

# Flirting With the Law: An Analysis of the *Ellerth/Faragher* Circuit Split and a Prediction of the Seventh Circuit's Stance

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# FLIRTING WITH THE LAW: AN ANALYSIS OF THE *ELLERTH/FARAGHER* CIRCUIT SPLIT AND A PREDICTION OF THE SEVENTH CIRCUIT’S STANCE

*This Comment critically analyzes the split in the circuits over the second prong of the Ellerth/Faragher defense. Further, this Comment predicts how the Seventh Circuit will rule on this split. The Ellerth/Faragher defense is an affirmative defense available to employers who would otherwise be held liable for their supervisors’ harassing acts in hostile work environment situations. There are two prongs to the defense: (1) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and (2) “the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” Some courts drop the second prong of the defense in single-incident cases of harassment, arguing that the affirmative defense is fact specific, impermissibly imposes strict liability in single-incident cases, and is unfair to employers. This Comment suggests that the Seventh Circuit will affirmatively apply both prongs of the defense in all situations based on its adherence to precedent, trends in the lower courts, and its rationale in another recent circuit split. Further, this Comment argues that the application of both prongs of the defense is the correct standard regardless of the length of time of the harassment.*

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## I. INTRODUCTION

At 9 a.m., at the beginning of a normal workday in January 2008, Ms. Annastacia Alalade was assaulted by her supervisor at work.<sup>1</sup> Ms. Alalade worked for AWS Assistance Corporation (AWS) as a trainer, feeding and giving medication to the residents at a group home.<sup>2</sup> She had worked under the supervision of Mr. Sam Ntawanda, without incident, until January 21.<sup>3</sup> Suddenly, that day, Mr. Ntawanda followed Ms. Alalade into a pantry and physically and sexually assaulted her.<sup>4</sup> Mr. Ntawanda, a supervisor that Ms. Alalade's employer trusted enough to place in a position of authority, grabbed her, pushed her against the pantry wall, unzipped her pants and removed her belt, kissed her, and touched her inappropriately.<sup>5</sup> During this incident, Ms. Alalade pleaded for him to stop and tried to fight him away.<sup>6</sup>

Ultimately, Ms. Alalade escaped from the pantry and locked herself in a bathroom, but her trauma did not end there.<sup>7</sup> Although Ms. Alalade made a formal report to her employer, there was very little follow-up and she got the impression that no one believed her.<sup>8</sup> Ms. Alalade decided to pursue formal charges against her employer and filed a charge of discrimination in the Northern District of Indiana on June 19, 2008.<sup>9</sup> AWS subsequently argued (1) that the single incident of harassment she experienced was not severe enough to constitute hostile work environment harassment and (2) employers in single-incident cases should be entitled to a modified *Ellerth/Faragher* defense in which only the first prong is applied, such that employers with a valid anti-harassment policy who promptly respond to reports of harassment are shielded from liability.<sup>10</sup>

Sex harassment<sup>11</sup> is still a very current and problematic issue—as

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1. The Videotaped Dep. of Annastacia Alalade at 24:8, 29:7–9, 30:3–9, 30:15, Alalade v. AWS Assistance Corp., 796 F. Supp. 2d 936 (N.D. Ind. 2011) (No. 3:09-CV-338).

2. The Videotaped Dep. of Annastacia Alalade, *supra* note 1 at 9:12–13, 12:10–13.

3. *Id.* at 14:1–3, 24:5–9, 24:19–22.

4. *Id.* at 30:2–15, 31:10–16.

5. *Id.* at 30:3–9, 30:15, 31:10–16, 31:25, 32:1–13.

6. *Id.* at 32:7–15.

7. *Id.* at 32:17–18.

8. *Id.* at 41:21–23, 46:16–18.

9. Def's Ex. No. A, Charge of Discrimination, Alalade v. AWS Assistance Corp., 796 F. Supp. 2d 936 (N.D. Ind. 2011) (No. 3:09-CV-338).

10. Alalade, 796 F. Supp. 2d 936, 937–38.

11. Sex (or sexual) harassment is a subset of illegal sexual discrimination under Title VII of the Civil Rights Act of 1964. FRANCIS ACHAMPONG, WORKPLACE SEXUAL

evidenced above. The Equal Employment Opportunity Commission (EEOC) reported that the highest number of workplace discrimination claims of all time were brought in 2011, with sex discrimination claims making up almost twenty-nine percent of all claims.<sup>12</sup> Of the sex discrimination claims filed and resolved under Title VII in 2011, 11,364 (approximately forty percent) were sexual harassment claims.<sup>13</sup> Within this category, supervisory harassment issues<sup>14</sup> comprise a significant number of the cases that circuit courts see each year.<sup>15</sup> Over a five-year period, the eleven circuit courts and the D.C. Circuit reviewed a total of 126 supervisory sexual harassment cases.<sup>16</sup> Yet the question of when employers are liable for supervisory harassment remains a contested area of sex harassment law. The Supreme Court seemingly settled this issue when it established a two-pronged affirmative defense to employer liability in the twin cases of *Burlington Industries, Inc. v. Ellerth*<sup>17</sup> and *Faragher v. City of Boca Raton*,<sup>18</sup> (hereinafter the “*Ellerth/Faragher* defense”) but there is still disagreement among the circuits concerning

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HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 4 (1999). Actionable sex harassment can take two forms: quid pro quo or hostile work environment. *Id.* at 17; Arthur J. Marinelli, Jr., *Title VII: Legal Protection Against Sexual Harassment*, 20 AKRON L. REV. 375, 380 (1987). Quid pro quo harassment is the “conditioning of employment benefits on sexual favors.” Marinelli, *supra*, at 380. Employers are strictly liable for supervisory quid pro quo harassment. ACHAMPONG, *supra*, at 21. The focus of this Comment is on the liability of employers in instances of hostile work environment harassment.

12. *Charge Statistics FY 1997 through FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 2, 2013). In 2011, there were 99,947 individual charges filed and 28,534 sex discrimination charges filed. *Id.*

13. *Sexual Harassment Charges: EEOC & FEPAs Combined: FY 1997 – FY 2011*, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm) (last visited Nov. 2, 2013).

14. The Supreme Court recently ruled that the definition of “supervisor” for Title VII purposes is a person who “is empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). Thus, a person is a supervisor for purposes of Title VII liability when the person has the power of “hiring, firing, failing to promote, reassign[ing] with significantly different responsibilities, or [making] a decision causing a significant change in benefits.” *Id.* at 2443 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Otherwise, a harasser is a coworker. Whether the harasser is a supervisor or a coworker changes the standard of liability for the employer. See *infra* Part IV.C for more information on this topic.

15. See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 210–11 (2004).

16. *Id.* at 210–11, 273 (the period was from June 26, 1998 to June 30, 2003). Of this total, thirteen of the cases were in the Seventh Circuit Court of Appeals. *Id.* at 272.

17. *Ellerth*, 524 U.S. at 765.

18. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780, 807 (1998).

the application of the second prong of the defense.<sup>19</sup>

There are certain instances in which an employer can be liable for its supervisor's illegal harassing conduct.<sup>20</sup> This test is laid out in the twin cases of *Ellerth* and *Faragher*.<sup>21</sup> Specifically, to avoid liability, the employer must prove (1) that it exercised reasonable care to prevent and promptly correct issues of harassment and (2) that the employee unreasonably failed to report the harassment or otherwise take advantage of an employer's preventative measures.<sup>22</sup> A straightforward reading of this defense suggests that in any situation, an employer can successfully invoke the affirmative defense only if the employee-victim failed to report the harassment without justification.<sup>23</sup> However, this is where the circuit split arises.

Some courts have held that the second prong of the *Ellerth/Faragher* defense is inapplicable in single incidents of sex harassment, as AWS argued in its response, discussed above. These courts hold that employers must prove only the first prong of the defense in order to prevail when there has been a single, severe incident of harassment.<sup>24</sup> Generally, these courts use three arguments to justify applying a modified *Ellerth/Faragher* defense in single-incident cases: (1) the factual differences between their cases and the *Ellerth* and *Faragher* cases, (2) the need to avoid strict liability in applying the defense, and (3) the desire for fairness to employers.<sup>25</sup> On the other hand, some courts refuse to drop the second prong of the defense in any circumstances.<sup>26</sup> These courts argue that the language of the defense is clear; there is no indication from the Supreme Court that a separate test should be applied in single incidents of harassment; and that the defense can serve to reduce damages to the employer, thereby making it more fair.<sup>27</sup>

This Comment will explore the circuit split over the second prong of

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19. See *infra* Part III.

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

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

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

23. See L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 717 (2007); G. Roger King, *Sexual Harassment Claims in the New Millennium: A Litigator's Point of View*, 27 OHIO N.U. L. REV. 539, 548 (2001).

24. See *infra* Part III.A.

25. See *infra* Part III.A.

26. See *infra* Part III.B.

27. See *infra* Part III.B.

the affirmative defense to employer liability, hypothesize how the Seventh Circuit will decide this issue, and argue whether this is the correct approach. Part II of this Comment overviews Title VII of the Civil Rights Act of 1964 (the federal prohibition on employment discrimination), the Supreme Court's recognition of hostile work environment harassment in *Meritor Savings Bank, FSB v. Vinson*,<sup>28</sup> and the *Ellerth* and *Faragher* cases that led to the affirmative defense to employer liability for supervisor harassment.

Part III of this Comment delves into the circuit split over the two-pronged *Ellerth/Faragher* defense. It looks first at the rationale of courts that have dropped the second prong and then at the rationale of courts that have refused to do so. It concludes with a case study of *Alalade v. AWS Assistance Corp.*,<sup>29</sup> an opinion from a district court within the Seventh Circuit—a circuit that has not yet decided on the circuit split one way or the other.

Part IV of this Comment hypothesizes how the Seventh Circuit will decide this issue. It argues that the Seventh Circuit will likely continue to apply both prongs of the *Ellerth/Faragher* defense as established by the Supreme Court in all instances. This prediction is based on the Seventh Circuit's history of adherence to binding Supreme Court precedent, the trend in Seventh Circuit district court decisions regarding the split, and an analogy to the Seventh Circuit's rationale in another relevant circuit split<sup>30</sup> over the definition of "supervisor" for Title VII purposes.

Finally, Part V of this Comment argues that it is the correct decision to apply both prongs of the *Ellerth/Faragher* defense in all cases. The Supreme Court crafted a straightforward and workable defense that considers both the employer and employee's interests. Although some courts argue that it is not fair for employers to be held liable in single-incident cases of harassment solely because the employee reported the harassment, the reality is that the Supreme Court anticipated this exact result. Whether harassment occurs one time or on an ongoing basis, the rule forces employers to take responsibility for harassment in their workplaces. Additionally, this result is justified because employers are not innocent in hiring and promoting harassers to the position of supervisor, especially in comparison to the truly innocent employee-

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

29. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011).

30. *See Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011).

victims. Moreover, the second prong of the defense serves an important purpose of providing a check on the practicality of the employer's anti-harassment policy mandated by the first prong of the defense.

## II. TITLE VII, *MERITOR*, AND THE CREATION OF THE *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination, including discrimination based on sex.<sup>31</sup> After Title VII's enactment, it was unclear to many courts whether workplace sexual harassment qualified as actionable discrimination under Title VII.<sup>32</sup> The Supreme Court in *Meritor Savings Bank, FSB v. Vinson*<sup>33</sup> answered in the affirmative: sexual harassment is actionable when it is quid pro quo or creates a hostile work environment.<sup>34</sup> *Meritor* suggested that employers may be liable for the harassing acts of their supervisors but failed to establish exactly what the standard for liability was. This question was ultimately decided by the Court in *Burlington Industries, Inc. v. Ellerth*<sup>35</sup> and *Faragher v. City of Boca Raton*.<sup>36</sup> In short, employers are liable for supervisory harassment in hostile work environment cases, subject to the availability of an affirmative defense.<sup>37</sup>

### A. Title VII and the Meritor Backdrop

Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice" for any employer to discriminate against an employee or a potential employee because of that person's sex.<sup>38</sup> Specifically, an employer may not "fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

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31. 42 U.S.C. § 2000e-2(a)(1) (2006).

32. See Marinelli, *supra* note 11, at 377–78 ("The initial district court decisions almost uniformly rejected sexual harassment as a cause of action under Title VII because of fear of widespread and frivolous litigation. . . . The early cases viewed sexual harassment as a 'personal' dispute and gave little weight to the employment context within which the sexual harassment took place." (footnote omitted)).

33. *Meritor*, 477 U.S. at 57.

34. *Id.* at 66. See also *supra* note 11 for a definition of quid pro quo harassment and see *infra* note 52 and accompanying text for the elements of a prima facie hostile work environment case.

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

36. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

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

38. 42 U.S.C. § 2000e-2(a)(1) (2006).

employment” based on that person’s sex.<sup>39</sup> The congressional intent of Title VII is two-fold: to deter discriminatory activity and to compensate the victims of discrimination.<sup>40</sup>

The landmark case of *Meritor Savings Bank, FSB v. Vinson*<sup>41</sup> interpreted Title VII to determine that hostile work environment sexual harassment, in addition to quid pro quo harassment, is an actionable claim under Title VII.<sup>42</sup> In *Meritor*, Vinson was a bank teller who suffered ongoing harassment from her direct supervisor.<sup>43</sup> Vinson maintained that she eventually agreed to an ongoing sexual relationship with her supervisor because she was afraid of being fired.<sup>44</sup> Ultimately, Vinson brought a Title VII claim of sexual harassment against her employer, Meritor Savings Bank, yielding mixed results from the district court and the court of appeals.<sup>45</sup>

The United States District Court for the District of Columbia dismissed Vinson’s claim on the grounds that the sexual relationship with her supervisor was voluntary; thus, there was no Title VII violation.<sup>46</sup> The court opined that even if there had been a violation of Title VII, Vinson’s employer would not have been liable to Vinson because it had no knowledge of the alleged harassment.<sup>47</sup> The Court of

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39. *Id.*

40. John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1407 (2002).

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

42. *Id.* at 65–66 (“[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”). The first case from a lower court to recognize a hostile work environment claim was *Rogers v. EEOC*, 454 F.2d 234, 237–38 (5th Cir. 1971). In contrast, quid pro quo harassment occurs when an employer “require[s] sexual consideration from an employee . . . for job benefits.” *Henson v. City of Dundee*, 682 F.2d 897, 900, 908, 912–13 (11th Cir. 1982) (finding quid pro quo harassment when a supervisor prevented an employee from attending the police academy unless she would engage in a sexual relationship with him).

