

## WHEN RULES ARE MADE TO BE BROKEN

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**ABSTRACT**—When do judges follow rules expected to produce unjust results, and when do they intentionally misapply such rules to avoid injustice? Judicial rule-breaking is commonly observed when national dignity and morality are at stake, such as abolitionist judges charged with applying federal fugitive slave laws, or when lives hang in the balance, such as applications of criminal sentencing rules. Much less is understood about judicial rule-breaking in quotidian civil litigation, in spite of the sizeable impact on litigants and potential litigants, as well as the frequency with which judges face such decisions. This Article is the first to theoretically assess and empirically analyze judicial rule-breaking in the commonplace setting of applying two rules regarding sexual harassment. We find that the likelihood of rule-breaking increases when judges perceive that pleas to legislatively or judicially correct the rule that produces unfair results would go unanswered.

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INTRODUCTION

Judges are frequently charged with applying rules. Some rules are easier to follow than others. Sometimes, properly followed rules lead to unjust results. Some rules, especially judicially made rules derived from interpreting unique fact patterns of cases, are more likely to result in unfair or unjust outcomes when applied to more common fact patterns. There are no formal or moral guidelines for judges to follow when applying rules

perceived to lead to unjust results.<sup>1</sup> What should a judge do when she expects that applying a straightforward but bad rule will result in an unjust outcome? A judge has two possible ways of dealing with such a situation. First, she may diligently follow the rule, allow the expected unjust outcome, and call attention to the problem in the hope of fixing the rule for future cases.<sup>2</sup> This path presents a dilemma for the judge: the more unfair the outcome, the more likely the call to legislators will be answered; but the more unfair the outcome, the more the judge might want to avoid the responsibility or association with the result. Second, a judge may intentionally misapply the rule to achieve a more just outcome in the instant matter but risk appearing incapable of interpreting and following rules, and worse, increase the risk that the rule will go unfixable, with the knowledge that future applications will likely result in more injustices. The more straightforward and clear the rule is, the less flexibility the judge will have to get away with masquerading a misapplication as legitimate interpretation.

Putting aside the important normative question of which route judges *should* take,<sup>3</sup> this Article is concerned with addressing when judges are more likely to pick one route over the other when faced with a judicially constructed rule likely to result in unjust results when properly applied. We are particularly interested in instances of this choice being made when no lives hang in the balance and no matters of national security are being weighed. That is, we are interested in the choices judges make when they feel less political and social pressure to behave as expected. Under these circumstances, when do judges take the first path (follow the rule, drawing attention to the unjust result), and when do they take the second path (deviate from the rule to achieve a more just result, setting a bad precedent on rule interpretation and perhaps undermining the judge's analytic credibility)?

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<sup>1</sup> Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 615–16 (1999) (“[T]here is no solid ground—based on embedded understandings of rationality, or equitable treatment, or absurd results—on which rule appliers can stand to resist formal rule-like readings that might be thought to produce such outcomes. And even if this is the legal situation we face, we cannot find shared agreement that judges ought to interpret as if they could purposively reason from a coherent legal universe in which such concepts were intelligible.”).

<sup>2</sup> Of course, a judge could also follow the rule without calling attention to the injustice. Because of the low cost of including dicta in opinions and the likelihood that a failure to include such dicta given the injustice resulting from the judge's opinion would tarnish the judge's reputation, this course of action is not considered as viable as the other two described in more detail. In any event, exclusion of this option does not affect the authors' argument or analysis.

<sup>3</sup> This issue is taken up directly elsewhere. See, e.g., JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* (2010); Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007); Robert M. Cover, 68 COLUM. L. REV. 1003, 1005–06 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)).

As distinguished from “standards,” which leave to the judge the ability to specify which conduct qualifies as permissible (for instance, using “reasonable care”), “rules” determine in advance the specific conduct qualifying as permissible, leaving only factual inquiry for the judge (for instance, care is reasonably taken when driving less than or equal to sixty-five miles per hour).<sup>4</sup> Rules may produce inefficient results (on average) because they do not sufficiently permit judges to reach sensible outcomes in individual cases.<sup>5</sup> Judges want to fashion decisions that make sense given the relevant facts and policies; they want their opinions to feel right to them. Presumably, the American legal system harmonizes with the goal of reaching the “right” decision. This is the basis for the view among many commentators that the law abhors rules and prefers standards.<sup>6</sup> Others have spent substantial energy articulating when rules are better than standards for reaching socially optimal results.<sup>7</sup> This paper contributes to this robust discourse by focusing on what judges actually do when faced with a rule that likely produces unjust results—when a standard might have provided a better vehicle for administering legal commands. It also contributes to the discussion of rule-breaking by empirically analyzing what judges do when confronting this decision in cases unlikely to draw national attention or to affect judges’ political aspirations.

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<sup>4</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

<sup>5</sup> *Id.*; see also Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 37 (2008) (citing Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1102 (2004)) (discussing the inefficient results from mandatory minimum rules); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287, 1305 (2006) (“[I]t is generally understood that the use of standards might contribute to efficient allocations in certain situations.”); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 600 (1988) (“[C]rystalline rules seem less the king of the efficiency mountain than we may normally assume.”); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992) (“Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decisionmakers to treat like cases that are substantively alike.”); cf. Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 86 (2007) (“Predictability in antitrust is important, but it is not sufficient to justify rules even for a system concerned primarily with incentive effects.”).

<sup>6</sup> William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1399–400 (1997) (“The truth of the matter is that judges bitterly resist being bound by ‘rules’ that prevent them from reaching sensible results. . . . Thus, predictability, as a raw tool, will generally lose out to sensibleness.”); see also *supra* note 5.

<sup>7</sup> See, e.g., John J. Donohue III, *The Law and Economics of Tort Law: The Profound Revolution*, 102 HARV. L. REV. 1047 (1989) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)); Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

In deciding which path to take, judges are likely to start from a position of preferring the first path (applying the rule correctly). This is because, *ceteris paribus*, judges feel charged with the task of following rules as they are set out, as distinguished from standards, which axiomatically permit more room for interpretation of facts and law to be molded to a preferable result.<sup>8</sup> The job of a judge is to distinguish rules from standards and apply rules as written.<sup>9</sup> We theorize that two conditions must exist for judges to follow the first path despite a known likelihood of an unjust outcome. First, judges must perceive that a plea for assistance from legislative or judicial bodies is sufficiently likely to be answered or at least seriously considered. As discussed in greater detail below, this is certainly not always the case. Judges vary significantly in how strongly they believe that pleas will be heeded.

Second, the judge must perceive that the injustice produced by applying the rule perfectly will not be *too* severe. Determining how much injustice is too much is relatively easy when the injustice is either extremely great or extremely minimal. For instance, if the result were executing an innocent man, this would likely be too unjust to merit applying a bad rule to the facts of a case, even if it were certain to get the attention of legislators and compel them to amend the rule. If the unjust result were merely a financial burden easily shouldered by one of the parties, a judge might more readily tolerate applying a bad rule to the facts. The tougher cases are those where the injustice is significant, but not morally intolerable. For instance, what about sentencing someone to a prison term longer than one might think is appropriate for the offense? That is, evidence sufficiently supports the claim that a defendant committed a crime, but the rule requires a longer sentence than one might think is justified. This is precisely the situation for many judges faced with minimum sentencing rules that require harsh penalties relative to the crime committed.<sup>10</sup>

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<sup>8</sup> Cover, *supra* note 3, at 1005 (“The federal judiciary, however, has remained faithful to its long tradition as executors of immoral law.”); Greenblatt, *supra* note 5, at 6–9; Kaplow, *supra* note 4, at 594.

<sup>9</sup> Emily Bazelon, *Bench Pressed: When the Judge’s Hands Are Tied*, SLATE (Nov. 23, 2004), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2004/11/bench\\_pressed.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2004/11/bench_pressed.html) [<http://perma.cc/72H5-P9U8>] (describing Judge Cassell’s perception that the court had no choice but to sentence a man to life in prison for possessing a handgun in his home even though it is “unjust, cruel, and even irrational”).

<sup>10</sup> See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1745–46 (1992) (discussing judges’ criticism of the Federal Sentencing Guidelines); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 57–58 (2010) (noting that a trial court described the mandatory fifty-five-year prison term of a “young [twenty-four-year-old], first-time offender . . . convicted of dealing marijuana and . . . possessing a gun three times in connection with his marijuana dealing . . . as ‘cruel, unjust, and irrational’”); J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669 (2007); Elizabeth A. Olson, *Rethinking Mandatory Minimums After*

Perhaps the most famous example of this type of dilemma is when abolitionist judges were charged with applying fugitive slave laws requiring them to legally find that a human being was a possession of another human being in spite of the judges' consciences.<sup>11</sup> But there are more quotidian, modern examples in which less is at stake than the nation's collective regard for human dignity and welfare, and judges still feel the tension of applying a clear rule that directly results in injustice localized to the parties. These examples are important because they present instances in which it is easier to isolate the factors that likely influence judges' decisionmaking.

For instance, even in the application of the Employee Retirement Income Security Act (ERISA)<sup>12</sup>—a soporifically complex act but not one notoriously brimming with moral quandaries—judges may face the difficult decision of applying rules that produce unjust results. In *Andrews-Clarke v. Travelers Insurance Co.*,<sup>13</sup> Judge William G. Young was charged with applying a rule that was certain to produce the unpleasant result of denying a grieving widow relief against an insurance company. After reciting the facts of Diane Andrews-Clarke's late husband's battles with alcohol and mental instability, his multiple suicide attempts, and his being raped in a mental institution, Judge Young concluded:

Under traditional notions of justice, the harms alleged—if true—should entitle Diane Andrews-Clarke to some legal remedy on behalf of herself and her children against Travelers . . . . Consider just one of her claims—breach of contract. This cause of action—that contractual promises can be enforced in the courts—pre-dates [the] Magna Carta. It is the very bedrock of our notion of individual autonomy and property rights. It was among the first precepts of the common law to be recognized in the courts of the Commonwealth and has been zealously guarded by the state judiciary from that day to this. Our entire capitalist structure depends on it.<sup>14</sup>

After essentially explaining that failing to give the plaintiff a remedy here would not only be woefully unjust, but also would fly in the face of bedrock notions of American jurisprudence and defy all that for which the American capitalist free market system stands, Judge Young found that the

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Apprendi, 96 NW. U. L. REV. 811, 840 (2002) (discussing how the lack of a judge's sentencing discretion "underscores the substantial harm to the defendant's liberty interest"); Andre M. Davis, Editorial, *Mandatory Injustice: Federal Sentencing Rules Tie Judges' Hands and Result in Unfairly Harsh Prison Terms*, BALT. SUN, Dec. 9, 2011, at 25A.

<sup>11</sup> Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 534–37 (1969) (discussing the Marshall Court's grappling with moral and legal issues relating to the slave trade).

<sup>12</sup> 29 U.S.C. §§ 1001–1461 (2012).

<sup>13</sup> 984 F. Supp. 49 (D. Mass. 1997).

<sup>14</sup> *Id.* at 52–53 (footnotes omitted).

court had “no choice but to pluck Diane Andrews-Clarke’s case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . . to slam the courthouse doors in her face and leave her without any remedy.”<sup>15</sup> The court went on to describe this case as “yet another illustration of the glaring need for Congress to amend ERISA to account for the changing realities of the modern health care system.”<sup>16</sup>

What makes the calculation of which path to take more challenging is the endogenous relationship between the severity of the perceived injustice and the likelihood that rote application of the rule will be regarded as needing legislative or judicial repair. Correctly applying a bad rule that requires a wealthy party to overpay a fine is less likely to garner the attention necessary to fix the rule than a judicial ruling correctly applying a federal law requiring federal officers to assist in the return of escaped slaves.<sup>17</sup> As noted above, this makes it harder to predict which path judges will take because they might be more inclined to tolerate the resulting injustice if they believe that it will be remedied. Greater likelihood of injustice being remedied fuels judges’ abilities to rationalize their actions as “just doing their jobs,” both internally to reduce cognitive dissonance experienced from rendering a judgment at odds with their consciences,<sup>18</sup> and externally to protect the perceived legitimacy of the bench.<sup>19</sup>

What happens when a judge realizes that a judicial or legislative “fix” is unlikely and applying the rule will lead to untenable results? When will the judge follow the rule and when will she circumvent it? To address these important questions one could compare cases at opposite ends of the spectrum. For instance, one could argue that judges are more likely to follow the rule if the penalty is a \$50 fine and will not if the penalty is life in prison. But between these extremes, generalizations are harder to make

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<sup>15</sup> *Id.* at 53.

<sup>16</sup> *Id.* (footnote omitted).

<sup>17</sup> This is a reference to the Fugitive Slave Acts of 1793 and 1850, which required federal officers to assist in the return of escaped slaves. Abolitionist judges applied the law and explained that this was what they were obligated to do even though they believed the result to be immoral. *See* Butler, *supra* note 3, at 1787–88.

<sup>18</sup> *See generally* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); Ronald Dworkin, *The Law of the Slave-Catchers*, 1975 *TIMES LITERARY SUPPLEMENT* 1437, 1437 (reviewing COVER, *supra*).

<sup>19</sup> Kathryn Abrams, *Extraordinary Measures: Protesting Rule of Law Violations After Bush v. Gore*, 21 *LAW & PHIL.* 165, 167–77 (2002) (synthesizing law professors’ collective response to *Bush v. Gore* as an illustration of a decision that so tears at the fabric of conscience that it might be regarded as problematic for the continued trust in the rule of law); Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1399, 1440 (2005) (“It is undoubtedly false that perceived injustice in the legal system leads to greater willingness to break the law for all people, in all circumstances, at all times.”).

because other factors—the area of law, the types of parties involved in the disputes, the result of applying the rule, and the judges’ perception that the rule would be fixed legislatively or judicially if the injustice were publicized—play a greater role in determining the path a judge will take. This is the primary aim of this Article: to identify a body of cases that controls each of these factors to the greatest possible extent, permitting isolated observation of the judicial decisionmaking process. Using doctrinal and empirical analysis, this Article examines the judicial reality of applying untenable rules in one cause of action, sexual harassment, to explain why judges applied the two rules in the past and predict how they will apply the rule in the future.

This Article uses sexual harassment to accomplish this for three reasons. First, there are now three untenable rules in this legal area. Second, a judicial or legislative fix is likely not forthcoming. Third, discrimination claims make up close to 10% of the federal court docket, and 22% of all Equal Employment Opportunity Commission (EEOC) charges from 2010 through 2013 involved harassment claims.<sup>20</sup> Sexual harassment cases are thus theoretically fruitful, empirically available, and phenomenologically important.

*Vance v. Ball State University*, a recent employment discrimination case, provides perhaps a uniquely well-serving proving grounds to test whether our hypothesis is true.<sup>21</sup> There, the Supreme Court articulated a new rule regarding the definition of a supervisor for the purposes of determining the proper standard for employer liability for sexual harassment.<sup>22</sup> The Court held, in applying its standard for liability for harassment by a supervisor, that an employer may be vicariously liable for a supervisor’s unlawful harassment only when the “employer has empowered that [supervisor] to take tangible employment actions against the victim, *i.e.*, to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>23</sup>

This rule seems to belie a simple reality. To comply with an ever-burgeoning array of employment laws, companies were already well advised to make their human resource departments the only authorized

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<sup>20</sup> Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); *Charge Statistics: FY 1997 Through FY 2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<http://perma.cc/9WAH-UD7H>]; *Harassment Charges: FY 2010 – FY 2013*, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/harassment_new.cfm) [<http://perma.cc/X3PR-5DAN>].

<sup>21</sup> 133 S. Ct. 2434 (2013).

<sup>22</sup> *Id.* at 2454.

<sup>23</sup> *Id.* at 2443 (internal quotation marks omitted).

final decisionmakers in the firms.<sup>24</sup> Will courts follow *Vance*'s rule or not? It will be interesting to see how courts will apply this new rule, given that if applied as written, a company could avoid liability for virtually all instances of workplace harassment by simply requiring HR approval for all tangible employment actions.

To help predict how courts will apply the newly promulgated *Vance* rule, we examine how the courts reacted when, in 1998, the Supreme Court issued three decisions that yielded two similarly untenable rules. The first rule the Court established was that an employer may avoid agency-based liability for the actions of a manager who sexually harassed an employee of one gender if the harasser also sexually harassed an employee of the other gender.<sup>25</sup> This type of harasser is sometimes referred to as an "equal-opportunity harasser," and the defense applying this rule is known as the "equal-opportunity harassment defense."<sup>26</sup> The second rule the Court established was that an employer may avoid liability if the employee-plaintiff behaves unreasonably, which often equates to failing to complain or report the alleged sexual harassment either in a timely fashion or at all.<sup>27</sup> The logical extension of this holding was that employers, no matter how much care they exercised to prevent harassment and no matter how well they responded to harassment complaints, were liable if the employee complained in a timely manner.

As this Article demonstrates, whereas almost all judges dutifully applied the first rule, the vast majority of judges did not follow the second rule. Why do judges act so differently with these two rules arising out of the same cause of action? Both are simple rules and easy to apply to most facts underlying sexual harassment claims. They carry identical penalties. Both rules, as applied, lead to unjust results: The first rule tolerates

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<sup>24</sup> Kelli F. Robinson, Comment, *Constructive Discharge Is Not a Tangible Employment Action: The Impact of Pennsylvania State Police v. Suders*, 36 CUMB. L. REV. 581, 600 (2006) ("Another preventive measure that employers can take is to require approval from human resources or upper management for employment decisions like demotions, reductions in pay, or discharges. With this requirement, supervisors cannot take any adverse employment actions against employees without some oversight by management.").

<sup>25</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–82 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

<sup>26</sup> Miguel Nieves, Comment, *Joseph Oncale v. Sundowner Offshore Services, Inc.: Redefining Workplace Sexual Harassment to Include Same-Sex Sexual Harassment and the Effect on Employers*, 34 NEW ENG. L. REV. 941, 957–60 (2000) (discussing the use of this term and defense); see also Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 720 (1997) ("Because [the equal opportunity harasser's] omnidirectional conduct does not expose 'members of one sex . . . to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,' at present, sexual harassment doctrine affords a safeharbor that shields these scoundrels from Title VII sexual harassment liability." (footnote omitted)).

