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Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors

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EASY AS P.I.E.: AVOIDING AND PREVENTING VICARIOUS LIABILITY FOR SEXUAL HARASSMENT BY SUPERVISORS

Blair T. Jackson

Kunal Bhatheja+*

ABSTRACT

In 1998, the Supreme Court in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton set forth a two-pronged affirmative defense for employers to avoid vicarious liability for sexual harassment by supervisors. Under both Ellerth and Faragher, when no tangible employment action is taken, an employer can raise an affirmative defense to liability or damages by establishing two prongs: “(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.”

The Authors contend that careful analysis of the cases involving the Ellerth–Faragher affirmative defense evinces that satisfying both prongs can actually be as “easy as P.I.E.” if the employer has a sufficient antiharassment policy, it sufficiently implements that policy, and it sufficiently enforces that policy.

Specifically, a sufficient policy contains an adequate definition of the proscribed behavior, assurances that employees who make complaints of harassment or provide information related to such complaints will be protected

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+ Special thanks to research assistants Nicholas Kamenjarin and Leigha Landry Wanczowski for their hard work, dedication, and patience.

against retaliation, and reasonable complaint procedures that provide accessible avenues of complaint and identify to whom harassment need be reported. Implementation is sufficient if there is adequate dissemination of and training regarding the policy, and employees are required to sign that they have read the policy, understand it, and agree to abide by it. Enforcement is sufficient if the behavior complained of is properly investigated and the harassing behavior is promptly corrected.

This Article provides an in-depth analysis of the three P.I.E. components, how they affect both prongs of the affirmative defense, and how their sufficiency and interplay with each other can, in a very real way, not only shield a company from vicarious liability for sexual harassment by its supervisors, but also prevent the underlying sexual harassment. After analyzing the conditions under which courts have found each of these three P.I.E. components sufficient, the Authors offer practical solutions using a fictional company, Noble Corporation, to illustrate how the P.I.E. model works.

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“A company’s policy manual is about as useful as Morton’s Steakhouse catering a PETA convention.” “Madonna is more relevant than my company’s code of ethics.”¹ “‘Helpful employee handbook’ is an oxymoron.” Whatever colorful manner in which we express our views toward a company’s policy manual or code of ethics, a pejorative undertone dominates.

We have little reason to regard, let alone champion, what many consider a public-relations move at best.² Companies in the past have used corporate codes of conduct in such a manner.³ But like anything else, corporate policy manuals are what we make of them. And when it comes to defending against vicarious liability in sexual harassment cases, policy manuals can be invaluable.

Imagine Noble Corporation, a social media-based advertising company started by a brother and sister in Chicago 10 years ago. Noble Corporation has about 1,000 employees throughout its seven offices located across the East Coast and Midwest. Like all businesses, Noble

1. The Authors of this Article express no opinion regarding the *Material Girl*.

2. See, e.g., Haley Revak, Note, *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, 63 HASTINGS L.J. 1645, 1667 (2012) (“[C]odes of conduct that have no efficacy . . . are a boon for public relations and corporate image but create no real obligation on the corporation . . .”).

3. See *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 685 (9th Cir. 2009) (rejecting all of the plaintiffs’ attempts to hold Wal-Mart liable based on its code of conduct).

Corporation is in the business of making and saving money, but it is also part of the company's vision to promote a comfortable, safe, and happy workplace.

This Article will show how an effective anti-sexual harassment policy and program can help achieve all these objectives by not only preventing a company's vicarious liability in sexual harassment cases, but by preventing the underlying harassment as well. Parts I and II of this Article show the reader how preventing vicarious liability for sexual harassment by a supervisor is as easy as P.I.E.: an effective *policy* (P), the *implementation* of that policy (I), and the *enforcement* of that policy (E).

Parts III and IV of this Article revisit Noble Corporation for practical examples of how thinking about the policy, its implementation, and its enforcement collectively advance the goals of preventing sexual harassment and subsequent liability.

I. SEXUAL HARASSMENT LAW

Title VII of the Civil Rights Act of 1964 bans employment discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁴ Two types of employment discrimination are covered under this provision: "so-called discrete acts of discrimination, such as 'termination, failure to promote, denial of transfer, or refusal to hire,' and acts that create a hostile workplace, which 'are different in kind from discrete acts,' and do not require tangible adverse employment actions."⁵

Additionally, Title VII makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."⁶ Discrimination claims under this provision are known as retaliation claims.⁷

4. 42 U.S.C. § 2000e-2(a)(1) (2012).

5. *Turner v. Saloon, Ltd.*, 595 F.3d 679, 683 (7th Cir. 2010) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114–15 (2002)).

6. 42 U.S.C. § 2000e-3(a).

7. *See, e.g., Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (10th Cir. 2013); *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013); *Turner*, 595 F.3d at 687. *See generally* B. Glenn George, *Revenge*, 83 TUL. L.

Although harassment is not specifically mentioned in Title VII, claims for harassment are analyzed as “hostile work environment” claims.⁸ A prima facie claim for hostile work environment based on sexual harassment requires plaintiffs to show “(1) [they were] subjected to unwelcome sexual conduct, advances, or requests; (2) because of [their] sex; (3) the acts were severe or pervasive enough to create a hostile work environment; and (4) there is a basis for employer liability.”⁹

In determining whether a basis exists to impute vicarious liability to an employer, courts apply different standards based on the type of employee involved in the proscribed behavior. When the hostile environment is created by nonsupervisory coemployees, courts will impose liability only if the employer knew or reasonably should have known of the conduct and failed to take prompt and appropriate corrective action.¹⁰

If nonemployees create the hostile environment, liability depends on (1) whether the employer had actual or constructive knowledge; (2) whether it took prompt and appropriate action; and (3) the degree of control or legal responsibility the employer has over the conduct of the offending nonemployees.¹¹

With respect to supervisory employees, the Supreme Court held that an employer was strictly liable for actionable hostile environment harassment “by a supervisor with immediate (or successively higher) authority over the employee.”¹² The Court reasoned that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them.¹³ Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.

However, the *Faragher v. City of Boca Raton* and *Burlington*

REV. 439, 441–43 (2008).

8. See, e.g., *Rester v. Stephens Media, LLC*, 739 F.3d 1127, 1131 (8th Cir. 2014); *Debord*, 737 F.3d at 650; *Turner*, 595 F.3d at 683–84.

9. *Turner*, 595 F.3d at 684 (citing *Lapka v. Chertoff*, 517 F.3d 974, 982 (7th Cir. 2008)).

10. 29 C.F.R. § 1604.11(d) (2013); see, e.g., *Bertsch v. Overstock.com*, 684 F.3d 1023, 1027 (10th Cir. 2012); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333–34 (4th Cir. 2003); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 62 (2d Cir. 1998).

11. 29 C.F.R. § 1604.11(e); see *EEOC v. Cromer Food Servs., Inc.*, 414 F. App’x 602, 606–07 (4th Cir. 2011) (surveying cases from several circuits).

12. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

13. See *Faragher*, 524 U.S. at 802–03.

Industries, Inc. v. Ellerth decisions did carve out an affirmative defense to counter the strict liability imposed on employers for the sexual harassment committed by their supervisors when no tangible employment decision was made. Under *Faragher–Ellerth*, when no tangible employment action is taken, an employer can raise an affirmative defense to liability or damages if it can establish the following two prongs: “(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.”¹⁴

With respect to raising this affirmative defense to vicarious liability in a sexual harassment claim under Title VII, a corporate code of ethics or conduct, or a policy manual, proves invaluable. A thorough review of case law reveals that using a code of conduct and its harassment policies to shield a corporation from vicarious liability for sexual harassment committed by its supervisors is as easy as P.I.E. There must be a *policy* in place containing the appropriate provisions, the policy must be sufficiently *implemented*, and the policy must be sufficiently *enforced*. The next Part examines the current state of the law with respect to these three factors and discusses how they can be used to create an anti-sexual harassment program that prevents not only vicarious liability but also sexual harassment in the workplace altogether.

II. P.I.E.

A. P for Policy

An insufficient policy will not automatically result in a court finding that an employer failed to take reasonable preventative measures.¹⁵ However, a sufficient policy will permit a court to make a strong presumption in favor of finding that the employer took such measures.¹⁶

14. *Id.* at 807; *Ellerth*, 524 U.S. at 765.

15. *See Faragher*, 524 U.S. at 807 (“[P]roof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance . . .”); *see also* *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1313–14 (11th Cir. 2001); *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 245 (4th Cir. 2000).

16. *See Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998) (stating that evidence from an employer that it “had disseminated an effective anti-harassment policy provides compelling proof of its efforts to prevent workplace harassment”); *see also Faragher*, 524 U.S. at 807 (suggesting that a suitable policy may be important in litigated cases); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (“[T]he

There is no bright-line rule for what a policy must include to be effective, but courts have found a policy insufficient when there is no definition of the proscribed conduct,¹⁷ no assurance against retaliation for reporting,¹⁸ no provision for the requirement of training,¹⁹ and no reasonable complaint process.²⁰ Courts have also stressed the importance of policies containing statements that prompt, corrective action will be taken after a complaint is reported,²¹ and that complaints will be kept confidential.²²

1. *Definition*

At a minimum, a sufficient policy must contain a definition of sexual harassment.²³ A good definition of sexual harassment can help establish both prongs under *Faragher–Ellerth*. Its importance in establishing the first prong should be obvious: how can an employer claim to have taken reasonable measures to prevent and correct sexual harassment when it does not put its employees on notice as to what conduct and behavior is proscribed?