43. *Meritor*, 477 U.S. at 59–60. Vinson’s supervisor reportedly touched her inappropriately, followed her into the bathroom, and “forcibly raped her on several occasions.” *Id.* at 60.

44. *Id.*

45. *Id.* at 60–62.

46. *Id.* at 61–62 (explaining that Vinson “was not the victim of sexual harassment . . . while employed at the bank.” (internal quotation marks omitted)).

47. *Id.* at 62 (“After noting the bank’s express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by [the supervisor], the court ultimately concluded that the bank was without notice and cannot be held liable for the alleged actions of [the supervisor].” (internal

Appeals for the District of Columbia Circuit completely disagreed.<sup>48</sup> The court of appeals held that Vinson had a clear case of hostile work environment sexual harassment and that employers should be strictly liable for any supervisory sexual harassment that occurs in their workplaces.<sup>49</sup>

The Supreme Court agreed with the court of appeals that hostile work environment sexual harassment claims are valid grounds on which to bring a suit.<sup>50</sup> Thus, the Court in *Meritor* held that a hostile work environment arises when there is unwelcome sexual behavior that is “sufficiently severe or pervasive to alter the conditions of employment and create[s] an abusive working environment.”<sup>51</sup> To establish a prima facie case of sexual harassment, a plaintiff must show: “(1) [t]he plaintiff was a member of a protected group; (2) the plaintiff was subjected to unwelcome conduct of a sexual nature; (3) the unwelcome sexual conduct was based on sex; [and] (4) the conduct affected a term, condition, or privilege of employment.”<sup>52</sup> Ultimately, the Court remanded *Meritor* for a complete factual finding consistent with these elements.<sup>53</sup>

The Court in *Meritor* recognized that there may be instances in which an employer is vicariously liable for the sexual harassment of its employees, but failed to establish exactly when that liability attaches.<sup>54</sup> The Court rejected theories of mere negligence or strict liability on their own, stating that employers should not always be “automatically liable

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quotation marks omitted)).

48. *Id.*

49. *Id.* at 62–63 (“[T]he Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct.”).

50. *Id.* at 65–66. The Court based its opinion in large part on the EEOC Guidelines from 1980 that said the same. *Id.* EEOC Guidelines have particularly persuasive force in discrimination litigation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (recognizing that the EEOC’s interpretation is entitled to “great deference”); *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (recognizing “the principle of deference to administrative interpretations”). The Supreme Court has held that “interpretations and opinions” of an administrative agency are relevant because they “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

51. *Meritor*, 477 U.S. at 66–68; ACHAMPONG, *supra* note 11, at 41.

52. ACHAMPONG, *supra* note 11, at 41 (footnote omitted).

53. *Meritor*, 477 U.S. at 73. The D.C. Circuit remanded *Meritor* without further comment. *Vinson v. Taylor*, 801 F.2d 1436 (D.C. Cir. 1986) (unpublished table opinion).

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

for sexual harassment by their supervisors,” yet “absence of notice to an employer does not necessarily insulate that employer from liability.”<sup>55</sup> But because *Meritor* was the first Supreme Court case to recognize a claim for hostile work environment sexual harassment and the specific factual elements had not been litigated thus far in the case, the Court remanded the case without issuing a standard for employer liability.<sup>56</sup>

This incomplete standard left lower courts in disarray.<sup>57</sup> Following *Meritor*, the majority of courts tended to hold employers liable based on a negligence standard unless the harassment was quid pro quo by a supervisor, in which case the employer would be vicariously liable.<sup>58</sup> Yet, there was disagreement over exactly why this was the correct practice. The Supreme Court acknowledged this confusion and established what it hoped to be a “uniform and predictable standard”<sup>59</sup> in the landmark *Burlington Industries, Inc. v. Ellerth*<sup>60</sup> and *Faragher v. City of Boca Raton*<sup>61</sup> cases. Although these cases were not initially brought together, the Court treated them as twin cases and issued their opinions, identical in many important respects, on the same day.<sup>62</sup>

### B. The Ellerth/Faragher Defense

The issue of employer liability in supervisory harassment cases came to a head in the twin cases of *Burlington Industries, Inc. v. Ellerth*<sup>63</sup> and *Faragher v. City of Boca Raton*.<sup>64</sup> The Supreme Court granted certiorari in both cases in order to settle the circuit split over when employers are liable for supervisory harassment.<sup>65</sup> The Supreme Court could not impose a strict liability standard for employers because such a standard

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55. *Id.*

56. *Id.* at 72–73.

57. Michael C. Harper & Joan Flynn, *The Story of Burlington Industries v. Ellerth and Faragher v. City of Boca Raton: Federal Common Lawmaking for the Modern Age*, in EMPLOYMENT DISCRIMINATION STORIES 225, 226 (Joel WM. Friedman ed., 2006). This disarray was exemplified in the Seventh Circuit’s handling of *Burlington Industries, Inc. v. Ellerth*, which resulted in eight different opinions and “200-plus pages” in the Federal Reporter from the justices. *Id.*

58. *See id.* at 237.

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

60. *Id.* at 742.

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

62. Harper & Flynn, *supra* note 57, at 225.

63. *Ellerth*, 524 U.S. at 742.

64. *Faragher*, 524 U.S. 775.

65. *Ellerth*, 524 U.S. at 753; *Faragher* at 780, 785–86.

was barred by its holding in *Meritor*, but the Court felt that the standard should be something more than negligence.<sup>66</sup> To that end, the Supreme Court created a two-pronged affirmative defense in an attempt to balance the competing interests of employers and employees in supervisory harassment suits.<sup>67</sup>

Both *Ellerth* and *Faragher* were Title VII sexual harassment suits involving ongoing supervisory harassment.<sup>68</sup> In *Ellerth*, the plaintiff claimed that her supervisor had constantly subjected her to offensive and sexual remarks and on one occasion had touched her knee in an invasive manner.<sup>69</sup> Burlington's employee handbook contained a policy regarding anti-harassment procedures, but Ellerth did not think that the policy was ever enforced nor did she know to whom to complain.<sup>70</sup> Ellerth did not inform her employer about the harassment and resigned from her position after a year.<sup>71</sup>

Similarly, in *Faragher v. City of Boca Raton*, Faragher suffered ongoing harassment for five years during her job as a lifeguard for the Boca Raton Parks and Recreation Department.<sup>72</sup> Two of Faragher's immediate supervisors made offensive comments about her physical attractiveness, touched her without invitation, and simulated lewd gestures in front of her.<sup>73</sup> Although the City maintained a sexual harassment policy, it failed to properly disseminate it throughout the Parks and Recreation Department in which Faragher worked.<sup>74</sup> Faragher ultimately quit her job without formally reporting the harassment.<sup>75</sup>

In both cases, the Supreme Court was tasked with determining when

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66. *Ellerth*, 524 U.S. at 759, 763–64; *Faragher* 524 U.S. at 791–92.

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

68. *Ellerth*, 524 U.S. at 748–49; *Faragher*, 524 U.S. at 780.

69. *Ellerth*, 524 U.S. at 748. The harasser was not Ellerth's immediate supervisor; however, Ellerth's direct supervisor reported to the harasser, and the harasser had the authority to make employment decisions regarding the hiring and firing of employees. *Id.* at 747.

70. *Id.* at 749; Harper & Flynn, *supra* note 57, at 234.

71. *Ellerth*, 524 U.S. at 747–48.

72. *Faragher*, 524 U.S. at 780.

73. *Id.* at 782. Women were the minority on the lifeguarding staff at this time, numbering only four to six, and these two supervisors had harassed each of them at one point. *Id.*; Harper & Flynn, *supra* note 57, at 228.

74. *Faragher*, 524 U.S. at 781–82.

75. *Id.* at 780, 782. Unfortunately for Faragher's supervisors, she continued on to Case Western Reserve University Law School. Harper & Flynn, *supra* note 57, at 228.

an employer should be liable for the harassing actions of its supervisors.<sup>76</sup> The Court first looked to *Meritor* for guidance.<sup>77</sup> *Meritor* suggested that Congress intended the Court to use agency law as a guiding principle in formulating employer liability because Congress had used the word “agent” in the definition of employer under Title VII.<sup>78</sup> Keeping in mind that *Meritor* stood for the proposition that employers are not strictly liable for supervisory harassment, the Supreme Court then turned to the Restatement (Second) of Agency.<sup>79</sup>

The Supreme Court looked specifically to section 219 of the Restatement (Second) of Agency, entitled “When Master is Liable for Torts of His Servants.”<sup>80</sup> Generally under the Restatement, an employer is not liable for the torts of its employees unless the torts are committed within the scope of employment.<sup>81</sup> The Court stated that sexual harassment is not usually done within the scope of employment, so it looked further to the exceptions found in section 219.<sup>82</sup> Under section 219, an employer can incur vicarious liability for tortious employee actions committed outside the scope of employment when “(a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation.”<sup>83</sup> Thus, an employer is strictly liable for its supervisor’s actions if the harassment was a result of the employer’s own tortious intent or that of a high-

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76. *Ellerth*, 524 U.S. at 753; *Faragher*, 524 U.S. at 780. Ironically enough, the Supreme Court granted certiorari in *Ellerth* not to determine the issue of liability, but to resolve whether a claim of sexual harassment could stand without a tangible employment action taken against the employee. Harper & Flynn, *supra* note 57, at 240. However, the oral argument opened and closed with discussion on the issue of liability, and the majority of the oral argument hour was spent on liability as well. *Id.* It is clear from the two opinions that the justices were really deciding the issue of liability, not whether hostile work environment could stand as a claim without a tangible employment action. *Id.* at 242.

77. *Ellerth*, 524 U.S. at 754 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)); *Faragher*, 524 U.S. at 791 (citing *Meritor*, 477 U.S. at 70–72).

78. *Ellerth*, 524 U.S. at 754; *Faragher*, 524 U.S. at 791.

79. *Ellerth*, 524 U.S. at 755–59; *Faragher*, 524 U.S. at 793–805.

80. See *Ellerth*, 524 U.S. at 755–59; *Faragher*, 524 U.S. at 793–805; RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

81. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958). The scope of employment rule requires that employees are acting with the purpose of furthering the employer’s business goals. See *Ellerth*, 524 U.S. at 756 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70:505 (5th ed. 1984)).

82. *Ellerth*, 524 U.S. at 757–58 (stating that supervisory harassment is usually done for “personal motives”).

83. RESTATEMENT (SECOND) OF AGENCY § 219(2)(a)–(d).

ranking employee acting as a proxy.<sup>84</sup> Additionally, an employer is vicariously liable under the Restatement if the employer acted negligently—if it knew or should have known about a hostile work environment and failed to take action—or if the tortious act could not have been committed but for the agency relationship.<sup>85</sup>

Thus, the Court was at a crossroads. It appreciated the benefits offered by the potentially expansive theories of direct and vicarious liability but was restrained by its holding in *Meritor* that employers should not be strictly liable for supervisory harassment. Additionally, the Court recognized that negligence was merely a “minimum standard,” and as the plaintiff in *Ellerth* urged, Title VII demanded a more stringent liability standard.<sup>86</sup> The Court compromised between the theories of vicarious liability and negligence in holding that employers are vicariously liable, subject to an affirmative defense, in instances of hostile work environment supervisory harassment when there was no tangible employment action (such as termination) taken against the employee.<sup>87</sup> The defense provides that if an employer can prove by a

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84. RESTATEMENT (SECOND) OF AGENCY § 219(2) (a); *Ellerth*, 524 U.S. at 758–59; *Faragher*, 524 U.S. at 793.

85. RESTATEMENT (SECOND) OF AGENCY § 219(2)(b)–(d); *Ellerth*, 524 U.S. at 758–59. The Court seemed persuaded by the argument that the harassment could not have been committed without the agency relationship, thus imputing vicarious liability on the employers, but it recognized its limitation in that every plaintiff in every case could argue that the harassment would not have occurred but for the supervisor being employed by the employer. *Ellerth*, 524 U.S. at 760; Marks, *supra* note 40, at 1418 (noting that the Court believed that this theory gave good support for imposing vicarious liability on the employer based on the fact that “an employer selects and trains its supervisory personnel, . . . confers upon supervisors a status imbued with a special capacity and opportunity to harass subordinates, and an employer can monitor supervisors more directly”).

86. *Ellerth*, 524 U.S. at 759.

