" policy	53%
Employer made other efforts	37%
Employer trained employees	31%
Toll-free report line provided	19%
Policy described the penalty	13%
Policy promised investigation of complaints	26%
Had anti-retaliation policy	15%

occurred in about half of the cases, the courts determined that they had satisfied neither prong. Failure to satisfy the reasonable employer standard alone occurred in 21 percent of losses on appeal, and the unreasonable employee prong by itself was involved in 31 percent of unsuccessful appeals.

We found that if the court addressed both prongs and the defendant satisfied only one of them, it was always the reasonable employer prong. Exhibit 3 reviews employer preventive behavior in that light. As noted above, 84 percent of the employers involved in this study had a policy, but only 73 percent of cases indicated that the policy was adequately disseminated, and only 54 percent of cases indicated that the policy contained alternative channels to report harassment. In short, only 53 percent of cases provided enough detail to conclude that the employer's policy was a "good" policy.<sup>59</sup> Employers provided workplace harassment training in 31 percent of cases and had a toll-free harassment hotline in 19 percent of cases. That is, 37 percent of employers made "other efforts."

<sup>59</sup> Our measures likely under-report the number of employers with good policies, and the effect of having a good policy on the success of the defense is likely underestimated because appellate opinions frequently lack the level of detail needed for content-rich coding. For instance, to be coded as having a "good policy," the employer's policy must be disseminated and provide alternative reporting channels. Plaintiffs, however, do not always challenge the sufficiency of the policy, opting instead to challenge the correction portion of the reasonable employer prong or only the unreasonable employee prong. If the plaintiff does not challenge the policy, the court is less likely to describe the policy in sufficient detail. Moreover, plaintiff's decision not to challenge the policy increases the likelihood that it is a good policy given the low incremental cost of challenging the policy weighed against the possible downsides associated with challenging it—if a plaintiff attempts to challenge a good policy, they might lose credibility with the fact finder, or inadvertently shine a spotlight on the employer's apparent diligence to prevent harassment.

## Model of outcomes of Ellerth/Faragher defenses

Independent Variable	Prong 1 (Reasonable employer)		Prong 2 (Unreasonable employee)	Overall Defense
	(A)	(B)		
<b>Employer Behavior</b>				
Good Policy	-0.62	0.08	0.37	-0.35
Other Efforts	-0.01	-0.68	-1.58	-0.90
Good Response	4.28***	—	2.67*	2.69*
Employer Defect	—	-4.04***	-2.30	-2.77
<b>Employee Behavior</b>				
Employee Reported Harassment	-2.45**	-1.93	-4.15***	-4.24***
Report was Timely	-3.22**	-4.01**	-5.70***	-6.05***
Report was Otherwise Defective	2.64**	1.32	4.11**	4.14**
Employee Rejected the Redress Offered	3.60*	3.90*	5.34*	6.55***
<b>Constant</b>				
Constant	3.75**	7.08***	7.42***	7.90***
Wald Chi-squared	26.16***	26.07***	15.64**	14.67*
PRE	81%	85%	87%	87%
N	127	127	123	131

Notes: \*  $p < 0.10$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ . Prong 1 is run twice, first omitting the "defective employer conduct" variable (Column A), and then omitting the "good employer response variable" (Column B). Prong 2 is subject to separation, and thus we applied Firth's penalized-likelihood approach, which modifies the way in which the coefficients for the unreasonable employee variable are estimated.

Courts found that employers responded appropriately to harassment in 69 percent of cases, but fired alleged harassers in just 21 percent of cases. Alleged harassers were disciplined in some other way (short of termination) in 23 percent of cases. The harasser or the plaintiff was transferred in 15 percent of cases—the harasser half of the time and the employee the other half. In 14 percent of cases, the employer investigated the complaint but took no further action, and did nothing at all in 21 percent of cases.

With regard to employees, courts determined that the employee reported to the correct person in 81 percent of cases, and was timely in 59 percent of cases. In 7 percent of cases, the employee's claim suffered from some other defect, such as vagueness, and in 5 percent of cases, the employee rejected the corrective action the employer offered.