For instance, in *Stricker v. Cessford Construction Co.*, the defendant offered the following as evidence of its sexual harassment policy:

To whom it may concern:

Joseph P. McGuire Ph.D has been appointed the Equal Employment Opportunity Officer for Cessford Construction Company. He will handle all complaints which allege discrimination

existence of an appropriate anti-harassment policy will often satisfy th[e] first prong [of the *Faragher–Ellerth* defense].”).

17. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 463 (5th Cir. 2013) (“[The employer] maintained a broad nondiscrimination policy [but] offered no specific guidance regarding sexual harassment.”).

18. *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1030–31 (N.D. Iowa 2000), *aff’d*, 9 F. App’x 557 (8th Cir. 2001).

19. *Id.* at 1030.

20. *See, e.g., id.* at 1031; *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334–35 (4th Cir. 2003); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541–42 (10th Cir. 1998).

21. *See, e.g., EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 434–35 (7th Cir. 2012); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (noting a policy contained a promise that appropriate action would be taken, but the employer did not follow through on that promise).

22. *See, e.g., Dunlap v. Spec Pro, Inc.*, 939 F. Supp. 2d 1075, 1087 (D. Colo. 2013); *Presley v. Pepperidge Farm, Inc.*, 356 F. Supp. 2d 109, 128 (D. Conn. 2005).

23. *See Stricker v. Cessford Constr. Co.*, 179 F. Supp. 2d 987, 1008 (N.D. Iowa 2001).

because of race, religion, sex, color, age, national origin, creed or disability.

This company is bound to live up to the provisions of the Civil Rights Act of 1964 and the current Executive Order relating to equal employment opportunity. Anyone who believes he or she has been discriminated against, should report this fact promptly to the assigned Company E.E.O. Officer.²⁴

The court found the policy “woefully inadequate” because the policy only referenced discrimination, and “the plaintiffs testified they understood [it] to mean unfair treatment in jobs because of race or some other characteristic, not ‘harassment.’”²⁵ The court found the plaintiffs’ interpretation “entirely reasonable.”²⁶

In the same vein, the absence of a proper definition of sexual harassment could preclude an employer from establishing the second prong because an employee might claim they did not follow the employer’s complaint process because they did not think the supervisor’s behavior constituted sexual harassment under the policy’s definition. When a definition does not define the conduct complained of, courts have been quick to find that the employer has failed to establish the second prong because the employee had a reasonable excuse for failing to report the behavior.²⁷

In *Smith v. First Union*, First Union had the following policy in place regarding sexual harassment:

It is First Union’s policy to prohibit sexual harassment of our employees. Sexual harassment includes any unwelcome offensive sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. This policy applies to management

24. *Id.* at 1007–08 (capitalization altered).

25. *Id.* at 1008–09.

26. *Id.* (quoting *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 245 (4th Cir. 2000) (internal quotation marks omitted)).

27. *See, e.g., id.* at 1010–11; *see also* *Lacey v. State*, 768 N.W.2d 132, 138 (Neb. 2009) (finding a plaintiff’s failure to report was reasonable when she never received a copy of the state’s harassment policy and therefore could not know what was covered). Other courts have found that an inadequate definition obviates the need to evaluate the second prong because the first prong is not satisfied. *See Smith*, 202 F.3d at 245–46; *Thompson v. Wiener*, No. CV-08-991-PHX-GMS, 2009 WL 5128559, at *11–12 (D. Ariz. Dec. 17, 2009); *Gordon v. W.E. Stephens Mfg. Co.*, No. M2007-01126-COA-R3-CV, 2008 WL 4254584, at *10–11 (Tenn. Ct. App. Sept. 16, 2008).

employees, nonmanagement employees, outsiders, and customers.²⁸

Among the many sexist statements Smith alleged were made to her by her supervisor included that (1) “he would have preferred a male in the team leader position because males are ‘natural leaders’”; (2) “women should not be in management because they are ‘too emotional to handle a managerial role’”; (3) “the ‘only way for a woman to get ahead at First Union was to spread her legs’”; and (4) “he wished he had been a woman so that he could ‘whore his way through life.’”²⁹

Naturally, Smith found the supervisor’s conduct to be incredibly offensive, but she did not think that her supervisor’s behavior constituted sexual harassment under First Union’s policy because his conduct and remarks were not sexual in nature.³⁰ His remarks were, instead, based on gender.³¹ Accordingly, she did not report the behavior to First Union.³² The court found that Smith’s failure to report was justified given her reasonable interpretation of First Union’s policy as not including gender-based harassment.³³ *Smith* demonstrates that sexual harassment includes gender-based harassment, and an appropriate policy should incorporate gender-based discrimination in its definition of sexual harassment.³⁴

2. *Assurance That Employees Who Make Complaints of Harassment or Provide Information Related to Such Complaints Will Be Protected Against Retaliation*

In addition to an adequate definition, an appropriate antiretaliation provision can help establish both prongs of the *Faragher–Ellerth* affirmative defense. Because retaliation is also actionable under Title VII, courts may find that a policy fails to establish reasonable measures to prevent sexual harassment if the policy does not have an express antiretaliation provision.³⁵ The absence of such a provision is also usually enough to create a question of fact as to whether the plaintiff was justified

28. *Smith*, 202 F.3d at 245.

29. *Id.* at 238–39.

30. *Id.* at 245.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *See Williams v. Spartan Commc’ns, Inc.*, No. 99-1566, 2000 WL 331605, at *3 (4th Cir. Mar. 30, 2000); *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 566 (D. Md. 2000).

in failing to report the harassment for fear of retaliation.³⁶ An appropriate antiretaliation provision provides that retaliation for good faith reporting of violations will not be tolerated.³⁷

Not only should an employer have an antiretaliation provision, but other provisions should not have the effect of making the employee fear retaliation. In *Williams v. Spartan Communications*, the defendant included in its sexual harassment policy that false reports of sexual harassment will subject a complainant to disciplinary action.³⁸ The court in *Williams* found the policy was ineffective because the provision essentially had the effect of chilling sexual harassment reporting, which would, in turn, impede the defendant's ability to prevent sexual harassment.³⁹ If such a provision is desired, the best way to include it is to incorporate it in the company's code of conduct relating to discipline but to omit such language in the section on sexual harassment.⁴⁰

3. Reasonable Complaint Procedures That Provide Accessible Avenues of Complaint and Identify to Whom Harassment Need Be Reported

A policy must either include, or be accompanied by, reasonable complaint procedures.⁴¹ This does not mean, however, that courts have carte blanche to scrutinize how good the policy is.⁴² Nor does it mean that

36. See *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1030 (N.D. Iowa 2000), *aff'd*, 9 F. App'x 557 (8th Cir. 2001).

37. See *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1180 (9th Cir. 2001); *Montero v. AGCO Corp.*, 192 F.3d 856, 862 (9th Cir. 1999).

38. *Williams*, 2000 WL 331605, at *2.

39. See *id.* at *3 (denying summary judgment and finding that “[a] factfinder could conclude that the language in the anti-harassment policy together with the conduct of Spartan’s most senior management ‘discouraged complaining about a supervisor’s harassing behavior’” (quoting *Smith*, 202 F.3d at 245)); see also *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 438 (7th Cir. 2012) (noting that language in the employer’s policy, which noted the “severity of knowingly making a false accusation of discrimination or harassment,” could support a jury finding that the defendant’s sexual harassment policy was ineffective and could make the employer susceptible to punitive damages for discouraging reporting) (internal quotations marks omitted).

40. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 525 (2003).

41. See *Mgmt. Hospitality of Racine*, 666 F.3d at 434; see also *Stricker v. Cessford Constr. Co.*, 179 F. Supp. 2d 987, 1007 (N.D. Iowa 2001) (collecting cases in agreement).