87. *Id.* at 764–65; *Faragher*, 524 U.S. at 807; see also Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 695 (2000); Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 553–54 (2006). Both the *Ellerth* and *Faragher* opinions “commanded strong majorities” with only two justices dissenting. Harper & Flynn, *supra* note 57, at 241. Inexplicably, Justice Ginsburg joined in the majority in *Faragher* but merely concurred in judgment in *Ellerth*. *Id.*; *Ellerth*, 524 U.S. at 766 (Ginsburg, J., concurring) (noting that she, Justice Ginsburg, agreed with the Court’s holding and rule of liability). The two Justices who dissented in both cases were Justices Thomas and Scalia. Harper & Flynn, *supra* note 57, at 241. Justice Thomas took issue with the fact that the Court seemed to be engaging in policymaking and formulating a rule out of “whole cloth.” *Ellerth*, 524 U.S. at 772 (Thomas, J., dissenting); Harper & Flynn, *supra* note 57, at 250. He believed that the majority completely misread section 219(2)(d) of the Restatement (Second) of Agency and had consequently created an “unjustified symmetry” in the area of sex discrimination law that was

preponderance of the evidence “two necessary elements,” it can avoid “liability or damages.”<sup>88</sup> The employer must prove “that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and “that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>89</sup>

The defense incorporates “the agency principle of vicarious liability for harm caused by misuse of supervisory authority,” the twin aims of Title VII (deterrence and compensation), and a measure of reasonableness.<sup>90</sup> The first prong reflects the negligence principle and speaks directly to employer reasonableness by requiring employers to promptly “prevent and correct” supervisory harassment.<sup>91</sup> This requirement encourages employers to adopt formal policies against harassment that incorporate a grievance procedure and resolution system.<sup>92</sup> These policies often demand prompt remedial employer action upon a report of sexual harassment.<sup>93</sup> The second prong speaks to employee reasonableness and the tort principle of avoidable consequences.<sup>94</sup> Prior to *Ellerth* and *Faragher*, many circuits stated that employers should not be held liable for harassment that they did not know about.<sup>95</sup> Thus, the second prong of the defense requires that employees formally report harassment in order to provide notice to their employers about problems in their workplaces.<sup>96</sup> In general, the defense works to “encourag[e] preventative action by both the employer and employee.”<sup>97</sup>

The Court applied the newly-formed *Ellerth/Faragher* defense in

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not paralleled elsewhere in Title VII. *Ellerth*, 524 U.S. at 772–74 (Thomas, J., dissenting); Harper & Flynn, *supra* note 57, at 241. Somewhat forebodingly, Justice Thomas predicted that this rule would open the floodgates of litigation and criticized the rule for failing to clarify the law. *Ellerth*, 524 U.S. at 774 (Thomas, J., dissenting) (“There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance.”).

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

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

90. *Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 807.

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

92. See Hébert, *supra* note 23, at 714–15; Murr, *supra* note 87, at 555–57.

93. See Hébert, *supra* note 23, at 714–15; Murr, *supra* note 87, at 556–57.

94. Marks, *supra* note 40, at 1421; see also Murr, *supra* note 87, at 609–11.

95. King, *supra* note 23, at 543.

96. Hébert, *supra* note 23, at 717.

97. Marks, *supra* note 40, at 1421.

*Faragher* and found in favor of the plaintiff.<sup>98</sup> The Court held that the City of Boca Raton could not meet the first prong of the defense because it did not sufficiently disseminate its sexual harassment policy, thereby failing to exercise the requisite reasonable care that would entitle it to the affirmative defense.<sup>99</sup> On the other hand, *Ellerth* was remanded to the district court for further factual findings and to allow the employer an opportunity to raise the affirmative defense.<sup>100</sup> Although *Faragher* exemplifies a straightforward application of the *Ellerth/Faragher* defense, certain circuit courts have since interpreted and applied the second prong of the defense in such a way as to dash the Supreme Court's dreams of establishing a "uniform and predictable" standard in this area of law.<sup>101</sup>

### III. THE CIRCUIT SPLIT OVER THE SECOND PRONG

Although some consider the two-pronged *Ellerth/Faragher* defense "straightforward"<sup>102</sup> and "simple,"<sup>103</sup> the second prong of the defense alone has managed to cause a split of opinion between various circuit courts.<sup>104</sup> The two prongs of the defense are (1) an employer exercised reasonable care to prevent and promptly correct instances of sexual harassment and (2) the employee unreasonably failed to utilize the employer's corrective mechanisms or to otherwise avoid harm.<sup>105</sup> The defense has become controversial because some courts have inconsistently applied the second prong, most commonly dropping it in cases of single-incident or rapid-onset hostile work environment harassment.<sup>106</sup> Other courts hold firm to the notion that the

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98. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

99. *Id.*

100. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998). Harper and Flynn noted that because Ellerth did not use her employer's corrective mechanism as required under the defense, her likelihood of success was low on remand; however, there is not a further record of the case. Harper & Flynn, *supra* note 57, at 245–46.

101. *Ellerth*, 524 U.S. at 754; *see also infra* Part III.A.

102. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (citing *Indest v. Freeman Decorating, Inc. (Indest II)*, 168 F.3d 795, 796 (Wiener, J., specially concurring)).

103. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 940 (N.D. Ind. 2011); Marks, *supra* note 40, at 1404.

104. *See* Rachel Shachter, Note, *Creating Equitable Outcomes Through Remedies: When Reasonable Employers Must Be Held Liable for Sexual Harassment Under Title VII*, 8 VA. J. SOC. POL'Y & L. 567, 567 (2001) ("Despite the clear structure of the two-pronged test, some federal courts have determined that the second prong is optional.").

105. *Ellerth*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

106. *See infra* Part III.A.

*Ellerth/Faragher* defense applies in all cases of supervisor hostile work environment harassment where there was no tangible employment action.<sup>107</sup> The Seventh Circuit remains silent on this issue, as noted in *Alalade v. AWS Assistance Corp.*<sup>108</sup>

#### A. Courts That Have Dropped the Second Prong

A number of courts have applied a modified *Ellerth/Faragher* defense in certain instances. Generally, a modified *Ellerth/Faragher* defense is one in which a court applies only the first prong and drops the second prong.<sup>109</sup> In other words, the courts look at whether the employer has acted reasonably with regard to preventative and corrective procedures in the sexual harassment context, but ignore whether the employee has acted similarly reasonable or otherwise attempted to avoid harm. Consequently, an employer is not liable under a modified *Ellerth/Faragher* defense if it “promptly exercise[s] reasonable care to prevent and correct any sexually harassing behavior.”<sup>110</sup>

Most commonly, the second prong is dropped in single-incident or rapid-onset cases.<sup>111</sup> Single-incident cases are situations where there is one single occurrence of harassment, often very severe, as contrasted with ongoing harassment that lasts for a longer period of time.<sup>112</sup> Rapid-onset harassment is generally understood as a sudden, serious instance of harassment that could not have been prevented because there was no

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107. See *infra* Part III.B. Hereinafter, when this Comment refers to “all cases of supervisor hostile work environment harassment,” readers should interpret this as referring to instances in which there was no tangible employment action taken against the employee, because if there was, strict liability attaches, and the question of employer liability is moot. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986).

108. See *infra* Part III.C.

109. Marks, *supra* note 40, at 1404 (describing the modified defense as one in which the courts read “the word ‘and’ between the two prongs of the defense [as] mean[ing] ‘or’ in [certain] cases”).

110. John C. Ayres, Note, *Is It Sexual Harassment or Not? The Single Incident Exception*, 71 MO. L. REV. 205, 208 (2006).

111. Marks, *supra* note 40, at 1423.

112. See *id.* at 1423 n.124. However, at least in the Eighth Circuit, it appears that a single incident does not necessarily mean one occurrence, but could include harassment that happens in one fell swoop, such as all in one day or evening. See *McCurdy v. Ark. State Police*, 375 F.3d 762 (8th Cir. 2004). One commentator has noted that in *McCurdy*, the court categorized the case as a single-incident case by considering “the five or six acts of alleged sexual harassment by [the supervisor] on July 5, 2002, as a single incident.” Ayres, *supra* note 110, at 217. For more instances of courts that have blurred the single-incident/rapid-onset line, see *infra* note 304.

lead-up to the incident.<sup>113</sup> Currently, the Second, Fourth, and Eighth Circuits use a modified *Ellerth/Faragher* defense in single-incident or rapid-onset cases.<sup>114</sup> In addition, a Ninth Circuit district court and Fifth and Eleventh Circuits' non-precedential opinions have also endorsed this viewpoint.<sup>115</sup> In these cases, courts generally give three reasons for deviating from the traditional *Ellerth/Faragher* defense: (1) the factual differences between the *Ellerth* and *Faragher* cases and the case before it; (2) the necessity of avoiding strict liability as was prohibited in *Meritor*; (3) and the desire for fairness towards employers who have done everything in their power to avoid workplace harassment.<sup>116</sup>

### 1. Factual Differences

Many courts that deviate from a strict application of the *Ellerth/Faragher* defense do so because of perceived factual distinctions between the cases that inspired the defense and the cases presently in front of the court. Specifically, these courts note that in *Burlington*

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113. Marks, *supra* note 40, at 1404. There is no clear distinction between the definitions of single-incident and rapid-onset, and they seem similar in many respects. Additionally, one court has described the full *Ellerth/Faragher* defense as inapplicable to “incipient” cases. *Indest v. Freeman Decorating, Inc. (Indest I)*, 164 F.3d 258, 265 (5th Cir. 1999) (Jones, J.). Although the definition of “incipient” is unclear, it seems to mean a sudden and unavoidable exposure to a hostile work environment to which a plaintiff promptly complains, or an “early-stage hostile work-environment claim.” Charles W. Garrison, Comment, *Once Is Enough: The Need to Apply the Full Ellerth/Faragher Affirmative Defense in Single Incident and Incipient Hostile Work Environment Sexual Harassment Claims*, 61 CATH. U. L. REV. 1131, 1146 (2012); *see also* Marks, *supra* note 40, at 1423.

114. *See McCurdy*, 375 F.3d 762; *Van Alstyne v. Ackerley Grp., Inc.*, 8 F. App'x 147 (2d Cir. 2001); *Watkins v. Prof'l Sec. Bureau, Ltd.*, 201 F.3d 439, No. 98-2555, 1999 WL 1032614 \*1 (4th Cir. Nov. 15, 1999) (per curiam) (unpublished table opinion).

115. *See EEOC v. Asia Pac. Hotels, Inc.*, No. 10-00002, 2011 WL 3841601, at \*5–6 (D. N. Mar. I. Aug. 26, 2011); *Indest I*, 164 F.3d at 265–66; *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, J., concurring specially).

116. The arguments boil down to these three rationales, although they are admittedly intertwined (e.g., some courts may think that the defense is unfair to employers because it imposes strict liability). A fourth potential argument was advanced by a district court in the Eighth Circuit and relates to the construction of the defense as a whole. Some courts read the “and” in the *Ellerth/Faragher* as an “or.” *See, e.g., Keefer v. Universal Forest Products, Inc.*, 73 F. Supp. 2d 1053 (W.D. Mo. 1999). In *Keefer*, the court questioned the applicability of the *Ellerth/Faragher* defense in a single-incident case where the supervisor allegedly forced the plaintiff to remain in a shed with him for two hours, during which, he allegedly begged the plaintiff to have sex with him. *Id.* at 1055–56. After citing relevant portions of *Ellerth* and *Faragher* that establish the affirmative defense, the court suggested that “[a]lthough the [defense] uses the conjunctive ‘and,’ it appears from the surrounding discussion that either of these elements can be proved in order to establish the defense.” *Id.* at 1055 n.2.

*Industries, Inc. v. Ellerth*<sup>117</sup> and *Faragher v. City of Boca Raton*,<sup>118</sup> the employees had been victims of ongoing harassment.<sup>119</sup> Because of these factual distinctions, these courts reason that the Supreme Court intended the *Ellerth/Faragher* defense to apply only to similar factual scenarios.<sup>120</sup>

For example, the Eighth Circuit confronted the issue of single-incident sexual harassment and invoked the factual distinction argument in order to apply a modified *Ellerth/Faragher* defense in *McCurdy v. Arkansas State Police*.<sup>121</sup> McCurdy worked as a radio dispatcher for the Arkansas State Police.<sup>122</sup> During one shift, a sergeant entered the dispatch room and made comments about McCurdy's body and her attractiveness, hugged her, and touched her breasts.<sup>123</sup> McCurdy reported the events to another sergeant—the highest-ranking official on duty that night—when the sergeant arrived for work a few hours later.<sup>124</sup> Although the fact that McCurdy reported the harassment to a superior would in principle preclude her employer from successfully using the *Ellerth/Faragher* defense, the court of appeals affirmed the grant of summary judgment in favor of the employer.<sup>125</sup>

The court justified its deviation from the full defense by noting that the Supreme Court had considered issues of repeated harassment in *Ellerth* and *Faragher* while McCurdy's harassment was a single incident.<sup>126</sup> The court stated that “[j]udicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases,” and held that the use of the *Ellerth/Faragher* defense would be inappropriate based on the “unique facts” of the case.<sup>127</sup> To the court, applying the

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

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

119. *See supra* note 68 and accompanying text.

120. *See, e.g.*, *McCurdy v. Ark. State Police*, 375 F.3d 762, 771–72 (8th Cir. 2004); *Indest I*, 164 F.3d at 265.

121. *McCurdy*, 375 F.3d 762. For an in-depth look at this case, see Ayres, *supra* note 110.

122. *McCurdy*, 375 F.3d at 764.

123. *Id.* at 764–65.

124. *Id.* at 765.

125. *Id.* at 771–74.

126. *Id.* at 771 (“In *Ellerth* and *Faragher*, the Supreme Court confronted cases involving repeated incidents of supervisor sexual harassment. In contrast, we are confronted with McCurdy's case involving a single incident of alleged supervisor sexual harassment.”).

127. *Id.* Another case from the Eighth Circuit specifically noted that the defense was “adopted in cases that involved ongoing sexual harassment.” *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999). Thus, the court suggested that a plaintiff will never recover

defense would be “like trying to fit a square peg into a round hole” because of the distinct factual differences.<sup>128</sup>

An additional factual difference some courts look to is whether the plaintiff reported the harassment. The employees in *Ellerth* and *Faragher* never reported being harassed.<sup>129</sup> In many cases where courts apply a modified defense, the employees utilized the employer’s harassment policy and the employer quickly and remedially responded to their complaints.<sup>130</sup> For example, in *Indest v. Freeman Decorating, Inc. (Indest I)*,<sup>131</sup> the vice-president of the plaintiff’s employer made “crude sexual comments and sexual gestures” to her on four separate occasions over the course of a weeklong convention.<sup>132</sup> The plaintiff reported these incidents to her director and the branch office manager, who escalated the issue to a human resources director before the week’s end.<sup>133</sup> Although the court did not decide whether the harassment rose to the level of an actionable hostile work environment claim, it held that Indest’s claim failed nonetheless because there was no basis for employer liability.<sup>134</sup> The court held that the defense did not control in this case based on the factual variances from *Ellerth* and *Faragher*, and instead, the employer should be rewarded for taking swift action to remedy the situation and for potentially impeding the creation of a

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“for any initial act of harassment as long as the employer subsequently responds.” Grossman, *supra* note 87, at 714.