### Empirical Strategy

Using logistic regression, we modeled employer success on each prong of the affirmative defense, and on the defense overall, as

a function of eight independent variables. In all three analyses, the dependent variable is dichotomous (taking the value 1 if an employer satisfied the prong, 0 if not).<sup>60</sup>

Two complications emerged: slight multicollinearity and quasi-complete separation. Multicollinearity exists with respect to two independent variables in the reasonable employer model, namely, whether the employer responded adequately to a complaint and whether there was some defect in the employer's general conduct. Therefore, we modeled the reasonable employer prong twice, first omitting the "defect" variable and then omitting the "good response" variable.

Because of separation, we had to modify the treatment of the timeliness variable with regard to the unreasonable employee prong. Separation occurs when the dependent variable

<sup>60</sup> In some cases, courts address one prong, but not the other. As a result, the model for the reasonable employer prong has a different set of observations than the models for the unreasonable employee prong and the overall defense. This explains how multicollinearity can exist in one model but not in other models that use the same independent variables.

has the same value for all observations in which an independent variable takes on a given value, and this occurred whenever plaintiffs' reports of harassment were deemed untimely. In those cases, the defendant always satisfied the unreasonable employee prong. Rather than take the step of excluding the problematic variable, we needed to keep it because it is an important determinant of whether the unreasonable employee prong is met.<sup>61</sup> Instead we used what is called Firth's penalized-likelihood approach, which modifies the way in which the coefficients for the variable in question are estimated.<sup>62</sup>

## Two Prongs, Two Outcomes

### The Reasonable Employer Prong

The model of the reasonable employer prong points to the importance of employers' corrective actions once there's been a complaint (Good Response and Employer Defect were significant in predicting success; see Exhibit 4). Courts take preventive efforts into account as a matter of course (that is, Good Policy and Other Efforts were nonsignificant because they either exist or don't). In contrast, the "correction" inquiry involves different forms of proof relating to the harassment investigation and any disciplinary action taken against the harasser. Moreover, the correction inquiry involves far more for a plaintiff to materially dispute. Similarly, there are more opportunities for a judge to decide that the "reasonableness" question is better left to the jury than declared as a matter of law.

Reasonableness also enters into consideration of the employee-behavior variables, which were significant in both models for predicting employers' success at proving the reasonable employer prong. Once again, the form of evidence relevant on summary judgment brings the correction portion of the reasonable employer prong into focus. But the reasonableness of the employer's corrective efforts depends in large part on the employee's behavior. For example, if an employee's report of harassment is vague or the employee refuses to participate in the internal investigation, it can impede the employer's ability to determine whether the alleged harassment occurred. Courts assessing the reasonableness of employers in these cases may be more forgiving. To summarize, the outcomes regarding the reasonable employer prong are entirely unremarkable. We

<sup>61</sup> Christopher Zorn, *A Solution to Separation in Binary Response Models*, 13 POL. ANALYSIS 157, 161 (2005).

<sup>62</sup> For example, see: Georg Heinze & Michael Schemper, *A Solution to the Problem of Separation in Logistic Regression*, 21 STATS. MED. 2409, 2410-11 (2002); Christopher Zorn, *supra*, at 162 ("Firth's method prevents researchers from being forced either to omit manifestly important covariates from their models or to engage in *post hoc* data manipulation in order to obtain parameter estimates for those covariates."). See also: David Firth, *Bias Reduction of Maximum Likelihood Estimates*, BIOMETRIKA 80:1, at 27-38 (1993). These authorities note that other alternatives are inferior, such as using exact logistic regression, manipulating the data, or using an arbitrary standard value as the estimate for the problematic variable's coefficient. Heinze & Schemper, *supra*; Zorn, *supra* at 162

expected as much, because the standard for this prong—that the employer exercised reasonable efforts to prevent and correct harassment—is uncontroversial. Accordingly, judges have no reason to be duplicitous in the name of achieving justice or incentivizing behavior. This is in line with our thesis that judges depart from rationality only when there is sufficient justification for doing so. As we explain next, the departure occurs with regard to the unreasonable employee prong.

### The Unreasonable Employee Prong

To satisfy the unreasonable employee prong of the defense, employers must show that the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities the employer provided. The most straightforward hypothesis has borne out: all employee-behavior variables were highly significant. Courts assessing the reasonableness of employees pay close attention to employee behavior.

However, it seems clear that the courts are also taking into account the employer's response to the report of harassment, even though that response necessarily occurs after the employee has made a report. Our studies have found that employer behavior is a significant predictor of the determination of the employee's reasonableness.<sup>63</sup> This finding suggests that the courts are engaging in mental gymnastics to avoid penalizing well-behaved employers. The result we have observed suggests that, when confronted with an employer who corrects well, courts scrutinize the employee's conduct to find it unreasonable.