42. See *Jordan v. R & O Aurora, Inc.*, No. 06 C 6452, 2008 WL 4812655, at *2 (N.D. Ill. Oct. 28, 2008) (“Plaintiff does not dispute that Defendant had promulgated

the policy can be attacked by the plaintiff as per se unreasonable for failing to prevent harassment against the plaintiff.⁴³

The policy will likely be deemed reasonable for purposes of establishing the “reasonable measures to prevent” component of the first prong of the *Faragher–Ellerth* affirmative defense so long as the policy’s complaint procedure includes the following components: (1) multiple avenues of complaint that include a mechanism for bypassing the harassing supervisor and that supervisor’s chain of command; (2) avenues that permit informal means of reporting; and (3) a requirement that once harassment is reported, the employee receiving such information must report it to someone who can take action.⁴⁴ The overall goal is to create an environment in which the aggrieved employee feels not only comfortable, but encouraged to report the harassment.

a. *Multiple avenues of complaint.* Courts have been emphatic that there must be multiple avenues for reporting harassment in order for a policy and its complaint process to be found reasonable. Typically, courts have heralded employers’ policies when they designate that, in addition to their immediate supervisor, employees can report harassment to someone in human resources, to another supervisor, and through a hotline.⁴⁵

The policy must clearly define each person or position to whom harassment should be reported so that there is no doubt in the employee’s mind as to whom they should report the harassment.⁴⁶ When the policies do not specifically designate someone to whom harassment should be reported, or it is unclear, courts have imputed notice to employers when employees reported harassment to those whom they reasonably believed were in a position to take action.⁴⁷

an antiharassment policy. Instead, she argues that *Ellerth/Faragher* requires a showing of the *effectiveness* of that policy. . . . Generally, the *Ellerth/Faragher* [defense] does not contemplate such an inquiry”)

43. See *Episcopo v. Gen. Motors Corp.*, 128 F. App’x 519, 523 (7th Cir. 2005).

44. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349–50 (6th Cir. 2005).

45. See, e.g., *Cross v. Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d 977, 979, 983 (8th Cir. 2010); *Adams v. O’Reilly Auto., Inc.*, 538 F.3d 926, 929 (8th Cir. 2008); *Lauderdale v. Tex. Dep’t of Criminal Justice*, 512 F.3d 157, 164 (5th Cir. 2007); *Hockman v. Westward Commc’ns, LLC*, 407 F.3d 317, 329–30 (5th Cir. 2004); *Maddin v. GTE of Fla., Inc.*, 33 F. Supp. 2d 1027, 1030 (M.D. Fla. 1999).

46. *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 847–48 (7th Cir. 2001).

47. See, e.g., *id.*; *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997).

i. *Bypassing the harassing supervisor.* The main reason behind requiring multiple avenues of complaint is that employees can bypass a harassing supervisor.⁴⁸ To that end, even if the harassing supervisor has told the employee not to go over his or her head, so long as the policy allows the harassing supervisor to be bypassed by providing sufficient alternatives that are clearly designated, many courts will expect the employee to do so.⁴⁹ Even if the first person the employee complains to does not take the complaint seriously, courts will often expect a reasonable employee to take the complaint to one of the other specified personnel.⁵⁰

Although some courts have found the bypass provision sufficiently met when a supervisor can be bypassed by others in the chain of command, the bulk of the cases evince that employers would be well advised to include mechanisms for bypassing the supervisor's chain of command altogether.⁵¹ It is not difficult to imagine situations in which harassing supervisors might work closely with and be friendly with their immediate supervisor, and maybe even their immediate supervisor's supervisor. In such situations, not only might it be futile to report the harassing supervisors to the supervisor's supervisor, but it might also make the harassed employee uncomfortable and less likely to report the situation.

Typically, the supervisory chain of command can be bypassed by designating certain people in human resources or supervisors in other departments to receive the complaint. An employer could get even more specific and designate a special employee as an Equal Employment Opportunity Commission (EEOC) officer. However, even the designation of an EEOC officer does not ensure that the policy will be found sufficient

48. Compare *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (foreclosing the employer from asserting the affirmative defense because there was no bypass mechanism), with *Harper v. City of Jackson Mun. Sch. Dist.*, 149 F. App'x 295, 300 (5th Cir. 2005) (permitting the affirmative defense when the policy included a bypass procedure); see also *Clark*, 400 F.3d at 349 (including a bypass route among the necessary elements of an effective policy).

49. See, e.g., *Hockman*, 407 F.3d at 329–30; *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002); *Duhé v. U.S. Postal Serv.*, No. Civ. A. 03–746, 2004 WL 439890, at *15 (E.D. La. Mar. 9, 2004).

50. See, e.g., *Cross*, 615 F.3d at 983; *Hockman*, 407 F.3d at 329–30; *Lamar v. Inst. for Family Health*, No. 1:09–CV–1154, 2011 WL 2432925, at *18 (N.D.N.Y. June 16, 2011).

51. See, e.g., *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 335 (4th Cir. 2003); *Lake v. AK Steel Corp.*, No. 2:03CV517, 2006 WL 1158610, at *50 (W.D. Pa. May 1, 2006).

if other deficiencies exist.⁵²

Whatever manner an employer chooses to permit the bypass of a harassing supervisor's chain of command, care must be given to accessibility. Simply designating a person outside the chain of command to receive complaints is not sufficient if the person is not accessible. If, for instance, the designated person is not located at the employee's facility, that person must at least be available for some time after hours at the facility in which he or she is located so that the aggrieved employee can report the complaint after work.⁵³ It is also sufficient for the designated person to visit the aggrieved employee's facility every two to three weeks.⁵⁴

ii. *Informal channels of communication.* The multiple-avenues-of-complaint requirement also implicates the manner in which the complaints are communicated. Courts have stressed that both formal and informal complaints must be permitted.⁵⁵ Formal channels are those that are explicitly designated by the employer. Informal channels of complaint are means other than those specified in the policy. Typically, complaints are deemed informal when they are communicated verbally.⁵⁶

Employers should designate formal complaint procedures because many courts will only impute notice of harassment to an employer if the employee has complied with the formal reporting requirements.⁵⁷ Indeed,

52. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 464 (5th Cir. 2013); *cf. Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000) (finding that, although a human resources representative was designated to receive complaints, the resulting investigation was inadequate).

53. See *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998).

54. See *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999).

55. See, e.g., *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005); *Wilson*, 164 F.3d at 541; *Gary v. Long*, 59 F.3d 1391, 1398–99 (D.C. Cir. 1995) (finding that formal and informal internal processing and review of complaints created “a detailed and thorough grievance procedure [that was] ‘calculated to encourage victims of harassment to come forward’” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986))).

56. See, e.g., *St. Louis v. N.Y.C. Health & Hosp. Corp.*, 682 F. Supp. 2d 216, 226 (E.D.N.Y. 2010); *Davis v. State of Cal. Dep't of Corr.*, No. S-93-1307DFLGGH, 1996 WL 271001, at *5 (E.D. Cal. Feb. 23, 1996). However, if the policy directs complainants to make oral inquiries, then verbal complaints are a formal mechanism. See *Durkin v. City of Chi.*, 341 F.3d 606, 612 (7th Cir. 2003).

57. See, e.g., *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1125 (8th Cir. 2007); *Durkin*, 341 F.3d at 612–13; *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301–02 (11th Cir. 2000).

even though courts have stated that informal complaints must be permitted, other courts have found that a plaintiff was unreasonable for failing to make use of an employer's formal policies—even though the policies did not explicitly forbid alternate informal means of complaint.⁵⁸

Thus, employers cannot be faulted for wondering why a provision permitting informal complaints should be included. Aside from being unnecessary, one might argue that permitting informal complaints puts an employer on notice all the time, thereby increasing its exposure to liability. The best answer has been expressed by many commentators: most people who are harassed are less likely to report harassment through formal complaint processes.⁵⁹ If harassment is not reported, an employer runs the risk that a culture of unreported harassment will develop, which would be bad for morale and attrition rates, and may lead to litigation arising out of more severe harassment. Consequently, a court could find the employer permitted the harassment by ignoring a culture of workplace harassment.⁶⁰

Further, even when there are no provisions in the policy stating that informal reporting is permitted, some courts have imputed notice to employers, holding that the issue is not *how* supervisors obtained knowledge, but the fact that they *did* obtain knowledge.⁶¹ To that end, the more channels an employer designates, the better the chance that a court will not impute notice when such channels are not used.⁶²

58. See, e.g., *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001); *Maddin v. GTE of Fla., Inc.*, 33 F. Supp. 2d 1027, 1032–33 (M.D. Fla. 1999); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (“[W]hile proof that an employee failed to . . . avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.”).

59. See, e.g., B. Glenn George, *If You’re Not Part of the Solution, You’re Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 168 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 23–24 (2003); L. Camille Hébert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 733–34 (2007).

60. See George, *supra* note 59, at 169.

61. See, e.g., *Duch v. Jakubek*, 588 F.3d 757, 764–65 (2d Cir. 2009); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 403 (1st Cir. 2002); *Varner v. Nat’l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

62. Compare *Adams v. O’Reilly Auto., Inc.*, 538 F.3d 926, 929 (8th Cir. 2008) (discussing a policy that provided three channels for reporting and not imputing notice until the plaintiff used one of those channels), with *Mingo v. Roadway Express, Inc.*,

Still, there are requirements. Although cases have held there are no “magic words” the employee must utter,⁶³ such as “title seven” or “pervasive,” the bulk of the cases state the employee must at least indicate the harassment is not an isolated incident—that it is ongoing, offensive, and unwanted. Otherwise, courts are likely to find that the informal complaint was not sufficient to put the employer on notice.⁶⁴

b. *Supervisors must report or take action upon learning of harassment.*

If employers do permit informal complaints, then the people to whom these complaints are being reported must be aware that such complaints are to be further reported or acted on. Thus, some courts also require that a reasonable complaint procedure provides that all supervisors must report any harassment that is reported to them.⁶⁵ Further, it is advised that the personnel to whom harassment can be reported must be aware of the steps they must take once harassment is reported.⁶⁶ In addition, policies should

135 F. Supp. 2d 884, 898 (N.D. Ill. 2001) (finding the employer had notice when its policy only provided one avenue for complaints, yet the plaintiff used other methods).