128. *McCurdy*, 375 F.3d at 771.

129. *See supra* notes 71, 75 and accompanying text.

130. *See, e.g.*, *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153 (D. Md. 2000). In *Jaudon*, the plaintiff alleged that her transportation coordinator had followed her into the restroom and looked over the stall at her, in addition to making inappropriate comments and physical contact on a number of occasions. *Id.* at 156–57. Jaudon reported the harassment to the director of human resources, consistent with her employer’s sexual harassment policy. *Id.* The court granted summary judgment to the employer partially on the basis that the employer proved the first prong of the *Ellerth/Faragher* defense, which the court asserted as sufficient to avoid liability. *Id.* at 164. The court upheld the idea that an employer’s prompt remedial action is sufficient to avoid liability based on a factual distinction between the *Ellerth* and *Faragher* cases and the one at issue. *Id.* The court contrasted the fact that the plaintiffs in *Ellerth* and *Faragher* had never complained to their employer, while Jaudon complained in a timely fashion. *Id.* at 164 & n.6. The court said that the second prong makes sense in a situation where an employee delays reporting the harassment, but otherwise it lacks “practical application.” *Id.* at 164 & n.6.

131. *Indest I*, 164 F.3d 258.

132. *Id.* at 260.

133. *Id.*

134. *Id.* at 264.

severe hostile work environment.<sup>135</sup>

## 2. Avoiding Strict Liability

A second justification for applying a modified *Ellerth/Faragher* defense in certain instances is to avoid imposing strict liability on employers. Some courts contend that applying the *Ellerth/Faragher* defense in single-incident or rapid-onset cases is akin to imposing strict liability on the employers.<sup>136</sup> These courts argue that the *Ellerth/Faragher* defense always imposes strict liability in supervisory harassment cases when an employee reports the harassment because it makes the first prong “irrelevant.”<sup>137</sup> This implication “truly bother[s]” some courts<sup>138</sup> and leads these courts to conclude that the Supreme Court “could not have meant what it said when it imposed the burden of persuasion . . . [of] both prongs . . . on the employer.”<sup>139</sup>

The court in *McCurdy v. Arkansas State Police*<sup>140</sup> used the avoidance of strict liability justification as an additional reason to grant summary judgment to the Arkansas State Police even though McCurdy promptly reported the sexual harassment from her supervisor.<sup>141</sup> McCurdy argued that the *Ellerth/Faragher* affirmative defense was not available to her employer because she had reported the harassment hours after it happened.<sup>142</sup> The court rejected this argument and said, “McCurdy’s argument, when boiled down, leads inevitably to strict liability for the [employer],” and noted that this was an unacceptable result based on

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135. *Id.* at 265; *see also* Marks, *supra* note 40, at 1425 (arguing that the modified defense “is intended to reward diligent employers who have promptly ‘nipped a hostile work environment in the bud’—at an ‘incipient’ stage.” (footnotes omitted)). Although Judge Jones’s opinion in *Indest I* is not binding precedent in the Fifth Circuit or elsewhere, it nonetheless led to an “ensuing line of diligent-employer cases.” Marks, *supra* note 40, at 1443–44; *see also Indest II*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (Wiener, J., specially concurring) (“Because [the third panel judge] concurs only in the judgment of this case without concurring in Judge Jones’s opinion or mine, neither enjoys a quorum and thus neither writing constitutes precedent in this Circuit.”).

136. *See, e.g.,* *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004); *Indest I*, 164 F.3d at 266.

137. *See* Daniel N. Raytis, Note, *Indest v. Freeman Decorating, Inc.: Dealing with Vicarious Liability for Sexual Harassment by a Supervisor*, 35 U.S.F. L. REV. 623, 647 (2001).

138. Marks, *supra* note 40, at 1426.

139. Hébert, *supra* note 23, at 716.

140. *McCurdy*, 375 F.3d 762.

141. *Id.* at 764.

142. *Id.* at 765, 771.

*Meritor*'s prohibition of strict liability for employers.<sup>143</sup> The court further stated that

[d]enying such an employer an opportunity to avail itself of the affirmative defense, when the employer has done all that an employer could reasonably be expected to do to avoid and remedy the offending behavior, effectively creates strict liability for employers in a [single-incident] case—contrary to the Supreme Court's holding in *Meritor*.<sup>144</sup>

In applying this rationale, the courts are attempting to adhere to precedent but also trying to stay true to the policy rationale behind *Meritor*. These courts believe that holding employers strictly liable for supervisory harassment even though the employers have seemingly done all they could do to avoid the harassment is “wholly contrary to a laudable purpose behind limitations on employer liability.”<sup>145</sup> Furthermore, these courts believe that imposing strict liability (or what appears to be strict liability) would discourage employers from reconciling with their employees and dissuade them from quickly correcting harassment in the workplace.<sup>146</sup>

### 3. Desire for Fairness Towards Employers

Another argument made by courts in favor of applying a modified defense in some circumstances is that it is not fair for employers to be held liable for supervisory harassment because they are innocent—that is, they have done everything in their power to prevent the harassment in the first place and remedy it once it comes to their attention.<sup>147</sup> These

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143. *Id.* at 771 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 71–72 (1986)).

144. *Id.* at 772. The court in *Indest I* echoed a similar sentiment. It held that imposing the *Ellerth/Faragher* affirmative defense when an employer has made a “swift and appropriate remedial response to the victim’s complaint would thus undermine . . . *Meritor*.” *Indest I*, 164 F.3d 258, 266 (5th Cir. 1999) (Jones, J.).

145. *Watkins v. Prof'l Sec. Bureau, Ltd.*, 201 F.3d 439, No. 98-2555, 1999 WL 1032614, at \*5 n.16 (4th Cir. Nov. 15, 1999) (per curiam) (unpublished table opinion). A district court within the Fourth Circuit has gone so far as to describe the *Ellerth/Faragher* defense as “an anathema to this court.” *Corcoran v. Shoney's Colonial, Inc.* 24 F. Supp. 2d 601, 606 (W.D. Va. 1998).

146. *See Watkins*, 201 F. 3d 439, 1999 WL 1032614, at \*5 n.16.

147. *See* Brian S. Kruse, Note, *Strike One—You're Out! Cautious Employers Lose Under New Sexual Harassment Law: Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), 78 NEB. L. REV. 444, 456–57 (1999) (“[A] vicarious liability standard will work an extremely unfair and punitive hardship on employers who proactively and cautiously try to prevent harassment. . . . A faultless employer who in good faith attempts to prevent sexual harassment in its workplace is still subject to liability.”); Shachter, *supra* note 104, at 576

courts assert that a modified *Ellerth/Faragher* defense is appropriate when the harassment is sudden and unpreventable.<sup>148</sup> As articulated by one court: “[I]t seems neither fair to that diligent employer nor consistent with the underlying policy of Title VII to have that employer’s Title VII liability turn on the alacrity of the complaining employee.”<sup>149</sup> Instead, in the interest of fairness, these courts want to apply a modified defense and hold the employers liable only if they fail to do their due diligence in taking remedial action in response to reported harassment.<sup>150</sup>

As a result, some courts have altered the *Ellerth/Faragher* defense to make employer response a turning point for liability.<sup>151</sup> For example, in *Van Alstyne v. Ackerley Group*,<sup>152</sup> a general manager of sales complained to her employer’s management in October of 1994 that a station manager had been sexually harassing her since February of 1994.<sup>153</sup> Although the court ultimately concluded that the incidents did

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(recognizing the argument that if employers take all reasonable steps to prevent harassment, then they are not wrongdoers for the purposes of Title VII liability and should not be held accountable). Other commentators think that these courts are biased towards employers and are using these superficial explanations to hide their true intentions. Hébert, *supra* note 23, at 715 (“[L]ower courts have applied [*Ellerth and Faragher*] in ways quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers.”); Lawton, *supra* note 15, at 245 (“[D]ecisions [that eliminate the second prong] are troubling . . . [because] they reveal a bias in favor of employers. Courts like *Watkins* are less concerned with the plaintiff’s ability to secure a remedy under Title VII than with what they consider a ‘fair’ result for the employer.”); Marks, *supra* note 40, at 1444, 1454 (suggesting that “this [*Indest I*] precedent reflects an outright employer-oriented bias” and that this line of cases results in “an overall ‘result-oriented’ bias among judges [because] they simply do not want to hold reasonably diligent employers liable.”).

148. See Marks, *supra* note 40, at 1425; see, e.g., *Watkins*, 201 F.3d 439, 1999 WL 1032614 \*1 (holding that the employer had shielded itself from liability for the unavoidable rape because it satisfied the first prong of the defense by properly responding to the employee’s complaints).

149. *EEOC v. Asia Pac. Hotels, Inc.*, No. 10-00002, 2011 WL 3841601, at \*5 (D. N. Mar. I. Aug. 26, 2011).

150. See, e.g., *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring specially).

151. See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 772 (8th Cir. 2004); *Van Alstyne v. Ackerley Grp., Inc.*, 8 F. App’x 147, 155 (2d Cir. 2001); *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 441 (2d Cir. 1999); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997); *Cajamarca v. Regal Entm’t Grp.*, 863 F. Supp. 2d 237, 252–53 (E.D.N.Y. 2012).

152. *Van Alstyne*, 8 F. App’x 147.

153. *Id.* at 152–53. The station manager had held her hand, kissed her on the cheek, brushed her hair away from her forehead, and repeatedly made unwanted romantic remarks to her. *Id.* at 152.

not rise to the level of an actionable hostile work environment, it continued to state that even if these incidents were actionable, the employer would be entitled to summary judgment because it took “immediate and effective corrective action” after receiving the complaint from Van Alstyne.<sup>154</sup>

*Van Alstyne* characterizes the affirmative defense differently than originally stated in *Burlington Industries, Inc. v. Ellerth*<sup>155</sup> and *Faragher v. City of Boca Raton*.<sup>156</sup> The *Van Alstyne* court says that an employer is entitled to the defense if:

(1) [T]he supervisor’s harassment did not culminate in a “tangible employment action,” and (2) the employer can show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (a) “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise,” or (b) the employee complained and the employer took “prompt and appropriate corrective action in response to [the] complaint.”<sup>157</sup>

Although the court did not fully explain the reasoning behind its adoption of this standard, it concluded that the employer was afforded

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154. *Id.* at 153. Some courts believe that employers should be credited for taking swift and appropriate responses to reported harassment, not punished with vicarious liability. *Cajamarca*, 863 F. Supp. 2d at 252–53. The argument is that employers will have no incentive to take remedial responses to reported harassment if doing so is seemingly irrelevant to the question of liability. *See id.*

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

156. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Van Alstyne*, 8 F. App’x at 152.

157. *Van Alstyne*, 8 F. App’x at 152 (citation omitted). In support of this articulation of the defense, specifically for subsection (2)(b), the court cites *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 154 (2d Cir. 1997), and *Richardson v. New York State Dep’t of Corr. Serv.*, 180 F.3d 426, 441–43 (2d Cir. 1999). *Id.* *Perry* was decided in 1997 and references a negligence standard that many courts used before the creation of the *Ellerth/Faragher* defense. *Perry*, 115 F.3d at 153; *see also* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435, 440 (1997) (“[I]n early Title VII sexual harassment cases, . . . the courts determined employer liability by applying commonsensical, traditional notions of fault and negligence—an employer would only be liable if it caused the harassment at issue or if it negligently failed to remedy the situation after it knew of the discrimination.” (footnote omitted)). *Richardson* largely discusses the negligence standard imposed for co-worker harassment, and in reference to supervisory harassment, says “an employer is presumed absolutely liable in cases where the harassment is perpetrated by the victim’s supervisor, although employers may interpose an affirmative defense to rebut that presumption,” and cites *Ellerth* and *Faragher*. *Richardson*, 180 F.3d at 441. As a result, neither of these cited cases seems to support the modification.

immunity because it had taken swift action in response to Van Alstyne's complaint of sexual harassment.<sup>158</sup> The *McCurdy* court similarly held that the second prong of the defense is inapplicable when the employer takes "swift and effective action the minute it learns of a single incident of supervisor sexual harassment."<sup>159</sup>

### *B. Courts That Have Refused to Drop the Second Prong*

Some courts continue to apply both prongs of the *Ellerth/Faragher* defense in all circumstances without issue. Thus far, the Tenth Circuit is the only federal appeals court to expressly refuse to drop the second prong of the *Ellerth/Faragher* defense in any circumstance,<sup>160</sup> but this decision has been reflected in concurring and dissenting opinions from the Fifth and Eighth Circuits<sup>161</sup> and has been endorsed by the EEOC.<sup>162</sup>

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158. *Van Alstyne*, 8 F. App'x at 153. A judge in another circuit established a similar standard in which employer liability revolves around whether the employer took prompt remedial action:

A court's assessment as to whether a defendant has proved this defense requires, first, an analysis of whether the employer has exercised reasonable care in preventing sexual harassing behavior. The court next directs its inquiry to whether the employee made reasonably sufficient use of available avenues to put the employer on notice of the problem. Finally, the court refocuses on the employer to determine whether the employer or its authorized agent, after receiving notice of the harassment, took adequate steps to abate it and prevent its recurrence.

*Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring specially). This concurrence is not controlling precedent in the Eleventh Circuit, but it is often cited for its articulation of a modified *Ellerth/Faragher* defense. Jeannine Novak, Note, "Let's Be Reasonable"—Resolving the Ambiguities of the Faragher-Ellerth Affirmative Defense, 68 DEF. COUNS. J. 211, 224 (2001).

159. *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004). A district court case similarly concluded that the issue of employer liability should not come down to when, or if, the employee reported the harassment when the plaintiff was a post office worker who had been harassed by her supervisor for over a year. *Brown v. Henderson*, 155 F. Supp. 2d 502, 506, 513 (M.D.N.C. 2000) ("[F]ocusing on the preventative measures an employer has in place and the remedial action taken by the employer once it is notified of a problem avoids a determination of liability based simply on when the employee reports the harassment.").