<sup>27</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–07 (1998).

harassment so long as both male and female victims are harmed; the second rule ties employers' liability to whether the employee had the wherewithal to report so that liability has nothing to do with the employer's actions. Both rules, as applied, create perverse incentives. The first rule teaches managers that one may get away with sexually harassing employees of one gender by equally harassing employees of the other. The second rule encourages employers to design their harassment reporting policies and practices to be good enough to meet the minimum standard of reasonableness but not so good that they encourage prompt reporting of harassment in all cases.

One might be tempted to conclude that that judges simply favor employers. But while pro-employer bias may be a factor explaining courts' adherence to *Oncale* but departure from *Ellerth* and *Faragher*, pro-employer bias does not explain the particular way in which courts have modified *Ellerth* and *Faragher*. This Article proposes that courts' behavior is better explained by considering the frequency of the two categories of cases requiring the rules' applications, the likelihood of holdings properly applying the rules resulting in perverse incentives being actualized by society, and the effect of issuing abhorrent rulings on judges' perceived values.

In Part I, we provide a brief description of sexual harassment law, which lays the foundation for the Court's three decisions in 1998. Part II presents these two untenable rules and explains why judges even somewhat familiar with legislative and judicial history in this area would not expect either rule to be modified judicially or legislatively. In Part III, using doctrinal analysis, we demonstrate that courts apply the untenable equal-opportunity harasser rule with abhorrent results. In Part IV, we empirically demonstrate that lower court judges do not dutifully apply the second untenable rule—the Supreme Court's employer liability rule. In Part V, we not only explain these divergent results by examining judicial motivation, but also we contend that given the fact that a fix is unlikely, the judiciary has created a body of law that is both impractical and unjust. We conclude by discussing the implications of these findings. We apply our findings to render a prediction about how lower courts will apply *Vance*, the latest Supreme Court decision affecting sexual harassment.

## I. A BRIEF OVERVIEW OF SEXUAL HARASSMENT LAW

What follows is a brief overview of the development of the law of sexual harassment. As described below, the law has evolved over time towards the affirmative defense under study in this Article. In short, courts grappled with extending the "because of sex" language of the statute to situations of ongoing harassment. The two vectors of case law posing the most difficulty for courts are the issue of same-sex harassment and the

issue of the extent to which liability should extend to employers for the actions of its employees and supervisors. We discuss this historical development as a way of introducing and explicating the context for the rule-breaking problem at the heart of this Article.

*A. The Origins and Early History of Sexual Harassment Law*

A detailed discussion of the history and development of sexual harassment in the workplace exceeds this Article's scope. It is important to note, however, that no federal statute prohibits or even addresses sexual harassment in the workplace. Moreover, scholars generally agree that when enacting Title VII of the Civil Rights Act of 1964, Congress did not contemplate that the statute's prohibition against discrimination based on sex would create a cause of action for employees who were subjected to unwanted sexual advances without suffering any tangible loss.<sup>28</sup> In fact, the origins of the legal prohibition against sexual harassment are generally attributed to Professor Catherine MacKinnon.

In 1979, Catherine MacKinnon coined the term "sexual harassment" and thereby fueled the creation of a cause of action when she published the book *Sexual Harassment of Working Women*.<sup>29</sup> MacKinnon defined sexual harassment in its broadest sense as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."<sup>30</sup> The influence of her work on both courts and scholars was swift and profound.<sup>31</sup>

In 1980, the Equal Employment Opportunity Commission (EEOC) expanded its "Guidelines on Discrimination Because of Sex" under Title

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<sup>28</sup> See, e.g., Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CALIF. L. REV. 1151, 1166 (1995) (discussing the Supreme Court's interpretation of congressional intent embodied in Title VII's protection against sexual harassment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)); Michelle Angelone, Note, *Same-Sex Harassment Claims Under Title VII: Quick v. Donaldson Co. Breathes New Life into the Post-Garcia State of the Law*, 9 U. FLA. J.L. & PUB. POL'Y 61, 76–79 (1997) (discussing several courts' interpretations of congressional intent underlying sexual discrimination). "Tangible losses" occur when there is a material change in employment, such as termination, failure to promote, demotion, or a significant change in benefits. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>29</sup> CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); see also Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (discussing Professor MacKinnon's influential role in the development of sexual discrimination law).

<sup>30</sup> MACKINNON, *supra* note 29, at 1. See generally Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 DUKE J. GENDER L. & POL'Y 3 (1999) (exploring the Court's holdings in *Ellerth* and *Faragher* and explaining the ramifications of these decisions from an employer's perspective).

<sup>31</sup> See e.g., Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) and discussing Professor MacKinnon's profound influence on legal doctrine and practice).

VII to include sexual harassment.<sup>32</sup> After the EEOC published its guidelines, courts routinely held that hostile environment sexual harassment did in fact create a cause of action.<sup>33</sup> In 1986, the Court put to rest any lingering questions concerning the legal efficacy of MacKinnon's hostile environment theory in *Meritor Savings Bank v. Vinson*.<sup>34</sup>

In its relatively short opinion, the *Meritor* Court: (1) established sexual harassment as a violation of Title VII; (2) held that there are two types of harassment: quid pro quo (this for that) and hostile environment; (3) held that the conduct had to be because of sex; and (4) provided a basis for employer liability, instructing courts to look to agency principles.<sup>35</sup> In the 1998 *Oncale*, *Ellerth*, and *Faragher* opinions, the Court was forced to revisit the terms "because of sex," "quid pro quo," "hostile environment," and "associated agency principles."<sup>36</sup> The resulting holdings created the untenable rules that are the subject of this Article.

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

When MacKinnon wrote that sexual harassment violated Title VII, she was focusing exclusively on male supervisors harassing subordinate women.<sup>37</sup> The early line of cases, including *Meritor*, followed that paradigm.<sup>38</sup> For a time, cases could be classified as falling into two

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<sup>32</sup> The EEOC Guidelines defined quid pro quo harassment as:

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

29 C.F.R. § 1604.11(a) (1980). That text has remained the same to present day. *See* 29 C.F.R. § 1604.11(a) (2013).

<sup>33</sup> *See, e.g.,* *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."); *see also* *Katz v. Dole*, 709 F.2d 251, 254–55 (4th Cir. 1983) (identifying two varieties of sexual harassment); *Bundy v. Jackson*, 641 F.2d 934, 942–43 (D.C. Cir. 1981); *Zabkowitz v. W. Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984).

<sup>34</sup> 477 U.S. 57 (1986); *see also* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

<sup>35</sup> *Meritor*, 477 U.S. at 66–72.

<sup>36</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 749–66 (1998) (revisiting "quid pro quo"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–92 (1998) (same); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998) (revisiting "because of sex"); *see* Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 307 (1998) (discussing *Oncale*, *Ellerth*, and *Faragher*); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (same); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (same).

<sup>37</sup> MACKINNON, *supra* note 29.

<sup>38</sup> Susan Silberman Blasi, *The Adjudication of Same-Sex Sexual Harassment Claims Under Title VII*, 12 LAB. LAW. 291, 292 (1996).

categories: sexual conduct and nonsexual conduct. In sexual conduct cases, the analysis was somewhat simple: if the conduct was either severe or pervasive and the conduct was sexual in nature, the courts presumed that the conduct was “because of sex” and found it unlawful.<sup>39</sup> If the conduct was not sexual in nature, then the court needed to determine motivation. If the employer was motivated by sex (meaning gender) the employee had a case for “gender harassment”; if gender was not the motivation, there was no cause of action.<sup>40</sup> Indeed, the “equal-opportunity jerk” became the tongue-in-cheek explanation for finding that a supervisor who created a hostile environment for employees regardless of sex (or any other protected class) did not violate the law.<sup>41</sup> Post-*Meritor* courts eventually were confronted with male plaintiffs alleging hostile environment harassment by female supervisors.<sup>42</sup> Courts upheld the cause of action.<sup>43</sup>

In the mid-1990s, courts were faced with an onslaught of “same-sex” sexual harassment cases (i.e., a man harassing a man or a woman harassing a woman). Between 1992 and 1997, at least four different appellate courts faced the question of whether plaintiffs could make out a cause of action in same-sex cases.<sup>44</sup> The circuits produced four different legal standards,

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<sup>39</sup> In fact, as the law developed, cases arose in which female employees were considered to have suffered harassment if they were exposed to sexual conduct (e.g., conversations or pornographic pictures) that was not directed at them but was so pervasive that the complaining employee could not escape. *See, e.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210, 214 (2d Cir. 2004) (“[W]hen working outdoors, Petrosino would constantly confront crude sexual graffiti scrawled by co-workers inside terminal boxes.”).

<sup>40</sup> *See Cline v. Gen. Elec. Capital Auto Lease, Inc.*, 757 F. Supp. 923, 931 (N.D. Ill. 1991) (“For lack of a better term, and to distinguish this type of harassment from harassment which is sexual in nature (which the courts call ‘sexual harassment’) this court in *Cline I* referred to the type of harassment in issue here as ‘gender’ harassment.”).

<sup>41</sup> *See, e.g.*, Toni J. Jaramilla, *Key Strategies in Wrongful Discharge Litigation*, in *WRONGFUL DISCHARGE LITIGATION STRATEGIES* 45 (2013), available at 2013 WL 5290493; Natasha L. Wilson & Keshia A. McCrary, *Stop the Violence: Preventing and Protecting Against Workplace Bullying and Violence*, FOR THE DEF., Jan. 2014, at 32.

<sup>42</sup> *E.g.*, *Egli v. Stevens*, No. Civ. A. 93-157, 1993 WL 153141, at \*1 (E.D. Pa. May 11, 1993) (“Plaintiff Christopher Egli alleges that he was on the Tredyffrin Library ‘fast track’ when, after six years of exemplary service, his female supervisors derailed his career in retaliation for his continual thwarting of their romantic overtures.”), *aff’d*, 17 F.3d 1429 (3d Cir. 1994); *Showalter v. Allison Reed Grp., Inc.*, 767 F. Supp. 1205 (D.R.I. 1991); *cf. Carter v. Caring for Homeless of Peekskill, Inc.*, 821 F. Supp. 225, 230 (S.D.N.Y. 1993) (acknowledging that the same cause of action is available for both male and female victims of harassment by applying the same standard but ultimately finding that the evidence was insufficient to support male employee’s claim of hostile environment).

<sup>43</sup> *Carter*, 821 F. Supp. at 230; *cf. Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n.15 (3d Cir. 1990) (explaining in dicta that while quid pro quo claims were available to male plaintiffs against their female supervisors, it would require a higher standard of proof to sustain a male plaintiff’s claim of hostile environment sexual harassment against a female supervisor).

<sup>44</sup> *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *rev’d*,

prompting the Supreme Court to address the issue in *Oncale v. Sundowner Offshore Services*.<sup>45</sup> Before examining *Oncale*, an analysis of four of the circuit court opinions that led to the decision is warranted.

The Fourth Circuit held that a same-sex sexual harassment claim would lie under Title VII if the harasser were gay. In *Wrightson v. Pizza Hut of America, Inc.*, the plaintiff alleged that his supervisor graphically described homosexual sex to Wrightson and pressured him to have sex.<sup>46</sup> The supervisor also allegedly rubbed his genital area against Wrightson's buttocks and often groped him.<sup>47</sup> In finding for Wrightson, the Fourth Circuit held that same-sex Title VII claims are actionable only when the alleged harasser is homosexual and therefore presumably motivated by sexual desire.<sup>48</sup>

The Eighth Circuit held that there was a same-sex sexual harassment cause of action if only one sex suffered the alleged conduct. In *Quick v. Donaldson Co.*, the employees engaged in an activity they described as "bagging."<sup>49</sup> Bagging consisted of one employee hitting and grabbing another employee in the genital area.<sup>50</sup> The plaintiff alleged that at least twelve different male coworkers bagged him.<sup>51</sup> There was no evidence that female employees were ever bagged.<sup>52</sup> The Eighth Circuit found for the plaintiff, reasoning that plaintiffs could maintain a claim for same-sex sexual harassment so long as employees of only one gender suffered the alleged conduct.<sup>53</sup> If, however, there was no disparate treatment (i.e., both men and women were treated similarly, even if poorly) then there was no cause of action.<sup>54</sup>

The Seventh Circuit held that an employee could maintain a claim of same-sex sexual harassment if the employee was treated poorly for failing to live up to a sexual stereotype. In *Doe v. City of Belleville*, two brothers, "J." and "H." (the Does), alleged that they were physically threatened and verbally harassed at the construction site where they worked.<sup>55</sup> J. was called

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523 U.S. 75 (1998); *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. at 75.

<sup>45</sup> 523 U.S. 75 (1998).

<sup>46</sup> 99 F.3d at 139.

<sup>47</sup> *Id.* at 140.

<sup>48</sup> *Id.* at 143.

<sup>49</sup> 90 F.3d at 1378–79.

<sup>50</sup> *Id.* at 1374.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1379.

<sup>54</sup> *See id.*

<sup>55</sup> 119 F.3d 563, 566 (7th Cir. 1997).

“fat boy” by his coworkers, ostensibly because he was overweight.<sup>56</sup> The employees, including a supervisor, referred to H., who was described as being effeminate, as “fag” and “queer” on a daily basis.<sup>57</sup> One employee, described by the court as a former marine of imposing stature, called H. his “bitch” and threatened to take H. “out to the woods” and “get [him] up the ass.”<sup>58</sup> The threats became physical when the former marine grabbed H. by his testicles and announced: “Well, I guess he is a guy.”<sup>59</sup> Fearing escalation into outright physical assaults, the brothers quit their jobs.<sup>60</sup> The Seventh Circuit rejected the argument that the sexual orientation of the harasser was relevant and instead focused on the conduct the plaintiffs were forced to endure.<sup>61</sup> The court stated that conduct with sexual overtures is “because of sex” and thus, if severe and pervasive, is unlawful.<sup>62</sup>

While the court’s language in *Belleville* appears to have been broad, its true holding was narrower. The court relied on *Price Waterhouse v. Hopkins*<sup>63</sup> to justify finding for the plaintiffs. In *Price Waterhouse*, the Supreme Court held that an employer violates Title VII when an employee is denied a term or condition of employment because his or her appearance or conduct does not conform to stereotypical gender roles.<sup>64</sup> Like the plaintiff in *Price Waterhouse*, H. was harassed because he did not conform to his coworkers’ stereotypical assessment of manliness. Accordingly, the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 566–67.

<sup>58</sup> *Id.* at 567 (alteration in original).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 586 (“The focus on the sexual orientation of the harasser betrays a fundamental misconception that sexual harassment inevitably is a matter of sexual desire run amok . . .”).

<sup>62</sup> *See id.* at 576–80; *see also* *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (“The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course.”).

<sup>63</sup> 490 U.S. 228 (1989).

<sup>64</sup> *Id.* at 250. Hopkins was a senior manager at Price Waterhouse, a professional accounting partnership. After she was neither offered nor denied partnership and the partners refused to reconsider her for partnership, she sued Price Waterhouse, charging that it had discriminated against her on the basis of sex. The trial court ruled in Hopkins’s favor, holding that Price Waterhouse had unlawfully discriminated against her on the basis of sex by consciously giving credence to some partners’ comments about her that resulted from sex stereotyping. Both the trial court and the court of appeals held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that Price Waterhouse could not carry this burden. The Supreme Court issued four fractured opinions, but five justices agreed that the proper evidentiary standard was not clear and convincing evidence, but preponderance of the evidence. *Id.* at 231–32.

Seventh Circuit's holding can be viewed merely as an application of *Price Waterhouse*.<sup>65</sup>

Finally, the clearest but probably most troublesome opinion holding that same-sex claims are never actionable under Title VII originated in the Fifth Circuit. In *Garcia v. Elf Atochem North America*, a male plaintiff alleged that on several occasions his male supervisor approached him from behind, grabbed him, and made sexual motions.<sup>66</sup> Garcia complained, and his employer informed the supervisor that any further incidents would result in termination.<sup>67</sup> After the supervisor was reprimanded, no further incidents occurred between Garcia and his supervisor.<sup>68</sup> Shortly thereafter, Garcia filed a charge of employment discrimination with the EEOC, alleging that he had been sexually harassed in violation of Title VII.<sup>69</sup> The Fifth Circuit affirmed summary judgment in favor of the defendant for four reasons. First, the harm was not redressable because the damages provisions of the Civil Rights Act of 1991 would not retroactively apply to the conduct, and equitable relief would be moot because Garcia still had his job.<sup>70</sup> Second, the plaintiff failed to prove that any defendant was his "employer" for the purpose of applying Title VII.<sup>71</sup> Third, even if one of the defendants could be construed as his employer, that defendant took prompt remedial action calculated to end the harassment and could thus avoid liability.<sup>72</sup> Finally, the court flatly stated, "[H]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones."<sup>73</sup>

Two years later, the Fifth Circuit once again faced a same-sex sexual harassment case in *Oncale v. Sundowner Offshore Services, Inc.*<sup>74</sup> This time, the plaintiff's case did not feature the defects that formed the basis for the somewhat unusual holding in *Garcia*; the requested relief was available, the plaintiff named the proper employer, and the employer did not respond to the plaintiff's formal complaints.<sup>75</sup> Moreover, the conduct

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<sup>65</sup> See Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 561–62 (2007) (identifying when and how courts have used the *Price Waterhouse* opinion to advance legal rights for transgendered Americans who may not live up to stereotypical gender norms for dress or behavior); Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 764 (2013).

<sup>66</sup> 28 F.3d 446, 448 (5th Cir. 1994).

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

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 449.

<sup>70</sup> *Id.* at 450.

<sup>71</sup> *Id.* at 450–51.

<sup>72</sup> *Id.* at 451.

