A #METOO MOMENT: THIRD CIRCUIT GIVES HOPE TO VICTIMS OF WORKPLACE SEXUAL HARASSMENT*

I. INTRODUCTION

Imagine going to work each day and constantly being subjected to unwelcomed kisses, hugs, and back rubs from your supervisor. He tracks your movements, calling your house when you call out sick and becoming angry when you do not pick up. He asks you extremely personal questions. He sends you sexually explicit emails. You tell him to stop. He ignores you. He becomes nasty when you reject his advances. You hear stories about other women in the office who reported his behavior, but nothing came of it. You need this job to pay for your daughter's cancer treatment. He knows this and uses it against you, threatening that you will lose your job if you report him. When his boss gets word of the harassment, she dismisses the transgressions claiming you acted unreasonably for not speaking up. But did you really act unreasonably? According to the Third Circuit, thanks to the #MeToo movement,[1] you have hope.

In July 2018, the United States Court of Appeals for the Third Circuit in *Minarsky v. Susquehanna County*[2] handed down a precedential opinion that revisited the *Faragher-Ellerth* affirmative defense.[3] Employers may raise this defense to shield themselves from liability in sexual harassment cases.[4] The court held that Sheri Minarsky's failure to report sexual harassment by her supervisor was not per se unreasonable.[5] The court relied heavily on one of the #MeToo movement's most crucial lessons—most victims do not report their harassment based on legitimate fear of retaliation.[6] In doing so, the Third Circuit made it clear that the #MeToo movement has left its mark on the federal judiciary and employers must do more to prove they take sexual harassment allegations seriously.[7]

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1. The #MeToo movement is a social media campaign that began in October 2017. *See* Dalvin Brown, *19 Million Tweets Later: A Look at #MeToo a Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018, 10:12 PM), http://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/ [https://perma.cc/3U7R-BTDA]. The hashtag "#MeToo" has been used by millions of people on social media websites, such as Twitter, to bring attention to the prevalence of sexual assault and sexual harassment across the world. *See id.*

2. 895 F.3d 303 (3d Cir. 2018).

3. *Minarsky*, 895 F.3d at 306.

4. *See id.* at 310.

5. *Id.* at 314, 317.

6. *Id.* at 314 n.12 (citing U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016) [hereinafter EEOC, SELECT TASK FORCE REPORT]).

7. *See id.* at 317.

This Comment discusses the impact of the #MeToo movement on the Third Circuit's reasoning in *Minarsky* and sets forth the legal and cultural implications of the decision. Section II contextualizes the anti-sexual harassment movement before the #MeToo movement in the United States and how the law came to reflect that movement through landmark Supreme Court cases. It then discusses how the Third Circuit has interpreted those cases in the wake of the #MeToo movement. Section III puts forth various studies and statistics on sexual harassment and discusses how *Minarsky* reflects those findings. Further, it discusses the legal and cultural implications for employers in light of the Third Circuit's precedential decision.

II. OVERVIEW

In the past fifty years, social movements have led to greater awareness of and protections against sexual harassment.[8] But the federal courts have not always made those protections clear.[9] Part II.A lays out the history of how the law has responded to sexual harassment in the workplace. Then, Part II.B discusses the *Faragher-Ellerth* affirmative defense, which shields an employer from liability against sexual harassment claims made by employees against their supervisors. Part II.C describes the subsequent application of this defense.

A. Sexual Harassment in the Workplace—A National Timeline

Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers on the basis of sex, race, color, religion, and national origin.[10] An employee subjected to sexual harassment in the workplace has an actionable claim of sex discrimination under Title VII.[11] However, Title VII has not always protected women against sexual harassment.[12] For decades, sexual harassment in the workplace was viewed as simply part of the job for a working woman.[13] It was not until the 1960s and 1970s, when women began to enter the workforce in greater numbers, that the prevalence of sexual harassment came into national focus.[14]

In 1975, journalist and activist Lin Farley and the anti-harassment group Working Women United at Cornell University coined the term "sexual harassment."[15] Farley worked as a lecturer at Cornell, where she taught a course called "Women and Work."[16] Carmita Wood, another employee at Cornell, filed for unemployment benefits after she

8. See *infra* Part II.A for a discussion of these social movements.

9. *See infra* Part II.A.