160. See *Harrison v. Eddy Potash, Inc.* 248 F.3d 1014, 1025–26 (10th Cir. 2001); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1261 (10th Cir. 1998).

161. See *McCurdy*, 375 F.3d at 774–76 (Melloy, J., dissenting); *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, J., concurring); *Indest II*, 168 F.3d 795, 798 (5th Cir. 1999) (Wiener, J., specially concurring).

162. EEOC, No. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, (June 18, 1999) [hereinafter EEOC GUIDELINES], available at <http://www.eeoc.gov/policy/docs/harassment.html>. Another source, *Cause of Action for Supervisor Sexual Harassment Under Title VII (42 U.S.C.A. § 2000e) with Ellerth/Faragher Affirmative Defenses*, seems to take the same approach as the

Relevant EEOC Guidelines remark:

Harassment is the only type of discrimination carried out by a supervisor for which an employer can avoid liability, and that limitation must be construed narrowly. The employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment *and* that the employee unreasonably failed to avoid all of the harm. If both parties exercise reasonable care, the defense will fail.<sup>163</sup>

The courts that refuse to drop the second prong of the defense find that even in single-incident or rapid-onset cases where an employer took prompt remedial action, an employer will not be shielded from liability if the employee reported the harassment.<sup>164</sup> Courts justify applying both prongs of the *Ellerth/Faragher* defense based on its plain language and straightforwardness as articulated in the Supreme Court opinions<sup>165</sup> and because nothing in either case indicated that the defense was to be fact-specific.<sup>166</sup> Additionally, some courts rebut the argument that the defense is unfair by reasoning that it can be used to reduce damages.<sup>167</sup>

### 1. Plain Language and Straightforwardness of the Defense

Courts that apply both prongs of the *Ellerth/Faragher* defense in all situations note that doing so is necessary based on the defense's plain

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EEOC, noting that the courts applying a modified *Ellerth/Faragher* defense have “strangely bypassed the second prong, holding that the employer need not prove the second prong of the affirmative defense when the first prong is satisfied,” but makes no other comments about it. *Cause of Action for Supervisor Sexual Harassment Under Title VII (42 U.S.C.A. § 2000e) with Ellerth/Faragher Affirmative Defenses*, 54 C.O.A. 2d 365 § 37 (Oct. 2012) (citing *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153 (D. Md. 2000)).

163. EEOC GUIDELINES, *supra* note 162, at Part V-B.

164. *Gunnell*, 152 F.3d at 1261 (“Under *Faragher* and . . . [*Ellerth*], an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment.”). In *Gunnell*, the director of maintenance/custodial services had been making unwanted sexual comments to a secretary. *Id.* at 1257. The court remanded the case in light of the standards established in *Ellerth* and *Faragher*, and advised the lower court that the relevant inquiries were whether the employer had a reasonable policy in place to prevent and correct sexual harassment and whether the plaintiff had unreasonably failed to take advantage of such policy. *Id.* at 1261. This approach has been described as the “opposite approach from *Indest*.” Novak, *supra* note 158, at 225. See *supra* notes 130–34 and accompanying text for more information about *Indest*’s reasoning.

165. See *infra* Part III.B.1.

166. See *infra* Part III.B.2.

167. See *infra* Part III.B.3.

language and straightforwardness. Because of the plain language of the defense, these courts believe that the defense is clear on its face as a “remarkably straightforward framework” and thus requires an employer to prove both prongs in order to avoid liability for supervisory harassment.<sup>168</sup> Specifically, courts cite that the defense uses the words “necessary” and “and” on its face.<sup>169</sup>

The concurring opinion to *Indest v. Freeman Decorating, Inc.* (*Indest II*)<sup>170</sup> cited this rationale. Judge Wiener’s concurring opinion criticized Judge Jones’s interpretation of the *Ellerth/Faragher* defense<sup>171</sup> and countered that the defense is unambiguous.<sup>172</sup> Judge Wiener noted the “straight-forward and unqualified bright-line rules” established by the Court and emphasized the words “two necessary elements” from the defense.<sup>173</sup> As the Tenth Circuit has succinctly concluded, “there is no reason to believe that the ‘remarkably straightforward’ framework outlined in *Faragher* and [*Ellerth*] does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor’s sexual harassment.”<sup>174</sup> Judge Melloy, the dissenting

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168. *Harrison v. Eddy Potash, Inc.* 248 F.3d 1014, 1026 (10th Cir. 2001) (citing *Indest II*, 168 F.3d 795, 796 (5th Cir. 1999) (Wiener, J., specially concurring)); see also *Chapman v. Carmike Cinemas*, 307 F. App’x 164, 170 (10th Cir. 2009) (“[W]e continue to require that the employer prove the employee did not promptly report the single-incident offense before the employer may avail itself of the *Ellerth/Faragher* defense.”).

169. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (“The defense comprises two *necessary* elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” (emphasis added)). Additionally, some commentators think it is clear that the mere availability of an affirmative defense thwarts the argument that employers are held strictly liable in instances of supervisory harassment. Shachter, *supra* note 104, at 582.

170. *Indest II*, 168 F.3d at 795 (Wiener, J., specially concurring).

171. See *supra* notes 130–34 and accompanying text for a description of Judge Jones’s lead opinion. Judge Wiener criticized Judge Jones’s opinion as a substitution of “her own balancing test in lieu of the Court’s,” a complete disregard of the two-pronged defense, and “as neat an illusion as any sleight-of-hand artist ever created.” *Indest II*, 168 F.3d at 798 (Wiener, J., specially concurring). *Harrison* similarly disregards Judge Jones’s reasoning because it was written by one judge on a panel of three, another judge on the panel expressly rejected it, and the opinion did not have precedential value in the Fifth Circuit. *Harrison*, 248 F.3d at 1025.

172. *Indest II*, 168 F.3d at 796 (Wiener, J., specially concurring).

173. *Id.* at 800.

174. *Harrison*, 248 F.3d at 1026 (citing *Indest II*, 168 F.3d at 796 (Wiener, J., specially concurring)). In *Harrison*, a supervisor in the potash mines harassed the plaintiff by repeatedly taking her to isolated areas in the mines, touching her in a sexual manner, and forcing her to masturbate him. *Id.* at 1016–17. About two months after the start of the

judge in *McCurdy*, similarly focused on the conjunctive “and” between the two prongs of the defense and determined that it was “remarkably clear” that both prongs must be applied.<sup>175</sup> These opinions found that to avoid liability, an employer has to prove both prongs of the *Ellerth/Faragher* defense in all situations.<sup>176</sup>

## 2. *Ellerth/Faragher* Defense is Not Fact Specific

The courts in favor of applying both prongs of the defense note that nothing in the *Burlington Industries, Inc. v. Ellerth*<sup>177</sup> or *Faragher v. City of Boca Raton*<sup>178</sup> opinions suggest that there are any exceptions to the defense’s application regardless of any factual distinctions between *Ellerth* and *Faragher* and single-incident or rapid-onset cases.<sup>179</sup> These courts argue that if the Supreme Court had intended to create an exception based on factual distinctions, it would have said so in the opinions rather than using broad, all-encompassing language in the defense.<sup>180</sup> Despite factual differences, these courts maintain that the defense was created to apply to all instances of supervisory harassment.

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harassment, Harrison reported the inappropriate behavior to a manager who took immediate action, including separating the two employees; promising to place the supervisor on permanent probation for any future, similar behavior; and promising that Harrison would be “made whole.” *Id.* at 1018. In court, the defendant attempted to escape vicarious liability for the supervisor’s conduct by arguing that *Indest I* had correctly modified the *Ellerth/Faragher* defense such that employers that take immediate corrective action can avoid liability. *Id.* at 1024. The court rejected the modified defense from *Indest I*, noting that the opinion did not have precedential value even in the Fifth Circuit, and reiterated the straightforwardness of the defense in requiring the application of both prongs. *Id.* at 1025–26. The court affirmed the district court’s holding in favor of the plaintiff because the employer failed to fulfill the first prong of the defense by not properly disseminating its anti-harassment policy. *Id.* at 1027–28.

175. See *McCurdy v. Ark. State Police*, 375 F.3d 762, 775 (8th Cir. 2004) (Melloy, J., dissenting) (citing *Indest II*, 168 F.3d at 796 (Wiener, J., specially concurring)).

176. *McCurdy*, 375 F.3d at 775 (Melloy, J., dissenting); *Indest II*, 168 F.3d at 796 (Wiener, J., specially concurring).

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

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

179. Commentators have also reflected this idea. See Shachter, *supra* note 104, at 583 (“Simply put, there is no indication that the Supreme Court intended . . . [a] limited scope [of the defense]. On the contrary, the affirmative defense reads more like a universal code than malleable, context-specific common-law.” (footnote omitted)).

180. See *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 940 (N.D. Ind. 2011); Garrison, *supra* note 113, at 1149; G. Dain Stewart, *Affirmative Defenses—Can an Employer Ever Avoid Liability for a Single Act of Sexual Harassment?—Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 937 (N.D. Ind. 2011), 35 AM. J. TRIAL ADVOC. 429, 436 (2011) (“[T]he Supreme Court did not *purposely* create exceptions to the applicability of the *Ellerth/Faragher*’s second prong.”).

For example, in his concurring opinion in *Indest II*,<sup>181</sup> Judge Wiener argued that the Supreme Court crafted the *Ellerth/Faragher* defense to cover “the entire spectrum of an employer’s vicarious liability under Title VII for supervisory harassment *writ large*.”<sup>182</sup> While courts that have dropped the second prong suggest that the defense was intended to cover “some lesser fragment of that statutory problem,” namely ongoing harassment only, Judge Wiener found that in neither the *Ellerth* nor the *Faragher* opinions did the Court “even remotely hint that it is limiting its analysis.”<sup>183</sup>

Judge Wiener cited the opening language of the *Ellerth* opinion as support for the idea that the defense is all-encompassing:

We decide whether . . . an employee who refuses unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions.<sup>184</sup>

Because of the broad and inclusive language from the Court in the opening paragraph, the lack of limiting language in the two opinions, and the plain language of the two-pronged defense, some courts and judges have concluded that they “cannot read anything in *Ellerth/Faragher* that creates an exception to the two prong affirmative defense for those cases of single incident harassment that do rise to the level of actionable harassment,”<sup>185</sup> and have rejected the idea that factual distinctions justify modifying the defense.<sup>186</sup>

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181. *Indest II*, 168 F.3d 795 (5th Cir. 1999) (Wiener, J., specially concurring).

182. *Id.* at 798.

183. *Id.* The Supreme Court recently invoked this consideration in an analogous situation. See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443, 2448 (2013). In the context of the definition of a supervisor, the Court stated that “[t]here is no hint in either *Ellerth* or *Faragher* that the Court contemplated anything other than a unitary category of supervisors.” *Id.* at 2448. The Supreme Court seems to be suggesting that if the Court were to limit its analysis, or expected a rule to be applied differently from how the Court laid it out, it would have said something to that effect within the opinion.

184. *Indest II*, 168 F.3d at 799 (Wiener, J., specially concurring) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 746–47 (1998)).

185. *McCurdy v. Ark. State Police*, 375 F.3d 762, 775 (8th Cir. 2004) (Melloy, J., dissenting); see, e.g., *Indest II*, 168 F.3d 795 (Wiener, J., specially concurring); *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011).

186. See *supra* Part III.B.

### 3. Defense Can Reduce Damages

Courts in favor of applying both prongs of the defense also reject the argument that the *Ellerth/Faragher* defense is unfair to employers. Courts in favor of dropping the second prong argue that the defense, when applied in full, is unfair to employers who have done everything in their power to prevent and correct harassment because the defense nonetheless imputes liability if the employee reported the harassment.<sup>187</sup> However, because the defense was intended to be an “affirmative defense to liability *or* damages,”<sup>188</sup> courts applying both prongs of the defense counter-argue that the defense is not unfair because an employer’s successful fulfillment of the first prong of the defense partially mitigates damages imposed on the employer.<sup>189</sup>

Therefore, employers still have an incentive to fulfill the first prong of the defense to the fullest (preventing and promptly correcting any sexual harassment reported to them) in order to mitigate their damages.<sup>190</sup> Additionally, employers are incentivized to institute formal (and effective) reporting policies in the interest of preventing an actionable hostile work environment from developing in the first place.<sup>191</sup> As the EEOC has recognized, “an employer’s quick remedial action will often thwart the creation of an unlawful hostile [work] environment.”<sup>192</sup> In this light, the defense serves Title VII’s deterrent

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187. See *supra* Part III.A.3.

188. *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher v. City Boca Raton*, 524 U.S. 775, 807 (1998) (emphasis added); Grossman, *supra* note 87, at 707 (“[T]he best reading of these opinions with respect to the affirmative defense is that in some cases the defense should avoid liability and in some it should reduce damages.”).

189. One judge stated, “If a supervisor abuses his authority to commit a sufficiently severe act of harassment, the employer’s affirmative defense, if established, should serve to reduce the damages, but I don’t understand why it should always erase the tort completely.” *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, J., concurring). Judge Melloy agreed that “the taking of prompt and effective remedial action may mitigate damages; however, it does not create a complete defense to liability.” *McCurdy*, 375 F.3d at 776 (Melloy, J., dissenting).

190. Lawton, *supra* note 15, at 207.

191. EEOC GUIDELINES, *supra* note 162, at Part V-B n.46; Grossman, *supra* note 87, at 713 (“[T]he employer will not face liability where it responded promptly and effectively because its actions will stymie the maturation of the hostile environment.”). In addition, Judge Melloy believes that the concerns about unfairness are greatly exaggerated, as “many, if not [in] most cases, a single incidence of harassment, or . . . incidences that occur over less than an hour’s time, will not normally rise to the level of being sufficiently severe and pervasive to constitute actionable harassment.” *McCurdy*, 375 F.3d at 775 (Melloy, J., dissenting).

