

Employer Liability for Harassment Under Title VII: A Functional Rationale for *Faragher* and *Ellerth*

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I. INTRODUCTION

In two decisions concerning sexual harassment, *Faragher v. City of Boca Raton*¹ and *Burlington Industries, Inc. v. Ellerth*,² the Supreme Court, on the last day of its 1997-1998 term finally articulated coherent vicarious liability rules critical for bounding the scope of the discrimination prohibitions in Title VII of the Civil Rights Act of 1964.³ The Court did so by explaining the meaning of the inclusion of “any agent” in Title VII’s definition of “employer.”⁴ The meaning of “agent”

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1. 118 S. Ct. 2275 (1998).

2. 118 S. Ct. 2257 (1998).

3. 42 U.S.C. §§ 2000e-2000e-17 (1994).

4. “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any *agent* of such a person” 42 U.S.C. § 2000e(b) (1994) (emphasis added). Title VII’s prohibitions of discrimination run against “an employer,” but not directly against individuals or agents. See 42 U.S.C. § 2000e-2 (1994).

in this definition is critical for establishing employer liability because almost all Title VII-protected employees work for corporations and other legal fictions which can act, and thus discriminate, only through human agents.⁵ The scope of Title VII, moreover, in part turns derivatively on the definition of “agent” because the Act’s proscriptions do not render discriminating employees individually liable.⁶

Perhaps appreciating that a restrictive interpretation of “agent” could qualify Title VII’s promise, courts consistently have held firms liable for the discriminatory decisions of some of their employees when the formal employment status of other employees is changed—such as through discharge, suspension, hiring, promotion, demotion, or compensation increase or decrease.⁷ The recognition by courts that Title VII may protect employees who suffer discrimination in working conditions, even when their formal job status is not changed,⁸ however, has presented more difficult questions regarding when employers should be held responsible.⁹

Justice Souter in *Faragher* and Justice Kennedy in *Ellerth*, in two separate opinions for the Court,¹⁰ provided a new analytical structure to

5. The definition of “person” in the Act “includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.” 42 U.S.C. § 2000e(a) (1994).

6. This is at least the position taken by most courts. See, e.g., *Lissau v. Southern Food Serv.*, 159 F.3d 177 (4th Cir. 1998); *Wathen v. General Elec. Co.*, 115 F.3d 400 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995). A few decisions suggested that individual employees can be held liable as agents under the definition of employer in Title VII. See, e.g., *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989). Such a view seems even harder to sustain after Congress, in the Civil Rights Act of 1991, provided for damage actions against employers that are limited based on the size of the employer’s workforce. See 42 U.S.C. § 1981a(b) (1994).

7. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This result has proven no less true in sex discrimination cases involving sexual harassment. See *infra* note 12.

8. The Supreme Court’s acceptance of such a Title VII cause of action was in a sexual harassment case, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986), but the Court noted that *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), the first of the discriminatory work environment cases, involved national origin discrimination.

9. For instance, the *en banc* Seventh Circuit decision reviewed in *Ellerth*, and its companion case, *Jansen v. Packaging Corp. of America*, resulted in eight opinions, each taking somewhat different positions. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997). The Eleventh Circuit decision reviewed in *Faragher* was also *en banc* and split that court 7-5. See *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997).

10. Six other Justices, including Justice Kennedy, joined Justice Souter’s opinion in *Faragher*. Five other Justices, including Justice Souter, joined Justice Kennedy’s opinion in *Ellerth*. Justice Ginsburg joined Justice Souter’s *Faragher* opinion, but,

govern employer liability for cases where the agent perpetrating the actionable discrimination is a supervisor of the victim. Though their analyses were only congruent, and not identical, Justices Souter and Kennedy took care to announce their holdings in the exact same words:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

By allowing no defense in cases where a “tangible employment action” is taken, the decisions confirm the accepted law that employers are always liable under Title VII for actionable, discrimination-based decisionmaking by supervisory employees that changes the formal job status of other employees.¹² More importantly, the Court’s twice-stated new analytical structure makes clear that employers are liable for their supervisory employees’ creation of discriminatory working environments, except where employers can establish the articulated two-pronged affirmative defense.

Language in the mutual holding of *Faragher* and *Ellerth*, as well as in the analysis of each opinion, understandably makes particular reference to sexual harassment, as each case involved this form of discrimination. In *Faragher*, the trial court found that two lifeguards employed by the city of Boca Raton as supervisors discriminated on the basis of sex

without any illuminating explanation, only concurred in the judgment in *Ellerth*. 118 S. Ct. at 2271. Justice Thomas, joined by Justice Scalia, penned dissenting opinions in each case.

11. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

12. See, e.g., *Nichols v. Frank*, 42 F.3d 503, 514 (9th Cir. 1994); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2d Cir. 1992); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). The aforementioned cases are all cited in *Faragher*, 118 S. Ct. at 2285. However, *Faragher*’s characterization of this automatic employer liability rule as “unanimous” may have been an overstatement. See *Reinhold v. Virginia*, 151 F.3d 172 (4th Cir. 1998) (suggesting that a harasser who denies an employee tangible job benefits must be the employee’s supervisor in order for the employer to be automatically liable); *Sims v. Brown & Root Indus.*, 889 F. Supp. 920 (W.D. La. 1995), *aff’d without opinion*, 78 F.3d 581 (5th Cir. 1996) (rejecting automatic employer liability in a “quid pro quo” sexual harassment situation where the victim suffered a pay cut).

against Faragher, one of the guards they supervised, by maintaining an abusive working environment through vulgarities, sexual comments, gestures, and touching.¹³ In *Ellerth*, the plaintiff offered to prove that one of her supervisors subjected her “to constant sexual harassment” through “repeated boorish and offensive remarks and gestures” and at least three incidents of “threats to deny her tangible job benefits.”¹⁴

Notwithstanding Justice Thomas’s allegation in his *Ellerth* dissent that the Court had fashioned tougher standards for employer liability in sexual than in racial harassment cases,¹⁵ it is clear that the Court’s new analytic structure will apply to all forms of Title VII-proscribed discrimination. In order to solve the employer liability issue in both *Faragher* and *Ellerth*, the Court utilized common law principles as well as Title VII policy and precedent to interpret the meaning of “agent” in Title VII’s definition of employer. The Court cited nothing (and could have found nothing) in the language, structure, or history of Title VII that would warrant interpreting “agent” differently for purposes of sex discrimination, than for purposes of race, color, religion, or national origin discrimination.¹⁶ Furthermore, the Court has repeatedly recognized that sexual harassment is covered by Title VII only as a form of sex discrimination,¹⁷ just as racial harassment is covered as a form of race discrimination.¹⁸ The courts, therefore, should and can be expected

13. 118 S. Ct. at 2277.

14. 118 S. Ct. at 2262. After accepting review in *Faragher*, the Court also granted certiorari in *Ellerth* to explore whether the presence of unfulfilled threats to deny tangible job benefits should place a case in that category (“quid pro quo” supervisory harassment for purposes of sexual harassment) for which employers would incur absolute vicarious liability. *See id.* The mutual holding in *Ellerth* and *Faragher* answered this question in the negative; employers may assert the affirmative defense in any case, such as *Ellerth*, where the threats are not fulfilled. *Faragher*, 118 S. Ct. at 2275; *Ellerth*, 118 S. Ct. at 2257.

15. 118 S. Ct. at 2271.

16. *See generally Faragher*, 118 S. Ct. at 2275; *Ellerth*, 118 S. Ct. at 2257. Any law formulated to treat the agency problem in sexual harassment cases must also define the law governing Title VII’s coverage of all other forms of not only sex, but also race, color, religion, and national origin discrimination. If a company is to be vicariously liable for an employee’s decision to pay an average-performing black employee less than an average-performing white employee, then the company must be liable for a male employee’s decision to pay less to a female employee who refuses to have sex with him than he would pay an otherwise comparable male employee from whom sex would not be requested. Conversely, if a company is not to be vicariously liable for the actions of one of its employee-supervisors subjecting a female subordinate to continual sexist taunts and insults, then the company should not be vicariously liable for the supervisor’s actions subjecting a black subordinate to racist taunts and insults.

17. The Court maintained its focus on sex discrimination in each of the three sexual harassment cases it previously decided. *See Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1001 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

18. Female employees who suffer the effects of a work environment in which they

to apply the approach of *Faragher* and *Ellerth* to all forms of Title VII-proscribed discrimination.¹⁹

Employers who wish to eliminate sexual and other forms of discriminatory harassment at their work sites should welcome the *Faragher* and *Ellerth* decisions. These decisions promise employers insulation from liability under Title VII for discriminatory work environments that the employers took reasonable steps to prevent and correct. Unless their employees are victimized by some tangible employment action, in most cases employers should be able to escape or at least substantially mitigate liability by promulgating and implementing effective anti-discrimination policies.²⁰

Title VII plaintiffs also should welcome *Faragher* and *Ellerth*. Prior to these decisions, some courts effectively required a plaintiff who did not suffer the loss of some formal employment status to prove that any discrimination suffered in the work environment was caused by the

are continually disparaged and assaulted are victims of sex discrimination in much the same way that black employees are victims of race discrimination in a working environment that disparages and assaults them. In these instances, male employees and white employees, respectively are not receiving equivalent disparaging treatment.

Additionally, the prevalence of demands for sexual favors in many sexual harassment cases does not render sexual and racial discrimination incomparable forms of discrimination. A female employee whose protection from discharge is conditioned on her willingness to engage in sexual acts is equivalent to a black male employee whose job is dependent on his willingness to perform demeaning services not required of his white peers. The female employee may be said to be a victim of a form of "sex-plus" discrimination, as the black male employee is a victim of "race-plus" discrimination. Cf., e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employment policies that require female employees, but not male employees, to be free of preschool children may be prohibited as sex discrimination). In each case, more is required of the employee than would have been required of a comparable employee who did not share the same Title VII-protected status.

Thus, Professor Schultz fairly criticizes any lower court decisions that have treated sexual harassment as somehow distinct from intentional sex discrimination under Title VII. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1713 (1998). Professor Schultz criticizes lower court decisions that take into account only sexual advances, and not other forms of sex discrimination, in considering whether a working environment is sufficiently hostile to be actionable. *Id.*

19. Courts already have begun applying the decisions to other forms of discrimination. See, e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. (1998) (race discrimination); *Wright-Simmons v. Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998) (race discrimination); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (race discrimination). See also *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 688 n.7 (8th Cir. 1998) (dicta concerning disability discrimination under Americans with Disability Act).

20. Employers should be able to escape or mitigate liability in most cases, but not all. See *infra* text accompanying notes 31-33.

negligence of management.²¹ To do so, a plaintiff had to prove that management knew, or in the exercise of reasonable care should have known, of the discriminatory environment, and that management failed to take reasonable remedial action. The employers in both *Faragher* and *Ellerth* asked the Court to adopt this negligence standard for supervisory sexual harassment that does not include the loss of formal job status or benefits.²²

The affirmative defense-qualified vicarious liability standard adopted in *Faragher* and *Ellerth* should prove more favorable to plaintiffs than the negligence standard for several reasons. First, the *Faragher-Ellerth* approach places the burden of proving the reasonableness of the employer's preventive and corrective actions upon the employer, the party that has the best evidence of the actions at issue. Moreover, placement of the burden of proof may be critical to the outcome of a case in which the trier of fact is uncertain about the reasonableness of the actions of either the employer or the victimized employee.

Second, *Faragher-Ellerth's* qualified vicarious liability standard avoids a causation issue that can be problematic for plaintiffs in negligence cases. For instance, in the decision reviewed in *Faragher*, the Eleventh Circuit, applying a negligence standard, perfunctorily dismissed the relevance of Boca Raton's ineffective dissemination of its anti-harassment policy by asserting that the "district court did not find that the City would have known about the harassment if it had effectively disseminated this policy."²³ Similarly, Justice Thomas in his *Faragher* dissent argued that the Court should have adopted a negligence standard under which Boca Raton would escape liability if the failure to disseminate its policy was not shown to have prevented its city managers from learning of Faragher's victimization.²⁴

By contrast, Justice Souter's majority opinion decides against Boca Raton without any consideration of causation. Souter's decision is based on the city's failure to disseminate its policy, to otherwise monitor lifeguard supervisors, and to assure possible complainants that they

21. See, e.g., *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *Nash v. Electrospace Sys.*, 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).

22. Brief for Petitioner at 19, *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998); Respondent's Brief at 17-31, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

23. *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1539 n.11 (11th Cir. 1997).

24. *Faragher*, 118 S. Ct. at 2294 (Thomas, J., dissenting). Thomas's opinion does not clearly indicate whether the plaintiff or the employer should have the burden of proving the causation issue. On the one hand, it states that the "City should be allowed to show" that the failure to disseminate was not the primary cause of Faragher's victimization. *Id.* On the other hand, it asserts that the plaintiff "would of course bear the burden of proving the City's negligence." *Id.*

could bypass harassing supervisors.²⁵ The only causation nexus that was relevant under the vicarious liability standard in *Faragher* was one that connected the harassing supervisors' discriminatory motivation (their intentionally different treatment of female subordinates) with *Faragher's* victimization.