10. 42 U.S.C. § 2000e–2(a) (2018).

11. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

12. Reva B. Siegel, *A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 11 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

13. *See id.*

14. *See id.* at 8.

15. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1698–99 (1998).

16. Nina Renata Aron, *Groping in the Ivy League Led to the First Sexual Harassment Suit—and Nothing Happened to the Man*, TIMELINE (Oct. 20, 2017), http://timeline.com/carmita-wood-sexual-harrassment-f2c537a0e1e8 [https://perma.cc/C8QP-K4V6].

quit her job due to a male supervisor's unwanted sexual advances.[17] When Cornell refused to offer Wood benefits, Farley was inspired and organized "Speak-Out on Sexual Harassment," a campus-wide event where secretaries, clerks, factory workers, and waitresses shared their stories about sexual harassment in the workplace.[18] In the months that followed, the *New York Times* published a lengthy article entitled *Women Begin To Speak Out About Sexual Harassment at Work*,[19] and *Redbook* magazine published a survey exposing the pervasiveness of workplace sexual harassment across the country.[20] Gradually, the concept of sexual harassment in the workplace was pushed onto the national stage.[21]

Even as society became more aware of sexual harassment in the workplace, federal courts were hesitant to acknowledge that it constituted discrimination under Title VII.[22] Courts reasoned that sexual harassment was not discrimination "on the basis of sex" because it could happen to both men and women, regardless of sex or gender.[23] Furthermore, some courts found that even if sexual harassment was only directed toward women employees, it only affected those who rejected their supervisor's advances, and therefore was not discrimination on the basis of being a woman alone.[24] Other courts emphasized that sexual harassment was a personal, private—even inevitable—problem all women faced, and therefore was not actionable under employment law.[25]

In the late 1970s, women attorneys and activists continued to push for recognition of sexual harassment in the federal courts as a form of legal injury.[26] In 1979, attorney and activist Catharine MacKinnon wrote *Sexual Harassment of Working Women*, in which she argued for the first time that sexual harassment in the workplace is consistent

17. *Id.*

18. *Id.*; *see also* Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016), http://time.com/4286575/sexual-harassment-before-anita-hill/ [https://perma.cc/EC9R-QSDD].

19. Enid Nemy, *Women Begin To Speak Out Against Sexual Harassment at Work*, N.Y. TIMES (Aug. 19, 1975), http://www.nytimes.com/1975/08/19/archives/women-begin-to-speak-out-against-sexual-harassment-at-work.html [https://perma.cc/6TBS-HSD5].

20. Aron, *supra* note 16 ("[A]mong 9000 female respondents, 92 percent reported that they saw sexual harassment as a problem. Eighty percent had personally experienced it.").

21. *See* Kyle Swenson, *Who Came Up with the Term 'Sexual Harassment'?*, WASH. POST (Nov. 22, 2017), http://www.washingtonpost.com/news/morning-mix/wp/2017/11/22/who-came-up-with-the-term-sexual-harassment/?noredirect=on&utm_term=.3b14f3d8bbcf [https://perma.cc/C8L9-R3C9].

22. *See* Siegel, *supra* note 12, at 11.

23. *Id.*

24. *See, e.g.*, Barnes v. Train, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) ("The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

25. *See* Siegel, *supra* note 12, at 11–12 ("In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." (quoting Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976))); *see also* Schultz, *supra* note 15, at 1701–02 ("By treating sexual advances as a purely personal matter beyond the scope of legal inquiry, courts refused to acknowledge that the sphere of sexuality can be infused with gender discrimination . . . .").

26. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 694 (1997).

with sex discrimination and therefore courts should recognize it as an actionable legal claim under Title VII.[27]

Sexual harassment was not officially recognized as unlawful employment discrimination in the federal courts until 1976.[28] The District Court for the District of Columbia found that retaliation by a male supervisor against a female employee, because she declined his sexual advances, constituted sex discrimination under Title VII.[29] The court reasoned that sexual harassment could be an "artificial barrier" placed on one gender, but not the other, and therefore was discrimination on the basis of sex.[30] Soon after, *Bundy v. Jackson*[31] became the first federal appellate court case to hold that sexual harassment constitutes discrimination on the basis of sex prohibited under Title VII.[32]

In 1980, the United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency responsible for enforcing Title VII, issued the first regulations that defined and prohibited sexual harassment in the workplace.[33] The EEOC defined workplace sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[34]

The EEOC also defined two separate categories of sexual harassment in the workplace: quid pro quo claims and hostile work environment claims.[35] Quid pro quo claims involve harassment where an employer or supervisor conditions employment and benefits on an employee's submission to unwanted sexual conduct.[36] Whereas hostile work environment claims involve harassment that may not result in a negative employment action but still creates a work environment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[37] With the recognition of lower courts and the EEOC in the early 1980s, the anti-sexual harassment movement gained momentum and worked its way up to the nation's highest court.[38]

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27. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 116–18 (1979).

28. Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

29. *Id.* at 661.

30. *Id.* at 657.

31. 641 F.2d 934 (D.C. Cir. 1981).

32. *Bundy*, 641 F.2d at 943.

33. Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 462–63 (2002); *see also* 29 C.F.R. § 1604.11 (2018).

34. 29 C.F.R. § 1604.11(a).

35. *See id.*

36. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454 (1984).

37. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990), http://www.eeoc.gov/policy/docs/sexualfavor.html [https://perma.cc/3SVP-8GE6] (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

38. *Meritor*, 477 U.S. at 66–67.

In the landmark 1986 case *Meritor Savings Bank, FSB v. Vinson*,[39] the United States Supreme Court relied on the EEOC guidelines and held that sexual harassment in the workplace is a recognized form of sex discrimination under Title VII.[40] Chief Justice Rehnquist noted, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[41] The Court emphasized that Title VII is not limited to economic or tangible discrimination, but rather it "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[42] Moreover, *Meritor* followed the EEOC's guidance and recognized both quid pro quo and hostile work environment claims as actionable under Title VII.[43]

After *Meritor*, sexual harassment law continued to evolve. Congress passed the Civil Rights Act of 1991, providing greater protections for employees subjected to sexual harassment by giving plaintiffs the right to both a jury trial in federal court and a collection of compensatory and punitive damages from their employers.[44] During this time, sexual harassment in the workplace entered the mainstream as a result of Anita Hill's allegations against her former boss, then-Judge Clarence Thomas, who President George H.W. Bush had nominated for the United States Supreme Court.[45] As a result of Anita Hill's testimony and the expanded provisions for victims under the Civil Rights Act, the amount of sexual harassment complaints filed with the EEOC skyrocketed.[46] Men and women have been coming forward with allegations of sexual harassment in the workplace ever since.[47]

Today, workplace sexual harassment has come into national focus more than ever as a result of the #MeToo movement—a worldwide movement against sexual harassment and sexual assault.[48] In October 2017, the #MeToo movement spread rapidly across the United States following sexual abuse allegations from over eighty women against former

39. 477 U.S. 57 (1986).

40. *Meritor*, 477 U.S. at 65–67.

41. *Id.* at 64 (alteration in original).

42. *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

43. *See id.* at 65–66.

44. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072–73 (1991) (codified as amended at 42 U.S.C. § 1981(a) (2018)).

45. Erin Blakemore, *How Anita Hill's Confirmation Hearing Testimony Brought Workplace Sexual Harassment to Light*, HIST. (Apr. 23, 2018), http://www.history.com/news/anita-hill-clarence-thomas-sexual-harassment-confirmation-hearings [https://perma.cc/24ZB-SNTD].

46. *See id.*

47. *See id.* In fiscal year 1992, there were 10,532 sexual harassment charges filed with the EEOC and state and local Fair Employment Practices agencies combined. *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 – FY 1996*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment-a.cfm [https://perma.cc/FA6S-EJCA] (last visited Nov. 1, 2019). Most recently, in fiscal year 2018, there were 13,055 sexual harassment charges filed with the EEOC alone. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2018*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [https://perma.cc/7NWU-B7ZT] (last visited Nov. 1, 2019).