Courts appear to employ the timeliness of the employee's complaint as evidence of unreasonableness. In many cases, the only employee defect the court is able to highlight is a period of delay in reporting harassment. These "unreasonable" periods can be surprisingly brief. For example, the Tenth Circuit, in *Conatzer v. Medical Professional Building Services Corp.*, held a seventeen-day delay unreasonable as a matter of law.<sup>64</sup> Note that the employer had a sterling anti-harassment policy, promptly investigated the complaint, and fired the harasser. On the other hand, courts have rejected far longer periods of delay as a basis for finding the employee unreasonable, often when the employer's response to the report of harassment was less than ideal. For example, in *Clegg v. Falcon Plastics, Inc.*, the court in the Western District of Pennsylvania held that a plaintiff's four-month delay was not unreasonable as a matter of law.<sup>65</sup> In this instance, the employer was slow to investigate and ultimately offered nothing more than to transfer the employee. Similarly, in *Walker v. United Parcel Service of America, Inc.*, the employee endured sexual harassment for seven years before complaining to a supervisor, and

<sup>63</sup> *Sherwyn et al.*, *supra* at 1287 tbl.3B (finding significant variables relating to whether the employer had a good harassment policy and whether the employer's response to the report of harassment was sufficient).

<sup>64</sup> 95 F. App'x 276, 281 (10th Cir. 2004) (unpublished).

<sup>65</sup> 174 F. App'x 18, 26 (3d Cir. 2006) (unpublished).

EXHIBIT 5

Model outcomes for "timely"

Independent Variable	Timeliness	
	(A)	(B)
Good Response	-3.74***	—
Employer Defect	—	4.64***
<b>Covariates</b>		
Delay_Length	0.02	0.01
Good_Policy	0.05	-0.01
Other_Efforts	0.60	0.39
Complained	-2.39***	-2.29***
EE_Defect	1.08	0.59
<b>Constant</b>		
Constant	4.51***	1.07
Chi-squared statistic (LR/Wald)	48.42***	19.08***
PRE	70%	60%
N	99	99

Notes: \*  $p < 0.10$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ . Model A is a logit analysis of timeliness as a function of an employer's "good" response; Model B applies Firth's penalized-likelihood approach to model the "timely" variable in relation to whether the employer's conduct was somehow defective.

then the employer took *no* action.<sup>66</sup> As part of its decision, the Tenth Circuit court found that the employer failed to satisfy the unreasonable employee prong, despite a seven-year reporting delay.<sup>67</sup>

To further examine the effect of employer behavior in courts' assessment of employee timeliness, we modeled the timeliness determination as a function of employer corrective action. In Model A, we modeled timeliness as a function of whether the employer had a "good" response and, in Model B, we modeled whether the employer's conduct was otherwise defective, with the results shown in Exhibit 5. In both models we controlled for the length of the delay, as well as employer preventive behavior and employee behavior. It is reasonable to expect that the determination of the timeliness of a complaint will vary with the length of the delay, but we also included whether the employee complained and whether there was some other defect in the employee's behavior, such as vagueness, even though those latter points should not influence the timeliness of the complaint. In fact, in Model B, the "defect" variable exhibited quasi-complete separation with the dependent variable, so we applied Firth's

<sup>66</sup> 76 F. App'x 881, 883 (10th Cir. 2003).

<sup>67</sup> *Id.* at 888.

penalized-likelihood analysis. (Model A exhibited no such separation.)

As hypothesized, both the *employer's* response and, alternatively, whether there was another defect in the employer's behavior are significant predictors of the likelihood a court will find an *employee's* complaint timely, even when controlling for the length of the delay and the employee's other behavior. Admittedly, because observational studies say nothing of causation, this empirical outcome could have either of two explanations: either it is the product of results-oriented adjudication, or some real-world correlation exists between employee timeliness and employer behavior. The latter explanation is unsatisfying because Good Response has a negative coefficient and Employer Defect has a positive coefficient.<sup>68</sup> In other words, that explanation would suggest that employees may delay *longer* when employers are *better* at correcting harassment, contrary to the intuitive narrative that an employer *worse* at responding to harassment gives employees more of a reason to delay reporting.