63. See *Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 138 (1st Cir. 2013); *Olson v. Lowe’s Home Ctrs. Inc.*, 130 F. App’x 380, 390–91 & n.22 (11th Cir. 2005); *Gentry v. Exp. Packaging Co.*, 238 F.3d 842, 849 (7th Cir. 2001).

64. See, e.g., *Nurse “BE” v. Columbia Palms W. Hosp. Ltd. P’ship*, 490 F.3d 1302, 1309–11 (11th Cir. 2007) (finding the defendant was not on notice of sexual harassment when the plaintiff reported five late-night phone calls by her supervisor but did not suggest “that any sexually explicit remarks or even sexual innuendos were made during these phone calls” and requested both that the matter not be reported and that it remain confidential); *Durkin v. City of Chi.*, 341 F.3d 606, 612–13 (7th Cir. 2003) (finding the defendant “simply was not provided with enough information to create some probability that it would think [the plaintiff] was being sexually harassed” when the plaintiff’s “complaints were vague [and] she never expressed her feelings of harassment or offered any specific examples of what she considered harassing or demeaning conduct”); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300–01 (11th Cir. 2000) (finding that relaying a particular incident to a supervisor during a group dinner was not enough to put the employer on notice of sexual harassment or inform the employer that the plaintiff wanted the employer to take action). *But see Valentine v. City of Chi.*, 452 F.3d 670, 681 (7th Cir. 2006) (finding that the employer may have been on notice after the plaintiff had complained of six instances of unwanted touching by a coworker). *Valentine* suggests that when the behavior reported is of such a nature that it is obvious that it was unwanted, less needs to be said. See *id.*; accord *Nurse “BE”*, 490 F.3d at 1310 n.12.

65. See, e.g., *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334–35 (4th Cir. 2003); *Varner*, 94 F.3d at 1214.

66. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 464 (5th Cir. 2013) (upholding a jury verdict in the plaintiff’s favor, in part because the employer “failed to

describe the responsibility of supervisors and employees who learn of harassment through informal channels.⁶⁷

B. I for Implementation

Even if a policy takes all the aforementioned provisions into account, the overall compliance program can still be found deficient—and prevent the employer from asserting the “reasonable measures to prevent” component of the first prong of *Faragher–Ellerth*—if it was not implemented properly. An employer’s compliance program can only be as effective as its implementation.⁶⁸ In some cases, effective implementation can insulate the employer from liability even when a policy is deficient.⁶⁹ A policy is the company’s words—implementation is its conduct. When the words “have teeth” but no one knows about them, courts will find that the employer did not make reasonable efforts to prevent the harassment.⁷⁰ And just as with an ineffective policy, courts may also find an employee’s failure to use the policy’s mechanisms reasonable if there is ineffective implementation of the policy.⁷¹ The areas of key importance in

provide its supervisors with any guidance regarding how to investigate, document, and resolve harassment complaints once they were reported”).

67. Compare *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998) (finding a policy inadequate because it lacked this guidance), with *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1066 (10th Cir. 1998) (reproducing a policy that contained these provisions), and *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 809 (7th Cir. 1999) (“Any AutoZoner who receives a complaint or becomes aware of a sexual harassment situation, should report the allegation *immediately*.”).

68. *Clark*, 400 F.3d at 350 (“The effectiveness of an employer’s sexual harassment policy depends upon the effectiveness of those who are designated to implement it.”).

69. See *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 245 (4th Cir. 2000) (“A deficient policy does not necessarily negate an employer’s affirmative defense in all cases.”); cf. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (suggesting that an otherwise sufficient policy could fail to satisfy *Faragher–Ellerth* if implemented in bad faith).

70. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (preventing the employer from using the affirmative defense because it “had entirely failed to disseminate its policy”); see also *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1091 (M.D. Ala. 2005) (“To be deemed sufficiently preventive, an anti-harassment policy must be ‘comprehensive, *well-known to employees*, vigorously enforced, and provide[] alternate avenues of redress.’” (alteration in original) (emphasis added) (quoting *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997))).

71. See, e.g., *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 335 (4th Cir. 2003) (finding the employee need not have utilized the procedures in the policy because they were “an illusion” and had failed to provide reasonable avenues to voice

implementing a policy are adequate dissemination, training, and having the employee read, understand, and sign the policy.

1. *Adequate Dissemination*

Adequate dissemination of a policy is fundamental to establishing the first prong of the affirmative defense.⁷² At a minimum, this entails providing employees with a copy of the company's sexual harassment policy in an information packet at the time of hiring and posting the policy at the job site.⁷³ This should ensure that, whether an employee is at home or at the workplace, the employee can readily access the employer's sexual harassment policy.

With respect to employees receiving a policy, it is imperative that every employee receive a copy of the policy; otherwise it will not be viewed as adequately disseminated.⁷⁴ The existing authority is clear that the policy must be readily available at the workplace.⁷⁵ In *EEOC v. Management Hospitality of Racine, Inc.*, "once the [employees] viewed the sexual harassment video and signed the sexual harassment and diversity policy, the policy was locked in a file cabinet, not accessible to [employees] without managerial approval."⁷⁶ The court found that "[i]f the managerial approval had to come from a manager who happened to be the alleged harasser, this could present a significant hurdle for relief," and accordingly, the employer did not take reasonable care to prevent harassment because it did not implement its policy effectively.⁷⁷

2. *Training*

Getting the policy in the hands of employees is only half the hurdle in implementing a policy; the other half is ensuring that the employees are familiar with it. Supervisors must be trained on the sexual harassment

complaints); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1315 (11th Cir. 2001) (denying the employer's request for summary judgment and excusing the plaintiff's failure to use the policy procedures because there were issues of fact about whether the employer had adequately disseminated the policy).

72. *See Faragher*, 524 U.S. at 808.

73. *See Frederick*, 246 F.3d at 1315.

74. *Faragher*, 524 U.S. at 808–09.

75. *E.g., id.; Frederick*, 246 F.3d at 1315; *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir. 2000).

76. *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 438 (7th Cir. 2012).

77. *Id.* at 438–39.

policy. Specifically, they must be trained on how to identify sexual harassment, the procedure that must be followed if sexually harassing behavior is observed, and the procedure that must be followed if an employee reports sexually harassing behavior to them.⁷⁸

Supervisors must also be trained on how to conduct effective investigations into the employee's allegations.⁷⁹ Not only should all supervisors receive training on the policy upon becoming a supervisor, but some courts have stressed the importance of continuing education regarding new developments in the law.⁸⁰ Certainly, every time a new version of the harassment policy is put in place, the supervisors must receive training pertaining to the new content. Retraining can also be used to help establish the first prong of the affirmative defense, which is that the employer took reasonable measures to promptly correct sexually harassing behavior. In *Harmon v. Home Depot USA, Inc.*, in response to the plaintiff's sexual harassment complaint, the court found that "Home Depot responded in a timely manner" by, among other things, retraining its night-shift employees.⁸¹

3. *Signing the Policy*

When employees have signed a statement acknowledging that they have read and understand the policy manual and then later fail to avail themselves of the company's policies, courts seem to have no problem finding that the employer met the second prong of the *Ellerth-Fargher* affirmative defense—regardless of the employee's excuse. In *May v. Fedex Freight East, Inc.*, for example, the plaintiff originally reported sexual harassment issues against her coworker to her immediate supervisor instead of the person designated in the policy to receive the complaint.⁸² FedEx took no action in response to the allegations until plaintiff finally

78. *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp. 2d 1026, 1029–30 (N.D. Iowa 2000), *aff'd*, 9 F. App'x 557 (8th Cir. 2001).

79. *Rosales v. City of San Antonio*, No. SA-00-CA-0144, 2001 WL 1168797, at *10–11 (W.D. Tex. July 13, 2001).

80. *See, e.g., id.* at *10; *EEOC v. Mid-American Specialties, Inc.*, 774 F. Supp. 2d 892, 898 (W.D. Tenn. 2011) (authorizing an injunction that required the employer to conduct "annual company-wide sexual harassment training"); *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 942–43, 958 (N.D. Iowa 2009) (dismissing a claim that the employer engaged in a pattern or practice of sexual harassment, in part because the company provided annual training and even "hired outside lawyers to give in-house presentations . . . about sexual harassment prevention").

81. *Harmon v. Home Depot USA Inc.*, 130 F. App'x 902, 905 (9th Cir. 2005).