192. EEOC GUIDELINES, *supra* note 162, at Part V-B n.46.

purpose because the first prong of the defense motivates employers to have an effective anti-harassment policy and reporting mechanism that “encourage[s] employees to report harassing conduct before it [becomes] severe or pervasive.”<sup>193</sup> Therefore, some courts believe that the defense has a fair and useful purpose for employers, even if it does not completely immunize them from liability in some instances. The defense encourages employers to implement effective anti-harassment policies, which in turn rewards them by preventing severe actionable hostile work environments from occurring. Additionally, the defense works to mitigate damages on the rare occasion that an actionable claim does arise.

### C. *Alalade v. AWS Assistance Corporation*

The Seventh Circuit has not yet voiced its opinion in support of either side of the circuit split; however, a district court within the Seventh Circuit has recently spoken on the issue in *Alalade v. AWS Assistance Corp.*<sup>194</sup> In *Alalade*, the plaintiff was physically and sexually assaulted by her supervisor.<sup>195</sup> Four days later, Alalade submitted a written complaint to her employer, and as a result, her supervisor was terminated.<sup>196</sup> Because Alalade promptly reported the harassment, the court concluded that the employer could not satisfy the second prong of the *Ellerth/Faragher* defense and denied its motion for summary judgment.<sup>197</sup>

However, the case did not end there. Alalade’s employer requested that the judge reconsider his denial of summary judgment on the basis that other courts had held that employers are not required to satisfy the second prong of the defense in all cases.<sup>198</sup> Essentially, the employer argued that the court should apply a modified *Ellerth/Faragher* defense. The court acknowledged the existence of the circuit split and found this to be a compelling reason to reconsider the denial of AWS’s motion for summary judgment.<sup>199</sup> The employer in *Alalade* argued that the application of the second prong in this case was inappropriate because it

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193. Lawton, *supra* note 15, at 207 (citing *Ellerth*, 524 U.S. at 764).

194. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011).

195. *Id.* at 937; *see also supra* Part I.

196. *Alalade*, 796 F. Supp. 2d at 938.

197. *Id.*

198. *Id.* at 938. The opinion notes that this issue was raised for the first time in the motion for reconsideration. *Id.*

199. *Id.*

would result in strict liability for the employer, conflicting with the holding from *Meritor*.<sup>200</sup> The court reviewed *McCurdy*, *Indest I*, and *Harrison*, which were pertinent to the employer's arguments.<sup>201</sup> Despite these arguments and the opinions that supported them, the court upheld its previous denial of summary judgment for four main reasons.<sup>202</sup>

First, the court said that there is no reason for "single instance . . . cases . . . to be treated any differently" than ongoing harassment cases.<sup>203</sup> The court concluded that *Ellerth* and *Faragher* do not indicate that single-incident cases are to be treated as an exception, stating "[t]he Supreme Court has laid out a simple and easy to apply two-part test, and my job [as a judge] is to follow it."<sup>204</sup> Second, the *Alalade* court stated that the defendant's argument had essentially the same force in pervasive cases as in single-incident cases.<sup>205</sup> That is, an employee's report of the harassment can prevent the availability of the affirmative defense for the employer just as easily in single-incident cases as in ongoing cases, so the distinction courts have made between these two types of cases is irrelevant.<sup>206</sup> And in either situation, the existence of the affirmative defense is enough to thwart the argument that the court is imposing strict liability on employers.<sup>207</sup>

Third, the court concluded that the defendant's argument would "create[] an exception that swallows the *Ellerth/Faragher* rule."<sup>208</sup> The defendant argued that it should have to prove only the first prong of the defense, because in doing so it has shown that it did everything in its power to prevent and correct the harassment—namely, that it had an anti-harassment policy in place.<sup>209</sup> The court rejected this logic because endorsing it would "eviscerate rather than merely modify the rule."<sup>210</sup> Lastly, the court recognized that limiting the defense to its first prong would defeat Title VII's purpose of mitigating damages and encouraging

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200. *Id.* at 940.

201. *Id.* at 940–43.

202. *Id.* at 946. There has been no appeal filed in this case.

203. *Id.* at 940; *see also* Garrison, *supra* note 113, at 1149; Stewart, *supra* note 180, at 436 (noting that "the Supreme Court did not *purposely* create exceptions to the applicability of the *Ellerth/Faragher*'s second prong").

204. *Alalade*, 796 F. Supp. 2d at 940.

205. *Id.* at 944.

206. *Id.*

207. Stewart, *supra* note 180, at 436.

208. *Alalade*, 796 F. Supp. 2d at 944.

209. *Id.*

210. *Id.* at 944–45; Stewart, *supra* note 180, at 436.

employees to avoid further harm.<sup>211</sup> The court also noted that the full defense encourages employees to report the harassment early, which can prevent a hostile work environment from ever arising.<sup>212</sup>

As articulated in *Alalade*, the Seventh Circuit has yet to address the circuit split over the second prong of the *Ellerth/Faragher* defense.<sup>213</sup> Because the application of the defense is a “key issue” in determining liability in cases involving supervisor harassment,<sup>214</sup> it is an imminent and timely problem for the Seventh Circuit to resolve.

#### IV. SEVENTH CIRCUIT PREDICTIONS

Despite seeing thirteen supervisory harassment cases over the five-year period of 1998–2003,<sup>215</sup> the Seventh Circuit has yet to choose a side in this circuit split.<sup>216</sup> As harassment filings continue to rise,<sup>217</sup> it is increasingly likely that the Seventh Circuit will be faced with this issue again in the near future.<sup>218</sup> For this reason, practitioners should be informed about the split and the stance that the Seventh Circuit is likely to take on it.

In order to make a prediction about how the Seventh Circuit will come out on this split, this Comment examines three considerations.

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211. *Alalade*, 796 F. Supp. 2d at 945. One commentator notes that “the problem with dropping the second prong . . . is that it ignores a key player in the harassment context: the employee.” Colin Miller, *Everything But the Girl: Northern District of Indiana Opinion Sharpens Split over Nature of Affirmative Defense in Single-Instance Harassment Cases*, FEMINIST LAW PROFESSORS (July 27, 2011), <http://www.feministlawprofessors.com/2011/07/everything-girl-northern-district-indiana-opinion-sharpens-split-nature-affirmative-defense-single-instance-harassment-cases/>.

212. Garrison, *supra* note 113, at 1149; Stewart, *supra* note 180, at 436; Miller, *supra* note 211.

213. *Alalade*, 796 F. Supp. 2d at 938.

214. *Id.*

215. *See supra* note 16.

216. *Alalade*, 796 F. Supp. 2d at 938.

217. *See supra* note 12 and accompanying text.

218. The Seventh Circuit must accept all cases that are correctly appealed to it. *See* 28 U.S.C. § 1291 (2006); *The Appeals Process*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx> (last visited Nov. 23, 2013). It is more likely that the Seventh Circuit will be faced with this issue, *see Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*, (noting “[t]he large and ever-growing number of appeals”), available at <http://www.ca7.uscourts.gov/rules/handbook.pdf> 11 (2012), before the Supreme Court grants certiorari to decide it. The Supreme Court granted certiorari in only seventy-eight cases in the 2011–2012 term. *2011 Term Opinions of the Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=11> (last visited Nov. 23, 2013).

First, the Seventh Circuit adheres to precedent and hesitates to deviate from Supreme Court precedent without good reason.<sup>219</sup> Second, district court case law on the split shows that lower courts within the circuit are continuing to apply the standard in full.<sup>220</sup> Last, this Section argues that the Seventh Circuit's analysis and rationale in another recent circuit split, involving the *Vance* decision, is readily applicable and informative as to how the Seventh Circuit will decide this split.<sup>221</sup> This Section concludes with a prediction that the Seventh Circuit will reject the modified *Ellerth/Faragher* defense and will apply both prongs of the defense in all factual scenarios.

#### A. The Seventh Circuit and Precedent

While a relatively obvious point, consideration should be given to the Seventh Circuit's history of strict adherence to precedent. Although the Supreme Court's holdings serve as mandatory authority on each of the circuits,<sup>222</sup> some circuits have found justifications for deviating from the precedent established in *Burlington Industries, Inc. v. Ellerth*<sup>223</sup> and *Faragher v. City of Boca Raton*<sup>224</sup> nonetheless.<sup>225</sup> However, it seems unlikely that the Seventh Circuit will follow in their footsteps. In *Heath v. Varsity Corp.*,<sup>226</sup> the Seventh Circuit Court cautioned that “[t]o avoid heaping needless costs and delay on the litigants, a district court should apply existing precedents while explaining why it believes that innovation is in order. Courts of appeals that believe decisions of the Supreme Court to be mistaken are under identical marching orders.”<sup>227</sup>

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219. See *infra* Part IV.A.

220. See *infra* Part IV.B.

221. See *infra* Part IV.C.

222. David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 87 (1984) (“The proposition that lower federal courts must follow Supreme Court precedent evokes little controversy.”). However, Bratz suggests that lower federal courts occasionally find ways to skirt Supreme Court precedent, *id.*, a pertinent observation to the issue in this Comment.

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

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

225. See *supra* Part III.A.

226. *Heath v. Varsity Corp.*, 71 F.3d 256 (7th Cir. 1995).

227. *Id.* at 257 (citation omitted). Similar to its decision in *Heath*, the Seventh Circuit faithfully followed Supreme Court precedent in *Khan v. State Oil Co. (Khan I)*, 93 F.3d 1358 (7th Cir. 1996), *overruled by State Oil Co. v. Khan (Khan II)*, 522 U.S. 3 (1997), even though the court thought that the precedent was unsound and inconsistent. In *Khan I*, the Court followed Supreme Court precedent established in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), “despite all its infirmities, its increasingly wobbly, [and] moth-eaten foundations.” *Khan I*, 93

This directive also appears in *Gacy v. Welborn*,<sup>228</sup> where the Seventh Circuit noted: “Ours is a hierarchical judiciary, and judges of inferior courts *must* carry out decisions they believe mistaken.”<sup>229</sup>

This rationale suggests that the Seventh Circuit would be more likely to apply the *Ellerth/Faragher* defense in its entirety, as that is how the Supreme Court established the defense. If the Seventh Circuit had any reservations about the defense’s applicability or conformance with precedent, it would follow the defense as established by the Supreme Court but may include comments and critiques as dicta, as “[the court is] bound to follow a decision of the Supreme Court unless [it is] powerfully convinced that the Court would overrule it at the first opportunity.”<sup>230</sup> While the Seventh Circuit should give the “most respectful consideration to the decisions of the other courts of appeals,”<sup>231</sup> the Seventh Circuit will still likely decide to apply both prongs of the *Ellerth/Faragher* defense as the Supreme Court drafted it without more conclusive evidence that the Court intended to create an exception for single-incident cases.

#### B. District Courts Within the Seventh Circuit After *Ellerth/Faragher*

In the circuits that have decided to drop the second prong of the *Ellerth/Faragher* defense in some cases, generally the court of appeals of that circuit did so first and then district courts followed suit.<sup>232</sup> Additionally, in those instances, the court of appeals made the decision

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F.3d at 1363. Also, the court noted that “the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are leaving the overruling to the Court itself.” *Id.* The Supreme Court later commended the Seventh Circuit when it granted certiorari, for this case: “The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court’s prerogative alone to overrule one of its precedents.” *Khan II*, 522 U.S. at 20 (1997).

228. *Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993).

229. *Id.* at 310 (emphasis added).

230. *Colby v. J. C. Penney, Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

231. *Id.*

232. *See, e.g.*, *Van Alstyne v. Ackerley Grp., Inc.*, 8 F. App’x 147 (2d Cir. 2001) (applying a modified defense); *Watkins v. Prof’l Sec. Bureau, Ltd.*, 201 F.3d 439, No. 98–2555, 1999 WL 1032614 \*1 (4th Cir. Nov. 15, 1999) (per curiam) (unpublished table opinion) (adopting a modified defense); *Cajamarca v. Regal Entm’t Grp.*, 863 F. Supp. 2d 237 (E.D.N.Y. 2012) (adopting *Van Alstyne*’s modified approach); *Yerry v. Pizza Hut of Se. Kan.*, 186 F. Supp. 2d 178 (N.D.N.Y. 2002) (adopting *Van Alstyne*’s modified approach); *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153 (D. Md. 2000) (adopting *Watkins*’s modified approach); *Brown v. Henderson*, 155 F. Supp. 2d 502 (M.D.N.C. 2000) (adopting *Watkins*’s modified approach).

to drop the second prong soon after the *Burlington Industries, Inc. v. Ellerth*<sup>233</sup> and *Faragher v. City of Boca Raton*<sup>234</sup> decisions came down.<sup>235</sup> Such patterns are not found within the Seventh Circuit. While the Seventh Circuit has stayed silent on this circuit split, district courts within the circuit have overwhelmingly continued to apply both prongs of the *Ellerth/Faragher* defense.<sup>236</sup> One district court has even advocated for the application of both prongs of the defense<sup>237</sup> despite a lack of clear directive from the Seventh Circuit.

The first time a district court within the Seventh Circuit encountered the issue of vicarious liability for supervisor harassment, post-*Ellerth* and *Faragher*, was in *Fall v. Indiana University Board of Trustees*.<sup>238</sup> *Fall* involved a single incident of severe harassment in which a chancellor of a university sexually assaulted an employee in his office.<sup>239</sup> *Fall* reported the harassment three months later.<sup>240</sup> The court recited the *Ellerth/Faragher* defense exactly as stated by the Supreme Court and applied both prongs to the facts at hand.<sup>241</sup> The court denied the defendant's motion for summary judgment on the grounds that there was a genuine issue of material fact as to whether the plaintiff unreasonably failed to take advantage of the defendant's corrective opportunities or to otherwise avoid harm.<sup>242</sup> Although this case involved a single, severe incident of sexual harassment of the kind some courts would consider unavoidable by the employer and a case for the modified defense, the district court did not hesitate in applying both

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

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

235. The *Ellerth* and *Faragher* cases were decided June 26, 1998. *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775. The Fifth, Eleventh, and Fourth Circuits deviated from the defense in 1999. See, e.g., *Watkins*, 201 F.3d 439, 1999 WL 1032614; *Indest I*, 164 F.3d 258 (5th Cir. 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999).