Third, imposing liability on employers who inadequately prevent or correct discriminatory harassment through a vicarious liability theory (rather than through a direct condemnation of the negligence of management in preventing harassment) clarifies that the intent of harassers to discriminate and to act with reckless indifference toward Title VII-protected rights can be imputed to employers²⁶ for purposes of assessing compensatory and punitive damages under section 102 of the Civil Rights Act of 1991.²⁷ Had the Court adopted a negligence standard, a defendant employer whose anti-harassment policy was judged to be deficient could have argued that negligence is an unintentional tort, and that while the deficient policy may have disparately impacted plaintiffs and their Title VII-protected class, management did not intend to discriminate against women, or any other victimized protected class, by adopting its neutral lax policy.²⁸ This

25. See *id.* at 2293.

26. See *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998) (holding that under *Faragher* and *Ellerth* a manager's "reckless" discrimination can be imputed to an employer for purposes of assigning punitive damages).

27. 42 U.S.C. § 1981a (1994). Prior to the Civil Rights Act of 1991, Title VII remedies were limited to reinstatement, back pay, and other forms of equitable relief. See 42 U.S.C. § 2000e-5(g)(1) (1994). Section 102 of the 1991 Act for the first time allowed the victims of Title VII discrimination to recover limited legal damages, but only for "intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . .," 42 U.S.C. § 1981a(a)(1), and punitive damages, but only for "discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

28. Some courts have held under common law principles that an employer who is held liable for the intentional torts of its employees on a negligent failure to supervise theory cannot be subjected to all the damages that could be collected against the tortfeasor employees unless the employer authorized, participated in, or ratified the wrongful act of the servant. See, e.g., *Lehman v. Toys 'R' Us, Inc.*, 626 A.2d 445, 464 (N.J. 1993) (plaintiff could not recover punitive damages for supervisory sexual harassment occurring outside the scope of supervisor's authority, where employer liability was based on negligence for not having a policy banning sexual harassment). See also *Preston v. Income Producing Management, Inc.*, 871 F. Supp. 411 (D. Kan. 1994); *Mason v. City of New York*, 949 F. Supp. 1068 (S.D.N.Y. 1996). But see *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491 (10th Cir. 1994) (under Oklahoma law a corporate employer is liable for punitive damages for negligence because it has a "nondelegable" duty not to hire or retain dangerous workers).

argument is foreclosed by an interpretation of “agent” in the definition of employer in Title VII which, in the absence of an adequate preventive and corrective policy, includes harassing supervisors.²⁹

Finally, by requiring employers to prove both that the employers acted reasonably, and that plaintiffs “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer,”³⁰ the *Faragher-Eltherth* approach clarifies that when both the employer and the employee victim have acted reasonably, the costs of the discriminatory harassment are to be imposed on the employer.

Reasonable preventive and corrective action by both the employer and the victimized employee may result in employer liability for discriminatory harassment in at least three situations. First, a situation may exist in which a particular victim reasonably chooses not to take advantage of an employer’s generally reasonable preventive system, perhaps because of the victim’s reasonable fear that the importance of the harasser’s contributions to the firm make employer retaliation, rather than corrective action, probable.³¹ Second, there may be a case in which a victim does invoke an employer’s preventive and corrective system through a reasonable complaint, but the employer’s reasonable operation of that system leads only to a stalemate of uncorroborated allegations and denials. This situation may result in less than full compensation of

29. Although not relied upon by either the *Faragher* or the *Eltherth* Court, Congressional expansion of remedies under Title VII indeed provides another justification for the Court’s rejection of a negligence standard in favor of a vicarious liability standard. One of the reasons that Congress provided for legal damages in the Civil Rights Act of 1991 was to grant harassment victims meaningful relief. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2(1) & 3(1), 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.) (wherein Congress found that “additional remedies under Federal law are needed to deter unlawful harassment” and Congress passed the Act “to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace”). The equitable relief previously afforded by Title VII generally could not benefit victims of harassment who did not suffer a loss of some tangible employment benefit. *See supra* note 27. *See also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 74 (Marshall, J., concurring) (noting that backpay would be available only to those hostile work environment victims who could claim constructive discharge). In addition, House Report 102-40 states:

[v]ictims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies.

H.R. REP. NO. 102-40, pt. 1, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. Thus, adoption of a negligence standard and the insulation of negligent employers from compensatory damages would have conflicted with the Congressional design of section 102 of the 1991 Act.

30. *Faragher*, 118 S. Ct. at 2279; *Eltherth*, 118 S. Ct. at 2261.

31. *See infra* text accompanying notes 107-11.

the victim for harassment that the victim could have proven through more formal Title VII litigation.³² Third, a case may exist in which an employee suffers significant harm because of a sudden, severe act of discrimination, such as a sexual assault, that the employee could not reasonably have anticipated or avoided by invocation of the employer's reasonable preventive or corrective system. The *Faragher-Ellerth* affirmative defense does not allow the reasonable employer to insulate itself from liability for the sudden severe discriminatory act if the victim promptly reports that act after its commission.³³

Thus, the analytical structure provided in *Faragher* and *Ellerth* includes elements that should be attractive to most parties to the debate on the Title VII agency question. Clearly, the Court in these cases crafted an extraordinarily fine example of the kind of interpretive law that modern regulatory statutes often require. Nevertheless, in both decisions the Court's use of common law agency principles was too formulaic, and its invocation of Title VII policy and precedent was too truncated to be either fully convincing or adequately explicative of the meaning of the structure to be applied to future difficult cases.

The remainder of this article will attempt, in part, to compensate for any deficiency in this analysis by more fully explaining a policy-based defense of the holding. This policy analysis will allow for a prediction, or at least a recommendation, of resolutions for a number of important questions which *Faragher* and *Ellerth* raise, but do not fully resolve. These include: 1) what exactly constitutes a "tangible" employment action; 2) what deficiencies in an employer's preventive or corrective opportunities would justify a victim not taking advantage of those opportunities; 3) whether a victim's failure to report earlier harassment pursuant to an employer's reasonable complaint processes should prevent the victim from recovering for harassment the victim did report; 4) whether a victim's unreasonable failure to avoid or mitigate the harassment may qualify the liability of even a negligent employer; and 5) whether the affirmative defense-qualified vicarious liability approach of these cases should also be applied to discriminatory harassment from co-workers.

32. See *infra* text accompanying notes 110-16.

33. See *infra* text accompanying notes 115-20.

II. THE INTERPRETIVE COMMON LAW OF *FARAGHER* AND *ELLERTH*

The Supreme Court addressed the Title VII agency question in a previous sexual harassment decision, *Meritor Savings Bank v. Vinson*.³⁴ In that case the Court declined “to issue a definitive rule on employer liability,” but concluded that “Congress wanted courts to look to agency principles for guidance,” even though “common-law principles may not be transferable in all their particulars to Title VII.”³⁵ When, in *Faragher* and *Ellerth*, the Justices deemed it time to attempt to formulate a definitive rule, they seemed to recognize that the common law of agency is too variant between jurisdictions and too much in flux to be easily transferable to the Title VII statutory scheme.

Instead, as Justice Kennedy acknowledged in *Ellerth*, the Court had to choose from among several common law doctrines, and thus rely on what he termed “the general common law of agency, rather than on the law of any particular State,” to formulate “a uniform and predictable standard . . . as a matter of federal law.”³⁶ Yet, contrary to the claim of Justice Thomas in his dissent,³⁷ the *Faragher-Ellerth* Court did not cut its new federal law standard out of “whole-cloth.”³⁸ Rather, the majority in each of the cases looked to the purposes, structure, and compromises of Title VII, as well as the guidelines expressed in *Meritor*, to limit responsibly the exercise of a law-making power delegated by Congress through the use of the general agency term in Title VII’s definition of employer. Given the lack of evidence of any more specific Congressional intent on the issue, it is difficult to understand how any other formulation of a general standard for employer liability for Title VII-proscribed discrimination could have constituted a more modest degree of law making.³⁹

34. 477 U.S. 57 (1986).

35. *Id.* at 72.

36. *Ellerth*, 118 S. Ct. at 2265.

37. *Id.* at 2273.

38. *Cf. Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (relying on a “common law” rule to interpret federal statute).

39. The holdings in *Faragher* and *Ellerth* are somewhat reminiscent of the holding of Justice Brennan’s plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse* Justice Brennan held that, while Congress did not intend the proscription of discrimination in Title VII to require plaintiffs to prove that a discriminatory motive was a necessary cause of any adverse employment decisions that they question, Congress did intend to provide employers the opportunity to prove the absence of such necessary causation as an affirmative defense. However, in light of the variant and developing meaning of “agent” in the many common law jurisdictions, the Court’s assumption in *Faragher* and *Ellerth* of delegated authority to formulate an affirmative defense seems less open to question than Justice Brennan’s assumption that Congress intended to delegate authority in order to fashion a compromise on the necessary causation question at issue in *Price Waterhouse*.

Both Justice Souter's opinion in *Faragher* and Justice Kennedy's opinion in *Ellerth* begin their analyses of agency law with a citation of the general principle, as stated in section 219(1) of the Restatement of Agency, that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment."⁴⁰ The two opinions' treatments of this principle vary appreciably, however. The *Ellerth* opinion rather easily concludes that as a "general rule . . . sexual harassment by a supervisor is not conduct within the scope of employment" because the "harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer."⁴¹ The *Ellerth* opinion relies on the traditional agency principle, as set forth in section 228(1)(c) of the Restatement, that to be within the scope of employment, conduct must be "actuated, at least in part, by a purpose to serve the master."⁴²

By contrast, Justice Souter's *Faragher* opinion finds problematic the application of the scope of employment standard to sexual harassment by a supervisor. Souter's opinion notes that a number of prominent decisions in this century have read the scope of employment test more expansively to allow vicarious liability against an employer for "intentional torts [including a number of sexual assaults] that were in no sense inspired by any purpose to serve the employer."⁴³ The opinion references these cases generally to demonstrate "differing judgments about the desirability of holding an employer liable for his subordinates' wayward behavior," and at least some of the cases more specifically to demonstrate "that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not."⁴⁴ The opinion then recognizes that these cases

40. *Faragher v. City of Boca Raton*, 118 S. Ct. at 2286; *Ellerth*, 118 S. Ct. at 2266.

41. *Ellerth*, 118 S. Ct. at 2266.

42. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958).

43. Justice Souter cited first the case of *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), in which Judge Friendly found the government liable for the damage caused by a drunken sailor's opening of water valves on a drydock upon returning from a night of heavy drinking. The sailor was clearly not motivated by a desire to serve the employer, but Judge Friendly stressed that a sailor's drinking on leave was "characteristic" and not "unforeseeable." Souter also cited *Leonbruno v. Champlain Silk Mills*, 128 N.E. 711 (N.Y. 1920), in which an employer was liable for foreseeable horseplay, and *Carr v. Wm. C. Crowell Co.*, 171 P.2d 5 (Cal. 1946) (en banc), where the employer was liable for an employee's assault on a co-employee. Souter also cited six additional cases finding employers liable for their employees' personally motivated sexual assaults. *Faragher*, 118 S. Ct. at 2287.

44. *Faragher*, 118 S. Ct. at 2287-88 (quoting *Taber v. Maine*, 67 F.3d 1029, 1037

would support treating all sexual harassment by supervisors as within the scope of employment precisely because such behavior is pervasive and “persistent” and therefore should be anticipated by employers “as one of the costs of doing business, to be charged to the enterprise rather than the victim.”⁴⁵ Nevertheless, Souter’s *Faragher* opinion stops short of applying the scope of employment standard in this manner for two reasons: first, a lack of evidence that Congress wanted to ignore the traditional distinction of intentional “frolics or detours from the course of employment”⁴⁶ and second, a concern that an expansive application would lead to employer vicarious liability for sexual harassment by coworkers as well as supervisors.⁴⁷

Neither the *Ellerth* nor the *Faragher* Court persuasively tied its analysis of the scope of employment standard to the common holding of the two cases. That holding, as stated above, imposes vicarious liability on employers without affording them a newly crafted affirmative defense only when a victim of discrimination has been harmed by a “tangible employment action.”⁴⁸ Yet both Justice Kennedy and Justice Souter acknowledged that employees sometimes may discriminate against other employees without taking tangible employment action and still satisfy even the traditional, ‘at-least-in-part-motivated-by-a-purpose-to-serve-the-employer’ test for the scope of employment standard. Justice Kennedy allowed that there are “instances, of course, where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer,” citing a district court case where a supervisor engaged in sexual harassment with the intent of furthering the employer’s policy of discouraging women from seeking advancement.⁴⁹ In suggesting that Congress wanted to preserve a distinction of “frolics or detours” from employee actions at least in part motivated by a purpose to serve the employer, Justice Souter noted that even this distinction would place within the scope of employment discriminatory acts to placate prejudiced co-workers. It would also place within the scope of employment the use of harsher disciplinary words against delinquent workers in a Title VII protected class than

(2d Cir. 1995) (quoting 5 F. HARPER, ET AL., LAW OF TORTS § 26.8, at 40-41 (2d ed. 1986))).