82. *May v. Fedex Freight E., Inc.*, 374 F. App'x 510, 512 (5th Cir. 2010).

notified the designated person of the sexual harassment issues.⁸³

The court held that because the plaintiff initially failed to follow the correct procedures set out in the handbook provided by FedEx and signed by her, the conversation between the plaintiff and her supervisor did not qualify as the plaintiff taking full “advantage of [the] corrective opportunities provided by the employer.”⁸⁴ Because the plaintiff did not take full advantage of those opportunities, she failed to abide by the policy she agreed to prior to her employment, and therefore, FedEx was not liable for the coworker’s conduct.⁸⁵

A copy of the policy signed by an employee is also helpful in rebutting employees’ claims that they never saw the policy. In *Shaw v. AutoZone, Inc.*, Shaw did not follow AutoZone’s procedures regarding sexual harassment.⁸⁶ Shaw simply quit within a few months of joining.⁸⁷ Upon joining, Shaw had received a handbook containing AutoZone’s policies, including its policies for reporting sexual harassment.⁸⁸ Further, she signed a form stating that she received the manual and it was her responsibility to read it.⁸⁹

The Seventh Circuit held that although AutoZone’s mechanisms of having an employee acknowledge the policy through signing an agreement failed in this instance, AutoZone still acted appropriately by having and distributing the policy.⁹⁰ Thus, even though having employees acknowledge their responsibility to follow and understand the policy might not be the most effective way to ensure that an employee has read the policy, in *Shaw* it was sufficient to avoid vicarious liability for a supervisor’s sexual harassment.⁹¹

83. *Id.*

84. *Id.* (alteration in original) (quoting *Harvill v. Westward Comm’n, L.L.C.*, 433 F.3d 428, 437 (5th Cir. 2005) (internal quotation marks omitted)).

85. *Id.* at 512–13. For other cases highlighting the importance of a signed acknowledgement, see, for example, *Helm v. Kansas*, 656 F.3d 1277, 1291–92 (10th Cir. 2011); *Takacs v. Fiore*, 473 F. Supp. 2d 647, 657–58 (D. Md. 2007).

86. *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 810 (7th Cir. 1999).

87. *Id.* at 808, 810.

88. *Id.* at 809.

89. *Id.*

90. *Id.* at 812.

91. *See id.* at 813.

C. E for Enforcement

An employer can create a policy and make sure everyone is aware of it, but it is inevitable that violations will still occur. Enforcement of the policy is an employer's way of ensuring that the policy's violators do not become repeat offenders. To that end, effective enforcement will help an employer establish the second component of the first prong, that the employer took reasonable measures to promptly correct the harassing behavior.⁹² Further, effective enforcement will prevent an employee from arguing against the second prong by asserting the policy was never enforced, and therefore, it was reasonable not to use the policy's protective measures.⁹³ Practically, enforcing a policy also serves a third function: to deter other employees from sexually harassing behavior by letting them know that their inappropriate behavior will have consequences. There are two components of enforcement: an investigation and the remedial measures taken to correct the situation.

1. Investigation

Once the appropriate employee has learned about the harassment, the first thing the employee must do is investigate the complaint. Time is of the essence. It is best that the responding employee conduct an investigation immediately.⁹⁴ Courts have found that even a ten-day gap is long enough to preclude an employer's motion for summary judgment because it creates a fact question regarding whether the employer promptly corrected the harassment.⁹⁵ Further, even if the plaintiff did not report the harassment to one of the employees designated in the policy, so long as the plaintiff reported the harassment to a supervisor and the supervisor is required to report the harassment to one of the designated employees, the "clock starts ticking" from the moment the supervisor learns of the

92. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

93. Compare EEOC v. Mgmt. Hospitality of Racine, Inc., 666 F.3d 422, 437 (7th Cir. 2012), with Adams v. O'Reilly Auto., Inc., 538 F.3d 926, 932 (8th Cir. 2008).

94. See, e.g., Perry v. Ethan Allen, Inc., 115 F.3d 143, 154 (2d Cir. 1997) (holding that the employer took prompt corrective measures when it investigated plaintiff's complaint the day it was made); see also Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642, 654 (10th Cir. 2013); Brenneman v. Famous Dave's of Am., Inc., 507 F.3d 1139, 1146 (8th Cir. 2007).

95. See McArdle v. Arms Acres, Inc., No. 03 Civ. 05721 (PGG), 2009 WL 755287, at *10 (S.D.N.Y. Mar. 23, 2009); see also Maher v. Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 267 (E.D.N.Y. 2009) (two months); Bennett v. N.Y.C. Dep't of Corr., 705 F. Supp. 979, 987-88 (S.D.N.Y. 1989) (four weeks).

harassment.⁹⁶

As for the investigation itself, it is imperative that the investigating employee investigate all of the reported incidents of harassment.⁹⁷ The investigation should include confronting the accused.⁹⁸ It should also include interviews with other employees.⁹⁹ This includes interviewing the employee making the complaint.¹⁰⁰ Lastly, the complaining employee should be notified of the results of the investigation.¹⁰¹

2. Promptly Correcting the Harassing Behavior

Whether an employer promptly corrected the harassing behavior depends on the reasonableness of the employer's response.¹⁰² Whether an employer's "response was reasonable has to be assessed from the totality of circumstances."¹⁰³ Factors to consider include "the gravity of the harm being inflicted upon the plaintiff, the nature of the employer's response in light of the employer's resources, and the nature of the work environment."¹⁰⁴ "Other factors may include (1) the amount of time that elapsed between the notice and remedial action; (2) whether the response taken comported with the employer's policies; (3) whether the co-employees complained of were confronted and reprimanded; and (4) whether the response ended the harassment."¹⁰⁵

As one can imagine, the inquiry into whether the harassment was promptly corrected is very fact specific. However, at a minimum, when the

96. See, e.g., *Mgmt. Hospitality of Racine*, 666 F.3d at 436; *Maher*, 650 F. Supp. 2d at 267; cf. *Prindle v. TNT Logistics of N. Am.*, 331 F. Supp. 2d 739, 752 (W.D. Wis. 2004).

97. See *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 442 (S.D.N.Y. 2009) (denying summary judgment in part because the employer's "perfunctory investigation" did not encompass every incident), *aff'd in part*, 663 F.3d 556 (2d Cir. 2011).

98. See *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000).

99. See *Dortz v. City of New York*, 904 F. Supp. 127, 153–55 (S.D.N.Y. 1995).

100. See *id.*

101. See *Snell v. Suffolk Cnty.*, 782 F.2d 1094, 1104–05 (2d Cir. 1986). While *Snell* is a racial rather than sexual harassment case, the legal standard is the same under Title VII. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002).

102. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

103. *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 65 (2d Cir. 1998).

104. *Id.*

105. *Abdullah v. Panko Elec. & Maint., Inc.*, No. 3:08-CV-0579 (GTS/DEP), 2011 WL 1103762, at *14 (N.D.N.Y. Mar. 23, 2011).

supervisor's behavior is improper, it appears that courts require there be some type of disciplinary action. In *Durkin v. Verizon New York, Inc.*, for example, the court found it insufficient that the harassing employees were repeatedly told that their behavior was improper.¹⁰⁶ "Plaintiff was offered other job placements, and additional sensitivity trainings were conducted . . . [But the employer's] actions never resulted in any direct disciplinary action against the offending co-workers, nor did they actually lead to termination of the offending behavior."¹⁰⁷

Disciplinary action does not mean that the employee must be terminated. However, simply requiring the harassing employee to apologize to the harassed employee probably will not be enough.¹⁰⁸ Actions such as suspension, separation from the employee being harassed, or written warnings have all been held as sufficient means of disciplinary action.¹⁰⁹ There are caveats. Suspension should probably be without pay, and all actions taken should be noted in the harassing employee's personnel file.¹¹⁰ As for warnings, there is a good chance that if they are

106. *Durkin v. Verizon N.Y., Inc.*, 678 F. Supp. 2d 124, 136–37 (S.D.N.Y. 2009).

107. *Id.*; *see also* *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991) (holding that, even though the defendant "promptly investigated" the harassment allegation, genuine issues of fact precluded summary judgment for the employer because the employer "did not express strong disapproval of [the harasser's] conduct, did not reprimand [him], did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination").

108. *See, e.g.*, *Howley v. Town of Stratford*, 217 F.3d 141, 156 (2d Cir. 2000) (finding triable issue of inadequate employer response to a public incident of coworker sexual harassment when the employer failed to mete out discipline for five weeks, issued only a two-day suspension, and merely recommended that the harasser apologize to the complainant but failed to take action to persuade him to do so); *Maher v. Alliance Mortg. Banking Corp.*, 650 F. Supp. 2d 249, 267 (E.D.N.Y. 2009).

109. *See, e.g.*, *Johnson v. West*, 218 F.3d 725, 731 (7th Cir. 2000) (finding that employer exercised reasonable care to end the harassment when it conducted a prompt investigation and separated the alleged harasser from the plaintiff); *Casiano v. AT&T Corp.*, 213 F.3d 278, 286–87 (5th Cir. 2000) (holding sufficient action was taken when a supervisor accused of harassment was suspended and the employer dispatched specialists to conduct an in-depth investigation involving the complaint); *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (finding employer exercised reasonable care to correct harassment when supervisor met with the alleged harasser, gave him a written warning, and placed a sealed note in his personnel file).