Instead, the likely explanation for our findings is results-oriented adjudication. Our analysis provides compelling empirical evidence that courts seize on any delay in reporting harassment as a justification for holding well-behaved employers harmless. This indicates that, in deciding whether a complaint was timely, courts tended to weigh the employer's response more heavily than how long a plaintiff waited. The problem, of course, is that this conclusion violates the clear language of the *Ellerth/Faragher* defense. That is, if the employee behaves reasonably, the unreasonable employee defense should be unavailable. Such is not the case, as we explain below.

Full Defense

All employee-behavior variables and one employer-behavior variable were significant in predicting success of the defense overall. To prevail on the affirmative defense, the employer must satisfy both prongs. Thus, the reasonable expectation is that significant factors in the individual-prong models remain significant in the model of the overall defense. This hypothesis was borne out except with respect to the variable representing whether there was a defect in the employer's general behavior. Thus, it is likely that, as compared with the employee's behavior and the employer's response to that behavior, other defects in the employer's behavior are simply not important (or the effect is too small to detect with our sample size). Those results do not undermine the central thesis of this article, namely, that courts consider employer behavior in assessing the unreasonable employee prong. This explanation is especially convincing given our results, summarized in Exhibit 5, showing that employer response is significant to courts' findings regarding the timeliness of employee complaints.

<sup>68</sup> Employer's good response is negatively correlated with *Employer Defect* ( $r = -.75, p < .001$ ).

## Focus on Employer Actions

The outcome of *Davis v. Team Electric Co.* helps clarify the point regarding the importance of employer behavior.<sup>69</sup> In the cases we studied here, the employer prevailed in all but one case where the employee failed to report. In that case, *Davis*, the employee failed to report but still prevailed. The employer was woefully deficient in its efforts to prevent or correct harassment and the conclusion that the employee “failed to complain” was questionable at best. The court noted that there was no evidence that the employer had an anti-harassment policy, nor did the employer perform an investigation or take action against the harassing supervisors. The court concluded that the “employee failed to complain” because she only complained to the harassing supervisors.<sup>70</sup> This case indicates that an employer’s behavior can be so bad that an employee’s “failure” to complain is not regarded as an unreasonable failure if no such opportunities are available. However, this case is an outlier because the employer was so deficient. In the other 24 non-report cases that we studied, an employer who exercises reasonable care to prevent harassment will always prevail if the employee fails to report alleged harassment.<sup>71</sup>

More commonly, the employee’s actions do have a bearing on the case outcome. The employer prevailed in 90 of the 106 cases in which employees did report. However, courts sometimes held that an employee was unreasonable for declining an employer’s proposed remedy, even when it disadvantaged the employee (such as the offer of a transfer). We found seven cases where employees failed to avoid harm by rejecting their employer’s accommodations. For example, in *Brenneman v. Famous Dave’s of America, Inc.*, once the employee complained of harassment, the employer investigated the allegations and offered to transfer her to another store away from the allegedly offending supervisor.<sup>72</sup> Because the employee refused this offer and resigned instead, the court found that the employee was unreasonable.<sup>73</sup> Similarly, in *Baldwin v. Blue Cross/Blue Shield of Alabama*, the plaintiff resigned when, after complaining about harassment, her employer offered to keep her in the same position but provide counseling between her and the alleged harasser.<sup>74</sup> The court held that refusing this “first step” in conflict resolution was unreasonable. Similarly, courts found resigning or refusing to return to work after employers disciplined or fired harassers unreasonable.<sup>75</sup>

<sup>69</sup> 520 F.3d 1080 (9th Cir. 2008).

<sup>70</sup> We coded this as failing to complain.

<sup>71</sup> *Sherwyn et al., supra*.

<sup>72</sup> 507 F.3d 1139, 1145–46 (8th Cir. 2007).

<sup>73</sup> *Id.* See also: *Harmon v. Home Depot USA Inc.*, 130 F. App’x 902, 905 (9th Cir. 2005) (finding a plaintiff unreasonable where she quit when the employer was attempting to work out a transfer); *Wallace v. San Joaquin Cnty.*, 58 F. App’x 289, 291 (9th Cir. 2003) (finding a plaintiff unreasonable where she refused to cooperate in the investigation and refused to pursue a transfer).

<sup>74</sup> 480 F.3d 1287, 1305 (11th Cir. 2007).

<sup>75</sup> *Collette v. Stein-Mart, Inc.*, 126 F. App’x 678, 686 (6th Cir. 2005); *Thompson v. Naphcare, Inc.*, 117 F. App’x 317, 324 (5th Cir. 2004).