45. *Faragher*, 118 S. Ct. at 2288. This position is more fully developed in Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

46. *Faragher*, 118 S. Ct. at 2288.

47. *Id.* at 2288-89.

48. *Id.* at 2279; *Burlington Indus. v. Ellerth*, 118 S. Ct. at 2257, 2261 (1998).

49. *Ellerth*, 118 S. Ct. at 2266 (citing *Sims v. Montgomery County Comm’n*, 766 F. Supp. 1052, 1075 (M.D. Ala. 1990)).

those words used against similarly delinquent workers not in that class.⁵⁰

The *Faragher* and the *Ellerth* opinions also do not use the scope of employment standard to justify their imposition of irrebuttable vicarious liability on employers for tangible employment actions. In *Faragher*, Justice Souter noted that this rule has been uniformly adopted by the lower courts under a variety of theories, including one based on "scope of authority." However, he endorsed no theory in particular to support the decision's ultimate holding.⁵¹ Justice Kennedy in *Ellerth* did endorse a particular theory, but it was not one based on the scope of employment vicarious liability standard.⁵² Instead, Justice Kennedy asserted that the rule of absolute employer liability for Title VII-proscribed discrimination resulting in tangible employment actions "reflects a correct application" of a standard drawn from the Restatement of Agency's exceptions to the insulation of employers for employee torts committed *outside* the scope of employment.⁵³ That exception, where

50. *Faragher*, 118 S. Ct. at 2288-89. In each case, the discriminatory act would, in part, serve employer interests. However, Justice Souter did not seem to appreciate that just as the "scope of employment" test is too inclusive to serve his purposes, it is also too exclusive. See *infra* note 52.

51. *Faragher*, 118 S. Ct. at 2285.

52. *Ellerth*, 118 S. Ct. at 2268. Although noted by neither opinion, a "scope of employment" standard limited by the "at-least-in-part-motivated-by-a-purpose-to-serve-the-employer" test would not only sweep in some cases where no tangible employment benefits were denied victims, it would also exclude some cases where such benefits were denied. For example, under this standard had the Recreation Department of Boca Raton decided to close a beach and dismiss three lifeguards in order to save money, a decision to choose *Faragher* and two of her female co-guards for dismissal because they were "sexually uncooperative" females could be imputed to the city because the decision would have been made in part to advance the city's budget-cutting policy. Yet, if *Faragher* and the two others had been dismissed only for the purpose of replacing them with three less experienced male or "cooperative" female guards to appeal to the Chief Guard's sexist preferences, it is hard to understand how the dismissal would have been affected as part of some task undertaken for the city. Compare, for instance, the following illustration from section 235 of the RESTATEMENT (SECOND) OF AGENCY:

P, a railroad company, employs A as a freight brakeman and instructs him to eject trespassers from the train. A permits persons to ride upon the freight train upon payment to him of a small amount. He ejects T, one of A's regular customers, for failure to pay the bribe. A's act is not within the scope of employment.

RESTATEMENT (SECOND) OF AGENCY § 235 cmt. a, illus. 3 (1958). By making A a personnel officer with authority to discharge or "eject" unneeded or unproductive employees from the employment train, and by making the bribe a sexual favor, the RESTATEMENT's illustration can be read to deny employer liability for some discriminatory discharges.

53. *Ellerth*, 118 S. Ct. at 2268.

the employee is “aided in accomplishing the tort by the existence of the agency relation,”⁵⁴ also serves as the doctrinal basis for the rest of the *Faragher-Ellerth* holding.

In both *Faragher* and *Ellerth* the Court relied on the “aided-by-agency-relation” exception as the common law principle warranting employer liability for some supervisory discriminatory harassment that does not result in tangible employment actions. In both cases, the Court first distinguished this exception from that of the use of “apparent authority.” The latter exception had been invoked by several lower courts⁵⁵ and by the EEOC to extend potential employer liability.⁵⁶ It is set forth in the same subsection of the Restatement of Agency as the “aided-by-agency-relation” exception.⁵⁷ Justice Kennedy in *Ellerth*, however, indicated that apparent authority analysis only could be relevant where the harasser claims to have supervisory authority at the workplace that he or she does not have.⁵⁸ Presumably, Justice Kennedy assumed that no victim could reasonably believe that a supervisor had authority to harass; therefore, only a supervisor’s actual, or apparent, authority to supervise could advance his or her discriminatory harassment. In his *Faragher* opinion Justice Souter seemed to agree; he asserted that the subsection of the Restatement setting forth both exceptions is intended to cover the abuse of actual agency authority as well as that of apparent authority.⁵⁹

54. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

55. See, e.g., *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987). See also *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (endorsing apparent authority standard, but finding it inapplicable to case). Cf. generally *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961 (6th Cir. 1998) (using apparent authority theory to extend employer liability under the Fair Credit Reporting Act).

56. See EEOC: Policy Guidance on Sexual Harassment, 8 Fair Empl. Prac. Man. (BNA) 405:6681, 6697 (March 19, 1990) [hereinafter *EEOC Policy Guidance*].

57. Section 219(2)(d) of the RESTATEMENT (SECOND) OF AGENCY states:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

...
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

58. *Ellerth*, 118 S. Ct. at 2260.

59. See *Faragher v. Boca Raton*, 118 S. Ct. 2275, 2278 (1998). The use of an “apparent authority” theory by the EEOC and some lower courts, however, was based on the reasonable assumption that, in the absence of a strong anti-harassment policy, a victimized employee can reasonably believe that the employer accepted the harassment, even if it did not authorize it. See, e.g., *EEOC Policy Guidance*, *supra* note 56 (“in the absence of a strong . . . policy against sexual harassment . . . employees [may] believe

Both Justices Souter and Kennedy then suggested how a supervisor's authority might facilitate his or her discriminatory harassment. Souter was less tentative, asserting that the "agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior."⁶⁰ Justice Kennedy agreed that a "supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation."⁶¹ Justice Kennedy, however, also acknowledged the "malleable terminology" of the "aided-by-agency-relation" exception and noted that "there are acts of harassment a supervisor might commit which might be the same acts a co-employee would commit, and there may be some circumstances where the supervisor's status makes little difference."⁶² Kennedy cited "this tension" as a justification for looking beyond strictly common law-based considerations in formulating the *Faragher-Ellerth* rule.⁶³

Ultimately, Justices Souter and Kennedy had to look elsewhere (other than to common law precedent) to support their holding on employer liability for supervisory harassment. They cited no common law cases in their cursory, formal, and rather abstract discussion of the Restatement exception on which they relied. In fact, there seem to be no common law cases that allow any kind of affirmative defense to employers. Indeed, as Justice Kennedy stated, the "aided-by-agency-relation" exception is still a "developing feature of agency law."⁶⁴ Moreover, as he did not acknowledge, the cases that might be cited to support this exception also could have been decided under the expanded "scope of authority" analysis for foreseeable intentional torts.⁶⁵ Thus,

that a harassing supervisor's actions will be ignored, tolerated or condoned"). Such an assumption is not unrealistic given the economic advantages for employers in not challenging the uncontrolled prejudices and urges of some employees.

60. *Faragher*, 118 S. Ct. at 2291.

61. *Ellerth*, 118 S. Ct. at 2269.

62. *Id.*

63. *Id.* at 2269-70.

64. *Id.* at 2269.

65. See, e.g., *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) (trucking company was liable for a deliveryman's rape of a customer where an agency relationship enabled the rapist to enter the victim's premises); *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991) (city was liable for a rape committed by a police officer while on duty); *Graves v. Wayne County*, 333 N.W.2d 740 (Mich. Ct. App. 1983) (county which required officers to be armed at all times could be liable for a deputy sheriff's off-duty shooting of a man discovered with the deputy's girlfriend); *Rodgers v. Kemper Constr.*

the *Faragher-Ellerth* formulation was not compelled by common law agency principles; it depended on other policy-based considerations.

Justices Souter and Kennedy did in fact offer some such considerations. On the one hand, the *Faragher* opinion recognizes a rationale for imposing liability on employers for all Title VII-proscribed discrimination inflicted at work: employers can reasonably foresee that their enterprises provide opportunities for such discrimination, and therefore they should bear the costs as part of the costs of doing business.⁶⁶

On the other hand, both the *Faragher* and the *Ellerth* opinions advance several policy-based reasons for having that liability be limited by the affirmative defense afforded to employers. First, each opinion stresses jurisprudential policy requiring adherence to prior statutory interpretation and refers to language in *Meritor* asserting that the court of Appeals in that case “erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.”⁶⁷ Second, the two 1998 opinions declare that giving “credit . . . to employers who make reasonable efforts to discharge their duty” to prevent violations of Title VII⁶⁸ would advance the “primary objective” of Title VII, the avoidance of further discriminatory harm,⁶⁹ and would do so by promoting “conciliation rather than litigation.”⁷⁰ Finally, each decision states that employer liability for harms created by discriminatory harassment must be limited by “the avoidable consequences doctrine,”⁷¹ as “imported from the general theory of damages, that a victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize the damages’ that result from violations of the statute.”⁷² The *Ellerth* opinion also elaborates that use of this doctrine “could encourage employees to report harassing conduct before it becomes severe or pervasive,” and thus could “also

Co., 124 Cal. Rptr. 143 (Ct. App. 1975) (construction subcontractor was liable for a drunken worker’s assault of two employees of a contractor).

66. This rationale is a synthesis of Justice Souter’s discussions in *Faragher* of the justifications for employer vicarious liability under the “scope of employment” standard, see *supra* text accompanying notes 44-45, and under the “aided-by-the-agency-relation” exception, see *supra* text accompanying note 60. Justice Kennedy’s analysis in *Ellerth* of the justifications for employer vicarious liability never goes beyond parsing of the language of the RESTATEMENT and the citation of common law and Title VII precedent. See generally *Ellerth*, 118 S. Ct. at 2257.

67. *Meritor Sav. Bank v. Vinson*, 477 U.S. at 57, 72 (1986).

68. *Faragher*, 118 S. Ct. at 2292.

69. *Id.* at 2292 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

70. *Ellerth*, 118 S. Ct. at 2270.

71. *Id.*

72. *Faragher*, 118 S. Ct. at 2292 (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)) (quoting C. McCormick, *LAW OF DAMAGES* 127 (1935)). *Ellerth* cites the same footnote of the *Ford Motor* case. *Ellerth*, 118 S. Ct. at 2270.

serve Title VII's deterrent purpose."⁷³

This policy analysis roughly supports the *Faragher-Ellerth* holding, and it further suggests a more complete analysis. However, it is insufficiently developed for the purpose of directing courts in future difficult cases or for convincingly answering arguments against the *Faragher-Ellerth* approach. For instance, under Justice Souter's own analysis, if an employer causes some extra level of discriminatory harassment by the operation of some particular enterprise from which it benefits, why should its reasonable efforts to prevent that harassment insulate it from having to incur the harassment's costs? Such insulation will encourage the employer to adopt a particular level of preventive policy that the courts define as reasonable. However, removing the insulation would also encourage employers to prevent harassment in order to avoid incurring its costs.⁷⁴ Indeed, removing the insulation might encourage more prevention if the courts underestimate the benefits of extra prevention in setting a standard of reasonableness. In any event, removing the insulation arguably could never result in a lower level of employer prevention efforts because rational employers will set their levels of prevention based on a comparison of the marginal costs of prevention against the marginal costs of their extra liability, regardless of whether their liability is absolute or qualified.

Justice Kennedy's statement in *Ellerth* that "limiting employer liability could encourage employees to report harassing conduct"⁷⁵ begins to answer this argument, but it raises further questions. Why cannot the same point be made to qualify employer liability for discriminatory employee decisions that affect the "tangible" job benefits of other employees? Would not requiring employees to utilize employer processes to complain about such decisions encourage their correction, as well as the prevention of additional aggravating discriminatory decisions? Should not the "avoidable consequences doctrine" thus be equally applicable to limit the liability of employers in cases where "tangible" employment actions have been taken? Furthermore, Justice Kennedy's statement does not explain why an employer's efforts to prevent or correct harassment should be relevant to an employee's duty to report; do we not want to encourage employee reporting in all cases?

73. *Ellerth*, 118 S. Ct. at 2270.

74. See generally Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

75. *Ellerth*, 118 S. Ct. at 2270.