48. *See* Nicole Smartt, *Sexual Harassment in the Workplace in a #MeToo World*, FORBES (Dec. 20, 2017, 9:00 AM), http://www.forbes.com/sites/forbeshumanresourcescouncil/2017/12/20/sexual-harassment-in-the-workplace-in-a-metoo-world/#5034cde55a42 [https://perma.cc/7NWU-B7ZT] (illustrating the focus placed on sexual harassment as a result of the #MeToo movement).

film producer Harvey Weinstein.[49] The hashtag #MeToo became viral as an attempt to highlight the prevalence of sexual harassment and sexual assault, particularly among women in the workplace.[50] Just one year after the movement "exploded," #MeToo had been used more than nineteen million times on Twitter.[51] As a result of the movement, a large number of prominent men in media, journalism, and politics were accused of sexual harassment or assault, including Kevin Spacey, Matt Lauer, and Al Franken.[52] Over the past two years, millions of people have shared their own experiences with sexual harassment using the hashtag, putting the onus on employers to confront sexual harassment in their offices.[53] In response, many employers have improved their sexual harassment policies and procedures.[54] The long term effects of the #MeToo movement have yet to be seen, but the movement has certainly made an imprint in shaping the response to sexual harassment in the workplace.

B. Faragher-Ellerth—*Supervisory Employee Liability for Sexual Harassment*

Although the Supreme Court recognized sexual harassment claims as actionable under Title VII in *Meritor*, the Court did not definitively decide the proper standard of employer liability for sexual harassment claims against supervisors.[55] As Part II.B.1 discusses, because lower courts could not agree on employer liability, the Supreme Court clarified the standard of liability for supervisory harassment in 1998 with landmark twin cases: *Burlington Industries, Inc. v. Ellerth*[56] and *Faragher v. City of Boca Raton*.[57] Additionally, as Part II.B.2 explains, the Court created an affirmative defense for employers when a supervisor harasses his or her subordinate. Part II.B.3 discusses the EEOC's approval of the standard and its issuance of further guidelines on employer liability for supervisor harassment.

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49. *See* Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), http://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/ [https://perma.cc/TJE3-ERRT]; Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME, http://time.com/time-person-of-the-year-2017-silence-breakers/ [https://perma.cc/4LNE-MGKQ] (last visited Nov. 1, 2019).

50. Smartt, *supra* note 48.

51. Brown, *supra* note 1.

52. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 231–33 (2018).

53. *See* Smartt, *supra* note 48.

54. *See* Christopher Wilkinson et al., *#MeToo One Year Later – Employers' Responses to the Movement*, ORRICK: EMP. L. & LITIG. (Oct. 22, 2018), http://blogs.orrick.com/employment/2018/10/22/metoo-one-year-later-employers-responses-to-the-movement/ [https://perma.cc/LM4M-UCMW] ("[E]mployers are increasingly focused on evaluating the quality of their sexual harassment prevention trainings. . . . Some companies have taken steps to address the reporting and investigation of sexual harassment claims, such as promoting the accessibility of internal reporting procedures, improving investigative capacities of human resources departments, and engaging outside counsel to investigate the claims.").

55. *See* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1035 (2015) [hereinafter Grossman, *Moving Forward*].

56. 524 U.S. 742 (1998).

57. 524 U.S. 775 (1998).