In one case, the employee was found unreasonable when she reported the harassment to a supervisor but specifically asked the supervisor not to commence an investigation for fear of reprisal.<sup>76</sup> In another nine cases, employee’s reporting suffered some defect (e.g., the complaint was vague).<sup>77</sup>

## Judicial Rule-Breaking Explained

The question before us is, why is there judicial rule breaking in the *Ellerth/Faragher* context but not with regard to *Oncala*? This is a matter of considerable interest, because we found 56 cases in which employers prevailed even though employees reported alleged harassment to the correct persons, did not reject their employers’ accommodations, and suffered from no other defect limiting their claims. In each case the court held that the report was untimely, but none of the employees in these cases reported the alleged misconduct in what one might consider an untimely way. Instead, in each of these cases the employer exercised reasonable care to prevent and correct harassment, and the court simply would not rule against an employer apparently doing what it could to prevent or correct harassment. As shown in Exhibit 4, courts looked to employer behavior to determine whether the employee’s behavior was reasonable, and as shown more specifically in Exhibit 5, the court looked to employer behavior in determining whether the reports were timely.

Courts’ reliance on reporting timeliness has effectively eviscerated the unreasonable employee prong for cases of pervasive harassment. One justification that courts cite for finding a delay unreasonable is that the victim could have prevented future instances of harassment with an earlier report. Courts have described this as a duty to stop harassment before it becomes “severe or pervasive.”<sup>78</sup> But by placing this obligation on the victim, courts effectively eliminate the unreasonable employee prong of the defense (at least with respect to harassment alleged to be pervasive, versus severe).<sup>79</sup>

<sup>76</sup> See: *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005). Note that Viacom Television Stations, Inc., and Viacom Broadcasting of Seattle, Inc., were also named in the dismissed action.

<sup>77</sup> For example, see: *Episcopo v. Gen. Motors Corp.*, 128 F. App’x 519, 523 (7th Cir. 2005); *Hardage, supra*; and *Benfield v. Fulton Co., GA*, 130 F. App’x 308, 312 (11th Cir. 2005), abrogated on other grounds by *Crawford v. Carroll*, 529 F.3d 961, 971 (11th Cir. 2008).

<sup>78</sup> For example, see: *Ellerth, supra* (“To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”); and *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (“The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage amounting to discrimination in violation of Title VII.”)

<sup>79</sup> *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063-64 (10th Cir. 2009) (“Had [defendant] been notified earlier, there is a good chance that Title VII’s primary goal of preventing harm would have been served.”); and *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003) (“Had [plaintiff] notified [defendant’s] officials in June, when the harassment initially began, most of the incidents complained of could have been avoided.”).

Depending on how long an employee waits to report ongoing harassment, it appears that an employee's good behavior can never subject an employer to liability, contrary to what the letter of the affirmative defense mandates. All that seems to matter in pervasive harassment cases is the employer's behavior. We anticipate that employees whose employers acted reasonably will themselves be found to be unreasonable due to a lack of timeliness or due to reporting too soon, rendering the harassment not yet pervasive.

This result probably stems from the courts' perception of the unfairness of the conjunctive nature of the two-pronged affirmative defense. If an employer acts reasonably to prevent and correct harassment, it may seem unfair to extend vicarious liability to that employer just because the employer was unlucky enough that the employee complained. Moreover, our findings lend continued support to the argument that the affirmative defense perversely incentivizes employers not to make it *too* easy for employees to complain, lest they foreclose the possibility of satisfying the unreasonable employee prong. Rather than incentivizing employers to do all they can to prevent harassment, the rule incentivizes only the bare minimum of preventive efforts, and nothing more.

The majority of courts seem to have solved this problem by making new law. In contrast to the Supreme Court's apparent intentions, employers that exercise reasonable care to prevent harassment and react well to a complaint will almost always prevail at summary judgment. To justify this, courts must declare the plaintiff untimely, and therefore unreasonable, regardless of whether the delay, if any, was reasonable and regardless of how much time actually elapsed before the report.