236. See, e.g., *Stanfield v. Dart*, No. 10C6569, 2012 WL 6720433 at \*6–9 (N.D. Ill. Dec. 27, 2012); *Mueller v. McGrath Lexus of Chi.*, No. 02C0021, 2003 WL 21688230, at \*5, \*9 (N.D. Ill. July 17, 2003); *Finnane v. Pentel of Am., Ltd.*, No. 98C5187, 99C0189, 2000 WL 288437, at \*10–11 (N.D. Ill. Mar. 14, 2000).

237. See *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011).

238. *Fall v. Ind. Univ. Bd. of Trs.*, 12 F. Supp. 2d 870 (N.D. Ind. 1998).

239. *Id.* at 873.

240. *Id.* at 884.

241. *Id.* at 876, 880–84.

242. *Id.* at 884. The court held that because the plaintiff had waited three months before reporting the harassment, it was unclear as to whether she had reasonably taken advantage of the employer's reporting mechanisms. *Id.* Ultimately, a jury awarded the plaintiff \$800,000 in punitive damages and \$5,157 in compensatory damages. *Fall v. Ind. Univ. Bd. of Trs.*, 33 F. Supp. 2d 729, 733 (N.D. Ind. 1998).

prongs of the defense.<sup>243</sup>

In a more recent case, the Northern District Court of Illinois applied both prongs of the *Ellerth/Faragher* defense to an incident of sexual harassment at a sheriff's office.<sup>244</sup> In *Stanfield v. Dart*,<sup>245</sup> a supervisor called the plaintiff into his office on four occasions for massages and on one of those occasions sexually assaulted her.<sup>246</sup> A few months after this incident, Stanfield reported the conduct to a sexual harassment coordinator who encouraged her to file a written complaint, which she did eight months after the supervisor began harassing her.<sup>247</sup> The district court applied both prongs of the *Ellerth/Faragher* defense in full.<sup>248</sup> The question of employer liability in this case revolved around the application of the second prong—whether the plaintiff had correctly utilized her employer's reporting mechanisms.<sup>249</sup> The court stated that a plaintiff "satisf[ies] her obligation to avoid the harm" when she "adequately alert[s] her employer to the harassment," which the court believed she did in this case by filing a written formal complaint in compliance with the employer's reporting process.<sup>250</sup> Again, the district

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243. A district court within the Seventh Circuit encountered this issue again in *Finnane v. Pentel of America, Ltd.*, No. 98C5187, 99C0189, 2000 WL 288437 \*1 (N.D. Ill. Mar. 14, 2000). The court considered whether vicarious liability was appropriate for two instances of supervisory harassment consisting of unwanted touching taking place in the same night. *Id.* at \*6. The court laid out the defense as it was crafted by the Supreme Court and ultimately decided that the employer was entitled to the affirmative defense because the employee failed to use the employer's harassment reporting policy. *Id.* at \*7, \*10–11. Liability in this case revolved around the application of the second prong; however, the court applied both prongs of the defense and did not mention the possibility of a modified defense in which the second prong was inapplicable. *Id.* at \*10–11.

244. *Stanfield v. Dart*, No. 10 C 6569, 2012 WL 6720433, at \*1, \*6 (N.D. Ill. Dec. 27, 2012).

245. *Stanfield*, 2012 WL 6720433, at \*1.

246. *Id.*

247. *Id.* at \*1–2.

248. *Id.* at \*5–10.

249. *Id.* at \*8–9.

250. *Id.* at \*9. Although waiting an extended period of time before filing a complaint can sometimes constitute an unreasonable delay in reporting, in this case the employer's harassment policy gave victims 365 days to file a report, so Stanfield's complaint eight months after the first incident was within that window. *Id.* at \*2, \*9. In a contrasting case, a district court from the Seventh Circuit held in *Mueller v. McGrath Lexus of Chicago*, that the employer was entitled to the affirmative defense after an employee reported receiving sexually explicit phone calls from her supervisor on two occasions. *Mueller v. McGrath Lexus of Chi.*, No. 02C0021, 2003 WL 21688230, at \*2, \*10 (N.D. Ill. July 17, 2003). The employee reported the harassment, leading the employer to meet with the harasser and institute a "zero tolerance policy" after which the harassment ceased, but the victimized employee quit a few months later. *Id.* at \*2–4 (internal quotation marks omitted). The court

court did not question the use of both prongs of the defense and emphasized that an employee's report of harassment was enough to satisfy the second prong.

Therefore, the only district court case from the Seventh Circuit that has directly addressed the circuit split over the second prong of the defense is *Alalade v. AWS Assistance Corp.*<sup>251</sup> The other district court opinions from this circuit that have encountered the issue of vicarious liability in single-incident cases have applied both prongs of the *Ellerth/Faragher* defense without questioning the defense's fairness or applicability. This pattern may be persuasive for the Seventh Circuit when it first faces this issue.<sup>252</sup> It may also be relevant that the Seventh Circuit has remained silent on this issue up until this point. This silence could be implicit approval of the district court's application of applying both prongs of the *Ellerth/Faragher* defense in all instances.

### C. Analogy to the Recently Resolved Split in *Vance v. Ball State University*

Recently, the Seventh Circuit weighed in on another circuit split regarding the *Ellerth/Faragher* defense: the split over the definition of supervisor. The Circuit's reasoning in that split provides some guidance as to how the Seventh Circuit would resolve the circuit split over the second prong of the *Ellerth/Faragher* defense. Regarding the recently resolved circuit split, the Seventh Circuit determined the definition of

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applied the second prong of the defense and held that the plaintiff had unreasonably failed to take advantage of her employer's corrective opportunities by quitting her job; thus, the employer was not liable. *Id.* at \*7, \*9–10. Although this court applied the *Ellerth/Faragher* defense as a complete defense to liability, the Supreme Court designed the defense to be a "defense to liability or damages." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). It appears that *Mueller* would have been an appropriate case for the affirmative defense to limit damages but not function as a complete bar to liability. The court could have awarded the plaintiff damages for the sex harassment, as she immediately reported it, thus fulfilling the second prong of the defense. One commentator suggests that using the defense as a complete bar to liability in all situations is a way for lower courts to appear as if they are applying the full defense while actually subtly modifying it. *See Novak, supra* note 158, at 223–24. It is unclear whether this was the court's intention in *Mueller*.

251. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011); *see also supra* Part III.C.

252. Similarly, the district court's opinion in *Keefer* likely influenced the Eighth Circuit's decision in *McCurdy*. *See supra* notes 112, 116, 126–28 and accompanying text. This may also come to be the case in the Ninth Circuit where the district court's opinion in *Asia Pacific Hotels* could influence the court of appeals in the future. *See EEOC v. Asia Pac. Hotels, Inc.*, No. 10-00002, 2011 WL 3841601 (D. N. Mar. I. Aug. 26, 2011).

supervisor by looking both to the plain language and intent of Title VII, but also to Title VII's practical purposes and the interpreting case law.<sup>253</sup> Applying that same logic to this circuit split over the application of the affirmative defense in single-incident cases, it is likely that the Seventh Circuit would come out in favor of applying the defense in its entirety in order to stay true to the spirit behind the harassment laws.

Until June of 2013, a disagreement regarding the proper definition of "supervisor" for the purposes of Title VII was splitting the courts. Whether a harassing employee is a supervisor or not is a crucial distinction for the purposes of determining employer liability.<sup>254</sup> If a supervisor committed the harassment, the employer can avoid liability only by proving both prongs of the *Ellerth/Faragher* defense.<sup>255</sup> If the harasser was a co-worker, the employee can prevail by showing that the employer was negligent in preventing the harassment.<sup>256</sup> Thus, a court's interpretation of the definition of supervisor can greatly affect the outcome of a case.<sup>257</sup>

Before the Supreme Court clarified the split in its most recent term, courts generally took one of two approaches to the definition of supervisor. The more defined approach was that an employee is a supervisor if he or she "has the power to hire, fire, demote, promote, transfer, or discipline the victim."<sup>258</sup> The more "open-ended" definition was that a person is a supervisor if he or she has the power to direct another's daily activities.<sup>259</sup> The Seventh Circuit fell into the former group, the definition that was ultimately upheld by the Supreme Court.<sup>260</sup>

The Seventh Circuit has consistently held that an employee is a supervisor only if that person had the power to "*directly* affect the terms and conditions" of other employees' work.<sup>261</sup> Thus, the Seventh Circuit generally deems a person a supervisor if that person has the authority to

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253. *Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011).

254. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

255. *Id.*

256. *Id.*

257. *See id.*; *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

258. *Vance*, 133 S. Ct. at 2443.

259. *Id.* at 2443.

260. *Id.* at 2439.

261. *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004) (citing *Parkins*, 163 F.3d at 1034).

“hire, fire, demote, promote, transfer, or discipline an employee.”<sup>262</sup> The Seventh Circuit made this final determination on the definition of supervisor by looking at the plain language of Title VII, the inherent meaning behind Title VII, and the relevant interpreting case law.<sup>263</sup> Although the definition of supervisor is not laid out in Title VII, the Seventh Circuit in *Parkins v. Civil Constructors of Illinois, Inc.*<sup>264</sup> discerned its meaning by examining the underlying purposes and policy guiding Title VII.<sup>265</sup> The court recognized that heightened employer liability exists for supervisory harassment because the employer has entrusted the supervisor with more power than the average employee.<sup>266</sup> For that reason, it was clear to the court that “the touchstone for determining supervisory status is the extent of authority possessed by the purported supervisor” and that authority is explicit when the employee can “affect the terms and conditions” of others’ employment.<sup>267</sup>

The Seventh Circuit’s decision on the supervisor circuit split has similarities to the split currently at issue over the second prong of the *Ellerth/Faragher* defense. Its ultimate decision and corresponding rationale in the resolved split suggest that the Seventh Circuit would side with the courts that refuse to drop the second prong in any circumstances. In the supervisor split, the term at issue was not explicitly defined. Therefore, the court had to determine the relative importance of available sources. The court chose to look closely at the plain language of Title VII, the policies guiding it, the common law of agency that inspired it, and the case law—*Burlington Industries, Inc. v. Ellerth*<sup>268</sup> and *Faragher v. City of Boca Raton*<sup>269</sup>—that interpreted it.<sup>270</sup>

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262. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002).

263. *See Parkins*, 163 F.3d at 1032–33.

264. *Parkins*, 163 F.3d 1027.

265. *Id.* at 1033.

266. *Id.*

267. *Id.* at 1033–34. The Supreme Court upheld the Seventh Circuit’s approach. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). The Court emphasized that the *Ellerth/Faragher* defense was crafted to be “workable,” and adopting the more liberal definition of supervisor would be “murky” and be difficult to consistently apply. *Id.* at 2448–49. The Court also noted that the *Ellerth/Faragher* defense was designed to appropriately and fairly take into account the interests of both the employer and the employee, which the Seventh Circuit’s definition did more effectively than the competing approach. *Id.* at 2444.

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

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

270. *Parkins*, 163 F.3d at 1033.

The Seventh Circuit noted that the Supreme Court imputes heightened liability on employers in supervisory harassment cases under the *Ellerth/Faragher* defense because the law of agency suggests that the tort of harassment is aided by the employer's decision to place him in a position of authority.<sup>271</sup> The Seventh Circuit strove to stay true to the spirit of that law behind Title VII and held that a person must truly be in a position to be aided by his status in order to be a supervisor; that is, he must have the heightened powers that a supervisor generally has.<sup>272</sup>

Similarly, the Seventh Circuit will likely use the spirit and principles behind Title VII and the interpreting case law to make a conclusive decision on the circuit split here. *Ellerth* and *Faragher* are silent as to whether the affirmative defense excludes single-incident cases of harassment.<sup>273</sup> The Seventh Circuit should accordingly interpret the rule in light of the plain language and spirit that inspired Title VII and the defense and the interpreting case law.<sup>274</sup> The Seventh Circuit has yet to decide one way or the other on the circuit split, so it may first look to district court opinions for guidance.<sup>275</sup> But even if the court of appeals does not accord value to the district court opinions, the plain language and spirit inspiring Title VII and the affirmative defense should appear clear to the Seventh Circuit. The rule uses the word “and” between its two prongs and strives to represent a workable balance between the interests of the employer and the employee.<sup>276</sup>

Interpreting the rule differently in single-incident cases of harassment would be completely contrary to the plain language of the defense and the intent of Title VII. The Seventh Circuit would have to reject the policy inspiring Title VII and affirmatively state that the interests of the employer are superior to the interests of the employee in single incidents of harassment in order to find that the second prong should be dropped. Given the Seventh Circuit's rationale in the supervisor split, it is unlikely that the Seventh Circuit would be willing to completely reject both the plain language and spirit of the law to hold that there is a separate standard for single incidents of harassment.

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271. *Id.*

272. *See id.* at 1033–34.

273. *See supra* Parts II.B, III.

274. *See, e.g., Parkins*, 163 F.3d at 1033.

275. *See supra* Part IV.B.

276. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2444 (2013); *Shachter, supra* note 104, at 582.

#### D. Predictions

Based on these factors, it is likely that the Seventh Circuit will side with the Tenth Circuit in this split and apply both prongs of the *Ellerth/Faragher* defense in all relevant cases. The three main arguments advocated by courts in favor of dropping the second prong in select cases are: fairness to employers,<sup>277</sup> adherence with *Meritor Savings Bank, FSB v. Vinson*'s<sup>278</sup> prohibition of strict liability,<sup>279</sup> and the factual distinctions from the *Burlington Industries, Inc. v. Ellerth*<sup>280</sup> and *Faragher v. City of Boca Raton*<sup>281</sup> cases.<sup>282</sup> However, it is unlikely that the Seventh Circuit will find these arguments persuasive and instead will find that the defense, as crafted by the Supreme Court, is binding precedent to be followed in all cases.