None of these questions are answered by the Court's citation of *Meritor*. That precedent states that there should be some qualification on employer liability for supervisory harassment, but it does not require the particular limitation of *Faragher-Ellerth*.⁷⁶ Moreover, although the Court's stated reluctance to depart from a prior statutory interpretation is commendable, statutory precedent is often set aside in the face of strong policy arguments.⁷⁷ Clearly more elaboration than a citation to *Meritor* is needed to guide future difficult cases.

III. DEFINING EMPLOYER LIABILITY TO ADVANCE TITLE VII GOALS

Such an elaboration might begin with an iteration of the goals of Title VII that the *Faragher-Ellerth* analytical structure should advance. The *Faragher*⁷⁸ decision repeats the Court's early confirmation in *Albemarle Paper Co. v. Moody*⁷⁹ that Title VII has dual objectives: the prevention of future discriminatory harm and the provision of redress to make victims whole for injuries from past discrimination.⁸⁰ Notwithstanding the intervening passage of the Civil Rights Act of 1991 and its expansion of remedies to include compensatory damages,⁸¹ the *Faragher* decision also repeats the *Moody* Court's characterization of the preventive goal as the "primary objective" of Title VII.⁸²

However, a stronger argument than that suggested by Justice Souter in *Faragher* can be made that Title VII's "primary" goal of preventing discrimination, as well as its complementary objective of remediation, can be best advanced in many cases by imposing vicarious liability on employers for the discriminatory harassment of employees conducted by other employees. This argument would note, as did Justice Souter,⁸³ that it seems entirely fair to require an employer to pay for the foreseeable costs of any extra discriminatory harassment that its enterprise creates. The argument also would stress that inefficient decisions will not be encouraged by requiring employers to pay such costs, regardless of whether it would be cost efficient for the employer to take extra preventive measures to curtail the harassment. The shutting of a marginally profitable enterprise because it has had to pay for the costs of discriminatory harassment that it cannot control is no more inefficient

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

77. See, e.g., *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

78. See *Faragher v. City of Boca Raton*, 118 S. Ct. at 2292.

79. 422 U.S. 405 (1975).

80. See *id.* at 417-19.

81. See 42 U.S.C. § 1981(a) (1994).

82. See *Faragher*, 118 S. Ct. at 2292 (citing *Albemarle Paper*, 422 U.S. at 417).

83. See *supra* text accompanying note 45.

than the shutting of a similar enterprise because of extraordinarily high energy costs that it cannot avoid.

In order to tie the argument to Title VII's primary deterrent objective, however, it should be stressed that making employers liable for the harm caused by any discriminatory act of their employees would induce employers to continue to expend more funds in the prevention of further discrimination until further expenditures would exceed the marginal costs of any further discrimination that these expenditures could eliminate.⁸⁴ As suggested above,⁸⁵ imposing liability on employers only when triers of fact decide that they have not reasonably attempted to prevent the discrimination would not lead to more prevention efforts from employers (because rational employers would not make extra inefficient expenditures to avoid liability under a negligence standard any more than they would under a strict liability standard). Furthermore, imposing liability only for negligence could lead to less prevention, because triers of fact sometimes miscalculate efficient levels of prevention.⁸⁶

In a separate opinion of the Seventh Circuit decision reviewed in *Ellerth*, Judge Posner argued that courts should apply a negligence rather than what he calls a strict liability standard to govern employer liability for the creation of hostile working environments by supervisors, as well as by co-workers, because courts know basically what level of prevention against hostile work environments is "reasonable." Imposing liability in cases where that level of prevention has been obtained will

84. Judge Flaum, in his separate opinion in the Seventh Circuit decision reviewed in *Ellerth*, seemed to appreciate this point with respect to cases such as *Ellerth* where supervisors allegedly create discriminatory environments by making unfulfilled threats that they will retaliate through some formal employment decision against subordinates who do not grant them sexual favors. He noted that "[l]iability in this situation serves the goal of preventing such abuse from occurring by creating incentives for companies to take steps in hiring and training their supervisors." *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 500 (7th Cir. 1997) (consolidated with *Ellerth* for decision by the circuit court). The same argument, however, applies to cases similar to *Faragher* where supervisors create discriminatory hostile work environments without any express threat to use their authority or influence over the job status or compensation of the victim.

85. See *supra* text accompanying note 74.

86. For less prevention by employers to occur, courts would not always or even usually have to underestimate the level of prevention that would be efficient. A rational employer that knew it would be liable only when found negligent, would reduce its prevention because of the likelihood of some underestimation. A rational employer would calculate that cases of overestimation are not relevant because it would not wish to purchase an inefficient level of prevention to avoid liability in any event.

only lead to employers internalizing such costs (and passing them on to other employees or consumers) rather than to the prevention of any further discrimination.⁸⁷

This argument is flawed and unconvincing for several reasons. First, as suggested above,⁸⁸ the internalization of actual costs presumably encourages efficient business decisions, even where it results in bankruptcy rather than in any further prevention of discrimination in an ongoing enterprise.⁸⁹ Second, even if Judge Posner were correct in stating that federal judges, or juries, could determine the exact level of expenditures that would be “reasonably” incurred to prevent discriminatory work environments by a “reasonable” employer (for Judge Posner, presumably a rational, efficient employer), Title VII’s complementary goal of victim compensation as supplemented by the tort principle of risk spreading provides justification for requiring that all the costs of harassment be borne by employers.⁹⁰ In whatever manner employers spread costs among shareholders, employees, and customers, employers that allow employees to harass certainly seem better candidates for bearing the costs of discriminatory work environments than are the presumably innocent victims of those environments.⁹¹

87. See *Jansen*, 123 F.3d at 511, 513.

88. See *supra* text accompanying note 83.

89. Employers do not internalize all the costs of bankruptcy, including the impact on the lives of employees. This is true of all displacement of employees, however, and should be accounted for generally by public policy, rather than by using it as a justification for the selective externalization of other particular costs.

90. This policy also provides justification, in the apparent view of Congress, for the costs of litigation that Title VII regulation imposes on our society. As explained earlier, the Civil Rights Act of 1991 affords victims of certain Title VII violations punitive, as well as compensatory damages. See *supra* note 27. One might argue that punitive damages are not justified by any victim compensation goal and that awarding them might encourage a socially inefficient level of prevention if imposed on employers simply because of supervisors’ malicious or reckless harassment. However, the strict caps placed on punitive as well as compensatory damages by the 1991 Act make the inducement of excessive prevention unlikely. More importantly, Title VII’s primary goal is, presumably, maximum prevention of discrimination, rather than the achievement of some limited “efficient” level of prevention.

91. As noted previously, the victims of harassment and other illegal discrimination cannot sue the employee perpetrators under Title VII. See *supra* text accompanying note 6. However, actions may be brought under some state statutory and common law rules against employee perpetrators (for public employees, see 42 U.S.C. § 1983 (1994)) for some forms of discrimination covered by Title VII, including sexual assaults. Victims of violent sexual attacks at the workplace also may be able to recover compensatory and punitive damages from their attackers under the Violence Against Women Act of 1994. See 42 U.S.C. § 13981(c) (1994). However, perpetrators often are not able to pay full judgment costs.

Theoretically, employees could negotiate a clause in an employment contract allowing for reimbursement for any harm from discriminatory harassment caused by fellow employees. Statutes like Title VII, however, reasonably assume that such negotiations never occur because of market imperfections. Judge Posner suggested that victim

Most importantly, however, there is no reason to assume that federal judges and juries are particularly adept at determining what steps “reasonable,” rational employers would take to avoid discriminatory hostile work environments. The Court in *Faragher* and *Ellerth* declined to define what would constitute “reasonable care” by an employer in preventing harassment. Each decision allows that “an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law.”⁹² Most judges and juries might conclude that it would not be reasonable to require employers to make special efforts to check the backgrounds and overt prejudices of new hires, or to closely monitor the workplace through the dispersal of hidden cameras and microphones. If employers were required to bear the costs of all discriminatory work environments, however, some employers might find that such monitoring techniques cost less to implement (even accounting for the price of the inevitable loss of employee privacy) than the costs of the discrimination that this monitoring would eliminate. Other employers might effectively change their corporate “culture” or make institutional innovations that lead to more effective harassment control without a sacrifice of employee privacy. For both sets of employers, the substitution of unqualified employer vicarious liability for a negligence standard would result in more preventive measures being taken.

In any event, the difficulty of applying negligence or reasonableness standards to employer efforts to prevent hostile work environment discrimination seems just as difficult as applying such standards to employer efforts to avoid the formal or “tangible” discriminatory personnel decisions that most federal judges, including all members of the *Faragher-Ellerth* Court, as well as Judge Posner, have acknowledged must be subject to unqualified employer vicarious liability. A court reviewing, for instance, the reasonableness of a large

compensation can be ignored as a goal in Title VII hostile work environment cases because deterrence of future harassment is the underlying goal of allowing damages for pain and suffering and because victims rarely need compensation to be made whole. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 510 (7th Cir. 1997). Most victims of racist and sexist work environments probably would not agree. Moreover, Congress provided a compensatory damage remedy in the 1991 Civil Rights Act in part to address the inadequacy of relief in harassment cases. See *supra* note 29. In any event, Judge Posner’s subordination of the compensatory goal of Title VII does not render it irrelevant to resolving questions of allocation of damages in cases where the deterrence goal is equally well served by strict liability or negligence standards.

92. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293(1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. at 2257, 2270 (1998).

employer's personnel department's review of a supervisor's recommendation to deny a female employee a scheduled promotion could test the department's good faith and reasonable efforts to avoid accepting a discriminatory recommendation through some checklist at least as meaningful as any that could be formulated for averting hostile environment discrimination.⁹³

Judge Posner also suggested that employer vicarious liability is more appropriate for supervisory decisions affecting "a significant alteration in the terms or conditions of his victim's employment" than for other actions creating discriminatory working environments because higher management's monitoring of the former decisions should be "relatively easy."⁹⁴ In his *Ellerth* opinion, Judge Flaum made a similar point, asserting that while employers should be able to effectively control the bartering of job perquisites for sex by supervisors, "it may not be possible for employers to take the measures necessary to eradicate all arguably offensive conduct from the workplace."⁹⁵

Although this argument has merit, it is incomplete. The argument has merit because, as Judge Posner claimed, higher management realistically can review for discriminatory intent supervisors' decisions or recommendations to deny some formal job status or benefit, because there generally is some system in place for reviewing whether these decisions serve the company's business interests. Indeed, since the standards of job performance upon which rational personnel decisions could be based would not include the forms of discrimination proscribed by Title VII, higher management, as part of its process of bureaucratic control, normally should be able to ferret out suspicious personnel decisions for further closer review.

By contrast, employees may create discriminatory hostile work environments for their fellow employees surreptitiously, consciously avoiding the attention of superiors who either are not involved or are invested in the discriminatory abuse and thus might curtail it. Indeed, a supervisor may be even more likely to act covertly than is an average co-worker who lacks the use of a private office or other opportunities to hide his or her dereliction. Thus, rather than merely adjusting its normal review of formal personnel decisions, higher management often will

93. Judge Posner set forth a meaningful list of actions that a "reasonable" employer would take to attempt to avert hostile work environment harassment: "institute a tough policy, disseminate it, establish a procedure by which a worker can complain without fear of retaliation . . . respond promptly and effectively to any report of possible harassment." *Jansen*, 123 F.3d at 513. But the list still leaves judges and juries with difficult questions about what levels of "toughness," "dissemination," and "promptness of response" are reasonable.

94. *Id.* at 512.

95. *Id.* at 501.

have to engage in some higher level of monitoring to prevent supervisors from creating discriminatory working environments.

However, this argument is incomplete. It fails to explain why employers should not be given incentives, in the form of unqualified vicarious liability for all discrimination, to determine what level of additional monitoring is justified by the costs of the discrimination that the monitoring could eliminate. As suggested above, if companies are forced to internalize all the costs of discrimination, they not only can compensate the victims from the many pockets of shareholders, consumers, and employees, they can also determine an efficient level of prevention.⁹⁶

Making a compelling policy-based argument against unqualified employer vicarious liability for all Title VII violations thus requires an explanation of why incentives for prevention should be placed on parties other than company management. Such an explanation must rest on the probability that these other parties could be induced to take action to prevent a category of discrimination at lower costs than management could.⁹⁷ If this is the case, then forcing the other parties to bear the burden of such costs will lead to more prevention of discrimination (which is Title VII's primary goal)⁹⁸ than will imposing these costs on employers.

One might assume that the employee-perpetrators of discrimination in all cases would be the lower-cost avoiders of that discrimination and that imposing ultimate liability on them thus would lead to the greatest level

96. *See supra* text accompanying note 84. Perhaps a clear standard of absolute employer liability also would encourage settlement and reduce litigation. If an expansion of liability produced more litigation, however, the increase in litigation costs would affect calculations concerning the efficiency of absolute employer liability. The passage of Title VII, however, presumably reflects Congress's judgment that the prevention of discrimination warrants any necessary costs of litigation.