<sup>73</sup> *Id.* at 451–52.

<sup>74</sup> 83 F.3d 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

<sup>75</sup> *Oncale*, 523 U.S. at 77.

was so severe and so pervasive that it withstood summary judgment,<sup>76</sup> forcing the court to reach the issue of whether same-sex sexual harassment would support a claim under Title VII directly. Bound by the decision in *Garcia*, the *Oncale* court dismissed the case but was troubled enough by its precedent to send up a flare:

This panel, however, cannot review the merits of Appellant’s Title VII argument on a clean slate. We are bound by our decision in *Garcia* . . . and must therefore affirm the district court. Although our analysis in *Garcia* has been rejected by various district courts, we cannot overrule a prior panel’s decision. In this Circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the Court *en banc* or the Supreme Court.<sup>77</sup>

As we will discuss in Part II, the Supreme Court agreed to hear the case<sup>78</sup> and proceeded to create the first of our two bad rules.

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The problem of determining when an employer should be held vicariously liable for sexual harassment committed by its employees arose directly out of the *Meritor* Court’s failure to clearly define quid pro quo, hostile environment, and agency principles.<sup>79</sup> Without clear guidance, the lower courts were forced to define each of these terms themselves. At first glance, it would seem that the definitions of quid pro quo and hostile environment would be relevant only to deciding whether sexual harassment existed, whereas agency principles alone would guide liability. But until the Supreme Court intervened in 1998, the courts regularly comingled these concepts in determining employer liability for sexual harassment. Below, we examine the early cases that grappled with this issue and the lead-up to the Supreme Court’s decisions in *Ellerth* and *Faragher*, and the aftermath of the decisions.

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<sup>76</sup> *Oncale*’s coworkers, including supervisory personnel, restrained him, unzipped their trousers and placed their genitals on his neck and arm, and threatened to rape him. *Oncale* claimed he was in a shower at work when these same men got in the shower with him, restrained him, and sexually assaulted him using a bar of soap. *Oncale*, 83 F.3d at 118–19.

<sup>77</sup> *Id.* at 119 (footnote omitted).

<sup>78</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 520 U.S. 1263 (1997) (granting certiorari).

<sup>79</sup> See, e.g., Katherine Philippakis, Comment, *When Employers Should Be Liable for Supervisory Personnel: Applying Agency Principles to Hostile-Environment Sexual Harassment Cases*, 28 ARIZ. ST. L.J. 1275, 1275 (1996) (illustrating the ambiguity brought on by the Court’s failure to precisely define “agency principles” by pointing out the confusion among lower courts).

*C. Determining Employer Liability: What Preceded  
Ellerth and Faragher*

After *Meritor*, lower courts were required to look to agency principles in order to determine employer liability.<sup>80</sup> By 1998, there was general agreement between the circuits on some liability issues and a split between the circuits with regard to others. The circuits agreed that employers were always liable for quid pro quo harassment but could avoid liability for hostile environment cases.<sup>81</sup> The theory behind this distinction was that in quid pro quo cases, a supervisor truly acted as an agent of the company because the threatened actions (for example, hiring, firing, promoting, or demoting) were company actions that could only be accomplished in the course of employment with the express or implied consent of the employer.<sup>82</sup> In contrast, a hostile environment could be created without any use of authority delegated by the company. The supervisor could, for instance, make comments and touch employees without engaging in an official company action. This is why all circuits agreed that employers were liable for quid pro quo harassment but not always for the existence of a hostile environment.<sup>83</sup>

With regard to hostile environment, a split between two theories emerged. The minority of courts applied quid pro quo reasoning and held that if a supervisor acted within the “scope of employment” to create a hostile environment then the company would be held liable.<sup>84</sup> As an example, a company would be liable for the actions of a supervisor who used the power of the job to call a daily meeting with a subordinate during which the supervisor commented on the subordinate’s body, touched the subordinate employee inappropriately, or required the employee to watch pornography. Conversely, the majority of circuits employed the so-called

<sup>80</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

<sup>81</sup> See, e.g., *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 493–94 (7th Cir. 1997) (requiring negligence to hold employer vicariously liable for hostile work environment); *Davis v. City of Sioux City*, 115 F.3d 1365, 1367–68 (8th Cir. 1997) (finding that employers are vicariously liable for quid pro quo harassment); *Nichols v. Frank*, 42 F.3d 503, 513–14 (9th Cir. 1994) (finding that employers are vicariously liable for quid pro quo harassment); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106–07 (3d Cir. 1994) (finding that employers are vicariously liable for quid pro quo harassment, but requiring use of actual authority to hold employer vicariously liable for hostile work environment); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (finding that employers are vicariously liable for quid pro quo harassment); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) (same); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185–86 (6th Cir. 1992) (same); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (same).

<sup>82</sup> *Karibian*, 14 F.3d at 777 (“Because the *quid pro quo* harasser, by definition, wields the employer’s authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for *quid pro quo* harassment.”).

<sup>83</sup> See, e.g., *Jansen*, 123 F.3d at 501–03.

<sup>84</sup> See, e.g., *Kauffman*, 970 F.2d at 183.

negligence standard.<sup>85</sup> Under the negligence standard, the employer was liable if it knew or should have known about the alleged harassment.<sup>86</sup> Thus, in the example above, the employer would not be liable if it had a policy against sexual harassment informing employees to complain and an affected employee did not do so.

As expected, this encouraged plaintiffs' lawyers to label their cases as quid pro quo as opposed to hostile environment.<sup>87</sup> That the labels were both unclear and overlapping likely contributed to the substantial increase in sexual harassment litigation throughout the 1990s.<sup>88</sup> The differences between the theories are substantial at their extremes but not at the margin. For example, a supervisor who instructs an employee, "sleep with me or you are fired," and then fires the employee who does not acquiesce has clearly engaged in quid pro quo harassment. The issue is not so clear, however, when (1) the employee refuses to sleep with the supervisor and does not get fired; (2) the employee sleeps with the supervisor and does not get fired; (3) the employee quits and the supervisor later claims the purported threat was a joke; or (4) the threat is not as clear (e.g., "things would go better for you here if you wore more provocative clothes and were a little more accommodating"), and the employee quits, acquiesces, or ignores the supervisor but is not disciplined. Are any, or all, of the scenarios listed above quid pro quo? Are any, or all, of the scenarios hostile environment? The answer from the case law is confusing. There are cases in which each of these scenarios has been labeled quid pro quo, hostile environment, both, and neither.<sup>89</sup> As this Article contends, the diverse opinions are the product of results-oriented adjudication in the lower courts that led to a spilt in the circuits and, in this case, to the Supreme Court addressing the issue.

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<sup>85</sup> See, e.g., *Jansen*, 123 F.3d at 493–94.

<sup>86</sup> Philippakis, *supra* note 79, at 1282–83.

<sup>87</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998).

<sup>88</sup> Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 551 & n.7 (2001).

<sup>89</sup> Compare *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1181 (9th Cir. 2003) (classifying an implied threat as a hostile work environment), and *Gregory v. Daly*, 243 F.3d 687, 700 (2d Cir. 2001) (suggesting that an implied demand for sex could be considered hostile work environment), with *Quantock v. Shared Mktg. Servs., Inc.*, 312 F.3d 899, 904 (7th Cir. 2002) (stating that a supervisor's direct requests for sex were sufficient to alter the terms of an employee's employment, and also that those threats potentially created a hostile work environment), and *Jansen*, 123 F.3d at 512 (7th Cir. 1997) (Posner, C.J., concurring and dissenting) (stating that cases in which an employer "fires her, or denies her a promotion, or blocks a scheduled raise, or demotes her, or transfers her to a less desirable job location, or refuses to give her the training that the company's rules entitle her to receive" constitute quid pro quo and not hostile work environment claims), and *Estes v. Ill. Dep't of Human Servs.*, No. 05 C 5750, 2007 WL 551554, at \*2 (N.D. Ill. Feb. 16, 2007) (defining hostile work environment cases as ones in which no tangible action was taken).

## II. THE TWO RULES

A. *Oncale Creates the First Bad Rule*

In *Oncale v. Sundowner Offshore Services*, the U.S. Supreme Court resolved the split among the circuits by deciding that a plaintiff could make out a claim for sexual harassment as long as the harassing conduct was “because of sex.”<sup>90</sup> The immediate reaction to the ruling was one of celebration by the plaintiffs’ bar, which collectively regarded the holding as a victory for workers, especially for homosexuals in the workplace.<sup>91</sup> Indeed, the American Civil Liberties Union (ACLU) hailed *Oncale* as an important breakthrough “for all Americans, gay or straight, male or female.”<sup>92</sup> The ACLU, however, missed the point.

The key holding in *Oncale* is that the conduct in question must be “because of sex.”<sup>93</sup> Because of sex, however, does not mean that the conduct is sexual in nature. Making conduct of a sexual nature per se unlawful would, according to the Court, create a general civility code for the American workplace and would ignore the differences in the ways men and women routinely interact with members of the same and opposite sex.<sup>94</sup> According to the Court:

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

In other words, in an effort to avoid “transform[ing] Title VII into a general civility code,”<sup>96</sup> the Court imposed both the “because of sex” and “severe or pervasive” requirements, and removed the requirement that the conduct be sexual in nature. The resulting doctrine, however, provides incomplete protection to workers: what if conduct is sexual in nature and is either severe or pervasive, but is not “because of sex”? The Court stated

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<sup>90</sup> 523 U.S. 75 (1998).

<sup>91</sup> Jennifer J. Ator, *Same-Sex Sexual Harassment After Oncale v. Sundowner Offshore Services, Inc.: Overcoming the History of Judicial Discrimination in Light of the “Common Sense” Standard*, 6 AM. U. J. GENDER & L. 583, 586 (1998) (challenging the “lower courts to step away from their previous discriminatory treatment of homosexuals to create a body of law that consistently finds liability based on harassment ‘because of sex’”); Kathy Peck & Lisa Freiley, *New Developments in Sexual Harassment Case Law*, 15 LERC MONOGRAPH SERIES 77, 90 (1998).

<sup>92</sup> Jan Crawford Greenburg, *Sex Suit Fallout Alarms Its Advocates*, CHI. TRIB., Aug. 2, 1999, at A1.

<sup>93</sup> *Oncale*, 523 U.S. at 81.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

<sup>96</sup> *Id.* at 80.

that the issue in this situation is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>97</sup> To emphasize this point, the Court stated that a man could prove same-sex harassment if men were subjected to some form of harassing conduct and women were not.<sup>98</sup> However, the obvious logical extension of this argument is that if women were subjected to the same conduct as men then there is no actionable harassment for either the men or the women. Thus, the *Oncale* rule created a perfect test case for a rule that could result in an unjust result—a harasser escaping liability because he or she harasses victims of both genders.<sup>99</sup> This situation highlights the question raised in this Article: Would judges apply the rule as established by the Court, or would they find a way around the rule and thus create new law? As described below, courts followed the rule.

### *B. The Equal-Opportunity Harasser Defense*

In *Holman v. Indiana*, a husband and wife alleged that the same supervisor sexually harassed each of them.<sup>100</sup> The wife alleged that the male supervisor sexually harassed her by touching her body, standing too close to her, asking her to go to bed with him, making sexual comments, and otherwise creating a hostile work environment.<sup>101</sup> In addition, as a result of her refusal to perform the acts requested, the supervisor negatively altered her job performance evaluations and otherwise retaliated against her for protesting his harassing behavior.<sup>102</sup> The Holmans’ complaint further alleged that the supervisor harassed the husband by “grabbing his head while asking for sexual favors.”<sup>103</sup> When the husband refused such requests, the supervisor retaliated by opening the husband’s locker and throwing away his belongings.<sup>104</sup>

The court dismissed the case based on the equal-opportunity harasser defense.<sup>105</sup> To support its decision, the court stated that “the ‘equal-opportunity harasser’ does not treat plaintiffs differently than members of

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 80–81.

<sup>99</sup> See generally Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383, 406–08 (1996); David S. Schwartz, *When Is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1739–42 (2002) (discussing the equal-opportunity harasser defense and its applications).

<sup>100</sup> 24 F. Supp. 2d 909, 911 (N.D. Ind. 1998).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 916.

the opposite sex . . . [And] under current sex discrimination theories, there is no discrimination when something happens to both sexes and not simply to one.”<sup>106</sup> The court concluded by stating: “Simply put . . . under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination ‘because of sex’” and is therefore not unlawful.<sup>107</sup>

Similarly, in *Landrau Romero v. Caribbean Restaurants, Inc.*, the court dismissed the plaintiff’s sexual harassment case because the supervisor exhibited the same harassing conduct to both men and women.<sup>108</sup> The plaintiff, a man, alleged that his supervisor made an explicitly sexual comment to him, and the supervisor then repeated the comment to a female employee shortly thereafter.<sup>109</sup> Like in *Holman*, the *Landrau Romero* court dismissed the case pursuant to the equal-opportunity harasser defense.<sup>110</sup> To support its decision the court stated: “[T]he record clearly shows that [the supervisor] did not reserve his tasteless comportment for male employees, or that he treated male employees differently from female employees. In fact, it appears that [the supervisor] directed his most outlandish behavior, grabbing his genitals, as an insult to female employees.”<sup>111</sup> The court concluded: “While [the supervisor]’s behavior and comments were often sexual in nature, and may have created an undignified or even unpleasant working environment, they were not discriminatory and thus not actionable under Title VII.”<sup>112</sup> In fact, according to *Landrau Romero*, the equal-opportunity harasser defense defeats both quid pro quo and hostile environment cases.<sup>113</sup>

If two principal functions of judicial decisions are to allocate justice to the parties and to impose rules that incentivize good behavior,<sup>114</sup> the equal-opportunity harasser defense undermines both. The *Holmans*, for example, suffered tremendous injustice. Ms. Holman, Mr. Holman, and Mr. Landrau Romero all experienced the same type of conduct as any sexual harassment claimant. Yet they all were denied redress under Title VII solely because they were harassed by someone who harassed members of both genders—a

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<sup>106</sup> *Id.* at 912.

<sup>107</sup> *Id.* at 916.

<sup>108</sup> 14 F. Supp. 2d 185, 190 (D.P.R. 1998).

<sup>109</sup> *Id.* at 187.

<sup>110</sup> *Id.* at 190.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Jeffrey Evans Stake, *Status and Inventive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447, 1450–62 (1991) (discussing the incentive and status effects of judicial opinions); see generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (providing an overview of various positive and normative scholarship concerning motivations of judicial decisionmaking).

fact that in no way reduces the degree of harm they suffered. The courts in *Holman* and *Landrau Romero* accurately applied *Oncale*, but doing so deprived the plaintiffs of justice.

Moreover, this rule creates incentives that are downright bizarre: managers learn that they have carte blanche to sexually harass employees so long as they conduct themselves the same way with both sexes. Despite these abhorrent results, courts follow this rule even when there is a way to justify ignoring the rule. In *Oncale*, the defense was neither raised nor discussed.<sup>115</sup> Judges could, therefore, cite that distinction as a basis for refusing to validate the defense. But judges do not do this and instead uniformly follow this rule. Conversely, when it comes to employer liability in sexual harassment cases, the vast majority of courts ignore the clear rule in order to provide justice to employers and to prevent perverse incentives from prevailing. Before we explain why this is the case, we need to demonstrate that courts do in fact ignore the vicarious liability rule.

### C. Ellerth and Faragher Create the Second Bad Rule

In *Burlington Industries, Inc. v. Ellerth*, the question before the court was:

Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII . . . where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances?<sup>116</sup>

The Court addressed the *quid pro quo*–hostile environment distinction but not in the way the parties had hoped. First, the Court seemingly defined *quid pro quo*, stating: “Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”<sup>117</sup> Arguably, then, the Court’s view was that to be *quid pro quo* harassment the threat must be carried out.<sup>118</sup>

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<sup>115</sup> 523 U.S. 75 (1998).

<sup>116</sup> Petition for Writ of Certiorari at i, *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569), 1997 WL 33485655, at \*i.

<sup>117</sup> *Ellerth*, 524 U.S. at 751.

<sup>118</sup> *Id.* We say arguably because the contrast that the Court used (“as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive”) is a false dichotomy. *Id.* The former has never been considered unlawful harassment, and the latter is about as clear a definition of hostile environment as we have. The true dichotomy would be: Cases based on threats which are carried out are referred to often as *quid pro quo* cases as opposed to cases in which an employee is not disciplined after either: (1) acquiescing to or (2) rejecting a supervisor’s advances. Despite the Court’s lack of clarity, one could argue that *Ellerth* stands for the proposition that in order for there to be *quid*

After acknowledging the quid pro quo–hostile environment distinction, the Court rejected the theory that this distinction was determinative of employer liability.<sup>119</sup> Instead, the Court held that the key issue was whether the employee suffered a tangible loss.<sup>120</sup> If so, the employer would be strictly liable.<sup>121</sup> If not, the employer could still be liable but might escape liability if it could prove an affirmative defense.<sup>122</sup>

How does this rule square with the quid pro quo–hostile environment dichotomy? A fortiori all quid pro quo cases impose strict vicarious liability on employers because they, by the Court’s definition, necessarily involve a carried-out threat (i.e., a tangible loss). Hostile environment cases can go either way—they can result in an employee suffering a tangible loss, resulting in strict employer liability; or they can involve no tangible loss at all, resulting in employer liability subject to an affirmative defense.

In *Faragher v. City of Boca Raton*,<sup>123</sup> the plaintiff, a lifeguard, alleged that she was sexually harassed by her supervisor, Terry. The district court found that the conduct was unlawful harassment and that the City was liable.<sup>124</sup> After an appeal<sup>125</sup> and en banc<sup>126</sup> rulings reversing the lower court, the Supreme Court heard the case as a companion case with *Ellerth*. Like in *Ellerth*, the Court established and applied the new standard for sexual harassment liability: Employers are liable for supervisor’s harassment if employees suffer a tangible loss.<sup>127</sup> If there is no tangible loss, employers can avoid liability only if they can satisfy the two-prong affirmative defense: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm.<sup>128</sup> Unlike in *Ellerth*, the Court did not remand the case because while the City of Boca Raton had a sexual harassment policy, it did not distribute it to employees and lower level supervisors. Thus, the Court held, as a matter of law, the City of Boca Raton did not exercise reasonable care to prevent

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pro quo harassment the employee must suffer the discipline threatened. If this is the case, then all cases in which no discipline is taken would constitute hostile environment cases.