We found only one case (out of 72), *Moore v. Sam's Club*, where a court denied summary judgment to an employer who (according to the court) exercised reasonable care to prevent and correct harassment when the employee complained.<sup>80</sup> Instead the *Moore* court (in the District of New York) applied the rule technically and allowed the employee's complaint to go forward. This case was heard in 1999, and we have seen nothing of the kind since that time. Thus, in the 213 cases we studied in this context, there was only one case where the courts applied the rule so that it yielded a result that all other cases avoided. A "good actor" employer who acted reasonably to prevent and correct harassment was found guilty because the employee complained. In every other case, such "good actor" employers were rewarded regardless of whether the employee reported or not.

### Why Judges Ignore *Ellerth/Faragher* but Follow *Oncale*

Our theory about why judges follow *Oncale* but disregard *Ellerth* and *Faragher* is that they perceive the *Oncale* rule to affect a fairly narrow population of litigants, but the broadly applicable *Ellerth/Faragher* rule warrants greater judicial initiative to prevent injustice. We also must point out that it is unlikely that either

<sup>80</sup> 55 F. Supp. 2d 177 (1999).

the Supreme Court or Congress will address these rules any time soon (absent a prominent split in the circuits, which does not now exist). In particular, the Court will not make a change because it so recently created the rules. Moreover, the Court left these rules largely untouched when it decided *Pennsylvania State Police v. Suders* in 2004<sup>81</sup> and *Vance* in 2013. We should also point out that in the three cases we have been discussing the Court expressly created rules for future cases. *Oncale* did not just hold that there was a cause of action for same-sex harassment, it set forth the rule on how to prove sexual harassment. Similarly, *Ellerth* and *Faragher* created a new affirmative defense that was not part of the case. This was a true act of judicial fiat. As for Congress, it has yet to codify sexual harassment, even as it made several adjustments to the civil rights laws in 1991. Thus, expecting no rescue from the Court or Congress, judges will determine whether to observe the rules by considering the frequency of cases and the relative harm to litigants and society caused by strict application of the rules.

With regard to *Oncale*'s equal-opportunity harasser defense, the frequency multiplied by the harm is not worth the costs judges incur by ignoring or misapplying the rule. Only 73 federal court opinions since *Oncale* use the phrase "equal opportunity harasser" (or some derivative thereof), demonstrating the small number of cases in which this defense comes up.<sup>82</sup> Even if a would-be harasser knew of this defense, there is always a risk that it may not work. Moreover, while the consequences to the plaintiffs affected by the defense are harsh—they lose their case—it will not really affect society as a whole.

In contrast, cases involving the two-prong *Ellerth/Faragher* test are commonplace. We found 72 summary judgment motions filed on the rule in its first 18 months alone.<sup>83</sup> A Thomson Reuters Westlaw search using the terms "sexual harassment," *Ellerth*, and "affirmative defense" (or derivatives thereof) yielded 2,360 cases.<sup>84</sup> Every circuit has analyzed the defense.

There's more to this matter, however. In stark contrast to *Oncale*, if courts dutifully follow the *Ellerth/Faragher* rule, this

<sup>81</sup> 542 U.S. 129 (2004) (holding that to establish a "constructive discharge," an employee must show that the abusive working environment became so intolerable that any reasonable person would quit, but that the *Ellerth/Faragher* defense would be available unless the employee quits in response to an adverse action changing her employment status or situation, such as a demotion).

<sup>82</sup> We searched for the phrase "equal-opportunity-harass!" across the "All Federal" case database on what was then known as WestlawNext, limiting the results to cases decided after March 4, 2008. We ran this search most recently on May 25, 2014, and received 73 hits. This result is likely underinclusive because a court need not use the phrase "equal opportunity harasser" to describe the defense, but the result is also overinclusive because some number of the 73 cases were false hits. Nevertheless, this is still useful as a rough indication of how rare these cases are.

<sup>83</sup> *Sherwyn et al., supra.*

<sup>84</sup> On May 26, 2014, we ran a search in the "All Federal" case database on WestlawNext using the following syntax: ((sex! gender) /1 harass!) & (ellerth faragher "118 s.ct. 2257" "524 u.s. 742" "118 s.ct. 2275" "524 u.s. 775") & affirmative-defense.

carries a high probability of disastrous results for a large target pool. If employees prevail whenever they complain, the message to employers will be: *exercise at least some reasonable care to prevent harassment, but not too much*. In practical terms, rigid application of the two-prong test disincentivizes employers from doing anything more than the baseline that courts routinely find constitutes “reasonable efforts” to prevent harassment, which means establishing a strong, written anti-harassment policy with more than one avenue to report harassment.<sup>85</sup> As a corollary, we see little reason under the law for any employer to continue to provide harassment identification training, toll-free harassment reporting hotlines, or other mechanisms that increase the likelihood that harassment will be properly identified and timely reported.