97. *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (especially chs. 7 and 10). Consider also Judge Posner's analysis:

So, if a class of activities can be identified in which activity-level changes by potential injurers appear to be the most efficient method of accident prevention, there is a strong argument for imposing strict liability on the people engaged in those activities. And, conversely, if there is a class of activities in which activity-level changes by potential victims are the most efficient method of accident prevention, there is a strong argument for no liability, as by applying the doctrine of assumption of risk to participation in dangerous sports.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 177 (4th ed. 1992).

98. *See supra* text accompanying notes 78-82.

of prevention. However, since Title VII has been interpreted not to afford any action against the actual agents of discrimination,⁹⁹ courts are left with the choice of imposing the costs of discrimination either on the victims or on the employers of the perpetrators. Thus, the critical policy question is whether cases exist where victims could prevent discrimination at lower cost than controlling management could. If so, Justice Kennedy is accurate in his statement in *Ellerth* that “limiting employer liability” would “serve Title VII’s deterrent purpose” by encouraging “employees to report harassing conduct.”¹⁰⁰

The argument that a significant category of such cases exists must rest on informational asymmetries between victims and uninvolved higher management that would attempt to control the discrimination if they knew it existed. Since few Title VII discrimination cases exist where the victims have supervisory authority over the perpetrators,¹⁰¹ the only effective prevention recourse that victims normally have is reporting the existence of the discrimination to those that do have such authority. This does not necessarily mean, however, that there are very few cases where imposing the costs of discrimination on its victims would induce more effective prevention at lower costs than would imposing the costs on employers. Many employees who create discriminatory environments for their fellow employees do so covertly without making any formal decision or recommendation that is reviewed by higher, uninvolved management. In these cases, assuming that management is in fact committed to preventing further discrimination, the key step to effect that prevention is to make management aware of the discrimination.¹⁰² In many of these cases, the perceived costs to the

99. See *supra* note 6. Even if employees were personally liable under Title VII, if employers were not also vicariously liable, the possibility that the perpetrating employees could not pay a full judgment could lead to insufficient incentives to avoid wrongdoing. See Sykes, *supra* note 45, at 567. See also Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984). As Professor Sykes also points out, however, given the costs of indemnification actions, employer vicarious liability may actually reduce incentives to avoid wrongdoing for personally liable employees who cannot be effectively monitored and who do not care about their continuing relationships with their employers. See Sykes, *supra* note 45, at 569-70.

100. *Burlington Indus. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998). See also *supra* text accompanying note 73.

101. Even in cases involving harassed supervisors, as in a case in which the leadership of a black superior is sabotaged by white racist subordinates, the supervisor-victim probably will need the assistance of his or her superior to arrest the ill treatment. Cf. *Reynolds v. Atlantic City Convention Ctr. Auth.*, 53 Fair Empl. Prac. Cas. (BNA) 1852 (D.N.J. 1990), *aff’d*, 925 F.2d 419 (3d Cir. 1991) (involving a pattern of male conduct challenging a female’s supervisory authority).

102. Through termination or other forms of discipline, employers can impose costs on harassing employees who value the continuation of their employment relationships. However, such an imposition of costs also depends on managements’ awareness of the harassment, and thus does not avoid the question of which liability rules can best

victim of reporting may be lower than the costs of additional monitoring. When this is true, requiring victims who do not report the harassment to bear the costs of that harassment may provide an effective incentive for prevention.¹⁰³

Justice Kennedy's assumption that limiting employer liability will serve Title VII's deterrent purpose by encouraging employees to report harassing conduct will not be true for all cases of covert hostile work environment discrimination. Most importantly, it will not be true for those cases in which victims believe that there is an appreciable risk of incurring retaliation for reporting the discrimination. In most cases, victims will fear that reporting will cause costly embarrassment, stress, and possible social ostracism from fellow employees loyal to the accused harasser. If, in addition to these costs, a harassment victim also rationally fears retaliation from an employer, the victim surely is not the lowest cost avoider. In such a case, increased prevention of future discrimination can be accomplished by imposing a penalty on the employer for not providing adequate assurances against retaliation. Such a penalty encourages employers to bear the relatively low costs of

encourage such awareness.

103. Admittedly, there are factors that prevent knowing with certainty that where the victim's reasonably perceived costs of reporting ("PCR") are less than the employer's costs of monitoring ("CM"), requiring a nonreporting victim to bear his or her own costs of harassment ("CHV") will lead to more potential prevention. The complicating factors are the need for an employer to incur additional costs of investigation and correction ("CIC") after an employee reports harassment and the fact that harassment may impose costs on an employer ("CHER") in addition to those borne by its victim. Thus, where $PCR < CM$, we cannot be certain that $PCR < CHV$ whenever $CM + CIC < CHV + CHER$. We have to make the further assumption that CHER is negligible, or even negative in those cases where employers compensate supervisors by the indulgence of their harassment. If CHER can be ignored, then if $PCR < CM$, whenever $CM + CIC < CHV$, then $PCR + CIC < CHV$, and both $PCR < CHV$ and $CIC < CHV$, given the further realistic assumption that all unknowns are positive. Whenever reporting is cheaper than further monitoring, there will be no cases where requiring a victim to report in order to avoid bearing the costs of harassment will lead to less prevention than imposing such costs on the employer to induce further monitoring and correction. Bringing CHER back into the equation weakens the case for qualifying absolute employer liability with a victim reporting rule.

However, capping damages that can potentially be extracted from liable employers under Title VII, *see supra* note 6, makes the case stronger for a victim reporting rule because liable employers will be willing to spend less on monitoring to avoid liability than victims will be willing to risk in reporting harassment. Therefore, in some cases, even a victim who is not a lower cost avoider than an employer would be more likely to be induced to prevent further discrimination.

giving such assurances.¹⁰⁴

This analysis supports the formulation of qualified employer vicarious liability provided by *Faragher* and *Ellerth*. Employers should not be able to avoid vicarious liability for discriminatory “tangible” or formal personnel decisions because such decisions have been made available for review and have been effectively passed on or acquiesced to by more senior management.¹⁰⁵ By contrast, an employer should be able to avoid

104. This analysis does not rest on blaming the victims of hostile work environment discrimination for the continuation of a course of conduct that may have been arrested by disclosure to management. An unqualified employer vicarious liability rule may encourage some discrimination victims and their lawyers to defer complaining until they believe they have an airtight case to collect substantial damages and fees. In most cases, however, victims who reasonably should report, but do not, probably do not report simply because they lack sufficiently strong incentives to do so. Regardless of employer liability rules, any victim has both the reporting incentive of avoiding the suffering of future harassment and the reporting disincentive of resulting stress and embarrassment. The *Faragher-Ellerth* affirmative defense simply assumes that by making recovery dependent on the utilization of an effective reporting system, the balance will tip in favor of encouraging significantly more complaints. Additionally, in many cases victims confront collective action problems. When harassing discriminators target multiple victims, any individual victim will not consider all the costs of continuing discrimination when weighing the risks and benefits of disclosure. Where an employer, through an adequate anti-retaliation policy, has made the risks of disclosure low, this problem is addressed, albeit imperfectly, by forcing victims to bear at least the costs of the discrimination against them if they do not act to help avoid the future discrimination of others.

105. In a rigorous and thorough article otherwise generally supportive of the Court’s later holding in *Faragher* and *Ellerth*, Professor Verkerke concluded that employers should not be vicariously liable for any discrimination-based employment decision of their employees, no matter how tangible, significant, or formal, if the discrimination is against the company’s official policy and has not been reported by the victim, and where the employer has offered a reasonable complaint procedure and reasonable post-complaint relief. See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 347-61 (1995). Professor Verkerke contended that the case for qualifying employers’ vicarious liability is stronger for garden variety individual disparate treatment cases and for “quid pro quo” harassment cases than for hostile work environment cases. Verkerke argued that the discriminatory motive in the former cases is generally covert, while hostile work environments are generally created in the open.

Verkerke’s assumption that victims of discrimination in formal job actions are more likely to be lower cost avoiders than the employer’s management is almost certainly incorrect for most cases. Management typically possesses information—such as the comparative performance records of employees—necessary to determine whether a discriminatory motive is likely. Victims, however, usually have no more than variant, and sometimes flawed, sensitivities to ill treatment. Therefore, conditioning employer liability for formal employment actions on victim complaints would encourage employers to focus their investigatory resources on those cases most likely to result in litigation, rather than on those cases in which a preliminary review suggests discrimination. Victims whose ill treatment appears to fulfill the threats of sexual predators do have special access to information that would be critical to establishing discrimination, but the Court could not coherently carve out an exception for one specific kind of discrimination from the general rule for disparate treatment cases. Furthermore, even these sexual harassment cases ultimately turn on proof of the adequacy of an

vicarious liability for workplace discriminatory harassment that has not been formalized or otherwise reported, if and only if the employer has taken reasonable steps to make the reporting of this harassment seem of relatively low cost to the victim, and the victim has still failed to report the offending conduct.

This analysis also explains why the *Faragher-Ellerth* qualified vicarious liability analytical structure is better suited for Title VII hostile work environment cases than the negligence standard it eclipses. Consider again the four reasons why Title VII plaintiffs should welcome the *Faragher-Ellerth* approach as an alternative to negligence analysis. First, the policy analysis presented above explains why it is sensible to place on employers the burden of proving the adequacy of their own preventive and corrective measures (as well as the unreasonable inadequacy of the response of employee victims), rather than having the victims carry the burden of proving employer negligence. The analysis explains why there should be a presumption of employer liability not only because employers are better risk bearers of the costs of discrimination, but also because they generally are lower cost avoiders of discriminatory harassment than are the victimized employees—except in those instances where the victims have failed to take advantage of low cost opportunities to avert the harassment. Given such a presumption, and taking into account management's superior knowledge of its own efforts to curtail discrimination, shifting the burden of proof through the device of an affirmative defense seems attractive.

Second, the above policy analysis also makes a compelling case for the elimination of any obligation on the part of an employee who has proven that he or she has been significantly affected by discriminatory harassment, also to prove that the harassment would have been avoided by the employer's implementation of an adequate prevention scheme. As explained above,¹⁰⁶ under a negligence theory, a victim must prove that the negligence of which he or she complains (in this context, management's failure to reasonably take steps to avoid harassment) caused his or her injury. By contrast, a liability theory that is based on cost internalization and risk spreading does not make judgments about what should have been done to avoid injury, and thus requires no causal connection between reasonable action and injury avoidance. Instead, if

employer's justification for the adverse action, rather than on the existence of the threat. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 835-38 (1991).

106. See *supra* text accompanying notes 23-25.

the employer's operation provided the opportunities for the harassment, it should internalize and bear the costs of such harassment, unless the victim's failure to take low cost avoidance steps indicates that the victim should bear the costs as an incentive for future prevention.

Third, the analysis confirms that employers that do not take adequate preventive and corrective measures against discriminatory harassment should pay the costs of such harassment, not only to serve the remediation goal of Title VII, but also as the most effective incentive for the prevention of future discrimination. Thus, no questions should be raised about employer liability for compensatory or punitive damages, as would be raised under a theory that rests on employers being held liable for their managers' negligence rather than for their supervisors' intentional discrimination.¹⁰⁷

Finally, the analysis of this article justifies both prongs of the *Faragher* and *Ellerth* affirmative defense, requiring not only proof of the employer's own reasonable care, but also proof that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."¹⁰⁸ Proof that an employer took all steps that might be adequate in the average case to avoid discriminatory harassment does not establish that the harassment victim would have been the lower cost avoider in the particular case. To establish the latter, the employer would have to examine the particular situation of the victim and show that the victim acted unreasonably in failing to take opportunities to avoid harm.

For instance, consider a female filing clerk in a brokerage office who is being continually ogled, propositioned, and sexually demeaned (though not physically threatened) by the firm's leading sales producer. If the firm has a well publicized and generally reasonable policy against harassment, including a complaint procedure that enables targets to report to management not involved in the harassment and that gives assurances against retaliation, is it clear that the clerk is the lowest cost avoider in her particular case? Might she reasonably believe that the firm's officers would rather replace a filing clerk than a star salesman and therefore that her job might be in jeopardy were she to complain?¹⁰⁹

107. See *supra* text accompanying notes 26-29.

108. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2279 (1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998).