<sup>119</sup> *Id.* at 754.

<sup>120</sup> *Id.* at 764–65.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 765.

<sup>123</sup> 524 U.S. 775 (1998).

<sup>124</sup> *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1562, 1564 (S.D. Fla. 1994).

<sup>125</sup> *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir. 1996).

<sup>126</sup> *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc).

<sup>127</sup> See *Ellerth*, 524 U.S. at 764–65.

<sup>128</sup> *Faragher*, 524 U.S. at 807.

harassment, and thus, it was liable for Terry's actions against the Plaintiff.<sup>129</sup>

#### D. *The Two-Prong Ellerth–Faragher Defense*

The so-called *Ellerth–Faragher* defense has two prongs: (1) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (the “Reasonable Employer Prong”), and (2) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (the “Unreasonable Employee Prong”).<sup>130</sup> Upon any fair reading of this language, employers cannot avoid liability simply by proving that they acted reasonably or even with the utmost care.<sup>131</sup> They must also prove that the employee was unreasonable in some way.<sup>132</sup> A fortiori, if an employee behaves properly—that is, reports harassment and accepts the employer's reasonable corrective action—the defendant should never be able to establish the Unreasonable Employee Prong, and will therefore always be vicariously liable.<sup>133</sup> This is exactly what Justice Thomas argued in his dissenting opinions.<sup>134</sup> But when we studied the first seventy-two summary judgment cases decided under the defense, a decade ago, this proved not to be the case.<sup>135</sup> Instead, our study of district court decisions revealed that courts routinely permitted well-behaved employers to avoid liability even when employees behaved entirely reasonably by any measure.<sup>136</sup>

The new study we present in this Article examines appeals of summary judgment motions. The main advantage of such cases is the de novo standard of appellate review for summary judgment determinations.<sup>137</sup> Because appellate courts give no deference to lower courts' rulings under the de novo standard of review, merits determinations come from the circuit courts themselves rather than the lower courts.<sup>138</sup> To prevail on summary judgment, the moving party must show “that there is no genuine

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<sup>129</sup> *Id.* at 808.

<sup>130</sup> *Id.* at 807; *accord Ellerth*, 524 U.S. at 765.

<sup>131</sup> *Ellerth*, 524 U.S. at 773 (Thomas, J., dissenting).

<sup>132</sup> *Id.* at 765 (majority opinion).

<sup>133</sup> *See id.*

<sup>134</sup> *See id.* at 771–74 (Thomas, J., dissenting); *accord Faragher*, 524 U.S. at 810–11 (Thomas, J., dissenting).

<sup>135</sup> David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1283–88 (2001).

<sup>136</sup> *See id.*

<sup>137</sup> *See, e.g., Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 743 (2d Cir. 2003).

<sup>138</sup> EDWARD BRUNET, JOHN PARRY & MARTIN REDISH, *SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE* § 11.1 (2014).

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>139</sup> If a plaintiff employee sufficiently disputes the facts on either prong, a court may not grant summary judgment.<sup>140</sup> Two observations bear noting here: First, of the 131 cases examined in this study, all but one originated with an employer’s motion for summary judgment. The plaintiff was the movant in only one case; that plaintiff was pro se, and the defendant cross-moved and prevailed both at the lower court and on appeal.<sup>141</sup> Second, all 131 cases involved a plaintiff appealing a pro-defendant grant of summary judgment in the lower court. This makes sense since denials of summary judgment motions are not immediately appealable,<sup>142</sup> and although a summary judgment denial theoretically merges with a court’s final order after trial, most jurisdictions do not permit appeal of that portion of the order.<sup>143</sup>

### III. PRIOR RESEARCH ON THE *ELLERTH-FARAGHER* DEFENSE

As noted above, our previous study examined all federal district and circuit court cases deciding summary judgment motions on the merits of the *Ellerth-Faragher* defense in the eighteen months following the Supreme Court’s issuance of the companion opinions.<sup>144</sup> For each case, we modeled success on the affirmative defense (and success on each prong of the defense) as a function of employer behavior and employee behavior. In particular, we looked at whether the employer had a “good” anti-harassment policy in place, whether the employer responded sufficiently to the reported harassment, whether the employer made additional efforts to prevent harassment beyond its harassment policy, and whether the employer exhibited any other defect not captured by the previous variables.<sup>145</sup> Regarding employees, we coded whether the employee failed to report the harassment, whether the employee reported harassment in a timely manner, and whether the report was complete.<sup>146</sup>

We found that two variables robustly and significantly predicted judicial outcomes: employer maintenance of a sexual harassment policy, and whether the employer sufficiently corrected harassment.<sup>147</sup> Importantly,

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<sup>139</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

<sup>140</sup> *See id.*

<sup>141</sup> *Seals v. Onondaga County*, No. 99-7834, 2000 WL 234446, at \*1 (2d Cir. Feb. 1, 2000).

<sup>142</sup> 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2715 (3d ed. 1998).

<sup>143</sup> *See* Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 MIL. L. REV. 145, 149 & nn.24 & 26 (1995).

<sup>144</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1266.

<sup>145</sup> *Id.* at 1279 tbl.1.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1284 tbl.3a, 1287 tbl.3b, 1288 tbl.3c.

employer behavior variables were significant in the model for the Unreasonable Employee Prong. This is unexpected because the Unreasonable Employee Prong requires evaluation of *employee* behavior.<sup>148</sup> We offered several plausible explanations for this result, including the possibility that judges conflate employer and employee behaviors in their analyses.<sup>149</sup> The data suggest that judges may be results oriented in their jurisprudential approach to cases in this area of law. Their decisions appeared to turn on whether the employer attempted to prevent and did correct sexual harassment regardless of the clear rule requiring assessment of the plaintiff-employee's behaviors. Contrary to the explicit directions of the Supreme Court, employees' behaviors were mostly irrelevant to the courts' holdings.<sup>150</sup>

Our prior study, of course, is not the only empirical examination of sexual harassment decisions. David Walsh published an empirical study comparing sexual harassment cases before and after *Ellerth* and *Faragher*.<sup>151</sup> His apparent aim was to determine whether the three Title VII Supreme Court cases decided in 1998<sup>152</sup> had any impact on plaintiffs' success rate. Walsh collected a rich dataset and his findings were broad, but he honed in on *Ellerth* and *Faragher* cases in one way relevant to the present inquiry: Walsh examined the significance of certain key employer and employee behaviors in predicting a plaintiff's success in establishing employer liability.<sup>153</sup> As we do below,<sup>154</sup> and as we did in our prior analysis, Walsh constructed a logistic regression model of plaintiffs' success on the liability element of a sexual harassment case.<sup>155</sup> As we do below and did before, Walsh included independent variables about employers' preventive and corrective efforts and employees' complaint and post-complaint behaviors.<sup>156</sup> In contrast to our findings, Walsh observed that employee

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<sup>148</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (“[T]he plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”).

<sup>149</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1285.

<sup>150</sup> *Id.* at 1289.

<sup>151</sup> David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 476 (2009).

<sup>152</sup> *Ellerth*, 524 U.S. 742; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>153</sup> *See, e.g.*, Walsh, *supra* note 151, at 516–17 tbl.11.

<sup>154</sup> *See infra* Table 4.

<sup>155</sup> Walsh, *supra* note 151, at 513–15 & tbl.10, 516–17 & tbl.11.

<sup>156</sup> *Id.* (listing “Failure to Report,” “Delayed Report,” “Failure to Comply With Procedure,” “Failure to Cooperate in Investigation,” and “Remedy Offered and Refused”).

behavior variables significantly predicted liability.<sup>157</sup> Walsh also found that the vast majority of affirmative defense cases cited facts relevant to establishing *both* prongs of the affirmative defense.<sup>158</sup> From this he concluded, “[T]he affirmative defense is being applied in a way that is at least superficially faithful to the Supreme Court’s formulation.”<sup>159</sup>

We respectfully disagree. What permitted Walsh to find superficial faithfulness is likely his taking the judges at their word. Judges could be mischaracterizing employee behavior to make results-oriented holdings appear facially legitimate. But closer examination of the facts of each case (to the extent that objective facts are ascertainable through the judicial gloss) would show that many of the employees that courts deem “unreasonable” are in fact very reasonable in their actions.

In addition, an article by Anne Lawton looked at all district and circuit court cases citing *Ellerth* and *Faragher* up to 2004 but did not perform an empirical analysis.<sup>160</sup> Rather, Lawton began by decrying the lack of empirical evidence to support federal courts’ assertions about what constitutes reasonableness under each prong.<sup>161</sup> Regarding the Reasonable Employer Prong, Lawton argued that federal courts unjustifiably hold that certain efforts—like workplace harassment training, promulgation of policies with a zero-tolerance standard, explanation of sanctions to employees, publication of harassment policies through multiple media,<sup>162</sup> and alternative channels to report—are effective harassment-prevention tools.<sup>163</sup> In contrast, Lawton argued that social science evidence suggests that the central predictors of harassment are organizational culture and the gender context of the work performed, both of which have little to do with harassment training or the content of a paper policy.<sup>164</sup> Thus, Lawton concluded, the Reasonable Employer Prong should turn on: (1) efforts to *implement* a policy rather than the content of that policy; (2) content and quality of harassment training sessions rather than whether training occurred; and (3) more generally, whether an employer made efforts to assess the impact of its organizational culture and policies on the incidence

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<sup>157</sup> *Id.* at 517–18 & tbl.11. “Facts related to plaintiffs’ failure to mitigate harm . . . had a profound effect on the outcome of [affirmative defense] cases.” *Id.* at 518.

<sup>158</sup> *Id.* at 511.

<sup>159</sup> *Id.*

<sup>160</sup> Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 210 (2004).

<sup>161</sup> *Id.* at 207–09. “Thus, the empirical evidence on reporting raises an interesting question: if the vast majority of harassment victims do not report harassment, then the reasonable response is *not* to report harassment.” *Id.* at 209.

<sup>162</sup> For example, distribution of hardcopy policies, combined with periodic trainings on those policies, and access to the policies through a company website.

<sup>163</sup> Lawton, *supra* note 160, at 206–10.

<sup>164</sup> *Id.* at 225–27.

of workplace harassment.<sup>165</sup> Regarding the Unreasonable Employee Prong, Lawton noted that federal courts often hold that a delay in reporting harassment is unreasonable as a matter of law.<sup>166</sup> Lawton pointed out, however, that a typical sexual harassment victim does not report harassment because of credible fears of retaliation, and sexual harassment typically involves an accretion of events over time that makes a work environment hostile.<sup>167</sup>

We wholeheartedly agree with Lawton’s suggestion that sexual harassment victims often do not report, and we concur that it is often true that delay in reporting is understandable, predictable, logical, and reasonable. There is no reason to penalize employees for trying to defuse a situation with subtle objections first. This requires an employee to take time before lodging a formal complaint and, quite literally, “making a federal case” out of it. We diverge from Lawton, however, in one major respect. She presumes that judges find that plaintiffs acted unreasonably because judges genuinely believe the delays to be unreasonable. In contrast, we view such holdings as cognitive gymnastics aimed at immunizing employers who acted with the utmost care to prevent (and correct) harassment. In either case, circuit and district courts have taken the nominal goal of Title VII and the *Ellerth–Faragher* defense—to prevent sexual harassment<sup>168</sup>—and turned it on its head.<sup>169</sup>

#### IV. METHODOLOGY, DESCRIPTIVE STATISTICS, AND INFERENTIAL MODEL

This Part reviews the methodology used in this study and provides some descriptive statistics. Section A describes our case-selection method. Section B describes the choices made in coding variables that measure characteristics of the cases. Section C provides relevant descriptive statistics. Finally, Section D reviews the model for our inferential statistics.

##### *A. Case-Selection Method*

This study aimed to evaluate as closely as possible all federal appellate court opinions evaluating the merits of the *Ellerth–Faragher* defense in the summary judgment context. This was accomplished by performing a search

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<sup>165</sup> *Id.* at 228–35.

<sup>166</sup> *Id.* at 253, 259.

<sup>167</sup> *Id.* at 255, 257.

<sup>168</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998) (“Although Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective’ . . . is not to provide redress but to avoid harm.” (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975))).

<sup>169</sup> See *infra* notes 290–92 and accompanying text.

on WestlawNext in the “Federal Courts of Appeal[s]” database using the following syntax:

“summary judgment” & ((sex! gender) /1 haras!) & (ellerth faragher “118 s.ct. 2257” “524 u.s. 742” “118 s.ct. 2275” “524 u.s. 775”)

The authors believe that these search terms capture every case that cites or mentions *Ellerth* or *Faragher* and uses the terms “summary judgment” and “sexual harassment” (or variations on these phrases). There may be cases that treat the merits of the *Ellerth–Faragher* defense that do not mention or cite *Ellerth* or *Faragher*, but such cases are likely rare, especially given the prominence of the opinions in this legal area and the low likelihood of neither party at least raising the issues. The search was intended to be overbroad; indeed, it returned 644 results. Irrelevant cases<sup>170</sup> were discarded, leaving 131 relevant cases.

Using circuit court opinions on Westlaw as the basis for empirical analysis carries two main limitations. First, appeals represent a tiny fraction of all workplace sexual harassment disputes.<sup>171</sup> From the broad base of “perceived injurious experiences,” only a portion constitutes “grievances”—i.e., injurious experiences in which some violation of a right has in fact occurred.<sup>172</sup> Only some grievances become “claims”—i.e., grievances in which the aggrieved party contacts the offender concerning the offense.<sup>173</sup> Still fewer become “disputes,” or claims in which the offender denies responsibility.<sup>174</sup> Only a fraction of disputes become formal complaints in the form of charges to the EEOC.<sup>175</sup> To add yet more levels, not all EEOC charges become lawsuits, and all lawsuits do not culminate in summary judgment.<sup>176</sup> And finally, not all grants of summary judgment are appealed.

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<sup>170</sup> These included a wide variety of false positives. Here is a partial list: Not Title VII, even if same standards apply (e.g., state law, other federal statutes); coworker harassment only; not summary judgment below (e.g., JMOL, 12(b)(6)); nonsex protected class (e.g., racial harassment, disability-based harassment); otherwise did not reach defense (e.g., harassment not severe or pervasive; tangible loss established; procedural bar; pre-*Ellerth–Faragher* standard applied below, and insufficient facts to evaluate new standard); and other false positives (e.g., cites *Ellerth* and *Faragher* for procedural or other proposition).

<sup>171</sup> Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 681; see also Charles A. Brown, Note, *Employment Discrimination Plaintiffs in the District of Maryland*, 96 CORNELL L. REV. 1247, 1252–53 (2011).

<sup>172</sup> Nielsen & Nelson, *supra* note 171, at 681.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Many are settled or dismissed in earlier pretrial motions.

Moreover, evidence suggests that “cases drop out of the dispute pyramid at a rapid rate.”<sup>177</sup> By some estimates, only 70% of grievances become claims, 46% of grievances become disputes, and 5% of grievances become lawsuits.<sup>178</sup> One estimate puts the pretrial settlement rate at 70%.<sup>179</sup> Only about 23% of employment discrimination cases involve a merits determination of a summary judgment motion brought by the employer,<sup>180</sup> and about 66% of those merits determinations are pro-defendant.<sup>181</sup> Additionally, plaintiffs appeal pretrial,<sup>182</sup> pro-defendant dispositions in employment discrimination cases at a rate of only about 24%.<sup>183</sup>

Not only do vast numbers of cases drop out of the pyramid, but those that do are not randomly selected. Stronger cases (that is, stronger in either direction) likely drop out earlier because either the stronger incentives to settle or the greater likelihood of an earlier dismissal.<sup>184</sup> Consequently, cases toward the top of the dispute pyramid are likely to be closer cases than those toward the base. Therefore, in interpreting the results of this study, one must be careful not to extend inference beyond the appropriate level of the pyramid of disputes. However, the reported findings still bear importantly on the top of the pyramid and how courts interpret and apply

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<sup>177</sup> Nielsen & Nelson, *supra* note 171, at 681.

<sup>178</sup> *Id.* at 681–82.

<sup>179</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 121 (2009).

<sup>180</sup> Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 53 (2005) (examining a sample of cases in the Eastern and Southern Districts of New York).

<sup>181</sup> *Id.* at 55 tbl.1 (reporting that of a sample of 485 motions for summary judgment brought by employers across PACER and published cases, 166 (34.2%) were denied).

<sup>182</sup> “Pretrial” includes procedural postures beyond summary judgment, including motions to dismiss, which are not included in this study.

<sup>183</sup> Clermont & Schwab, *supra* note 179, at 109–10 & display 2 (data based on employment discrimination cases spanning from 1988 to 2004); *see also* Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 551 display 1 (2004) (earlier study which previously cited source updates); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. LEGAL STUD. 429, 449 tbl.3 (2004) (same); Clermont et al. noted that because of data censoring at the beginning and end of their dataset, appeal rates might be somewhat understated. Clermont et al., *supra* at 550 n.11. All told, this would bring the final percentage to  $5\% * 30\% * 23\% * 64\% * 24\% = 0.05\%$ . In other words, only 5 of every 10,000 grievances become appeals of summary judgment motions. This is admittedly a very crude, unscientific measure, which is why it is relegated to a footnote.

<sup>184</sup> DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 72 (1966) (noting limited exceptions to the general rule that closer cases go to trial more often); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 220–21 (1970) (same); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 101 n.16 (1974) (same).