110. *See* *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 442 (S.D.N.Y. 2009) (finding that summary judgment for the employer was precluded because a reasonable fact finder could conclude that a paid suspension was "in essence giving [the harasser] a ten-week paid vacation [with] no diminution in pay or status [and that defendant] failed to take appropriate remedial action"), *aff'd in part*, 663 F.3d

given orally, a court will find them insufficient.¹¹¹ When separating the harasser from the harassed, care must be taken to ensure removal does not constitute a demotion if the harassed employee is the one being removed.¹¹² Some courts have held that any removal of the harassed employee is an insufficient response because the corrective measures should target the harasser, not the harassed.¹¹³

III. NOBLE CORPORATION WANTS AN EFFECTIVE ANTIHARASSMENT PROGRAM

Recall Noble Corporation, the fictional social media-based advertising company started by two siblings in Chicago 10 years ago. Noble Corporation has about 1,000 employees throughout its seven offices located across the East Coast and Midwest. Noble Corporation wants to be profitable, but it is also part of the company's vision to always promote a comfortable, safe, and happy workplace.

Noble Corporation's owners, Neal and Nancy Noble, have come to Know Itall, an employment law attorney who is a specialist in corporate compliance programs. Noble Corporation's current policy has all the basic components of a policy discussed in Part II. The policy has a definition of sexual harassment that mirrors the language of Title VII. Further, it has a statement in the policy that any retaliation against an employee who reports cases of harassment will not be tolerated. There is also a provision that states all supervisors must pass along any reported harassment to the head of human resources. They have outlined the procedure by which

556 (2d Cir. 2011); *Dortz v. City of New York*, 904 F. Supp. 127, 153–54 (S.D.N.Y. 1995) (finding that a factual dispute existed as to whether the employer reasonably corrected the harassing behavior when, among other things, the investigating employee did not put any notation in the harassing employee's personnel file).

111. See, e.g., *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 246 (4th Cir. 2000) (finding that there was no prompt corrective action when the written report did "not mention any of the sexually harassing remarks"); *Abdullah v. Panko Elec. & Maint., Inc.*, No. 3:08-CV-0579 (GTS/DEP), 2011 WL 1103762, at *15 (N.D.N.Y. Mar. 23, 2011).

112. See *Durkin*, 678 F. Supp. 2d at 136–37.

113. See, e.g., *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (citing *Intlekofer v. Turnage*, 973 F.2d 773, 780 n.9 (9th Cir. 1992)); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective per se."). *But see Breneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (finding that, although it was "not ideal," the employer's offer to transfer the harassed employee "to a[nother] restaurant five miles away" was reasonably corrective).

employees are to file a complaint. Specifically, employees are to go to either their department head or the head of human resources and file a written report.

With respect to implementation, Noble Corporation gives every employee a copy of its policy at the beginning of training and has a copy posted in the employee break area. In addition, it provides annual training to all supervisors regarding sexual harassment and other Title VII issues. With respect to enforcing its sexual harassment policies, all written complaints received by the designated personnel are investigated within 36 hours. The discipline section of the employee handbook states that all first-time offenses receive a written warning. Second-time offenses receive a warning and an unpaid suspension. A third offense warrants termination.

Neal and Nancy want Know Itall to come up with a new sexual harassment policy that more strongly encourages reporting. They genuinely want to stop harassment from happening. It is not just about avoiding legal liability for them. However, they do not want to be flooded with a sea of frivolous complaints. Neal suggests that the policy should be such that employees have to put a little effort into making a complaint. That way, only serious complaints will be filed. They also want a policy that has the effect of preventing the harassing behavior to begin with. They are also concerned with limiting the ways in which notice can be imputed to them.

They want their top people—the department heads, including the head of Human Resources—to be the only people who handle the complaints because they know they can trust these individuals. The remainder of this Part discusses what Know Itall should tell the Neal and Nancy Noble.

A. *Suggestions*

1. *The Policy*

a. *Existing provisions of the policy.* First, let us start with portions of the policy that Noble Corporation already has in place. The policy has a definition of sexual harassment that mirrors Title VII. That is a good start, but there is an increasing trend to allow the *Faragher–Ellerth* affirmative defense in other types of harassment cases as well.¹¹⁴ It would behoove Noble Corporation to have a statement that says Noble Corporation does not tolerate any type of harassment based on race, color, religion, sex, or

114. See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 n.3 (2013).

national origin. It also needs to make sure that the employees understand what constitutes harassment. Adding provisions that explain the Title VII language is key.

The antiretaliation provision is sufficient. The provision requiring supervisors to report the harassment to the head of human resources is a good start but needs elaboration. All the pieces of P.I.E. must be viewed in the context of each other. If Noble Corporation wants to curtail harassment significantly, its enforcement must be effective. If its enforcement is to be effective, supervisors need to know exactly what to do when harassment is reported to them. Certainly, this will be discussed in training. The policy aspect and implementation aspect work as checks and balances for one another, so the procedure should be enumerated in the policy manual, too.

The procedure should start with what the supervisor should do immediately upon receiving a report or complaint. First, the supervisor should assure the complainant that the matter will be fully investigated and kept confidential. The complaint should then be reduced to writing.

If the person receiving the complaint is the complainant's supervisor, then the supervisor should immediately separate the complainant and harasser. The two should remain separated at least while the ensuing investigation is pending. If the person receiving the complaint is not the complainant's supervisor, then the complainant's supervisor must be notified immediately—even before the complaint has been reported to the head of human resources—and the complainant's supervisor must then immediately ensure the complainant and harasser have been separated.

The supervisor must then bring the complaint to Camila Compliant, the head of human resources, unless the complaint is about Compliant, in which case it should be delivered to Otto Outsider, the EEOC Officer. Because checks and balances are integral to running an effective compliance program, once Camila Compliant has been notified about the complaint, he must immediately begin an investigation. Before he starts the investigation, however, she must first notify in-house legal counsel. In-house counsel will then check to verify that the complainant and harasser have been separated and will continue to follow up with Compliant throughout the investigation.

The policy should also set forth the manner in which the investigation is to be conducted. The procedures that the employees follow to lodge a complaint should be as simple as possible. The provision here clearly sets forth the people to whom employees should report. However, it does not have an appropriate mechanism to bypass all potential harassers. What if

Camila Compliant and the complainant's department head were both harassing the complainant? To whom would the complainant turn? Instead of requiring a complainant to complain to Camila Compliant or the department head, the policy should permit the complainant to report to any department head with whom the complainant is comfortable.

b. *Additional provisions and mechanisms addressing the Nobles' concerns.* The Nobles want to encourage reporting. That is great; a welcoming and encouraging environment to lodge complaints is the cornerstone of any effective compliance program. One way to encourage employees to report is to give them certain assurances. One such assurance is confidentiality.

Noble Corporation should have a provision in its policy that

make[s] clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment [will] be shared only with those who need to know about it. Records relating to harassment complaints [will] be kept confidential on the same basis.¹¹⁵

Confidentiality, although not required by courts, is an issue that could lead an employee to allege that they did not report for fear that the harasser would find out.¹¹⁶ Thus, without the provision that the information will be confidential, an employee could effectively argue that they did not avail themselves of the policy because they were afraid of the consequences of reporting. This could affect an employer's ability to assert that the second prong of the affirmative defense has been satisfied.¹¹⁷

115. EQUAL EMP'T OPPORTUNITY COMM'N, VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS 14 (2010), available at <http://www.eeoc.gov/policy/docs/harassment.pdf>.

116. See, e.g., *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 437 (7th Cir. 2012); *Schmidt v. Medicalodges, Inc.*, 350 F. App'x 235, 240 (10th Cir. 2009).

117. See, e.g., *Lake v. AK Steel Corp.*, No. 2:03CV517, 2006 WL 1158610, at *50 (W.D. Pa. May 1, 2006) ("The lack of avenues for informal reporting and the lack of confidentiality in exploring or investigating any reported concern involving coworkers are matters the finder of fact may conclude further undermined the reasonableness and effectiveness of defendant's policy . . ."); *Thomas v. BET Soundstage Rest.*, 104 F. Supp. 2d 558, 566 (D. Md. 2000) (stating that the failure to provide confidentiality or protection from retaliation when there is evidence of

The assurance that violators will be punished also encourages employees to report and discourages employees from harassing. Without such a provision, victims might feel less encouraged to report because they might feel nothing will really happen to the harasser. In that same vein, an employee might feel more inclined to harass because of the feeling that the behavior will not have real consequences.

For the assurance to have meaning, it should set forth the types of punishment and various disciplinary measures that the company can use in a harassment case. Currently, Noble Corporation does state the types of punishment that violators will face, but it is not in the portion of the employee handbook dealing with sexual harassment. To be more effective as a deterrent it should be included within the sexual harassment policy.