First, the Seventh Circuit has come out in favor of adhering to Supreme Court precedent unless it is absolutely sure that the Supreme Court would overrule its own holding if given the chance.<sup>283</sup> That finding is not apparent in this split. Second, the circuit should look to various district court holdings on this issue. The circuit will find that, uniformly, district courts within the Seventh Circuit have continued to apply both prongs of the *Ellerth/Faragher* defense as articulated by the Supreme Court.<sup>284</sup> In fact, the court in *Alalade v. AWS Assistance Corp.*<sup>285</sup> has expressly stated that applying both prongs of the defense is the proper outcome. Third, as evidenced by the Seventh Circuit's rationale in *Vance v. Ball State University*<sup>286</sup> and the preceding cases that interpreted the definition of supervisor, the circuit will first likely examine the plain language and reasoning behind the rule. As the rule is clear, containing the words "and" and "necessary," it would be unusual for the circuit to find that there should be a modified affirmative defense in different factual scenarios. Additionally, the circuit will look to the underlying policy and spirit behind the rule. Because the Supreme Court created the defense in order to promote reasonableness on behalf of the

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277. See *supra* Part III.A.3.

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

279. See *supra* Part III.A.2.

280. *Ellerth*, 524 U.S. 742.

281. *Faragher*, 524 U.S. 775.

282. See *supra* Part III.A.1.

283. See *supra* Part IV.A.

284. See *supra* Part IV.A.

285. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936 (N.D. Ind. 2011).

286. *Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011).

employer *and* the employee, the circuit should not deviate from this precedent in order to create an alternative, more “fair” rule for employers.

#### V. WHAT *SHOULD* THE SEVENTH CIRCUIT DO?

The Seventh Circuit should continue to apply both prongs of the *Ellerth/Faragher* defense in all instances of supervisory harassment. First, as the Supreme Court has noted, the rule provides a proper balance between the interests of the employer and the employee.<sup>287</sup> The employer is able to avoid strict liability per *Meritor Savings Bank, FSB v. Vinson*<sup>288</sup> purely by the existence of the defense.<sup>289</sup> The defense recognizes that employers do not want to be liable for their supervisor’s harassment of which they have no control over. However, this must be balanced with the fact that the employee wants, and needs, retribution for his or her harm. Additionally, the employee wants his or her employer to exercise caution when placing people in positions of authority and to continually oversee what is happening in its workplaces. Based on these considerations, the Court created the *Ellerth/Faragher* defense in order to promote reasonableness and responsibility on the part of both the employer and employee.<sup>290</sup> The employer must have anti-harassment policies and procedures in place, but at the same time, employees must timely report harassment if it happens to them. The expectations placed on employees under this defense are in part inspired by the tort of avoidable consequences,<sup>291</sup> but ultimately work to benefit the employer as well. An employee should not be able to hold his or her employer liable for supervisory harassment that continued for an extended period of time if the employer was never put on notice of the harassment—this is why the defense requires employee reporting under the second prong. Therefore, the defense, as crafted, adequately represents both the interests of the employer and employee.

Second, if the Seventh Circuit adopted a separate rule in single-incident supervisory harassment cases, it would go against the Supreme

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287. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443–44 (2013).

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

289. As one commentator noted: “[T]he *Ellerth* majority designed the affirmative defense within the parameters of the *Meritor* precedent. Moreover, the affirmative defense, by nature, erects a barrier to strict liability.” Shachter, *supra* note 104, at 582.

290. See *supra* notes 63–67, 90–97 and accompanying text.

291. *Murr*, *supra* note 87, at 609–11.

Court's desire to have a workable standard that could be "readily applied" in cases of employer liability.<sup>292</sup> Implementing separate standards in single-incident cases presents the problem of determining which standard to apply, and when. In some cases it may be clear when harassment is confined to a single incident, such as a rape that occurred one time. However, courts have already begun to blur the line between what is literally a single incident and what can be generalized as a single incident.<sup>293</sup> This extension of a modified *Ellerth/Faragher* defense to cases that are not obviously single incidents is disturbing in that the practice suggests that courts may begin to abandon the second prong altogether. This is a slippery slope, one that the Seventh Circuit should avoid at all costs.<sup>294</sup>

Third, the second prong of the defense serves as a useful check on the first prong—the existence of an anti-harassment policy. In recent times, most employers are smart enough to have an anti-harassment policy in place; however, in reality the policy may be useless. For example, a policy may exist but may not be distributed or accessible to all employees, or the policy may provide only one illogical method of reporting harassment.<sup>295</sup> In these cases, if the employer invokes the *Ellerth/Faragher* defense, the employer may be able to prove the first and second prong. However, in response to the second prong, the employee-victim will be able to raise issues relating to the deficiency of the reporting mechanism. In that way, the second prong serves as a check on the practicality of the anti-harassment policy and brings these issues to the forefront in court. A policy may look good on paper, and

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292. *Vance*, 133 S. Ct. at 2449.

293. See *supra* note 112; see also *infra* note 304 and accompanying text.

294. Additionally, there is support for the argument that the second prong of the defense functions exactly the same in both single-incident and ongoing cases and that an endorsement to drop the prong in some cases is an endorsement to drop the prong in all cases. The court in *Alalade* noted that regardless of whether harassment is ongoing or confined to a single incident, an employee's "quick action prevents the employer from satisfying *Ellerth/Faragher's* second prong." *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 944 (N.D. Ind. 2011). The court argued that the application of a modified defense "creates an exception that swallows the *Ellerth/Faragher* rule. . . . [T]he reasoning endorsed by [the employer] actually supports dropping the second prong altogether whenever the employer satisfies the first prong." *Id.*

295. As was the case in *Faragher v. City of Boca Raton*, the employer had an anti-harassment policy, but it was not distributed to all employees. *Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998). Another example of a policy being unusable would be where the policy requires reporting to the company's human resources manager, but that manager is the one committing the harassment.

may even pass the first prong of the *Ellerth/Faragher* defense, but the existence of the second prong gives the employee an opportunity to show the court that the policy was insufficient. This alone is a worthy purpose of the second prong.

Fourth, the bottom-line is that the burden and cost of the supervisory harassment tort should fall on the employer rather than on the employee. If the defense works out perfectly, wherein each party does their respective duty, the defense is clear that the employer remains responsible.<sup>296</sup> Some courts fear that this is unfair to employers—they argue that an employer should not be liable merely because an employee reports the harassment.<sup>297</sup> However, there are many reasons why this result is nonetheless appropriate and reasonable. The employer made the decision to promote the person to the position of supervisor in the first place,<sup>298</sup> in order to act vicariously on the part of the employer.<sup>299</sup> Being a supervisor comes with power. Employers need to recognize that fact and exercise caution when hiring supervisors. Employers should also continually do their due diligence to oversee how their supervisors function in the workplace, both through the supervisor's professional work and through their interactions with employees. Additionally, an employer can much more easily bear the cost of the tort (payment to the plaintiff) than the victim, who will be forced to suffer her harm without reparation.<sup>300</sup> It is the cost of doing business—employers should be responsible for any harm that they

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296. See Hébert, *supra* note 23, at 717; Shachter, *supra* note 104, at 582.

297. See, e.g., *Watkins v. Prof'l Sec. Bureau, Ltd.*, 201 F.3d 439, No. 98-2555, 1999 WL 1032614, at \*5 n.16 (4th Cir. Nov. 15, 1999) (per curiam) (unpublished table decision); *EEOC v. Asia Pac. Hotels, Inc.*, No. 10-00002, 2011 WL 3841601, at \*5 (D. N. Mar. I. Aug. 26, 2011); Lawton, *supra* note 15, at 245.

298. Hébert, *supra* note 23, at 717 (noting that it was the choice of the employer to “put a sexual harasser in a position of authority that facilitated the harassment”).

299. Grover notes: “In most discrimination cases, supervisors are quintessentially agents of the employer; a supervisor who discriminates in the course of taking an employment action that is his or her job to take, is necessarily operating as the agent of the employer.” Susan Grover, *After Ellerth: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 810 (2002).

300. See Garrison, *supra* note 113, at 1152 (citing Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 757 (1999)) (recognizing “Title VII’s policy of allowing recovery from the ‘deep[er]-pocket[ed]’ employer”); Shachter, *supra* note 104, at 583–84 (“[E]mployers should be viewed as . . . the superior spreader or insurer of the costs of discrimination . . . [and] the employer is in the superior position to . . . spread the risk more evenly across society.”(internal quotation marks omitted)).

directly, or indirectly, cause.<sup>301</sup>

Hence, courts that apply a modified *Ellerth/Faragher* defense in certain situations are ignoring the plain language and intent of the rule at the expense of the innocent employee-victims. Employees deserve to be protected in their workplaces, and the reality is that sometimes a mere anti-harassment policy does not ensure this protection. Employers need to be responsible for whom they promote to the position of supervisor and be knowledgeable about what is happening in their workplaces. The Seventh Circuit should examine the spirit and policy considerations behind Title VII and recognize that the Supreme Court acknowledged all of the arguments offered by courts who dropped the second prong, yet the Court chose to reject them all in favor of crafting a straightforward standard.

#### VI. CONCLUSION

In creating the *Ellerth/Faragher* affirmative defense, the Supreme Court wanted to avoid imposing strict liability on employers while still requiring more than the negligence standard that courts had been employing. Some courts are not satisfied with this defense, arguing that in single-instance cases it fails to avoid strict liability and is unfair to employers.<sup>302</sup> Since the modified *Ellerth/Faragher* defense appeared in single-instance cases, some courts have traveled down the slippery slope and expanded the rationale even further to rapid-onset, incipient,<sup>303</sup> and even ongoing cases.<sup>304</sup> Other courts and circuits have rejected this

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301. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (“[O]ne might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.”); Harper & Flynn, *supra* note 57, at 253; Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961).

302. See *supra* Parts III.A.2–3.

303. See *supra* notes 112–16 and accompanying text.

304. See, e.g., *Van Alstyne v. Ackerley Grp., Inc.*, 8 F. App’x 147 (2d Cir. 2001) (plaintiff was harassed for eight months and reported the harassment, but employer was entitled immunity because it took swift action in responding to the plaintiff’s complaint); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1362–63, 1367–69 (11th Cir. 1999) (Barkett, J., concurring specially) (plaintiff suffered harassment for over a year, but the concurring judge advocated for a modified defense); *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 157, 164 (D. Md. 2000) (plaintiff suffered inappropriate comments and physical contact on a number of occasions, but employer was immune from liability for taking prompt remedial action upon plaintiff’s complaint); *Brown v. Henderson*, 155 F. Supp. 2d 502 (M.D.N.C. 2000) (plaintiff was harassed for over a year, but the employer could avail itself of the defense because it promptly responded to the harassment).

modified defense, instead holding that the Supreme Court was clear in crafting a defense that considered the interests of the employer and employee and which was intended to apply in all cases.<sup>305</sup> The Seventh Circuit has not yet voiced its opinion in support of either side.<sup>306</sup>

Overall, it is more likely that the Seventh Circuit will side with the Tenth Circuit in applying both prongs of the *Ellerth/Faragher* defense than with courts such as the Eighth and Fifth Circuits in dropping the second prong in certain cases. First, the Seventh Circuit is reluctant to deviate from precedent unless there is a clear reason to do so.<sup>307</sup> The Supreme Court has established precedent in the *Burlington Industries, Inc. v. Ellerth*<sup>308</sup> and *Faragher v. City of Boca Raton*<sup>309</sup> cases, and unless the Seventh Circuit is willing to completely disregard the plain language and intent of the rule, it will likely apply both prongs of the rule going forward. Second, the circuit may look to district courts' decisions following the appearance of the split. District courts within the Seventh Circuit have consistently continued to apply both prongs of the defense, with one court in *Alalade v. AWS Assistance Corp.*<sup>310</sup> explicitly addressing the issue and arguing that all courts should be applying both prongs of the defense. Third, an analogy to another circuit split regarding sex harassment law suggests that the Seventh Circuit will look to the plain language of the rule and Title VII as well as invoking the policy and meaning behind them. For these reasons, the Seventh Circuit will likely come out in support of courts that have refused to drop the second prong in single-incident cases.

This conclusion is the right conclusion. The defense adequately balances the interests of the employer versus the employee and comes out appropriately in favor of the employee when both parties act responsibly.<sup>311</sup> The burden of the tort should not fall on the innocent

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305. See *supra* Parts III.B.1–2.

306. *Alalade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 938 (N.D. Ind. 2011).

307. See *supra* Part IV.A.

308. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

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

310. *Alalade*, 796 F. Supp. 2d 936.

311. See Grossman, *supra* note 87, at 708 (“Applied correctly, the *Faragher* and *Ellerth* rule should result in vicarious liability for the employer under some circumstances (a single, severe act of harassment) regardless of the fact that the employer may have responded adequately to stop the harassment and prevent further occurrences.”); Hébert, *supra* note 23, at 717 (“[The defense is] the appropriate allocation of liability between an employee who has been sexually harassed and the employer who has put a sexual harasser in a position of authority that facilitated the harassment.”); Shachter, *supra* note 104, at 582 (“[T]he

employee, especially when the employer is not really innocent. The employer hired the offender and made that individual a supervisor—the employer needs to be accountable for that. Additionally, the standard, as defined in *Ellerth* and *Faragher*, is easily applicable. If the Seventh Circuit were to begin applying different standards depending on different factual situations, it will inevitably run into a problem other courts are facing: what exactly is a single incident of harassment, and how is it recognized? Harassment is harassment, whether it happens one time or many times, and employers have to take responsibility for harassment when it takes place in their workplaces. The Seventh Circuit needs to promote this responsibility by refusing to drop the second prong of the *Ellerth/Faragher* defense in single-incident cases so that employees like Ms. Alalade do not continue to feel as if they are being victimized by both their supervisor *and* their employer.

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affirmative defense enables an employee's reasonable behavior (satisfaction of the second prong) to trump an employer's reasonable behavior (satisfaction of the first prong), resulting in employer liability.").

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