109. The reasonableness of the clerk's failure to utilize the firm's complaint procedure would be even more clear if the harasser were the firm's president. Both *Ellerth* and *Faragher* seem to confirm absolute employer vicarious liability in cases of harassment by senior officers, without consideration of the reasonableness of the employer's anti-harassment policy or of the reasonableness of the victim's response to that policy. In *Ellerth* Justice Kennedy referred to cases "where the agent's high rank in the company makes him or her the employer's alter ego." *Ellerth*, 118 S. Ct. at 2267. In

In other words, an anti-harassment policy and reporting system that might give adequate assurances in the average case, might not do so in some situations. If the victimized plaintiff acted reasonably in failing to utilize the system, the special justification articulated above for imposing costs on the victim is not persuasive.¹¹⁰

Consider next a case where an employee does take advantage of reasonable complaint procedures, and the employer conducts an investigation that results in a stalemate of uncorroborated accusations and denials, rather than in the punishment of the accused harasser. The employer should be liable to the employee for any actionable harassment that the employee can prove in Title VII litigation regardless of the reasonableness of the employer's internal investigation.¹¹¹ Where

Faragher Justice Souter described *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), in which "the individual charged with creating the abusive atmosphere was the president of the corporate employer, who was indisputably within that class of an employer's organization's officials who may be treated as the organization's proxy." *Faragher*, 118 S. Ct. at 2284 (citing *Burns v. McGregor Elec. Indus.*, 955 F.2d 559, 564 (8th Cir. 1992); *Torres v. Pisano*, 116 F.3d 625, 634-35 & n.11 (2d Cir. 1997); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983)) (all supporting automatic employer liability where the perpetrator is an owner or high officer).

110. Of course, the more comprehensive and effective an employer's anti-harassment policy, the less likely that there will be many cases where a victim who fails to report cannot be identified as the lower cost avoider of the injuries incurred. For instance, an anti-harassment policy could promise preliminary confidential investigations that would protect the identity of the accuser. It could also promise close review of the exercise of any authority that the alleged harasser has over the accuser. Moreover, it could promise, based on sufficiently clear warnings and definitions of what the employer would not tolerate, termination of this authority if the allegations are substantiated. However, particularly in light of the inevitable stress and embarrassment suffered by reporting victims, there may be cases, such as the case described in the text of this article, where a fact finder may determine that a victim reasonably declined to report some types of harassment against particular perpetrators regardless of the employer's policy.

111. This point is clarified in *Faragher* and *Ellerth* by the Court's reliance on an "aided-by-agency-relation" theory, separate from an "apparent authority" theory, for its qualified employer vicarious liability standard. Apparent authority is dependent upon the reasonable belief of an affected party that the principal accepts the agent's authority to engage in particular acts. See W. EDWARD SELL, AGENCY 25-26 (1975). A strong, well promulgated anti-harassment policy would negate such a belief. "When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer." See *EEOC Policy Guidance*, *supra* note 56, at 405:6697. For example, in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), a supervisor used his authority to order a subordinate to an isolated warehouse where he allegedly carried out a rape, but the court held the employer could not be vicariously liable under either an apparent authority or a negligence theory because of the employer's strong anti-harassment policy and its reasonable investigation.

By contrast, a supervisor's harassment of a subordinate employee might be aided by

employee victims take advantage of low cost prevention opportunities, employers should be viewed as lower cost avoiders of discriminatory harassment (as well as the superior spreader or insurer of the costs of discrimination) whether or not they can be judged guilty of negligent or unreasonable prevention and correction efforts.¹¹²

Employers might argue that if reasonable investigations do not insulate them from liability, they will not conduct such investigations for fear of providing employees with the evidence to advance a law suit against them.¹¹³ However, there are reasons to believe that thorough investigations of harassment allegations usually will be in the interest of employers even in the absence of a rule providing complete insulation from liability. First, an investigation can identify a delinquent supervisor who might otherwise engage in even more costly harassment against old or new victims in the future. Second, a timely investigation

the authority he derives from his agency relationship with the employer regardless of any anti-harassment policy. For example, in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), the court held an employer liable under an "aided-by-an-agency-relation" standard for a supervisor's harassment of a subordinate employee after ordering her to accompany him to an isolated mine.

112. Imposing employer liability in a case where a reasonable investigation has not resulted in a clear resolution of the validity of the charges might encourage unfair treatment of unjustly accused supervisors, who generally do not have as effective countervailing causes of action for unjust discharge. See, e.g., *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998) (employer must only act in good faith after an appropriate investigation with reasonable grounds for believing manager engaged in misconduct). In most cases, however, employers can limit their liability even after making inconclusive findings by simply ensuring that an accused and his accuser no longer have contact at work.

113. Cf. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (suggesting that corporate criminal liability may discourage some corporate investigation of crime because of fear of increased exposure to liability). Professor Verkerke relied on Professor Arlen's article to help advance his argument that employer liability for discrimination-based formal employment actions should be conditioned on the victim reporting his or her suspicion of discrimination to the employer. See *supra* note 105. It is difficult to believe, however, that the rule of absolute employer liability for discriminatory formal employment decisions discourages managerial review of such decisions for discriminatory bias. If management could predict which particular employment actions would result in lawsuits, perhaps some would attempt to bias their review of these decisions to help produce a defense; but since management cannot make such predictions, they must decide on the basis of the average case whether to attempt to avoid further actionable discrimination through good faith, unbiased reviews. Deciding to conduct such reviews should not be difficult. On the one hand, management understands that a discriminator that is not uncovered is likely to engage in further discrimination that will expose the employer to further liability. On the other hand, in the average formal employment decision discrimination case, if a review finds bias, the decision can be overturned before its victim suffers any significant harm for which the employer could be held liable; and if bias is not found, the review would not provide assistance to a Title VII plaintiff. Corporate investigators have incentives to compromise their investigations only in unusual cases where they find evidence of guilt, but are convinced of innocence.

and prompt corrective action can often provide effective insulation from a lawsuit by the complaining employee by arresting the harassment before it becomes sufficiently "severe or pervasive" to "create an abusive working environment."¹¹⁴ If the harassment has already reached that level because of the failure of the victim to complain earlier, the employer, under the Court's standard as explained below,¹¹⁵ should be able to escape liability for any harassment about which the plaintiff did not promptly complain.

Consider finally the third class of cases noted above for which an employer's reasonable prevention and corrective actions should not insulate it from liability absent proof that the employee victim did not reasonably take advantage of preventive or corrective opportunities. This class of cases involves a situation where an employee is victimized by a sudden, severe act of discrimination, such as a sexual assault, that the victim could not anticipate. In such a case, an employer with an effective anti-harassment policy and complaint procedure could be exposed to significant liability under the Court's standard, even after taking prompt action to prevent further harassment in response to a timely complaint from an employee victim. Timely complaints and immediate, effective corrective responses by employers cannot change what has already occurred. However, even in those situations, it seems unlikely that an employer could reduce the risk of liability by avoiding a thorough investigation that could lead to immediate termination of a guilty supervisor. A victim willing to invoke governmental regulatory processes will be able to provide evidence of the harassment through personal testimony. Thus, an employer would actively have to cover-up the assault, and any attempt at a cover-up, along with the resulting continued employment of the supervisor, could lead to the aggravation of damages against the immediate victim, as well as against other potential victims.¹¹⁶

Therefore, if a claim based on a single assault is to be thwarted, it

114. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

115. See *infra* text accompanying notes 145-146.

116. Similarly, after *Farragher* and *Ellerth*, an employer would be foolhardy to calculate that it could avoid additional liability by having no effective anti-harassment policy in order to avoid stirring up additional complaints, rather than by trying to avert harassment through an effective policy. The affirmative defense offered by the Court's decisions surely will prevent increased liability for the conscientious employer, as opposed to the recalcitrant employer, who attempts to repress employee consciousness of the harassment cause of action.

should be thwarted because it is considered not to state a cause of action under Title VII,¹¹⁷ not because the employer has demonstrated reasonable care, without also demonstrating that the victim unreasonably failed to take advantage of opportunities to avoid the assault.¹¹⁸ Where the employer cannot make the latter demonstration, the employer should be forced to bear the costs of discrimination. Thus, the employer should consider the costs of discrimination against the costs of any further preventive action, such as screening tests, training, and monitoring. Even when the court cannot determine that such steps would be cost efficient and thus reasonable for the employer, it can determine that the employer, rather than the victim, at least has the ability to take additional steps the costs of which can be weighed against the costs of harassment.¹¹⁹

In sum, a strong policy argument can be made in favor of the choice

117. An argument that a single sexual assault is not actionable sex discrimination under Title VII might reason as follows: if the perpetrator is immediately removed from his job, any physical or psychological harms would arise from the assault itself rather than from a hostile or abusive working environment. It is only where the perpetrator is allowed to continue to work in the same environment that his assault, or other harassment, creates inferior working conditions based on the victim's sex.

A similar analysis could apply to harassment that takes place outside the workplace and working hours. Outside harassment itself does not affect the conditions of employment of the victim and therefore should not be actionable. However, a victim's working conditions are affected if the victim continues to have to serve under the supervision of an extra-work harasser. Therefore, if the victim reports to the victim's employer an assault by a supervisor in a private apartment, the employer would have an obligation to take prompt corrective action to avoid the victim having to suffer a discriminatory work environment caused by the memory of the traumatic experience with the supervisor.

118. Compare the Eighth Circuit's use of a negligence standard in *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733 (8th Cir. 1998), to reject employer liability for an isolated rape, in light of the employer's reasonable corrective response.

119. It is important to remember that prevention of discrimination, not achievement of some theoretical efficient level of monitoring, is the primary goal of Title VII. Some might argue that hiring discrimination would actually be encouraged by any rule that does not provide absolute insulation from liability for employers that take effective preventive and corrective action. This argument constitutes a variation on the theme developed by some commentators that any form of regulation of discrimination after hiring makes the hiring of those who are most likely to bring discrimination actions more costly. See, e.g., Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983 (1991). However, this theme has never influenced Congress in its efforts to provide protection from post-hiring, as well as pre-hiring discrimination. Congress has chosen to prohibit both, and the Court's interpretation of the meaning of "agent" in the statute should advance, rather than reject, that choice. Furthermore, an equally compelling—though equally speculative—argument can be made that any rule of absolute employer liability for supervisory discriminatory harassment will provide a marginal incentive for the hiring and promotion of minorities and women who are less likely to engage in such harassment.

made by the Court in *Faragher* and *Ellerth* to formulate a qualified employer vicarious liability standard and to reject requiring plaintiffs to prove employer negligence in order to recover against employers for supervisory discriminatory harassment. Furthermore, as will be explained in Part IV of this article, this policy structure can assist courts in deciding difficult issues that the *Faragher-Ellerth* standard may present for future cases.

IV. QUESTIONS IN THE WAKE OF *FARAGHER* AND *ELLERTH*

As suggested above, this article will conclude by addressing five issues that raise policy concerns in the wake of *Faragher* and *Ellerth*. The first issue involves defining when employers cannot assert the affirmative defense against liability for the discriminatory actions of their supervisors because the actions are "tangible." What exactly constitutes a "tangible" employment action?

Both *Faragher* and *Ellerth* offer some guidance for defining the term in this context. The one paragraph that is common to both opinions, and which contains the statement of the holding in each,¹²⁰ concludes by stating that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."¹²¹ *Faragher* offers little more, noting only that employer liability for a supervisor's discrimination has been automatic where there have been "tangible results, like hiring, firing, promotion, compensation, and work assignment."¹²²

The *Ellerth* decision addresses the issue at greater length by first looking to whether the discriminatory action had a "significant" impact on the victim's employment status. It states that "[a] tangible employment action constitutes 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."¹²³ *Ellerth* then cites, with apparent approval, several cases that emphasize the importance of the impact being "significant," including two cases holding that "demotion without change in pay,

120. See *supra* text accompanying note 11.

121. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

122. *Faragher*, 118 S. Ct. at 2284.

123. *Ellerth*, 118 S. Ct. at 2268.

benefits, duties, or prestige”¹²⁴ and reassignment to more inconvenient job¹²⁵ are insufficiently significant.¹²⁶

Somewhat discordantly, the next paragraph of the *Ellerth* opinion stresses that tangible employment actions are actions “that fall within the special province of the supervisor” that only a person such as a supervisor can effect, being “empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.”¹²⁷ Finally, yet a third paragraph asserts that “[a] tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.”¹²⁸

Clearly the Justices intended “tangible” employment actions to encompass any discrimination-based discharges or refusals to hire. Presumably, any discrimination-based decision on an employee’s level of compensation would also be “tangible.”¹²⁹ However, in light of the *Ellerth* opinion, are all discrimination-based demotions or refusals to promote encompassed? Are all discriminatory work assignments or all disciplinary actions?

Assume, for instance, that Faragher’s primary supervisor had exercised his delegated authority to assign her regularly to an isolated, exposed, and dangerous beach outpost, and had done so either because he did not like having female guards under his authority or because she had refused his sexual advances. Would the City of Boca Raton have been able to assert an affirmative defense to its being liable for Faragher’s discrimination-based work assignments? Should it matter

124. *Id.* at 2269 (citing *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996)).