*Ellerth* and *Faragher*. The extent to which these findings trickle down to lower tiers of the pyramid is beyond the scope of this Article.<sup>185</sup>

The other limitation endemic to studies that rely solely on circuit court opinions available on Westlaw is that those opinions exhibit selection bias. Not all cases are published, and those that are published are not randomly selected.<sup>186</sup> While many unpublished opinions are available on Westlaw, circuits vary in the degree to which they publicize unpublished opinions.<sup>187</sup> Additionally, unpublished opinions affirm pro-defendant grants of summary judgment far more often than published opinions.<sup>188</sup> Thus, whatever the rate of affirmance observed in this study is, the true affirmance rate, especially in circuits that restrict unpublished opinions, is likely higher, though it is impossible to quantify how much higher.

### B. Coding Method

A primary question of interest in this study is how various independent variables impact the success of the *Ellerth–Faragher* affirmative defense. Like our prior work, this study examines the impact of these variables on the success of each prong of the defense and the defense overall. Thus, we include three indicator variables: two for whether the employer satisfied the Reasonable Employer and Unreasonable Employee Prongs, and a third for whether the employer satisfied both prongs. Five clusters of independent variables were coded for each case: (1) employer behavior, (2) employee behavior, (3) employer characteristics, (4) employee characteristics, and (5) other case characteristics.

1. *Employer Behavior.*—The employer behavior cluster concerns employers’ efforts to “prevent” and “correct” harassment insofar as they are relevant to the Reasonable Employer Prong of the affirmative defense.

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<sup>185</sup> See, e.g., Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 3–34 (2005); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1981); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1981); Nielsen & Nelson, *supra* note 171.

<sup>186</sup> Clermont et al., *supra* note 183, at 548–50 (discussing the strengths and weaknesses of the study’s electronic database); David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 926–27 (2010) (citing authority supporting the proposition that cases that are reported are not random).

<sup>187</sup> Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 245 (2001).

<sup>188</sup> The rate of affirmance observed was 54.8% for published opinions and 84.1% for unpublished opinions, which is statistically significantly different ( $\chi^2(1, N = 131) = 13.34, p < 0.001$ ). See also *id.*, at 247 (similarly noting that unpublished opinions in disability discrimination cases “are overwhelmingly affirmances of pro-defendant results at trial”).

Relating to the “prevention” portion of the Reasonable Employer Prong, we coded two variables. The first is an indicator variable for whether an employer had a “good” anti-harassment policy in place. A “good” policy is one that has been disseminated to employees<sup>189</sup> and provides alternative channels to report harassment, permitting a harassed employee to avoid having to report a supervisor’s alleged harassment to the offending supervisor.<sup>190</sup> Of the 131 cases, 110 employers had a policy (84%). Of the 110 employers that had a policy, 69 (63%) were considered good policies by the court. The second is an indicator variable for whether an employer took preventive efforts beyond maintaining a good policy (e.g., establishing a “1-800” hotline or conducting harassment training). Forty-nine (37.4%) employers were described as having taken other such efforts. Only one of the employers that did not have a harassment policy in place took “other efforts” as tracked by this variable.<sup>191</sup>

Relating to the “correction” portion of the Reasonable Employer Prong, we coded two additional variables. The first is an indicator variable for whether, upon learning of alleged harassment, an employer responded in a way the court characterizes as “good.” Courts are surprisingly deferential in this inquiry. While promptly firing a harasser is apparently universally considered a good response, far more tepid responses—such as transferring an alleged harasser or even an alleged victim to a different department—have satisfied this criterion.<sup>192</sup> In a few cases, performing an investigation that does not culminate in discipline has satisfied this criterion.<sup>193</sup> In 9 cases, we could not determine with certainty whether the employer responded at all, leaving 122. Of the remaining 122 cases, the courts described 90 (74%) as good. The second “correction” variable indicates whether an employer’s general behavior (other than its response to the specific complaint) suffered some defect. This was coded in the

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<sup>189</sup> Employers varied in their efforts to disseminate the policy. Many employers simply included the policy in the employee handbook distributed to each employee upon hiring. Some employers went further, requiring employees to sign an attestation that they received, read, and understood the policy. Other employers posted the policy in a break room or other employee area. In all of these instances, the policy was considered “good,” and we did not distinguish between employers who made minimal efforts to disseminate their policies and those who went above and beyond. We chose not to analyze this dimension because the minimal potential explanatory value was insufficient to justify the unique difficulties in coding and analyzing such a subjective variable.

<sup>190</sup> This definition is adopted from Sherwyn, Heise & Eigen, *supra* note 135, at 1278.

<sup>191</sup> *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 329 (4th Cir. 2010) (harassment training).

<sup>192</sup> *See, e.g., Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1300 (11th Cir. 2007) (suggesting that offering to transfer the employee was an acceptable response); *Valentine v. City of Chicago*, 452 F.3d 670, 677 (7th Cir. 2006) (finding that transferring the harasser was an appropriate response); *Harmon v. Home Depot USA Inc.*, 130 F. App’x 902, 905 (9th Cir. 2005) (suggesting that transferring the employee would have been an appropriate response).

<sup>193</sup> *See, e.g., McCurdy v. Ark. State Police*, 375 F.3d 762, 770–71 (8th Cir. 2004) (finding that the employer’s investigation, which resulted in the harasser’s termination, shielded it from liability).

affirmative when an employer showed that, if an employee were to lodge a complaint, the employer might not enforce its sexual harassment policy—for example, if it failed to investigate complaints in the past or administered its policy in bad faith.<sup>194</sup>

2. *Employee Behavior.*—The employee behavior cluster of variables captures information relevant to the Unreasonable Employee Prong of the defense. We coded four variables. The first is an indicator variable for whether the employee-plaintiff reported the harassment. In 113 of the 131 cases (86%), employee-plaintiffs reported the alleged harassment. Second, we coded whether the report was timely.<sup>195</sup> This was the case in 77 out of the 131 cases (59%). Third, we coded whether there was some defect in the employee’s attempt at reporting the alleged harassment. Reports were defective if an employee lodged a complaint in a timely fashion but failed in some other way—for example, the assertions were too vague to put the employer on notice of harassment<sup>196</sup> or the employee requested that the employer not pursue action against the harasser.<sup>197</sup> This was the case 9 times (6.9%).

We also separately coded whether the employee failed to cooperate with the employer’s corrective efforts. The paradigmatic situation among these seven cases is one in which the employee timely reports harassment, the employer investigates and offers to move the employee to a new department without any reduction in pay, and the employee refuses or resigns.<sup>198</sup> This happened in 7 of the 131 cases (5.3%).

3. *Employer Characteristics.*—The employer characteristics cluster consists of two pieces of information: (1) the employer sector (private, federal, or state–local) and (2) a categorical variable reflecting the North American Industry Classification System (NAICS)<sup>199</sup> number for the

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<sup>194</sup> See, e.g., *Mosby-Grant*, 630 F.3d at 337 (employer had a “history of sexual harassment”); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 105 (2d Cir. 2010) (several of the avenues for reporting harassment “appeared to be ineffective or even threatening”); *Donaldson v. CDB, Inc.*, 335 F. App’x 494, 505 (5th Cir. 2009) (prior complaints concerning non-harassment issues had proven ineffective).

<sup>195</sup> The actual length of the delay, in months, was also collected where available. This variable was not used in the models of the prongs or the overall defense because it was available for comparatively fewer cases. It was, however, included in the model of *Timely* because of its theoretical importance to whether a delay is reasonable. See *infra* Part V.

<sup>196</sup> E.g., *Episcopo v. Gen. Motors Corp.*, 128 F. App’x 519, 523 (7th Cir. 2005).

<sup>197</sup> E.g., *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005); *Benefield v. Fulton Co.*, 130 F. App’x 308, 312 (11th Cir. 2005), *abrogated on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008).

<sup>198</sup> See, e.g., *Clegg v. Falcon Plastics Inc.*, 174 F. App’x 18, 27–28 (3d Cir. 2006).

<sup>199</sup> NAICS is the standard used by the U.S. government to classify businesses for a variety of statistical purposes. *Introduction to NAICS*, U.S. CENSUS BUREAU, <http://www.census.gov/eos/www/>

employer's business. The first two digits correspond with one of twenty broad industry categories.<sup>200</sup> Each successive digit corresponds to a more specific subcategory within that industry.<sup>201</sup> In the analysis, to reduce the number of levels in the variable, we used only the first two digits of the NAICS numbers. We coded this variable only if enough information about the employer was available in the opinion and online to be confident in the classification. This was the case in 128 out of 131 employers (98%).

4. *Employee Characteristics.*—The employee characteristics cluster consists of eight pieces of information. When available, we coded plaintiffs' gender, race, and sexual orientation. Race and sexual orientation were ultimately excluded from the analyses because of widespread unavailability. We also coded the Standard Occupational Classification (SOC)<sup>202</sup> number and the O\*NET Job Zone number for the employee's occupation. SOC is six digits long, with each successive digit corresponding to a more specific job subcategory.<sup>203</sup> We used only the first two digits to constrain the number of levels in the variable. This was available for 95 (72%) of the cases analyzed. O\*NET Job Zone number is a classification system designed to overlay the SOC system. Instead of classifying occupations by job duties, it uses five categories based on the education, training, and experience needed for a given occupation.<sup>204</sup> This was available for 91 (70%) of the cases analyzed.

We also coded the employee's tenure at the company in months. If the employee was still employed when the lawsuit was filed, we considered their tenure as running from the employee's start date until the employee filed the lawsuit. For the 79 employees for whom we measured tenure (60%), the mean was 53.8 months (std. dev. = 59.3). The minimum tenure was 2 months, and the maximum was 264. Furthermore, we coded whether the EEOC was a party in the lawsuit (5 cases, or 3.8%). Finally, we coded

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naics/ [http://perma.cc/LL4-CM4P]. The White House's Office of Management and Budget developed NAICS in 1997 to replace the Standard Industrial Classification system. *Id.*

<sup>200</sup> *Frequently Asked Questions (FAQs)*, U.S. CENSUS BUREAU, <http://www.census.gov/eos/www/naics/faqs/faqs.html> [http://perma.cc/7UH6-29JE].

<sup>201</sup> *See id.*

<sup>202</sup> *Standard Occupational Classification*, BUREAU OF LAB. STAT., <http://www.bls.gov/SOC/> [http://perma.cc/7MH2-2J8T]. Like NAICS, SOC is a federal standard classification system developed by the Bureau of Labor Statistics.

<sup>203</sup> Alissa Emmel & Theresa Cosca, *The 2010 SOC: A Classification System Gets an Update*, OCCUPATIONAL OUTLOOK Q., Summer 2010, at 13, 15, available at <http://www.bls.gov/careeroutlook/2010/summer/art02.pdf> [http://perma.cc/5V7P-5ZBT].

<sup>204</sup> NAT'L CTR. FOR O\*NET DEV., PROCEDURES FOR O\*NET JOB ZONE ASSIGNMENT 3 (2008), available at [http://www.onetcenter.org/dl\\_files/JobZoneProcedure.pdf](http://www.onetcenter.org/dl_files/JobZoneProcedure.pdf) [http://perma.cc/XZ25-QV6H]. O\*NET Job Zone was developed and is maintained by the National Center for O\*NET Development under the sponsorship of the U.S. Department of Labor. *About Us*, O\*NET, <http://www.onetcenter.org/about.html> [http://perma.cc/YEM6-ANZX].

whether the case involved a group or class of plaintiffs (10 cases, or 7.6%), as opposed to an individual plaintiff

5. *Other Case Characteristics.*—The final cluster contains other information about the case, including which court of appeals decided the case and whether the opinion was published or unpublished. Mainly for descriptive purposes, we also coded details about the nature of the harassment, including duration of the harassment, whether the harassment took the form of a pattern of behavior or isolated instances of harassment, whether the plaintiff was harassed by only supervisors or both supervisors and coworkers, where the harassment took place, and what the alleged harassing behavior was. The length of the delay in months was also collected where available, and this variable was used in modeling the timeliness of the complaint.<sup>205</sup> Some opinions expressly specified how long the plaintiff delayed before complaining. Other opinions did not specify the delay, but otherwise indicated how long the harassment lasted; we used the length of the harassment in these cases unless there was some indication that the plaintiff complained earlier.

6. *Coding Limitations.*—One problem pervaded the coding process: appellate opinions frequently lack the level of detail needed for content-rich coding. For instance, to be coded as having a “good policy,” the employer’s policy must be disseminated and provide alternative reporting channels.<sup>206</sup> Plaintiffs, however, do not always challenge the sufficiency of the policy, opting instead to challenge the correction portion of the Reasonable Employer Prong or only the Unreasonable Employee Prong. If the plaintiff does not challenge the policy the court is less likely to describe the policy in sufficient detail. Moreover, plaintiff’s decision not to challenge the policy increases the likelihood that it is a good policy given the low incremental cost of challenging the policy weighed against the possible downsides associated with challenging it—if a plaintiff attempts to challenge a good policy, they might lose credibility with the fact finder or inadvertently shine a spotlight on the employer’s apparent diligence to prevent harassment. Therefore, our measures likely underreport the number of employers with good policies, as well as the effect of having a good policy on the success of the defense is likely underestimated.

A similar problem plagues the occupational classification variables. Appellate courts have little use for specifics about employers’ business models or employees’ job duties except insofar as they inform whether the harasser was a supervisor or coworker. Often the only information provided is the name of the business and the employee’s job title. Where possible,

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<sup>205</sup> See *infra* Table 5.

<sup>206</sup> See *supra* Part IV.B.1.

we supplemented the information with research conducted on the Internet. Still, a reader should have comparatively less confidence in the NAICS, SOC, and Job Zone numbers, and caution is urged in interpreting the findings with respect to these variables.

*C. Do Sexual Harassment Plaintiffs Fare Better on Appeal than the Average Discrimination Plaintiff?*

While not scientific, a descriptive comparison to other types of discrimination cases suggests that sexual harassment plaintiffs fare better on appeal than the average discrimination plaintiff. This Section serves to contextualize our study among empirical studies that have come before it. Appellate courts affirmed pro-defendant summary judgment dispositions at a rate of 70% in our sample. Studies in comparable areas have found both higher and lower affirmance rates. For example, Clermont and Schwab found pretrial, pro-defendant employment discrimination dispositions were affirmed on appeal at a rate exceeding 89% between 1988 and 2004.<sup>207</sup> This is statistically significantly higher than the 70% affirmance rate observed in our study.<sup>208</sup> In another study, Clermont, Eisenberg, and Schwab evaluated federal civil rights-type cases more broadly from 1988 to 2000, finding an affirmance rate of 87% for pretrial, pro-defendant dispositions,<sup>209</sup> which is also significantly higher than the 70% rate observed here.<sup>210</sup> Juliano and Schwab examined all appeals of sexual harassment cases from 1986 to 1995 and found an affirmance rate of 73%,<sup>211</sup> which is not statistically distinct from the 70% rate we observe. This study included appeals from all procedural postures, including pretrial and post trial. Note, however, that Juliano and Schwab's study ended before *Ellerth* and *Faragher* were decided. Additionally, Walsh's study of affirmative defense cases, described earlier, found a pro-defendant appellate disposition rate of

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<sup>207</sup> Clermont & Schwab, *supra* note 179, at 109–10 & display 2; *see also* Clermont et al., *supra* note 183, at 553 display 2 (noting a plaintiff reversal rate—i.e., the complement of the affirmance rate—of 10.66% from 1988 to 2000).

<sup>208</sup> Two-sided z-test of the proportion of affirmations observed in the instant set of cases (92 of 131) against Clermont & Schwab's proportion (1133 of 10,598) results in a *p*-value less than 0.001. *See* Clermont & Schwab, *supra* note 179, at 109–10 & display 2.

<sup>209</sup> Clermont et al., *supra* note 183, at 562–63 display 8 (noting plaintiff reversal rates of 8.4%, 26%, and 13% for prisoner civil rights, marine contracts, and federal civil rights-type cases overall, respectively).

<sup>210</sup> Two-sided z-test of the proportion of affirmed cases observed in the instant data set (92 of 131) against Clermont, Eisenberg & Schwab's proportion (13.27% of 60,667), *see id.*, results in a *p*-value of less than 0.001. Because 13.27% of 60,667 could result from an *x* value of anywhere from 8048 to 8053, 8048 was used as the most conservative value.

<sup>211</sup> *See* Juliano & Schwab, *supra* note 88, at 574.

60%.<sup>212</sup> This rate is only marginally significantly different from our observed 70% affirmance rate at the lower significance level of 90%.<sup>213</sup>

A number of differences exist between the sample examined in this Article and the samples that bore these other affirmance rates. Clermont and Schwab and Clermont, Eisenberg, and Schwab examined *all* pretrial dispositions; here, we examine only summary judgments. They looked at all forms of employment discrimination; we examined a much smaller subset on several dimensions—only Title VII, only sexual harassment, only cases lacking tangible loss, only supervisor harassment, and only merits determinations on the *Ellerth–Faragher* defense. Past studies also examined different time periods than ours does: Clermont, Eisenberg, and Schwab’s study covered 1988–2000, and Clermont and Schwab examined cases from 1988–2004, whereas our study examines a different, more recent period (1998–2012).

Juliano and Schwab’s study looked at sexual harassment cases, which is certainly narrower than all types of discrimination cases, so their set of cases is more similar to our set of cases along that dimension. Other characteristics of their dataset, however, were different: their timeframe was earlier still (1986–1995), and they included appeals after trial along with pretrial appeals. Walsh’s sample seems to be the most comparable—he ostensibly examined only affirmative defense cases.<sup>214</sup> Walsh’s description of the data he observed is somewhat opaque, making it difficult to ascertain the relevance of the observed pro-defendant affirmance rate, which is statistically lower than our rate.

Ultimately, further research that controls for all of these variables—time, type of discrimination, procedural posture below, and affirmative defense versus non-affirmative defense—is necessary to appropriately determine what accounts for the differences in rates. Preliminarily, though, it seems the affirmance rates in studies of sexual harassment cases are lower than those in studies of employment discrimination cases in general. This suggests that sexual harassment plaintiffs fare better on appeal than the average discrimination plaintiff.