Further, the punishments are based on the number of times the offense occurred. Instead, the punishment should be tailored to the severity of the offense. Under Noble Corporation's current structure, a first-time harasser who makes crude comments and a supervisor who sexually gropes a subordinate will both receive a verbal warning. The better way to phrase it is to say, "depending on the nature of the violation, violators will face consequences including, but not limited to, written reprimand, suspension without pay, and termination of employment."

c. Camila Compliant and the Otto Outsider should be accessible throughout all seven offices. Another approach in encouraging reporting is to be more accessible. Noble Corporation needs at least one other channel of complaint. Right now, the only way someone can make a complaint is by making it in person to someone they may or may not know. Either way, making such a complaint in person can be very embarrassing.¹¹⁸ A company with as many employees and offices as Noble Corporation should also have an anonymous hotline in place because talking to someone on the phone might be less embarrassing, making it easier to come forward with a

prevalent hostility can support a finding that the policy was defective and dysfunctional, thus making it an inadequate response to the general climate that it must be calculated to address). *But see* Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 267 (4th Cir. 2001) ("A generalized fear of retaliation does not excuse a failure to report sexual harassment."); Shaw v. AutoZone, Inc., 180 F.3d 806, 813 (7th Cir. 1999) ("[A]n employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty . . . to alert the employer to the allegedly hostile environment.").

118. *See* Shaw, 180 F.3d at 813 (recognizing that "discussing . . . harassment with an employer [may cause] inevitable unpleasantness").

complaint. Also, if the hotline is anonymous, the complainants might feel more comfortable because they will not have to deal with anyone else knowing they made the complaint.

There is a downside to anonymous hotlines: the scope of the investigation is limited because the employer will not know precisely who is being harassed. To that end, the person on the phone should serve as a support system and assure the complainant that Noble Corporation will do its best to stop the harassment, but the most effective investigation would occur if the victim identified themselves. The more accessible channels Noble Corporation has in place, the more likely employees will take advantage of its complaint procedure—and the more likely harassing employees will be deterred for fear of being reported.

The Nobles' concern about discouraging frivolous complaints is trickier to address. Putting hurdles in the way of prospective complainants goes against the Nobles' goal of encouraging reporting and preventing harassment. In addition, it might cause a court to find that Noble Corporation did not exercise reasonable measures to prevent the harassment. Further, as the cases show, a court might find a policy deficient if it has statements that can be perceived as discouraging reporting.¹¹⁹ Threatening discipline against bad faith reporting in the sexual harassment policy is perceived as discouraging.¹²⁰

Thus, Noble Corporation might want to revamp its section regarding the disciplinary measures against harassers. Noble Corporation can make a statement in its policy manual that “if investigations reveal the complaining employee made the complaint in bad faith, the employee is subject to, among other things, written warning, unpaid suspension, or termination of employment.” However, instead of putting the statement in the sexual harassment policy portion of the policy manual, Noble Corporation should put it in the discipline section of the manual.

2. *Implementation*

Although these measures might meet the minimum standard for adequate dissemination—thereby allowing Noble Corporation to withstand a plaintiff's motion for summary judgment—they will most likely not be

119. See, e.g., *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000); *Williams v. Spartan Commc'ns, Inc.*, No. 99-1566, 2000 WL 331605, at *3 (4th Cir. Mar. 30, 2000).

120. See *Williams*, 2000 WL 331605, at *2-3.

sufficient to support Noble Corporation's motion for summary judgment because a court could easily find that there are many questions of fact regarding whether Noble Corporation's dissemination is adequate.

The key to adequate dissemination seems to be accessibility. Information regarding a company's sexual harassment policy should be readily available. Noble Corporation should give all its employees a copy of its sexual harassment policy upon joining the company. That will permit all employees to have a copy they can refer to in the privacy of their own home. But what if an employee is at home and cannot find the copy provided by Noble Corporation? Because of this possible scenario, posting it on the company Web site is a great idea. Noble Corporation must take care to ensure the link to the policy is easy to locate. The best practice is to have a link in bold letters on the main page of Noble Corporation's Web site.

Because some employees may not have access to the internet, the policy should also be posted visibly in the workplace. The break area might suffice, but an employee might not feel comfortable reading it in front of other employees in the break room. Thus, in addition to posting it in the break room, Noble Corporation should also have a conspicuous sign in the break room and in various common areas throughout the building stating that employees can pick up a copy of the policy in the Human Resources office.

Employees should also be required to sign a statement at the end of the policy that states, "I have read and understand all the provisions of Noble Corporation's policy manual, and I understand that it is my responsibility to be familiar with and follow the procedures set forth inside this manual."¹²¹ They should be required to sign a document of similar effect at the end of training as well.

Further, Noble Corporation should take measures to encourage its employees to read the policy. As the cases demonstrate, having employees acknowledge that it is their responsibility to read and follow the policy is sometimes not actually enough to make them do it.¹²² It might be more effective to spell out explicitly for the employees just how important the policy is. On the cover of the manual, Noble Corporation could state

121. For similar language that was deemed effective, see *Shaw*, 180 F.3d at 811.

122. See *id.* (noting the plaintiff contended "she had never seen AutoZone's sexual harassment policy" even though she had signed an acknowledgment); *Helm v. Kansas*, 656 F.3d 1277, 1291-92 (10th Cir. 2011).

something to the effect of, “Failure to follow this policy manual may result in the dismissal of any lawsuit you might have against Noble Corporation.” This would likely garner a lot of attention. Noble can also provide incentives such as giving a test on the policy during the first week of employment and giving a prize to every employee who scores above 70 percent.

With respect to training, it is a good idea to train the supervisors every year regarding Title VII issues. However, this is not in and of itself sufficient. It is equally, if not more, important that the supervisors be trained on the sexual harassment policy itself. They must be trained specifically to identify three things: (1) sexual harassment under the policy’s definition; (2) the procedure that must be followed under the policy if sexually harassing behavior is observed or reported; and (3) how to conduct effective investigations into the employee’s allegations.

To that end, it is a good idea to train lower-level employees regarding all the policy provisions discussed in section III.A.1.¹²³ That way, even if the policy is unclear or deficient on a point, such as the definition or the complaint procedures, it can be remedied by effective training and a court can still find that Noble Corporation took reasonable measures to prevent sexual harassment.

IV. HOW MUCH DO WE REALLY NEED TO ENFORCE THIS POLICY?

Noble Corporation drafted and implemented its sexual harassment policies as suggested. Three weeks after all employees were trained regarding the policy, Deepak DuRight reported to Sam Supervisor that his friend Peggy Programmer told him she was being harassed by Steven Sleazy, the head of the Information Technology Department at Noble Corporation’s main branch. Specifically, he was slapping her on the buttocks, calling her “sweet cheeks.” On several occasions, he grabbed her breasts and said, “I got an app for those.” DuRight does not think Programmer will come forward herself because she “doesn’t like to play the victim” and said she could handle the situation herself.

The policy required supervisors to report all instances of harassment they were made aware of. To that end, Sam Supervisor told Camila Compliant—the head of Human Resources Department and one of the

123. See *Rosales v. City of San Antonio*, No. SA-00-CA-0144, 143 LC 34310, 2001 WL 1168797, at *10–11 (W.D. Tex. July 13, 2001) (denying summary judgment for the employer because its policy was deficient *and* its training was inadequate).

people designated to receive sexual harassment complaints. Importantly, Steven Sleazy is a computer software genius. The IT Department would be defunct without him. Badriyyah Bottomline, the company's president, has let it be known on numerous occasions that she considers Sleazy an indispensable employee. Camila Compliant is very nervous about approaching Sleazy for fear of offending him because Sleazy has been known to be temperamental. At the same time, the harassment against Peggy Programmer, if true, is unconscionable and must be stopped.

Compliant comes to Know Itall looking for a way out. She wants to know if he has to do anything at all, considering Programmer has not yet availed herself of the company's numerous channels of complaint. Compliant notes the policy states very clearly that all complaints are confidential, and there is even a confidential hotline she could have called. Further, she notes that even the initial complainant, Deepak DuRight, did not make a formal complaint to one of the designated people he was supposed to complain to under the policy. The policy specifically designates department heads, Camila Compliant, and Otto Outsider as the people to report to. If James Justice does have to do something, she wants to know if moving Programmer to a different branch will sufficiently resolve the situation. What should Know Itall tell Camila Compliant?

A. Suggestions

First, let us explore Noble Corporation's liability if it takes no action against Sleazy. Although Peggy Programmer has not yet come forward, she could still file a lawsuit sometime down the line. Assuming she never reports the harassment to Noble Corporation before filing the suit, Noble Corporation will have no problem establishing the second prong of *Ellerth-Faragher*—that she failed to avail herself of Noble Corporation's complaint process. The process was clearly described the people to whom she was to report the harassment were clearly delineated, the policy was properly implemented, Peggy had several channels of communicating the complaint, and she signed a form stating that she understood the policy, she was bound to follow it, and had to report harassing behavior.

Noble Corporation should also have no problem establishing the first component of the first prong of *Ellerth-Faragher*—that it took reasonable measures to prevent the harassing behavior. It had several channels of complaint (including an around-the-clock anonymous hotline), an antiretaliation provision, a definition of the proscribed conduct, a mechanism for Peggy to bypass her immediate supervisor, and adequate dissemination and training on the policy.

The issue is whether Noble Corporation will be able to meet the second component of the first prong—that it took prompt, corrective measures to remedy the harassment. Noble Corporation could argue that no action was ever warranted because Peggy never filed a complaint with anyone at Noble Corporation. It can only promptly correct harassment that it knows about. Of course, Peggy could argue that Noble Corporation was on notice because she told DuRight, who told Supervisor, who then told Compliant. Noble Corporation would counter that Peggy did not follow the complaint process that she pledged to abide by.