125. *Id.* at 2269 (citing *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

126. The Fourth Circuit Court of Appeals has already relied on this part of the *Ellerth* opinion in ruling that a supervisor’s assignment of extra work to a harassment victim did not constitute “tangible employment action” because, in the court’s view, such an assignment was not “significant.” *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998).

127. *Ellerth*, 118 S. Ct. at 2269.

128. *Id.*

129. In the sexual harassment context, however, decisions not to grant some job benefit such as a pay increase or a general promotion that would have been granted had the harassment target been willing to grant sexual favors to the harasser presumably are not discrimination-based tangible employment actions if the benefit would not have been given to a member of the opposite sex, or a nontargeted member of the same sex, for the same work performance. The sexual propositions used to attempt to bribe the target, however, presumably could create a discriminatory hostile work environment for which the employer could be liable if it could not establish the *Faragher-Ellerth* affirmative defense.

whether the formal duties are different at her unattractive beach posting than at others? *Ellerth* seems to point in different directions. On the one hand, the supervisor is “empowered” by the city to formulate work assignments like the ones that disadvantaged Faragher. On the other hand, the assignments are not official “company acts” approved by the central office of the city’s recreation department, and may not even have been reported to any superior of the assigning supervisor.

The policy analysis offered in the previous section clarifies how the “tangible” employment action line should be delineated. The critical consideration should be whether the discriminating supervisor has recorded or reported his discriminatory action (though not, of course, his discriminatory motivation) so that it is readily available for review. The above analysis assumes that employers are lower cost avoiders of discriminatory actions that are overt and thus subject to review; employee victims may be lower cost avoiders only of covert actions that have not been reported to management. Thus, while the “significance” to Faragher of the discriminatory work assignments described in the hypothetical is relevant to the level of damages that she can collect under Title VII, it should not determine whether Boca Raton should be able to assert an affirmative defense against its liability for whatever damages would remedy her loss.¹³⁰

The “recorded or reported” test could be adopted as a variation on one of Justice Kennedy’s themes. It would cover all “company acts” that

130. The significance of the impact on Faragher of the discriminatory work assignments arguably should be relevant to whether the discrimination against her was sufficiently “severe or pervasive” to create an actionable discriminatory working environment under Title VII. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). The *Ellerth* opinion, however, states that

When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

Ellerth, 118 S. Ct. at 2265. This explanation constitutes an effort to retain the relevance of the old distinction between “hostile work environment” and “quid pro quo” sexual harassment, and perhaps explains why Justice Kennedy in *Ellerth* also attempts to qualify “tangible” employment actions with the additional “significant” adjective. Rather than defining those employment actions not permitting an affirmative defense with the same language used to define employment actions for which no level of significance of impact is required, the Court could simply require that the impact of any discrimination be significant to be actionable, whether or not the discrimination imposes automatic liability on the employer.

receive the imprimatur of the firm. Even a company president's direct discharge of a subordinate is an official act available for review by the firm's Board of Directors.¹³¹ However, the test would not necessarily cover a supervisor's assignment of unattractive work, such as the isolated beach postings in the hypothetical.¹³² In such a case, a court would have to determine that the postings were reported or recorded for the potential review of the supervisor's superiors before denying the *Faragher-Ellerth* affirmative defense.¹³³

The policy analysis in this article also addresses one of the central issues presented by the *Faragher-Ellerth* holding for those cases of discrimination that do not involve tangible employment actions. In such cases courts often will have to determine what deficiencies in the opportunities for preventive or corrective action provided by an employer would justify a victim not taking advantage of those opportunities.

This question is not directly answered by the *Faragher* and *Ellerth* opinions. The language common to both decisions does not articulate any set criteria for all cases. It allows only that "the need for a stated [anti-harassment] policy suitable to the employment circumstances may appropriately be addressed in any case" and that a demonstration of "unreasonable failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer's burden under the second element of the defense."¹³⁴ The Court's application of its holding to the extreme facts of the *Faragher* case provides only somewhat more illumination. The Court decided that it need not remand to provide the city an opportunity to assert its affirmative defense because the city "entirely failed to disseminate its policy" among the widely dispersed beach employees and otherwise "made no attempt to keep track of the conduct of supervisors" like those who were found to have harassed Faragher.¹³⁵ Furthermore, "the City's policy did not include any assurance that the harassing supervisors could be bypassed

131. In any event, the president, as a high ranking officer of the firm, would be treated as the firm's alter ego for purposes of Title VII agency law. See *supra* note 109.

132. A company with a less rationalized management system may escape responsibility for some discriminatory harassment for which a better structured company would be liable. However, this is unlikely to provide a significant incentive for a company to relax its reporting requirements on middle managers.

133. However, even if the beach postings were not officially reported or recorded, and the city could assert an affirmative defense, the fact that the postings resulted in Faragher always occupying an unattractive seat on a public beach open to the inspection of city officials would be relevant to the city's ability to prove that the officials had "exercised reasonable care" in preventing the discrimination against her. The costs of monitoring some unreported decisions may be lower than the costs of victim reporting.

134. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270.

135. *Faragher*, 118 S. Ct. 2293.

in registering complaints.”¹³⁶

The policy analysis set forth in this article suggests that courts should require an employer to establish the adequacy of the employer’s assurances that no retaliation will arise against an employee who complains of sexual harassment or some other form of Title VII-proscribed discrimination. As argued above, the reason that victims may not be the lowest-cost injury avoiders in some circumstances is that the victims’ reasonable calculation of the costs of reporting, especially the potential costs of retaliation, may be greater than the costs to employers of further monitoring.¹³⁷ Only when an employer proves that it has provided adequate assurances against retaliation should it be able to demonstrate the sufficient likelihood that forcing a plaintiff to bear the costs of the plaintiff’s own victimization will discourage enough further harassment to warrant the employer’s escaping an obligation to remedy and internalize the cost of this harassment.

Clearly, the mere existence of a formal company policy against retaliation should not be sufficient to avert employer liability. As the Court recognized in *Meritor*,¹³⁸ victims cannot be expected to report their complaints to the same supervisor or supervisors against whom the harassment charges are pressed; the complaint or reporting process must provide alternative channels to bypass particular supervisors. Additionally, employers should promise and provide close review of any personnel decisions involving complainants, and, where feasible, conduct preliminary confidential investigations that do not unnecessarily identify complainants until there is sufficient evidence to suspend the accused harasser’s supervisory authority in the absence of a convincing exculpatory response. In any event, employers should remove the authority that any proven discriminators have over their accusers. As suggested above, the more valuable the accused discriminator is to the firm relative to the complainant, the more critical these precautionary measures will be. And, as also suggested above, there may be cases where no assurances are adequate to view the employee victim as the lower cost avoider.¹³⁹

136. *Id.*

137. See *supra* text accompanying notes 100-03.

138. *Meritor Sav. Bank v. Vinson*, 477 U.S. at 57, 73 (1986).

139. See *supra* text accompanying notes 109-10. Of course no formal policy, even one that comprehensively addresses retaliation threats, should satisfy an employer’s duty under the *Faragher-Ellerth* affirmative defense if that policy is not effectively implemented. Employees understand that their employers’ real policies are reflected in

This focus on requiring employers to protect discrimination complainants from retaliation accords with the *Faragher* and *Ellerth* rationale for adopting a qualified vicarious liability standard for supervisory harassment cases. Justice Kennedy in *Ellerth* stressed the “particular threatening character” of a “supervisor’s power and authority” over harassment victims in his explanation of how the agency relation aids supervisors in the commission of discriminatory harassment.¹⁴⁰ Presumably, Justice Kennedy was referring to the threat of the use of that power and authority against a target who resists or reports. Justice Souter in *Faragher* was more express, stating that the supervisor’s harassment is aided by his agency relation at least in part because “the victim may well be reluctant to accept the risks of blowing the whistle on a superior.”¹⁴¹ Therefore, to suspend the basis for vicarious liability, an employer should be required to show that it has successfully neutralized these risks for a reasonable victim of harassment.¹⁴²

A third important question raised by the joint holding of the *Faragher* and *Ellerth* decisions concerns whether a victim’s failure to report earlier harassment pursuant to an employer’s reasonable complaint system should prevent the victim from recovering for later harassment the victim did report. This question is important because harassment victims often delay complaints, even having knowledge of their employers’ strong anti-harassment policies and prevention and corrective systems. Victims delay their complaints not only to avoid possible retaliation or at least ostracism and embarrassment, but also to prove that they can deal with friction. They choose not to unnecessarily polarize the individuals in their workplaces. Should such delay be discouraged by denying employees recovery for later harassment that they did promptly report on the ground that this harassment could have been avoided had the employees taken advantage of reasonable opportunities to complain of earlier harassment?¹⁴³

their actions rather than in their words.

140. *Ellerth*, 118 S. Ct. at 2269.

141. *Faragher*, 118 S. Ct. at 2291.

142. Thus *Ellerth* on remand should have a chance to explain why she did not complain about her harassment to Burlington’s management before resigning. *Ellerth* may stress that she had been recently employed in an entry level position and that her claim was against the vice president of marketing in the mattress-fabric division of Burlington, a man she could assume the company would want to retain and protect. She might also emphasize, if true, that the company’s anti-harassment policy as presented in its employee handbook did not include any assurances against retaliation, or any explanations of how those alleging harassment would be protected. Finally, *Ellerth* should be able to set forth any other evidence that led her reasonably to believe that the firm allowed some level of harassment, notwithstanding its formal policy.

143. The lower court decisions since *Faragher* and *Ellerth* suggest that recovery for

Under this article's policy analysis, arguments can be made that the failure to invoke an employer's reasonable preventive and corrective processes should preclude recovery against the employer for any avoidable later harassment. An early complaint might seem to be the least costly step that could have been taken to prevent further harassment. In addition, one might argue that a harassment victim who may refuse to take into account the risk of a supervisor's future harassment of other employees when deciding whether to report, ought at least to be required to take into account the full non-reimbursable costs of his or her own potential future victimization.

Such arguments, however, do not account for the additional costs of encouraging complaints about harassment, or about arguable harassment, or even about annoying comments that employee victims feel they can handle without employer assistance. Encouraging complaints in anticipation of future escalated harassment that might never occur would result in unnecessary and costly investigations, polarized workplaces, and embarrassed and ostracized complainants. Precluding recovery for future harassment to employees who do not complain about what they view as manageable mistreatment from their supervisors also would result in an aggravation of the anxiety of victims caught between fears of retaliation and uncertainties about whether their treatment is sufficiently serious to require reporting.

At the least, courts should not preclude recovery for a victim's failure to report any treatment that is itself not clearly severe or pervasive enough to be actionable under Title VII.¹⁴⁴ Courts also should not preclude recovery for escalated levels of harassment simply because the plaintiffs were able to accept a lower level of harassment without initiating an adversarial investigation.¹⁴⁵ In order to provide incentives

harassment reported later should be denied if a court or fact finder views the victim's failure to report the harassment earlier as unreasonable. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884 (8th Cir. 1998); *Corcoran v. Shoney's Colonial, Inc.*, 24 F. Supp. 2d 601 (W.D. Va. 1998); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143 (E.D. Cal. 1998).

144. Precluding recovery for any earlier failure to report would be particularly draconian. A victim reporting harassment that she does not reasonably believe is sufficiently severe or pervasive to be actionable under Title VII may not be protected from retaliation under section 704 of Title VII. *See Clover v. Total Sys. Servs.*, 157 F.3d 824 (11th Cir. 1998).

145. Inasmuch as harassment inevitably becomes more severe as it becomes more frequent and pervasive, this in effect means that courts should never assert a victim's failure to report earlier harassment as a reason to preclude recovery for later harassment that is promptly reported.

for victim reporting (and thereby employer prevention) of harassment even before it becomes severe and actionable, victims simply should not be able to recover from employers for any damages caused only by acts of harassment that were not reported in a timely fashion. For instance, if a supervisor had made earlier verbal sexual attacks on a victim, the victim's failure to report the attacks should insulate the employer from liability for only the verbal attacks, not for a later and reported sexual assault. If the last and only promptly reported incident of harassment is limited to another (perhaps more offensive) verbal attack, the victim's recovery would probably be minimal.¹⁴⁶

The fourth question raised by the joint holding of the *Faragher* and *Ellerth* decisions is whether a victim's failure to take reasonable steps to avoid or mitigate particular harassment should qualify the liability of even a negligent employer for that particular harassment. Should an employee who fails to utilize a fair and effective reporting system for complaining about harassment be able to recover from an employer whose senior managers knew or should have known of the harassment even without the employee's complaint? The answer is not fully clear. On the one hand, an employee's failure to mitigate may seem irrelevant in the situation where an employer is negligent. *Faragher's* and *Ellerth's* common holding expresses the affirmative defense in the conjunctive, stating that the defense has two "necessary" elements; the Court connects the elements with the word "and" rather than "or".¹⁴⁷

On the other hand, a strong argument can be made that employer vicarious liability should be limited, though not eliminated, by proof of only the second element of the affirmative defense, the victim's unreasonable failure to take advantage of preventive or corrective opportunities. This view is suggested by the citation in each opinion of the "avoidable consequences doctrine" from the law of damages as a doctrinal rationale for consideration of the employee victim's avoidance efforts as the second element of the defense.¹⁴⁸ This doctrine as applied would limit an employer's liability for its failure to take adequate corrective or preventive measures where the employee victim nonetheless reasonably could have mitigated the harassment by, for example, accepting a transfer to a different department. Justice Souter in *Faragher* makes this application expressly: "if damages could

146. Acts of harassment that were not reported should be considered by the courts when determining whether the harassment had reached a level that was sufficiently pervasive to be actionable, but they should not be a basis for recovery.