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<sup>212</sup> Walsh, *supra* note 151, at 507 tbl.8 (this figure ignores the four cases in which liability was inconclusive; 60% is calculated as the 56 cases in which no employer liability compared with the 38 cases in which employer liability was established).

<sup>213</sup> Two-sided test of our proportion (92 of 131) against Walsh’s proportion (56 of 94), *see id.*, results in a *p*-value of 0.097.

<sup>214</sup> Walsh was a bit imprecise in delineating exactly which cases he examined, making it difficult to ascertain just how comparable his sample was to our sample.

*D. How Effective Are Employers at Asserting  
the Affirmative Defense?*

Out of the 131 cases, the court addressed the merits of both prongs in 119 cases (91%). In eight additional cases the court addressed only the Reasonable Employer Prong, and in the four remaining cases the court addressed only the Unreasonable Employee Prong.

Seventy-eight percent of employers satisfied the Reasonable Employer Prong in cases that addressed the merits of the Reasonable Employer Prong. That proportion dropped slightly to 75% for the Unreasonable Employee Prong. Overall, the defense was successful 70% of the time. In 49% of the cases in which defendants were unsuccessful on appeal, they failed to satisfy *both* prongs. Defendants failed to satisfy the first or Unreasonable Employee Prong alone in 21% and 31% of unsuccessful appeals, respectively. Interestingly, if the court addressed both prongs and the defendant satisfied only one of them, it was always the Reasonable Employer Prong.

Table 1 reviews employer preventative behavior. As noted above, 84% of the employers involved in this study had a policy, but only 73% of cases indicated that the policy was adequately disseminated, and only 54% of cases indicated that the policy contained alternative channels to report harassment. Thus, only 53% of cases provided enough detail to conclude that the employer's policy was a "good" policy. Employers provided workplace harassment training in 31% of cases and had a 1-800 harassment hotline in 19% of cases, resulting in 37% of employers making "other efforts."<sup>215</sup>

TABLE 1: DESCRIPTIVE STATISTICS ABOUT EMPLOYER EFFORTS TO  
PREVENT HARASSMENT

Preventative Measure	Percent
Had a policy	84%
Disseminated the policy	73%
Policy provided alternative channels of redress	54%
Court considered it a "good" policy	53%
Employer made other efforts	37%
Employer trained employees	31%
1-800 report line provided	19%
Policy described the penalty	13%
Policy promised investigation of complaints	26%
Had anti-retaliation policy	15%

<sup>215</sup> See text accompanying notes 189–94.

Employers responded appropriately to harassment in 69% of cases. However, employers only fired alleged harassers in 21% of cases, and disciplined alleged harassers in some other way (from a verbal warning up to a demotion, but short of termination) in 23% of cases. Transfer occurred in 15% of cases—the harasser half of the time and the employee the other half. In 14% of cases, the employer investigated the complaint but took no further action. Lastly, in 21% of cases, the employer did nothing at all.

In 81% of cases, the employee reported the harassment to the correct person as determined by the court. In 59% of cases, the complaint was timely. In 7% of cases, the employee's claim suffered from some other defect, such as vagueness, and in 5% of cases, the employee rejected the corrective action the employer offered.

Tables 2 and 3 present data that, while not used directly in the inferential statistics presented in this Article, serve to illustrate where our sample of cases fits in context of the broader American workplace. Table 2 presents characteristics of employers and employees involved in the cases in this study. Most defendants were private sector employers (71%). Of the public sector employers, roughly one-sixth were federal and five-sixths were state or local government actors. In the private sector, distribution across NAICS industries was dispersed—the modal industry was manufacturing (13%), followed by retail (11%) and accommodation and food services (9%), and there were no employers in the NAICS categories for agriculture, utilities, wholesale trade, management of companies, or other services. Plaintiffs were overwhelmingly female (95%) and were concentrated in O\*NET job zones two and three, with comparatively fewer employees in jobs requiring very low or very high education, training, and experience. Only about one-quarter of employees had been at their company for less than one year before filing the discrimination lawsuit; most employees' tenures were between one and ten years long. Finally, in 4% of cases, the EEOC represented the employee, and in 8% of cases, the case involved more than one employee-plaintiff.

Table 3 reports information about the harassing conduct, where available. Eighty-four percent of cases involved workplace-only harassment. Harassment extended beyond the workplace in only 17% of cases, and in no case was the harassment relegated to non-work-related areas, though courts frequently explain that harassment need not occur within the workplace to be actionable.<sup>216</sup> Table 3 also lists the frequency of different forms of harassment. General sexually charged comments and

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<sup>216</sup> *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 137 (2d Cir. 2001); Douglas R. Garmager, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a "Hostile Work Environment" Claim Under Title VII*, 85 CHI.-KENT L. REV. 1075, 1076 (2010) (noting that the Seventh Circuit has held that "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace").

sexual contact were the most frequently alleged behaviors, though these are also two of the less-specific categories. Comments about the plaintiff's appearance, nonsexual contact, and requests for sexual favors were also very common. Less common were things like love letters, written comments to the plaintiff, and displaying pornographic materials, as well as the most severe behavior, sexual assault.

The duration of the harassment and the delay in reporting the harassment were also recorded. About half of the cases involved harassment that lasted up to six months, and roughly half of the cases involved harassment that lasted between six months and five years, with very few cases of harassment lasting longer than that. The trend in the length of time it took the plaintiff to report the harassment is the same. This confirms the intuition that harassment, in the vast majority of cases, does not last long beyond the time an employee reports it to the employer. It also lends some support to the proposition that employer corrective efforts were generally efficacious in these sexual harassment cases.

#### *E. Empirical Strategy*

The following analysis models employer success on each prong of the affirmative defense, and on the defense overall, as a function of eight independent variables—those relating to employer and employee behavior described in Part III.B. In all three analyses, the dependent variable is dichotomous (taking the value 1 if an employer satisfied the prong/defense; 0 if not). We therefore use logistic regression in the models below.

Two barriers emerged that complicated the analysis: slight multicollinearity and quasi-complete separation. First, multicollinearity refers to unacceptably high correlation among independent variables in a model. Multicollinearity exists only in the model for the Reasonable Employer Prong<sup>217</sup> with respect to two independent variables, whether the employer responded adequately to a complaint and whether there was some defect in the employer's general conduct. Therefore, we modeled the Reasonable Employer Prong twice, first omitting the "defect" variable (Model A), and second omitting the "good response" variable (Model B). Multicollinearity did not exist in the models of the Unreasonable Employee Prong or the defense overall.

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<sup>217</sup> In some cases, courts address one prong but not the other. As a result, the model for the Reasonable Employer Prong has a different set of observations than the models for the Unreasonable Employee Prong and the overall defense. This explains how multicollinearity can exist in one model but not in other models that use the same independent variables.

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TABLE 2: EMPLOYER AND EMPLOYEE CHARACTERISTICS

Variable	Percent
<b><u>EMPLOYER</u></b>	
<i>Employer Sector</i>	
Private	71%
Public—Federal	5%
Public—State/Local	24%
<i>NAICS Number</i>	
21—Mining, Quarrying, and Oil/Gas Extraction	2%
31 to 33—Manufacturing	13%
44/45—Retail Trade	11%
48/49—Transportation/Warehousing	5%
51—Information	8%
52—Finance and Insurance	6%
53—Real Estate and Rental/Leasing	2%
54—Professional, Scientific, and Technical Services	2%
56—Administrative/Support and Waste	3%
<i>Management/Remediation</i>	
61—Educational Services	8%
62—Health Care and Social Assistance	8%
71—Arts, Entertainment, and Recreation	1%
72—Accommodation and Food Services	9%
92—Public Administration	21%
<b><u>EMPLOYEE</u></b>	
<i>Sex</i>	
Male	5%
Female	95%
<i>O*NET Job Zone Number</i>	
Level 1	15%
Level 2	37%
Level 3	27%
Level 4	14%
Level 5	5%
<i>Tenure</i>	
0–6 months	19%
6 months–1 year	8%
1–5 years	43%
5–10 years	19%
>10 years	11%
<i>EEOC Was a Party</i>	4%
<i>Multi-plaintiff Lawsuit</i>	8%

TABLE 3: DESCRIPTIVE STATISTICS ABOUT HARASSING CONDUCT

<b>Variable</b>	<b>Percent</b>
<i>Location of Harassment</i>	
Workplace Only	84%
Workplace & Work Events	4%
Workplace & Social Events	7%
All Three	6%
<i>Conduct Alleged</i>	
Derogatory Names Generally	11%
Insults Directed to Plaintiff	17%
Comments About Appearance	38%
Sexually Charged Comments Generally	73%
Sexual Gestures	16%
Written Sexual Comments	3%
Love Letters to Plaintiff	3%
Sexual Contact	54%
Nonsexual Contact	37%
Requests for Dates	19%
Requests for Sexual Favors	37%
Displaying Pornographic Materials	7%
Sexual Assault	9%
Nonsexual, Gender-Related Behavior	8%
<i>Duration Alleged</i>	
One or More Isolated Incidents	12%
<1 month	1%
1–6 months	42%
6 months–1 year	21%
1–5 years	31%
>5 years	5%
<i>Length of Delay</i>	
<1 month	1%
1–6 months	48%
6 months–1 year	19%
1–5 years	28%
>5 years	3%

Second, separation occurs when the dependent variable has the same value for all observations in which an independent variable takes on a given value. In the context of this study, for example, whenever plaintiffs' reports of harassment were deemed untimely, the defendant had always satisfied the Unreasonable Employee Prong. This makes sense because an untimely complaint qualifies as an employee unreasonably failing to take

advantage of corrective opportunities.<sup>218</sup> When such a relationship between independent and dependent variables exists, the coefficient of the independent variable is undetermined (it is infinite).

One remedy is simply to exclude the problematic variable.<sup>219</sup> But this often means excluding a variable that impacts the dependent variable in important ways, which constitutes deliberate specification bias.<sup>220</sup> For example, we would prefer not to exclude the timeliness of an employee's report from the model because we consider it an important determinant of whether the Unreasonable Employee Prong is met.

Statistics authorities recognize that the ideal solution to separation for the type of analysis we are performing (logistic regression) is to use what is called Firth's penalized-likelihood approach.<sup>221</sup> The approach does not remove problematic variables but instead modifies the way in which the coefficients for those variables are estimated.<sup>222</sup> Thus, our models apply Firth's penalized-likelihood model.

## V. RESULTS

Table 4 reports coefficients and their respective significance levels, as well as the goodness-of-fit measures<sup>223</sup> for each model (Wald Chi-squared test and proportional reduction in error (PRE) for each model). In the sections following Table 4, the models for each of the dependent variables are treated in turn, discussing specifically what conclusions may be drawn from the analysis.

### A. *The Reasonable Employer Prong*

The results of the model of the Reasonable Employer Prong suggest that in assessing the reasonableness of employers, judges have no need for

<sup>218</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Therefore, in all the cases in which *Timely* = 0, there are no cases where *Prong 2* = 0; but when *Timely* = 1, *Prong 2* is 1 in some cases and 0 in others (an example of quasi-complete separation).

<sup>219</sup> Christopher Zorn, *A Solution to Separation in Binary Response Models*, 13 POL. ANALYSIS 157, 161 (2005).

<sup>220</sup> *Id.* at 161–62.

<sup>221</sup> E.g., Georg Heinze & Michael Schemper, *A Solution to the Problem of Separation in Logistic Regression*, 21 STATS. MED. 2409, 2409–11 (2002); Zorn, *supra* note 219, at 165–66 (“Firth’s method prevents researchers from being forced either to omit manifestly important covariates from their models or to engage in post-hoc data manipulation in order to obtain parameter estimates for those covariates.”); see also David Firth, *Bias Reduction of Maximum Likelihood Estimates*, 80 BIOMETRIKA 27, 27–38 (1993). These authorities note that other alternatives are inferior, such as using exact logistic regression, manipulating the data, or using an arbitrary standard value as the estimate for the problematic variable’s coefficient. Heinze & Schemper, *supra*, at 2418; Zorn, *supra* note 219, at 165.

<sup>222</sup> Heinze & Schemper, *supra* note 221, at 2411–12.

<sup>223</sup> Goodness-of-fit measures, as the name suggests, can be thought of as metrics to compare models in terms of how well they explain variation in the data.

gamesmanship. To satisfy the Reasonable Employer Prong, an employer must show it took reasonable steps to prevent and correct harassment.<sup>224</sup> As we hypothesized in prior empirical findings reporting district courts' application of the affirmative defense, satisfaction of the Reasonable Employer Prong of the affirmative defense should be a function primarily of employer, rather than employee, behavior. Whereas the variables relating to the employers' *corrective* actions (*Good Response* and *Employer Defect*) were significant in predicting success, variables relating to the employers' *preventive* efforts (*Good Policy* and *Other Efforts*) were nonsignificant. This observation could suggest that courts consider an employer's enforcement of its anti-harassment policies to be more important than the details of the policies themselves. The more persuasive explanation, however, comes from the different forms of evidence required to prove prevention and correction. Employers may satisfy the prevention portion of the Reasonable Employer Prong with documentary evidence; they may submit their anti-harassment policy and, in many cases, the employee's signed acknowledgment of her receipt of that policy. This leaves little for the plaintiff to credibly dispute, and it may explain the phenomenon noted in Part V.D of plaintiffs opting not to challenge the sufficiency of the policy. In contrast, the "correction" inquiry involves different forms of proof—records and testimony concerning the investigation of harassment as well as records and testimony concerning the disciplinary action taken against the harasser. The correction inquiry involves far more for a plaintiff to materially dispute. Similarly, there are more opportunities for a judge to decide that the "reasonableness" question is better left to the jury than declared as a matter of law. This could account for the lack of significance of prevention-related variables and, in contrast, the high significance of whether the employer's response was "good" and whether the employer's conduct included some defect otherwise (correction-related variables).

Employee-behavior variables were significant in both models for predicting employers' success at proving the Reasonable Employer Prong, likely due to the effect of employees' behavior on the employers' ability to respond to harassment. This is consistent with the suggested explanation offered above. Once again, the form of evidence relevant on summary judgment brings the correction portion of the Reasonable Employer Prong into focus. But the reasonableness of the employer's corrective efforts depends in large part on the employee's behavior. For example, if an employee's report of harassment is vague or the employee refuses to participate in the internal investigation, it can impede the employer's ability to determine whether the alleged harassment occurred. Courts assessing the

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<sup>224</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998).

reasonableness of employers in these cases may be more forgiving. Similarly, if an employee never reports harassment there is no obligation for the employer to take *any* corrective action. Either way, the reasonableness of the corrective action depends on the employee's behavior.

TABLE 4. MODELS OF PRONG 1, PRONG 2, AND THE OVERALL DEFENSE, USING FIRTH'S PENALIZED-LIKELIHOOD APPROACH

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

\* SIGNIFIES  $P < 0.10$ ; \*\* SIGNIFIES  $P < 0.05$ ; \*\*\* SIGNIFIES  $P < 0.01$

To summarize, the Reasonable Employer Prong is entirely unremarkable. We expected as much, because the standard for this prong—that the employer exercised reasonable efforts to prevent and correct harassment—is uncontroversial. Accordingly, judges have no reason to be duplicitous in the name of achieving justice or incentivizing behavior. This is harmonious with our thesis that judges depart from rationality only when there is sufficient justification for doing so.

*B. The Unreasonable Employee Prong*

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

But at the same time, we see evidence of results-oriented adjudicating: the significance of the variable for the quality of the employer's response to the report of harassment. In theory, the employee's reasonableness logically cannot turn on the employer's response because the employee's behavior precedes the employer's response to that behavior. But in this study and in our earlier study, employer behavior is a significant predictor of the employee's reasonableness.<sup>225</sup>

We initially offered two explanations for this counterintuitive result, which the results in the instant study do not substantiate. First, we suggested that courts allow employers to "make or break" their own cases because employers are asking for summary judgment on an affirmative defense and they bear the burden of proof. This explanation could account for the significance of the employer's response in predicting success on the Unreasonable Employee Prong—employers who do not satisfactorily respond to complaints do not deserve the benefit of summary judgment on either prong. But it is less persuasive here than it perhaps was before because this model finds employee behavior highly significant.

Second, we suggested that courts may conflate employer and employee behavior. This explanation could also account for the significance of the response. Perhaps the reasonableness of the employer's behavior informs the court's assessment of the employee's behavior. For example, if an employer does not satisfactorily respond to a complaint of harassment, it could signal a systemic flaw in the employer's harassment-complaint system, justifying the employee's delay in reporting the harassment. This would explain the positive, significant effect that a good response has on satisfying the Unreasonable Employee Prong. It is reasonable to expect that if this hypothesis were true, judges would explain their reasoning in the written opinions. But we found no evidence in the opinions supporting this hypothesis.

Rather, judges' ostensible silence regarding the role of employer behavior counsel in favor of a third explanation: the same results-oriented holdings affect the analysis. The significance of the employer's response

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<sup>225</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1285–87 & tbl.3B (finding significant variables relating to whether the employer had a good harassment policy and whether the employer's response to the report of harassment was sufficient).

must be viewed together with the significance of employee-behavior variables. The significance of both employee and employer behavior suggests that the court is engaging in mental gymnastics to avoid penalizing well-behaved employers. The Unreasonable Employee Prong is supposed to evaluate employee behavior. In theory, the employer's response is immaterial to whether the employee acted unreasonably precisely because it takes place *after* the employee's behavior. But it is hard to justify applying vicarious liability to an employer that did all it reasonably could have done to both prevent and correct harassment. The result we have observed suggests that, when confronted with an employer who corrects well, courts scrutinize the employee's conduct to find it unreasonable.