Employees who complain of harassment that violates the law will prevail. Thus, employers investigating complaints of harassment have countervailing incentives: acknowledging that harassment occurred amounts to a party admission as to whether harassment occurred, but at the same time, performing an investigation in bad faith poses a risk to the employer’s ability to establish the reasonable employer prong.

As a practical matter, there’s a logic behind judges’ following the *Oncala* rule and ignoring *Ellerth/Faragher*. This analysis presents a cautionary tale for judges faced with the opportunity to make rules. Judges ought to consider the degree to which rules will create the problem described in this article for lower court judges charged with their application. All else equal, judges should weigh the probability of contemplated harm caused by application of the rule times the affected pool of individuals or entities to which the rule’s potential harm would extend. If the probability times the affected pool of individuals or entities is large, judges may be better advised to advance a standard, allowing augmented judicial discretion.<sup>86</sup> All else equal, rules are more likely to be applied when the target population of the rule’s application is small, and the probability of the harm is relatively low. While it may be tempting to embrace rules over standards because of predictability, such predictability is an illusion in the case of the *Ellerth/Faragher* defense given the extent to which judges distort the application of the rule.

## Testing the Theory

Our theory will be tested over the next few years in the wake of the Supreme Court’s *Vance* decision. Like the affirmative defense and the equal-opportunity harasser cases, the “tangible action” rule set forth in *Vance* yields an untenable result if applied properly.<sup>87</sup> The essence of the *Vance* holding is that only people with

actual power over working conditions (such as pay and promotion) can be considered as agents of a company with regard to sexual harassment. In this light, the employee who oversees day-to-day operations, has the power to assign work, has the power to make employees’ working conditions pleasant or miserable, and can effectively recommend terminations will no longer be considered a “supervisor,” because decisions regarding “tangible” employment changes ultimately rest with the human resources department. To counteract this unjust result, lower courts could expand the term “tangible action” to render *Vance* meaningless. In a vacuum, courts would likely engage in such holdings because *Vance* is out of touch with the way American businesses operate, and because this case affects every sexual harassment allegation, given that every sexual harassment case rests on whether the harasser was a supervisor and, further, because limiting that definition undermines the law.<sup>88</sup> Thus, courts should change the law.

We predict, however, that courts will not expand the definition of tangible loss to essentially overturn *Vance*, because applying *Vance*, as decided, allows the courts to continue to do what our study reveals they have already done. They have effectively rewritten *Ellerth* and *Faragher* into a *de facto* negligence standard. As it stands now, employees who do not suffer a tangible loss will recover only if the employer did not exercise reasonable care to prevent harassment or if the employer did not respond well to a reported complaint. *Vance* allows courts to follow this *de facto* “negligence” standard in all non-tangible loss cases by making supervisors into coworkers—and we predict that the courts will do so. Thus, instead of finding ways to make employees unreasonable, courts will deem all but the most obvious supervisors to be coworkers in order to perpetuate the *de facto* vicarious liability standard created by a host of lower-court decisions.

Analyzing judicial rule breaking behavior in common civil cases like those discussed in this article contributes to our understanding of judicial behavior more broadly because we are able to study behavior in a context stripped of the normative and political settings in which rule breaking is more often described and studied. Absent the strong political or social forces that might influence a judge to conform her behavior to expectations when she feels that she is being closely watched, this article begins to shed light on rule breaking by judges.

In closing, this article presents findings about a single area of law and one set of rules. We suggest that additional research is surely necessary to compare judges’ behavior in other areas of law with regard to other untenable rules, but we believe that this article lays a solid foundation to advance our understanding of rule breaking under quotidian adjudicative circumstances. ■

<sup>85</sup> For example, see: *Wright v. Anixter, Inc.*, 188 F.3d 517 (9th Cir. 1999) (decision); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001); *Thompson v. Naphcare, Inc.*, 117 F. App’x 317, 324 (5th Cir. 2004); and *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103-04 (2d Cir. 2010).

<sup>86</sup> Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 23-26.

<sup>87</sup> 133 S. Ct. at 2443.

<sup>88</sup> *Id.*, at 2439. The Court said: “If the harassing employee is the victim’s coworker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a ‘supervisor,’ however, different rules apply. If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable.”

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