147. *Faragher*, 118 S. Ct. at 2293; *Ellerth*, 118 S. Ct. at 2270. Justice Souter's preliminary statement of the affirmative defense in *Faragher* also uses the conjunctive "and." See *Faragher*, 118 S. Ct. at 2292.

148. *Faragher*, 118 S. Ct. at 2292; *Ellerth*, 118 S. Ct. at 2270.

reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."¹⁴⁹

This limitation is also supported by the policy analysis presented in this article. Victims should have incentives to take relatively low cost steps to report and otherwise avoid discriminatory harassment even where that harassment has been caused in part by the employer's negligence. Consider, for instance, a hypothetical case in which the chief operating officer of a firm inadvertently discovers, without anyone's knowledge, that one of the firm's supervisors (and the officer's subordinate) has been sexually harassing one of the supervisor's subordinates. Assume that the supervisor is one of the officer's best friends and that the officer takes no action to arrest the harassment. Assume also, however, that the firm has a strong and effective anti-harassment policy that directs complaints to a special personnel officer and that the victim knows this policy has been used as the basis for the dismissal of another supervisor involved in similar harassment. The officer's failure to ensure that adequate corrective and preventive measures are taken to stop the harassment should prevent the employer from demonstrating the first element of its affirmative defense and thus should render the employer liable for the supervisor's harassment. Since the victim probably could have taken advantage of the effective anti-harassment system at a relatively lower cost, however, her failure to do so should prevent her from collecting damages for any harassment that her use of that system could have prevented.¹⁵⁰

Probably the most important part of the Title VII agency question not fully resolved by the *Faragher* and *Ellerth* decisions concerns the

149. *Faragher*, 118 S. Ct. at 2292.

150. The approach to this problem can be based on the model of comparative negligence. A negligent employer should not be liable for harassment that a negligent victim could have avoided at a lower cost. However, the qualification made in the text should be reiterated. *See supra* notes 144-146. Employees should not be penalized for accepting one level of harassment by being prevented from recovering for further harassment; they simply should not be able to recover for the unreported harassment. Thus, using the example in the text, if the subordinate suffers nine unreported instances of harassment before she utilizes the complaint procedure after a tenth incident, she should be able to recover for damages resulting from the tenth (and any subsequent) incident, even though this tenth incident may have been avoided by an earlier complaint. The first nine incidents should be considered in determining whether the harassment was sufficiently severe and pervasive to be actionable, but not in determining the extent of the employer's liability.

treatment of employer liability for discriminatory abusive working environments created by the victims' nonsupervisory co-workers. Should the affirmative defense/qualified vicarious liability approach of these decisions also be applied to discriminatory harassment by co-workers?

Both opinions send strong signals that the Court does not intend to jettison the lower courts' current negligence standard for such cases. Justice Souter's opinion in *Faragher* asserts as a reason for the rejection of a "scope of authority" doctrinal rationale for vicarious liability for supervisory harassment the likelihood that its adoption would lead to the erosion of the negligence standard for co-worker harassment that has commanded a "unanimity of views" in the lower courts.¹⁵¹ Justice Kennedy's *Ellerth* opinion similarly expresses concern that a broad interpretation of the "aided-by-agency-relation" doctrine that recognized how "[p]roximity and regular contact may afford a captive pool of potential victims" for co-worker as well as supervisory harassment could lead to employer vicarious liability for the former as well as the latter.¹⁵² Finally, Justice Souter's opinion takes pains to distinguish supervisory from co-worker discriminatory harassment under the "aided-by-agency-relation" doctrinal rationale, contending that "an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker" and that "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers."¹⁵³

Despite the Justices' efforts, the distinction between co-worker and supervisory discriminatory harassment for purposes of employer vicarious liability is not convincing. The prevention-based cost internalization, as well as the remediation arguments for employer liability for co-worker discriminatory harassment, are as strong as those for employer liability for supervisory harassment. An employer's operation is as much a necessary and foreseeable cause of the former as of the latter.¹⁵⁴ Most importantly, in the absence of an adequate and

151. *Faragher*, 118 S. Ct. at 2289. The lower court opinions decided after *Faragher* and *Ellerth* have continued to assume that a negligence standard applies for employer liability in co-worker harassment cases. See, e.g., *Williamson v. Houston*, 148 F.3d 462 (5th Cir. 1998).

152. *Ellerth*, 118 S. Ct. at 2268.

153. *Faragher*, 118 S. Ct. at 2291.

154. Professor Sykes, defending the distinction between co-worker and supervisory harassment for purposes of vicarious liability, disagrees. See Sykes, *supra* note 45, at 608. Focusing on acts of sexual harassment, he assumed that those who are "prone" to engage in such acts may be as likely to do so regardless of employment status. This assumption ignores the reality that employment rules typically force employees to work closely with other workers, thus providing the opportunity for co-worker discrimination. More importantly, much discriminatory harassment—including much sexual

unused reporting system, an employer is as likely to be the lower cost avoider of co-worker harassment as of supervisory harassment.

It makes no difference either to the Civil Rights Act's discrimination prevention or to its complementary remediation goal that it may be easier for most employers to guard against the misbehavior of a limited number of screened and trained supervisors than against the misbehavior of the average employee.¹⁵⁵ As explained above, the most compelling argument that employer vicarious liability will encourage the prevention of future discrimination is not based on penalizing employers who have been judged to have acted "unreasonably" by engaging in less prevention than warranted by the reasonably foreseeable costs of discrimination, but rather on providing employers the proper incentives to calculate efficient levels of prevention.¹⁵⁶ Furthermore, the fact that preventing co-worker harassment might be more difficult than preventing supervisory harassment does not mean that employers are any less superior risk spreaders and anticipators for the costs of the former.¹⁵⁷

It might be argued that an effective reporting system is necessary for supervisory harassment because, as Justice Souter stresses, supervisors, unlike co-workers, generally possess authority to reward and penalize subordinates and can thereby discourage harassment victims' whistleblowing.¹⁵⁸ However, as the above described hypothetical case of the star salesman and filing clerk illustrates,¹⁵⁹ harassment victims may also rationally fear retaliation from a management that is not involved in

harassment—occurs not to gain something such as sexual favors but to assert or maintain power over the employment turf. See Schultz, *supra* note 18. Therefore, such harassment would not occur away from this turf.

155. This premise, as embraced by Justice Souter may be untrue for some forms of discriminatory harassment. See *Faragher*, 118 S. Ct. at 2291. For example, it may be easier for employers to discover the average employee's sexual harassment of a fellow employee than to discover sexual harassment by supervisors who have the authority and opportunity to engage in isolated encounters with their victims in private locations such as offices. Furthermore, the premise does not distinguish between supervisors with authority over their victims, who are expressly covered by the *Faragher-Ellerth* holding, and supervisors without such direct authority, who are not covered. Justice Souter's premise, even if cogent, would support imposing vicarious liability on employers for all the harassment of their supposedly more thoroughly screened supervisors, regardless of whether that harassment victimized someone under the particular harasser's authority.

156. See *supra* text accompanying note 84.

157. See *supra* text accompanying note 90.

158. See *Faragher*, 118 S. Ct. at 2291.

159. See *supra* text accompanying note 109.

or approving of the harassment, but that will acquiesce to the harassment for the purpose of continuing a profitable operation. The filing clerk, for instance, may experience the same level of fear whether or not the star salesman has authority to effect or even recommend her discharge.¹⁶⁰ Even an employee harassed by a group of co-workers at her own job level may rationally fear retaliation from a management that has not effectively promulgated a strict anti-harassment policy.¹⁶¹

Of course, the kind of anti-harassment policy and reporting system that should be adequate to encourage rational victims to report harassment by their peers need not be the same as that necessary to encourage accusations against more senior officials. But, as stressed above, the *Faragher-Ellerth* analytical structure for employer vicarious liability takes into account the harassment suffered by a particular victim by requiring proof that the particular plaintiff unreasonably failed to take advantage of preventive opportunities, as well as proof of the employer's generally reasonable care.¹⁶² The *Faragher-Ellerth* approach should be as adaptable to the many different situations involving co-worker discriminatory harassment, as it is for the variant situations of supervisory harassment.

A negligence standard may not be as adaptable. Under a negligence standard, a generally reasonable anti-harassment policy would insulate an employer regardless of whether the failure of a particular victim to utilize that policy was reasonable¹⁶³ and regardless of whether the victim did everything he or she could do to stop the harassment.¹⁶⁴ Furthermore, as suggested above, the negligence standard could frustrate employees seeking to recover under Title VII for co-worker harassment even in cases where the particular employer did not have a generally

160. Cf. *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 688-89 (8th Cir. 1997) (co-worker harasser had special relationship with branch manager).

161. Cf. *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997) (plaintiff presented evidence that management ignored her complaints of co-worker harassment and retaliated against her by withdrawing her more highly paid duties); *Doe v. City of Belleville*, 119 F.3d 563, 567 (7th Cir. 1997) (victims suffered unrelenting harassment from most co-workers).

Although it would be difficult to stretch agency law to provide doctrinal justification for vicarious employer liability for customer harassment, the policy arguments in this article nonetheless may be extended. Employees victimized by the harassment of their employers' valuable customers or clients also may not be the least cost avoiders of this harassment, in part because of their rational fear of retaliation. Furthermore, such victims may be forced to continue to work where they are vulnerable to their harassers. *But see Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998) (both post *Faragher-Ellerth* cases applying negligence standards for employer liability for customer harassment).

162. See *supra* text accompanying notes 107-10.

163. See *supra* text accompanying note 31.

164. Cf. *supra* text accompanying notes 32-33.

adequate anti-harassment policy. In such cases, a court applying a negligence standard might find that the absence of the policy did not cause the harassment, or that negligence, as an unintentional delict, does not support a damage remedy under the Civil Rights Act of 1991.¹⁶⁵

Notwithstanding the Court's efforts in *Faragher* and *Ellerth* to limit its holding to supervisory harassment and to retain the negligence standard for co-worker harassment, the latter standard ultimately may be influenced by the approach of these cases. Consistent with the intent of the Congress that passed the 1991 Act¹⁶⁶ and the vicarious liability theory, courts probably will not prevent successful plaintiffs in co-worker harassment cases from collecting at least compensatory damages against negligent employers. Additionally, courts may assess the reasonableness of a defendant employer's anti-harassment measures from the perspective of a particular plaintiff who failed to take advantage of those measures, rather than only from the perspective of the employer. And notwithstanding the formal elements of negligence, courts may not require Title VII harassment plaintiffs to prove that an employer's deficient anti-harassment policy caused the plaintiff's injuries simply because the perpetrators were co-workers rather than supervisors.¹⁶⁷

Still, absent Congressional action, there almost certainly will be at least two important lasting practical effects of the limitation of the *Faragher-Ellerth* vicarious liability approach to supervisory harassment cases. First, courts will continue to place the burden of proving negligence on plaintiffs in co-worker harassment cases. Second, employers will be insulated from liability for co-worker harassment when they conduct reasonable investigations after timely accusations by alleged victims. This article suggests that this second effect will be significant in two sets of cases: where the employer's reasonable investigation ultimately proves inconclusive and does not arrest the harassment;¹⁶⁸ and where the employer's reasonable investigation after a

165. See *supra* text accompanying notes 24-29.

166. See *supra* note 29.

167. Given *Faragher's* emphasis on the power of supervisors to threaten retaliation, courts may expand the definition of supervisor to include any company official with authority to influence the job status of a victim, regardless of whether the victim is in the official's direct chain of command. See *Faragher*, 118 S. Ct. at 2291.

168. Cf. *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010 (7th Cir. 1997) (employer that conducted reasonable, though inconclusive investigations, was not liable under a negligence theory for harassment, despite the timely complaints of the victim).

timely complaint is too late to prevent unexpected severe harassment that has already occurred.¹⁶⁹

169. Cf. *Todd v. Ortho Biotech Inc.*, 138 F.3d 733 (8th Cir. 1998) (rejecting, under a negligence theory, employer liability for an isolated rape that the employer promptly investigated and punished by discharge).