Courts appear to accomplish this result via the timeliness of the employee's complaint. In many cases, the only employee defect the court is able to highlight is a period of delay in reporting harassment. These periods can be surprisingly short; for example, the Tenth Circuit in *Conatzer v. Medical Professional Building Services Corp.* held a seventeen-day delay unreasonable as a matter of law.<sup>226</sup> Consider that, in *Conatzer*, the employer had a sterling anti-harassment policy and upon learning of the harassment promptly investigated and fired the harasser.<sup>227</sup> On the other hand, courts have rejected far longer periods of delay as a basis for finding the employee unreasonable. Unsurprisingly, in many of these cases, the employer's response to the report of harassment was less than ideal. For example, in *Clegg v. Falcon Plastics Inc.*, the court held that a plaintiff's four-month delay was not unreasonable as a matter of law.<sup>228</sup> As for corrective action, the employer had investigated but only at the employee's repeated insistence, and at the conclusion of the investigation, the employer only offered to transfer the employee.<sup>229</sup> Similarly, in *Walker v. United Parcel Service of America, Inc.*, the employee endured sexual harassment for seven years before complaining to a supervisor.<sup>230</sup> When she ultimately did complain, the employer took *no* action.<sup>231</sup> It should be obvious that the employer failed to satisfy the Reasonable Employer Prong—it did not reasonably correct the harassment. But the court also found that the employer failed to satisfy the Unreasonable Employee Prong even though the plaintiff delayed seven years.<sup>232</sup>

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<sup>226</sup> 95 F. App'x 276, 281 (10th Cir. 2004).

<sup>227</sup> *Id.* at 280.

<sup>228</sup> 174 F. App'x 18, 26 (3d Cir. 2006).

<sup>229</sup> *Id.* (“Clegg asserts that Falcon only acted at her repeated insistence.”).

<sup>230</sup> 76 F. App'x 881, 883 (10th Cir. 2003).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 888.

Indeed, empirical evidence supports the finding that courts consider employer behavior in assessing the timeliness of an employee's harassment. We investigated this relationship by modeling the "timeliness" determination as a function of employer corrective action. In two models we alternatively modeled timeliness as a function of (1) whether the employer had a "good" response and (2) whether the employer's conduct was otherwise defective. In both models we controlled for the length of the delay as well as employer preventive behavior and employee behavior. It is reasonable to expect that the timeliness of a complaint will vary with (1) most importantly, the length of the delay; (2) whether the employee complained; and (3) whether there was some other defect, such as vagueness, in the employee's behavior. The two other covariates in theory should not influence the timeliness of the complaint, but they were included to capture any unexpected association. Note the smaller sample size is because not all court opinions specified the length of time the plaintiff delayed. As with the model for the Reasonable Employer Prong, the variables for whether the employer's response was "good" and whether the employer's behavior was otherwise defective were unacceptably correlated with one another so they were omitted in alternative Models A and B. Additionally, in Model B, the "defect" variable exhibited quasi-complete separation with the dependent variable, so Firth's penalized-likelihood was used. Model A exhibited no separation. Table 5 lists coefficients and overall model tests for these analyses.

As hypothesized, both the employer's response and, alternatively, whether there was another defect in the employer's behavior are significant predictors of the likelihood a court will find an *employee's* complaint timely, even when controlling for the length of the delay and the employee's other behavior. Admittedly, because observational studies say nothing of causation, this empirical outcome could have either of two explanations: Either it is the product of results-oriented adjudication, or some real-world correlation exists between employee timeliness and employer behavior. The latter explanation is unsatisfying because *Good Response* has a negative coefficient and *Employer Defect* has a positive coefficient.<sup>233</sup> In other words, that explanation would suggest that employees may delay *longer* when employers are *better* at correcting harassment, contrary to the intuitive situation of an employer being *worse* at responding to harassment giving employees more of a reason to delay reporting.

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<sup>233</sup> Employer's *Good Response* is negatively correlated with *Employer Defect* ( $r = -.75, p < .001$ ).

TABLE 5: LOGIT AND FIRTH'S PENALIZED-LIKELIHOOD MODELS OF *TIMELY*

Independent Variable	(A)	(B)
<b>Timeliness</b>		
Good Response	-3.74***	—
Employer Defect	—	4.64***
<i>Covariates</i>		
Delay Length	0.02	0.01
Good Policy	0.05	-0.01
Other Efforts	0.60	0.39
Complained	-2.39***	-2.29***
EE Defect	1.08	0.59
Constant	4.51***	1.07
Wald Chi-Squared	48.42***	19.08***
PRE	70%	60%
N	99	99

\* SIGNIFIES  $P < 0.10$ ; \*\* SIGNIFIES  $P < 0.05$ ; \*\*\* SIGNIFIES  $P < 0.01$

Results-oriented adjudication is more likely to be the explanation. But, econometrically, alternative mechanisms may not be ruled out. This result provides empirical evidence that courts seize on any delay in reporting harassment as an ex post justification for holding well-behaved employers harmless. This conclusion is particularly compelling because the model controls for the length of the delay, which was nonsignificant.<sup>234</sup> In other words, in deciding whether a complaint was timely, courts tended to weigh the employer's response more heavily than how long a plaintiff waited. Our previous article did not demonstrate this relationship empirically, but it predicted this result: "[J]udges are drafting result-oriented opinions in which they must comport their conclusions . . . with the language of *Ellerth* and *Faragher*."<sup>235</sup> This study supports empirically what we inferred a decade ago. The problem, of course, is that this conclusion violates the clear language of the *Ellerth-Faragher* defense—if the employee behaves reasonably, the defense should be unavailable.

<sup>234</sup> The sign of its coefficient was even unexpected. The sign of the coefficient for the length of the delay was positive. But one would expect there to be a *negative* relationship between the length of the delay and whether the report is timely.

<sup>235</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1294.

### C. Full Defense

All employee-behavior variables and one employer-behavior variable were significant in predicting success of the defense overall. To prevail on the affirmative defense, the employer must satisfy both prongs. Thus, the reasonable expectation is for significant factors in the individual-prong models to remain significant in the model of the overall defense. This hypothesis bore out except with respect to the variable representing whether there was a defect in the employer's general behavior. Thus it is likely that, as compared with the employee's behavior and the employer's response to that behavior, other defects in the employer's behavior are simply not important (or the effect is too small to detect with our sample size). While this contrasts with our earlier study that found that employee behavior was not significant at all,<sup>236</sup> our results here do not undermine the central thesis of this Article, that courts consider employer behavior in assessing the Unreasonable Employee Prong. This explanation is especially convincing given our results, summarized in Table 5, showing that employer response is significant to courts' findings regarding the timeliness of employee complaints.

### D. Comparison with Earlier Cases

Thus we come to one of the same conclusions in this Article as we did in our previous one: Judges tend to misapply the *Ellerth–Faragher* defense to achieve just results. But, although we reach the same conclusion, the results of our regression analyses diverge substantially. In our earlier work, we found the existence of a good policy to be the only consistently significant variable across models.<sup>237</sup> Here, by contrast, not only does the variable for maintenance of a good policy lack significance in all models, but also in two of the models, it takes a negative sign—in our previous article we found a positive coefficient.<sup>238</sup> Additionally, our previous analogs for whether the employee complained, whether the complaint was timely, and whether there was some other defect in the employee's behavior all lacked significance,<sup>239</sup> whereas we now find them significant. And for whether the employee complained, the sign of the earlier study's coefficient was the opposite of that observed here.<sup>240</sup> Our results agree that an employer having a “good” response is significant and positive when predicting success under the Unreasonable Employee Prong and the

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<sup>236</sup> *Id.* at 1288 tbl.3C.

<sup>237</sup> *Id.* at 1284 tbl.3A, 1287 tbl.3B, 1288 tbl.3C.

<sup>238</sup> *Id.* at 1283.

<sup>239</sup> *Id.* at 1284 tbl.3A, 1287 tbl.3B, 1288 tbl.3C.

<sup>240</sup> *Id.*

defense overall.<sup>241</sup> But for the Reasonable Employer Prong, we previously did not find employer response to be significant (though it was positive).<sup>242</sup>

Table 4 also bears comparison with Walsh's 1999–2005 results. Again, Walsh looked only at the plaintiff's success in establishing employer liability, not the individual prongs.<sup>243</sup> Walsh's results agree with ours in the following ways: We both found the existence of a policy to lack significance, we both found the employer's response to be significant,<sup>244</sup> and we both found that whether an employee complained and the timeliness of the complaint were significant.<sup>245</sup> But Walsh did not find that the employee's rejection of the employer's corrective action was significant, as we do (though the signs of our coefficients agree).<sup>246</sup>

What could account for the fact that our earlier article is so different from Table 4, yet Walsh's findings are so similar? The two biggest factors are type of court and time frame.

First, both Walsh's study and this one looked solely at circuit court cases, while our earlier article addressed district court cases. Although summary judgment is not supposed to involve fact finding, and although summary judgment is reviewed under a *de novo* standard, it could be that district courts are indeed finding facts and circuit courts are deferring to those judgments, albeit not expressly. This explanation is unpersuasive, however, because it is hard to see how this would lead to the differences observed here—if anything, the facts of the employer's correction and employee's behavior would inure greater benefit from deference, but they are precisely the variables that remain significant. Alternatively, appeals may not fairly represent district court cases because appeals are not randomly selected. This explanation is somewhat more persuasive. As stated before, intuitively, the stronger cases in either direction should drop out of the dispute pyramid sooner than closer cases.<sup>247</sup> Moreover, the way courts have interpreted *Ellerth* and *Faragher* makes proving or disproving the prevention portion of the Reasonable Employer Prong relatively straightforward, where the correction portion and the Unreasonable Employee prong are more complex and individualized. It is easy to imagine, then, how “closer” cases prominently feature employee behavior

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<sup>241</sup> *Id.* at 1287 tbl.3B, 1288 tbl.3C.

<sup>242</sup> *Id.* at 1284 tbl.3A.

<sup>243</sup> See *supra* notes 151–59 and accompanying text.

<sup>244</sup> Walsh broke this into three separate variables: (1) whether the employer promptly investigated, (2) whether the employer took a strong corrective action, and (3) whether the harassment stopped. He found that prompt investigation was significant, but the other two were not. See Walsh, *supra* note 151, at 516–17 tbl.11.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* notes 177–83 and accompanying text.

and employer corrective behavior, which would result in greater significance on those variables.

Second, in our earlier article, we studied cases that arose shortly after *Ellerth* and *Faragher*.<sup>248</sup> Both Walsh and our new study examined cases extending long after that period. This difference could account for the different variables we found significant, under the following narrative: In early cases, the law is less settled about what factors make an employer's anti-harassment policy reasonable. As time goes on, there is an ever-expanding database of court-tested anti-harassment policies, which sidelines the relatively straightforward question of "is a policy reasonable?" Lawyers can more easily weed out cases with bad policies (which is a document counsel can review and compare to ample case law) than those with bad corrective efforts or good employee behavior (both of which the lawyer must ascertain through internal investigations involving document review and client interviews and are subject to biases, credibility, memory, and document retention). It is further possible that as sexual harassment decisions have informed the best practices of employers, an increasing number of employers are able to institute legally sufficient written policies. It is much easier for employers to publish a written policy that is sufficient under the law than it is to respond appropriately to the infinite possible harassment reports, particularly given the number and degree of uncertainties governing whether the response is appropriate—the likelihood that the allegations amount to harassment; the strength of the evidence, including the credibility of the claimant, the harasser, and any witnesses; and the appropriate degree of punishment in relation to the allegations. Accordingly, unreasonable policies become increasingly harder to find in the cases. If this narrative is true, it would explain why policy is a significant predictor early in the *Ellerth–Faragher* jurisprudence but that significance ceded to other variables as time progressed.<sup>249</sup>

## VI. JUDICIAL RULE-BREAKING EXPLAINED

In previous research, we found that employers prevailed in all cases in which the employer satisfied the Reasonable Employer Prong and the employee failed to report alleged harassment.<sup>250</sup> The general consensus

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<sup>248</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1275 ("Our data includes all published judicial opinions (N=72) for cases involving alleged sexual harassment in the workplace between June of 1998 and January 2000 . . .").

<sup>249</sup> Walsh offers another possible explanation for why his results diverge from our earlier study. He suggests that perhaps multicollinearity still plagued our results even after correcting for it. *See* Walsh, *supra* note 151, at 518 n.256. He also questions our method for testing for multicollinearity. *Id.* But Walsh does not mention the substantive differences between his dataset and ours in the earlier study.

<sup>250</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1290.

among the courts was that employees' fears of retaliation did not absolve them of their duty to complain.<sup>251</sup>

In this study, the employer prevailed in 96% of the cases in which the employee failed to report but in 100% of the cases in which the employer satisfied the Reasonable Employer Prong and the employee failed to complain. In the case in which the employee failed to report but still prevailed, *Davis v. Team Electric Co.*, the employer was woefully deficient in its efforts to prevent or correct harassment, and the conclusion that the employee failed to complain was questionable at best.<sup>252</sup> The court noted that there was no evidence that the employer had an anti-harassment policy at all or that it afforded any way for aggrieved employees to avoid complaining to an allegedly harassing supervisor.<sup>253</sup> Moreover, the employer performed no investigation and took no action against the harassing supervisors.<sup>254</sup> The court concluded that the employee failed to complain because she only complained to the harassing supervisors.<sup>255</sup> This fact did not, however, affect the court's holding at all because, as the court stated, "[Defendant] has not shown that [Plaintiff] failed to take advantage of any preventive or corrective opportunities that it offered."<sup>256</sup> In other words, an employer's behavior can be so bad that an employee's "failure" to complain is not regarded as an unreasonable failure to avail oneself of preventive or corrective opportunities because, in effect, no such opportunities are available. Because the employer was so deficient, this case does not contradict what we found in our previous study<sup>257</sup> and what the other twenty-four non-report cases in this study find: an employer who exercises reasonable care to prevent harassment will always prevail if the employee does not report alleged harassment.

There were 106 cases in which employees did report. In our earlier study, employers prevailed in 84% of the cases in which employees reported. In the instant study, the employer prevailed in 85% of such cases. Both results fly in the face of Justice Thomas's dissenting opinion in which he stated: "[E]mployers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable care to avoid harm."<sup>258</sup> Justice Thomas's contention is the logical extension of a faithful application of the rule. The question is: When does an employee fail to "fulfill[] [the] duty of

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<sup>251</sup> *Id.* at 1291.

<sup>252</sup> 520 F.3d 1080 (9th Cir. 2008).

<sup>253</sup> *Id.* at 1097.

<sup>254</sup> *Id.*

<sup>255</sup> We coded this as failing to complain. See *supra* Part III.B.3.

<sup>256</sup> *Davis*, 520 F.3d at 1097.

<sup>257</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1290.

<sup>258</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting).

reasonable care to avoid harm”<sup>259</sup> Not reporting constitutes such a failure when the employer exercises reasonable care to prevent harassment.

We also observed seven cases in which employees failed to avoid harm by rejecting their employers’ accommodations. For example, in *Brenneman v. Famous Dave’s of America, Inc.*, once the employee complained of harassment, the employer investigated the allegations and offered to transfer her to another store away from the allegedly offending supervisor.<sup>260</sup> The court found the employee’s refusal of this offer and resignation to be unreasonable.<sup>261</sup> Similarly, in *Baldwin v. Blue Cross/Blue Shield of Alabama*, the plaintiff resigned when, after complaining about harassment, her employer offered to keep her in the same position but provide counseling between her and the alleged harasser.<sup>262</sup> The court held that refusing this “first step” in conflict resolution was unreasonable.<sup>263</sup> Similarly, courts found resigning or refusing to return to work after employers disciplined or fired harassers unreasonable.<sup>264</sup> In one case, the employee was determined to have behaved unreasonably when she reported alleged harassment to a supervisor but specifically asked the supervisor not to commence an investigation for fear of reprisal.<sup>265</sup> In another nine cases, employees’ reporting suffered some defect (e.g., the complaint was vague).<sup>266</sup>

#### A. Empirical Support for Judicial Rule-Breaking

Our results have uncovered judicial rule-breaking in the *Ellerth* and *Faragher* context that we do not see in the *Oncale* context. This Section explores the ways in which judges have departed from the letter of *Ellerth* and *Faragher*.

There were fifty-six cases in which employees reported alleged harassment to the correct persons, did not reject their employers’ accommodations, and suffered from no other defect limiting their claims. In all of these cases, the employers still prevailed. How can this be? In each

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<sup>259</sup> *See id.*

<sup>260</sup> 507 F.3d 1139, 1145 (8th Cir. 2007).

<sup>261</sup> *Id.*; *see also* *Harmon v. Home Depot USA Inc.*, 130 F. App’x 902, 905 (9th Cir. 2005) (finding a plaintiff unreasonable where she quit when the employer was attempting to work out a transfer); *Wallace v. San Joaquin County*, 58 F. App’x 289, 291 (9th Cir. 2003) (finding a plaintiff unreasonable where she refused to cooperate in the investigation and refused to pursue a transfer).

<sup>262</sup> 480 F.3d 1287, 1305 (11th Cir. 2007).

<sup>263</sup> *Id.*

<sup>264</sup> *Collette v. Stein-Mart, Inc.*, 126 F. App’x 678, 686 (6th Cir. 2005); *Thompson v. Naphcare, Inc.*, 117 F. App’x 317, 324 (5th Cir. 2004).

<sup>265</sup> *See Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005).

<sup>266</sup> *E.g., id.*; *Benefield v. Fulton Co.*, 130 F. App’x 308, 312 (11th Cir. 2005), *abrogated on other grounds by* *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008); *Episcopo v. Gen. Motors Corp.*, 128 F. App’x 519, 523 (7th Cir. 2005).

case the court held that the report was untimely, but none of the employees in these cases reported the alleged misconduct in an untimely way. Instead, in each of these cases the employer exercised reasonable care to prevent and correct harassment, and the court simply would not rule against an employer apparently doing what it could to prevent harassment. Thus, each court apparently felt compelled to find a way to construe the employee's behavior as unreasonable. As shown in Table 4, courts looked to employer behavior to determine whether the employee's behavior was reasonable, and as shown more specifically in Table 5, the court looked to employer behavior in determining whether the reports were timely. The problem is, as stated above and explained further below, such a ruling seems to blatantly defy the express mandate of the law.