The implications of an employee failing to follow an employer's prescribed complaint process for purposes of assessing vicarious liability in sexual harassment cases under Title VII could warrant its own law review article, as courts greatly vary on this issue.¹²⁴ But there is method to the madness. The confusion arises because there are two areas in which following the complaint process is relevant. First, it is relevant to the question of whether an employer took prompt corrective measures because whether an employer had notice helps establish how long the employer took to correct the harassment. Second, it applies to the second prong, potentially establishing that the plaintiff unreasonably failed to take advantage of the employer's grievance mechanisms.

With respect to establishing that prompt, corrective action was taken, some circuits have held that the employer may determine how it receives notice via its policy.¹²⁵ Thus, if an employee does not complain to one of the

124. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (suggesting an employee's failure to use the prescribed procedures "will normally suffice to satisfy . . . the second element of the defense"); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same); *accord Shaw*, 180 F.3d at 813. *But see Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 335 (4th Cir. 2003) (finding the procedures so inadequate that the plaintiff could not reasonably have followed them anyway); *Mingo v. Roadway Express, Inc.*, 135 F. Supp. 2d 884, 898 (N.D. Ill. 2001) (finding strict compliance with written procedures unnecessary to defeat the second prong of *Faragher- Ellerth*). In fact, this topic has warranted at least some scholarly treatment. *See, e.g.*, B. Glenn George, *Theory and Practice: Employer Liability for Sexual Harassment*, 13 WM. & MARY J. WOMEN & L. 727, 741–43 (2007); Natalie S. Neals, Comment, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MARQ. L. REV. 167, 181–96 (2013) (discussing courts' divergent decisions about whether to drop the second prong entirely).

125. *See, e.g.*, *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir. 2000); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999); *Roelen v. Akron Beacon Journal*, 199 F. Supp. 2d 685, 694 (N.D. Ohio 2002); *see also* Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 246–53 (2004) (criticizing this approach).

people designated in the policy, notice will not be imputed, which effectively means that an employer does not have to take action.¹²⁶ Even when the employer's policy states that all supervisors must report harassment they are made aware of, if the plaintiff reports the harassment to a supervisor who is not designated as one of the people to report harassment to, some courts will only impute notice to the employer if the supervisor is in a position of authority over the harasser.¹²⁷ However, other courts have expanded liability even further and held that if the employer states that supervisors are to report harassment, then when any supervisor learns of harassment notice is imputed to the employer.¹²⁸

There are fewer layers of decisions regarding whether failure to follow a policy's complaint procedures establishes that the employer met the second prong of *Ellerth-Faragher*. One line of cases holds that it does not matter how an employer finds out about the harassment, so long as the plaintiff took some effort to notify the employer about the harassment.¹²⁹

126. See, e.g., *Madray*, 208 F.3d at 1300 (finding that when plaintiffs reported behavior to mid-level managers who also had witnessed other similar behavior by the same supervisor—but who were not designated to receive harassment complaints—defendant was not on notice of sexual harassment because “once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then ‘it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances’” (quoting *Farley v. Am. Cast Iron Pipe*, 115 F.3d 1548, 1554 (11th Cir. 1997))); *Maddin v. GTE of Fla., Inc.*, 33 F. Supp. 2d 1027, 1032–33 (M.D. Fla. 1999) (finding that notice could not be imputed to the defendant when “the sexual harassment policy clearly list[ed] a number of different entities to which a complaint of sexual harassment could be made” and plaintiff reported the harassment, but not to any of those specified entities).

127. See, e.g., *Chaloult v. Interstate Brands Corp.*, 540 F.3d 64, 76 (1st Cir. 2008) (“[A] company’s voluntary adoption of a policy requiring all supervisors, regardless of whether they are co-workers, to report sexual harassment [does not] increase[] the scope of the company’s legal liability as a matter of law under Title VII.”); see also *Calloway v. Aerojet Gen. Corp.*, 419 F. App’x 840, 843 (10th Cir. 2011).

128. See, e.g., *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005); *Blevins v. Famous Recipe Co. Operations*, No. 3:08-CV-1196, 2009 WL 4574004, at *7 (M.D. Tenn. Nov. 30, 2009).

129. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999); *Mingo*, 135 F. Supp. 2d at 898. The *Watts* court focused on the “to avoid harm otherwise” phrase in the second prong instead of the preceding phrase—“unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer”—and found that the employer could not establish the second prong of the defense when the employee filed a union grievance instead of filing a complaint with someone under the employer’s policy. *Id.* at 510–11 (quoting *Ellerth*, 524 U.S. at 765) (internal quotation marks omitted).

However, other courts have found—particularly when plaintiffs have signed a statement that they read the handbook and understand that they are bound to follow its policies—that the employee must follow the prescribed complaint process and report to the people designated in order to withstand an employer establishing that they unreasonably failed to utilize its prevention mechanisms.¹³⁰

This confusion could be avoided altogether if courts analyzed the issue of notice under the framework proposed by Judge Kermit Lipez in his well-reasoned dissent in *Chaloult v. Interstate Brands Corp.*¹³¹ Essentially, Judge Lipez noted that each prong should be evaluated in light of its separate purpose instead of “double counting” plaintiffs’ failure to avail themselves of an employer’s complaint procedure by giving the failure the same effect and weight in both prongs.¹³²

If a plaintiff reports harassment to a supervisor who is not designated as a person to report to but is nonetheless required to ensure that all harassment the supervisor is made aware of is investigated, then notice should be imputed to the employer for purposes of the first prong. The very purpose of the first prong is to ensure that an employer is taking reasonable measure to correct harassing behavior. That is why courts have held that a policy should state that all supervisors must report harassment of which they become aware. If courts do not impute notice to an employer for purposes of its duty to take corrective measures under the first prong, the provision regarding supervisor reporting—which has been deemed essential¹³³—is rendered essentially meaningless.

Here, Camila Compliant, one of the people designated in the policy, has received a complaint. For purposes of establishing that Noble Corporation had notice of the complaint, DuRight’s complaint to Supervisor—that Peggy told him that she was being harassed by Sleazy—is probably sufficient. The purpose of allowing the affirmative defense is to create an environment designed to prevent harassment. Once individuals who are designated to receive complaints actually receive one, they should

130. See, e.g., *May v. Fedex Freight E., Inc.*, 374 F. App’x 510, 513 (5th Cir. 2010); *Madray*, 208 F.3d at 1300; see also *Lawton*, *supra* note 125, at 246 n.204 (citing additional supporting case law).

131. *Chaloult*, 540 F.3d at 79–80 (Lipez, J., dissenting).

132. *Id.* at 80.

133. See *Clark*, 400 F.3d at 349 (noting that “an employer will not escape vicarious liability if it was aware of the harassment but did nothing to correct it or prevent it from occurring in the future”).

be required to take action. The more complex question would be if Supervisor never reported the harassment to Compliant. Whether notice would be imputed in such a situation would probably depend on the jurisdiction.

Just as it makes sense to impute notice when an employee designated as one of the people to whom harassment must be reported finds out about the complaint, it makes sense to find that an employee who did not report to one of the designated people failed to utilize the employer's corrective measures. If the policy is going to bind the employer, then it should also bind the employee. That is especially true here as it appears that Peggy—the one who was actually harassed by Sleazy—did not even want to lodge the complaint.

Further, just because Noble Corporation is on notice about a complaint does not mean that it necessarily has to take any action. The complaint must put Noble Corporation on notice of the harassment and on notice that the plaintiff wanted it to stop. Because of uncertainty in case law and because, at the end of the day, Noble Corporation wants to stop harassment, it should nonetheless investigate.¹³⁴ First, it should talk to Peggy Programmer and see if she wants the complaint dropped. Regardless, Noble Corporation probably should investigate.¹³⁵

If a proper investigation reveals Sleazy harassed Peggy, Sleazy does not necessarily have to be fired as long as appropriate action is taken. Note, however, that sending Peggy away to another location could be considered a demotion if the main branch where she was working is the flagship location. There is a split in jurisdictions as to whether the harassment must actually be stopped, so the best course of action after disciplinary action is taken is to continue to monitor the situation and have Peggy sign an agreement saying she approves of the action taken—especially if Noble Corporation does decide to move her to another location.

V. CONCLUSION

It should be clear from this Article that employers cannot expect to seek adequate legal protection from sexual harassment lawsuits simply by issuing some vague bromides directed to the evils of this type of conduct.

134. See *Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000) (“Prudent employers will compel harassing employees to cease all such conduct and will not, even at the victim’s request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.”).

135. See *id.*

Thorough work drafting a clear and comprehensive policy that is properly implemented and aggressively enforced against sexual harassment will be rewarded. All the elements of P.I.E. should function in a coequal manner to protect the business entity as well the respective rights of the perpetrator and the victim of the harassment. The complexity of determining what may be construed as sexual harassment in an age of instant access to information demands it.

Much like other corporate decisions, having an effective process to address sexual harassment complaints largely depends on available resources and requires a conscious decision by the corporation to place it high on its priority list. Once the aforementioned hard work is done, however, the rest is as easy as P.I.E.