By too heavily relying on timeliness, courts have effectively eviscerated the Unreasonable Employee Prong for at least one subset of cases representing a relatively common fact pattern: pervasive harassment. One justification that courts cite for finding a delay unreasonable is that the victim could have prevented future instances of harassment had the employee reported it sooner. Courts have described this as a duty to stop harassment before it becomes "severe or pervasive."<sup>267</sup> But by placing this obligation on the victim,<sup>268</sup> courts effectively eliminate the Unreasonable Employee Prong of the defense (at least with respect to harassment alleged to be pervasive, versus severe).

A hypothetical illustrates this point. Assume that a manager harasses Employee *A* and Employee *B* with identical behavior. The harassment becomes pervasive at thirty days for both employees. The employer has taken reasonable efforts to prevent harassment. Employee *A* suffers the harassment for thirty-one days, at which time she files a formal report with the employer. The employer promptly investigates and fires the harasser, following up with training sessions to make sure Employee *A* suffers no retaliation. Assume these steps constitute reasonable efforts to correct the harassment. Employee *B* suffers the harassment for twenty-nine days, at which point she files a formal report with her employer. Similarly, the

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<sup>267</sup> See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."); *Baldwin*, 480 F.3d at 1307 ("The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage amounting to discrimination in violation of Title VII.").

<sup>268</sup> *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1063-64 (10th Cir. 2009) ("Had [Defendant] been notified earlier, there is a good chance that Title VII's primary goal of preventing harm would have been served."); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003) ("Had [Plaintiff] notified [Defendant's] officials in June, when the harassment initially began, most of the incidents complained of could have been avoided.").

employer promptly investigates, fires the harasser, and makes the same follow-up efforts.

Our findings suggest that courts will likely conclude that Employee *A* waited too long to report the harassment, consider this time an unreasonable delay, and permit the employer to successfully advance its affirmative defense. As for Employee *B*, courts will be significantly less likely to reach the question of the affirmative defense, because the harassment is not yet pervasive, and therefore not actionable. Thus, in either case, an employee's proper behavior can never subject an employer to liability, contrary to what the letter of the affirmative defense mandates. All that seems to matter in pervasive harassment cases is the *employer's* behavior.

This result probably stems from the perceived unfairness of the conjunctive nature of the two-pronged affirmative defense. In other words, if an employer acts reasonably to prevent and correct harassment, it may seem unfair to extend vicarious liability to that employer just because the employer was unlucky enough that the employee complained.<sup>269</sup> Moreover, our findings lend continued support to our earlier argument that the affirmative defense perversely incentivizes employers not to make it *too* easy for employees to complain, lest they foreclose the possibility of satisfying the Unreasonable Employee Prong. Rather than incentivizing employers to do all they can to prevent harassment, the rule incentivizes only the bare minimum of preventative efforts, and nothing more.

The majority of courts seem to have solved this problem by making new law: In contrast to the apparent intentions of the affirmative defense as set forth by the Supreme Court, employers that exercise reasonable care to prevent harassment and react well to a complaint will almost always prevail at summary judgment.<sup>270</sup> To justify this, courts must declare the plaintiff untimely, and therefore unreasonable, regardless of whether the delay, if any, was reasonable and regardless of how much time it took to report. In fact, our earlier study included *Moore v. Sam's Club*, a case in which the employer, according to the court, exercised reasonable care to prevent and correct harassment and the employee complained.<sup>271</sup> The *Moore* court applied the rule technically and found for the employee.<sup>272</sup> This was the

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<sup>269</sup> One could also argue to the contrary on this point, perhaps because the employer hired the offending supervisor in the first place.

<sup>270</sup> See *supra* Table 4 (finding employer behavior variable significant in predicting whether the employee was unreasonable).

<sup>271</sup> 55 F. Supp. 2d 177 (1999).

<sup>272</sup> *Id.* at 191–93 & n.14 (citing Justice Thomas' dissent in *Faragher* and holding that "the *Burlington/Faragher* affirmative defense appears not to be applicable in this case because the facts presented on this motion do not support the second prong of that defense . . . [and in] the first prong of

only such case in the seventy-two cases in the study. There was no such case in the new study. Thus, in the 213 cases we studied, there was only one case where the courts applied the rule so that it yielded a result that all other cases avoided. A “good actor” employer who acted reasonably to prevent and correct harassment was found guilty because the employee complained. In every other case, such “good actor” employers were rewarded regardless of whether the employee reported or not.

*B. Why Judges Ignore Ellerth–Faragher & Follow Oncale*

In this Section, we assess why judges have followed *Oncale* but flouted the letter of *Ellerth* and *Faragher*. Absent any reason to believe that Congress or the Supreme Court will correct these rules, judges are left to consider breath and magnitude of their impact. We theorize that judges follow *Oncale* because they perceive the rule to impact a fairly narrow population of litigants, but the broadly applicable *Ellerth–Faragher* rule warrants greater judicial initiative to prevent injustice.

Before distinguishing *Ellerth* and *Faragher* from *Oncale*, it is worth noting what the two cases and the rules that derive therefrom have in common—it is unlikely that any plea for a correction of either untenable rule will be met by the Supreme Court or Congress. The Court will not fix the problems associated with either rule, in large part because it so recently created them. As stated above, the Supreme Court codified sexual harassment in 1986 as a violation of Title VII.<sup>273</sup> In 1993 the Court “clarified” the definition of hostile environment.<sup>274</sup> In 1998 the Court decided *Oncale*, *Ellerth*, and *Faragher*. The Court left these rules largely untouched when it decided *Pennsylvania State Police v. Suders*<sup>275</sup> in 2004 and *Vance v. Ball State University*<sup>276</sup> in 2013. Thus, there were four cases in the first twelve years following *Meritor* and two cases in the fifteen years since *Ellerth* and *Faragher*.<sup>277</sup> There are two likely reasons for the dearth of

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the defense[] the evidence does show that [the employer] “exercised reasonable care to prevent and correct promptly any sexually harassing behavior”).

<sup>273</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–69 (1986).

<sup>274</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993) (clarifying that complained of conduct need not result in psychological injury to the victim to rise to be actionable under Title VII; rather, courts must consider the “totality of the circumstances”).

<sup>275</sup> 542 U.S. 129, 153 (2004) (holding that to establish a “constructive discharge,” an employee must show that the abusive working environment became so intolerable that any reasonable person would quit, but that the *Ellerth–Faragher* defense would be available unless the employee quits in response to an adverse action changing her employment status or situation, such as a demotion).

<sup>276</sup> 133 S. Ct. 2434 (2013).

<sup>277</sup> Although there have been a number of cases since *Ellerth* and *Faragher* that have treated aspects of sexual harassment, none other than *Suders* and *Vance* have taken the opportunity to further clarify the definition of harassment or the standard for employer liability. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (holding that the employee-numerosity requirement for Title VII was

cases since 1998. First, *Oncale*, *Ellerth*, and *Faragher* could be characterized as more legislative than adjudicative. All three cases promulgated rules. *Oncale* did not just hold that there was a cause of action for same-sex harassment, it set forth the rule on how to prove sexual harassment. Similarly, *Ellerth* and *Faragher* created a new affirmative defense that was not part of the case. This was a true act of judicial fiat. The Court is unlikely to revisit these issues without a prominent split in the circuits (which there is not as of the writing of this Article). The breadth of impact on the citizenry of *Oncale* is somewhat small (as described below). There is no political momentum surrounding either *Oncale* or *Ellerth* and *Faragher*, there is no evidence that the federal government views these as particularly high priority issues, and the justices have not indicated that this is an area of ideological interest.<sup>278</sup>

There is no reason to believe that Congress will act, either. Despite the fact that sexual harassment is a cause of action created by the Court's interpretation of Title VII, Congress did not even address it in the Civil Rights Act of 1991. The Civil Rights Act of 1991 changed the burden of proof in adverse impact cases (a tiny minority of cases<sup>279</sup>), codified the mixed motive framework for intentional discrimination cases, added jury trials, and established standards and limitations for punitive and compensatory damages.<sup>280</sup> That Congress did not act on sexual harassment in 1991 was a clear signal to judges that there would be no legislative fix at that time. That was the perfect time to define hostile environment and employer liability, each of which was unclear and in flux.

Thus, judges are faced with the question of whether to enforce or not enforce these rules. Judges have followed the rule handed down in *Oncale*, but have not been so true to *Ellerth* and *Faragher*. Why? And, just as importantly, what can we learn from these outcomes? We learn from *Oncale*, *Ellerth*, and *Faragher* that in deciding when to follow a rule,

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nonjurisdictional and therefore could be conceded where not challenged before trial); *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 377–83 (2004) (treating the statute of limitations applicable to various types of discrimination claims); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119–20 (2002) (holding that for claims alleging discrete acts of discrimination, plaintiff must file an EEOC charge within 180 or 300 days of the discrete act, but a hostile environment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice and one of the acts occurred within the 180- or 300-day filing period); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001) (holding front pay is not an element of compensatory damages for sexual harassment claims); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 529–30 (1999) (treating the standard for proving punitive damages for Title VII claims).

<sup>278</sup> See Emily Grant et al., *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559, 568–69 (2012).

<sup>279</sup> See Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269, 316–17 (2006).

<sup>280</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

judges, knowing that there is no reasonable probability of a forthcoming legislative or judicial fix, will consider the frequency of cases and the relative harm to litigants and society caused by strict application of the rules.

With regard to *Oncale*'s equal-opportunity harasser defense, the frequency multiplied by the harm is not worth the costs judges incur by ignoring or misapplying the rule. Dutifully applied, *Oncale* allows bisexual managers to demand sex from, or to create a hostile environment for, both men and women.<sup>281</sup> Only seventy-three federal court opinions since *Oncale* use the phrase "equal opportunity harasser" (or some derivative thereof),<sup>282</sup> demonstrating the small number of cases in which this defense comes up. In addition, a recent survey found that 1.8% of adult Americans identify as bisexual.<sup>283</sup> The number of bisexuals who are (1) managers, (2) working for employers fitting Title VII's definition of employer,<sup>284</sup> (3) open in their sexual preferences, and (4) willing to engage in reprehensible conduct is likely a small subset of that 1.8%.

Of course, heterosexuals and homosexuals may also harass both men and women in order to avoid liability. But, the number of pretend equal-opportunity harassers is likely very small. Heterosexuals or homosexuals who have a desire to harass the gender they are interested in would need to know that the equal-opportunity harasser is a viable defense and would need to be willing to harass the gender they are not interested in (incurring the risks associated therewith). They would also need to be willing to suffer the consequences from an employer who, despite being absolved of liability, might not respond positively to a manager sexually harassing subordinates, and may incur substantial legal fees.

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<sup>281</sup> See *supra* Part II.A–B.

<sup>282</sup> We searched for the phrase "equal-opportunity-harass!" across the "All Federal" case database on WestlawNext and limited the results to cases decided after March 4, 2008. We ran this search most recently on May 25, 2014 and received seventy-three hits. This result is likely underinclusive because a court need not use the phrase "equal opportunity harasser" to describe the defense, and the result is also overinclusive because some number of the seventy-three cases were false hits. But it is still useful as a rough indication of how rare these cases are.

<sup>283</sup> GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [<http://perma.cc/M2FB-BER3>].

<sup>284</sup> 42 U.S.C. § 2000e(b) (2012) ("[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, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.").

Moreover, there is always a risk that the defense will not work. For instance, try as they may, the pretenders may not harass the sex in which they are not truly interested to the same degree as that of the other sex, and thus, may not satisfy the severe or pervasive standard. In other words, this defense will affect very few people. Moreover, while the consequences to the plaintiffs affected by the defense are harsh—they lose their case—it will not really affect society as a whole.

In contrast, *Ellerth* and *Faragher* cases are commonplace. Indeed, there were seventy-two summary judgment motions filed on the rule in its first eighteen months.<sup>285</sup> A WestlawNext search using the terms “sexual harassment,” *Ellerth*, and “affirmative defense” (or derivatives thereof) yielded 2360 cases.<sup>286</sup> Every circuit has analyzed the defense. The cases, however, do not tell the whole story. Every employer with at least fifteen employees is subject to the rule, and thus, every employer who seeks to comply with the rule will gather information from some source (legal counsel, human resources professionals, written materials, webinars, etc.).<sup>287</sup> In stark contrast to *Oncale*, dutifully following the rule carries a high probability of disastrous results for a very large target pool. If employees prevail whenever they complain, the message to employers will be: *exercise reasonable care to prevent harassment, but not too much*. In practical terms, it disincentivizes employers from doing anything more than establishing a strong, written antiharassment policy with more than one avenue to report harassment (i.e., the baseline that courts routinely find constitutes “reasonable efforts” to prevent harassment<sup>288</sup>). As a corollary, we see little reason under the law for any employer to continue to provide harassment identification training, 1-800 harassment reporting hotlines, and other mechanisms that increase the likelihood that harassment will be properly identified and timely reported. Employees who complain of

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<sup>285</sup> Sherwyn, Heise & Eigen, *supra* note 135, at 1275.

<sup>286</sup> On May 26, 2014, we ran a search in the “All Federal” case database on WestlawNext using the following syntax:

((sex! gender) /1 harass!) & (ellerth faragher “118 s.ct. 2257” “524 u.s. 742” “118 s.ct. 2275” “524 u.s. 775”) & affirmative-defense

<sup>287</sup> Employment law firms routinely distribute memoranda to clients updating them on new cases and their impact on day-to-day operations. For instance, a large national employer-side employment law firm, Seyfarth Shaw, released a memorandum to clients advising them of the new definition of “supervisor” when applying the *Ellerth–Faragher* affirmative defense following the *Vance v. Ball St. University* ruling. Camille Olson et al., *The U.S. Supreme Court to Revisit the Scope of the Faragher/Ellerth Supervisor Liability Rule*, SEYFARTH SHAW (Nov. 15, 2012), <http://www.seyfarth.com/uploads/siteFiles/publications/TheU.S.SupremeCourtToRevisitTheScopeOfTheFaragherEllerthSupervisorLiabilityRule.pdf> [<http://perma.cc/3KLN-3C8K>].

<sup>288</sup> *E.g.*, *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103–04 (2d Cir. 2010); *Thompson v. Naphcare, Inc.*, 117 F. App’x 317, 324 (5th Cir. 2004); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001); *Wright v. Anixter, Inc.*, No. 98-17164, 1999 WL 638714, at \*2 (9th Cir. Aug. 18, 1999) (unpublished table decision).

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

Considering the disparate outcomes our model predicts, it makes sense for judges to follow the *Oncale* rule and ignore *Ellerth* and *Faragher*. Aside from the important phenomenological reasons for highlighting these differences, given the large volume of sexual harassment claims, and the even larger volume of employers affected by the rules and their application or lack thereof, this example presents a cautionary tale for judges faced with the opportunity to make rules. Judges ought to consider the degree to which rules will create the problem described in this Article for lower court judges charged with their application. All else equal, judges should weigh the probability of contemplated harm caused by application of the rule times the affected pool of individuals or entities to which the rule's potential harm would extend. If the probability times the affected pool of individuals or entities is large, judges may be better advised to advance a standard, allowing augmented judicial discretion.<sup>289</sup> All else equal, rules are more likely to be applied (assuming that is the goal), even when application will have harmful results, when the target population of the rule's application is small, and the probability of the harm is relatively low. While it may be tempting to embrace rules over standards because of predictability, predictability is an illusion in the case of the *Ellerth-Faragher* defense given the extent to which judges distort the application of the rule.

#### CONCLUSION

Our theory will be tested in the next few years because of the Supreme Court's *Vance* decision. Like the affirmative defense and the equal-opportunity harasser cases, the rule set forth in *Vance* yields an untenable result if applied properly<sup>290</sup>—the employee who oversees day-to-day operations, has the power to assign work, has the power to make employees' working conditions pleasant or miserable, and can effectively

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<sup>289</sup> Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 23–26 (discussing the choice between rules and standards).

<sup>290</sup> *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013) (holding, in applying its standard for liability for harassment by a supervisor, that an employer may be vicariously liable for a supervisor's unlawful harassment only when the “employer has empowered that [supervisor] to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits’”).

recommend terminations, will no longer be considered a “supervisor” because decisions regarding “tangible” changes ultimately rest with the human resource department. To counteract this unjust result, we predict that lower courts will expand the term “tangible action” to render *Vance* meaningless. It is difficult to overstate the importance of this case for employment law. Employer liability for every sexual harassment case rests on whether the harasser was a supervisor,<sup>291</sup> and limiting that definition could undermine the law. As our study demonstrates, lower courts have already effectively rewritten *Ellerth* and *Faragher* so that employees who do not suffer a tangible loss will recover only if the employer did not exercise reasonable care to prevent harassment, or if reported, the employer did not respond well.<sup>292</sup> We predict that courts will thus follow a de facto “negligence” standard in all non-tangible loss cases. Thus, all but the most obvious supervisors will now be deemed coworkers in order to perpetuate the de facto lower-court-created vicarious liability standard.

Analyzing judicial rule-breaking behavior in common civil cases like those discussed in this Article contributes to our understanding of judicial behavior more broadly because we are able to study behavior in a context stripped of the normative and political settings in which rule-breaking is more often described and studied. Absent the strong political or social forces that might influence a judge to conform her behavior to expectations when she feels that she is being watched more closely, this Article begins to shed light on rule-breaking by judges. This Article presents findings about one area of law and one set of rules. Additional research is surely necessary to compare across other areas of law and other untenable rules, but this Article lays a solid foundation to advance our understanding of rule-breaking under quotidian adjudicative circumstances.

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<sup>291</sup> *Id.* at 2439 (“If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a ‘supervisor,’ however, different rules apply. If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.”).

<sup>292</sup> See *supra* Part V.