1. Clarifying Employer Liability

The *Meritor* Court broadly directed courts to use principles of agency in determining employer liability in instances of sexual harassment.[58] But it failed to establish the exact liability standard for supervisor-created hostile work environments.[59] In other words, while the Court held that a bank teller may have an actionable claim against her supervisor for harassment committed by the supervisor, it did not conclusively decide whether the bank would be liable as well. Because *Meritor* did not set strict guidelines for employer liability,[60] lower courts did not agree on when an employer should be held liable for a supervisor's sexual misconduct.[61] Some courts imposed vicarious liability, while other courts imposed a negligence standard.[62]

In 1998, with its landmark twin cases, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court attempted to resolve the circuit split and clarify when employers are liable for the sexual misconduct of supervisors.[63] Under the *Faragher-Ellerth* framework, the Court made clear that an employer is subject to vicarious liability for a supervisor's sexual misconduct and harassment.[64] This standard of liability is grounded in two main principles: "1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment."[65]

In *Ellerth*, the plaintiff had been subjected to numerous instances of sexual harassment by her supervisor.[66] She did not report him out of fear of retaliation, and the harassment led her to quit her job after one year.[67] Similarly, in *Faragher*, multiple supervisors sexually harassed the plaintiff during her job as a lifeguard.[68] The employer, the Parks and Recreation Department, had an anti-harassment policy in place but failed

58. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) ("[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.").

59. *See* Steven M. Warshawsky, Ellerth *and* Faragher*: Towards Strict Employer Liability Under Title VII for Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMP. L. 303, 304–05 (1999).

60. *Id.*

61. Grossman, *Moving Forward*, *supra* note 55, at 1035–36.

62. Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 254 (2012).

63. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 785–86 (1998).

64. *Ellerth*, 524 U.S. at 763–65; *Faragher*, 524 U.S. at 807.

65. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), http://www.eeoc.gov/policy/docs/harassment.html [https://perma.cc/9RZP-VKX6] [hereinafter EEOC, VICARIOUS EMPLOYER LIABILITY].

66. *Ellerth*, 524 U.S. at 748.

67. *Id.*

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

to make employees aware of it.[69] Like the plaintiff in *Ellerth*, she quit her job without reporting the harassment.[70]

The Court held that employers are vicariously liable for sexual harassment committed by a supervisor, unless they can prove an affirmative defense.[71] The Court reasoned that the employer should be held vicariously liable, regardless of whether the supervisor's conduct created a hostile work environment or resulted in a "tangible employment action" (the "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").[72]

2. The Employer's Affirmative Defense

In addition to clarifying employer liability, in an attempt to balance the competing interests of employers and employees,[73] the Court established a two-pronged affirmative defense that came to be known as the *Faragher-Ellerth* defense.[74] When no tangible employment action is taken against the harassed employee, an employer may raise an reasonable care affirmative defense if it can prove two elements by a preponderance of the evidence: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[75]

The first prong of the defense emphasizes the employer's reasonableness in preventing and remedying sexual harassment in the workplace.[76] The second prong, on the other hand, points to the reasonableness of the employee in reacting to the harassment.[77] The second prong therefore requires employees to take advantage of anti-harassment policies and provide employers notice of any harassment taking place.[78] The Court further articulated that while proof of an anti-harassment policy is not necessary to satisfy the first element of the defense in every case, the need for a policy may be addressed when litigating the first element.[79] In addition, although proof that an employee failed to exercise reasonable care is not limited to showing the employee failed to take advantage of reporting procedures, a demonstration of such failure is enough to satisfy the second element of the defense.[80] If an employer meets both elements of the defense, it is not liable for sexual harassment by a supervisor.[81]

69. *Id.* at 781–82.
70. *Id.* at 782–83.
71. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 780.
72. *Ellerth*, 524 U.S. at 761.
73. *See id.* at 764–65; *Faragher*, 524 U.S. at 807.
74. *See, e.g.*, Grossman, *Moving Forward*, *supra* note 55, at 1044.
75. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
76. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
77. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
78. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
79. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
80. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.
81. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The Court grounded the *Faragher-Ellerth* defense in the deterrent purpose of Title VII, highlighting that Congress designed Title VII to encourage the utilization of anti-harassment policies and effective reporting procedures.[82] With that purpose in mind, the *Faragher-Ellerth* defense puts the onus on employers to take preventative action with anti-harassment policies in their offices, and at the same time, encourages employees to promptly use these policies.[83]

3. The Equal Employment Opportunity Commission's Clarification

In 1999, the EEOC approved the standard of liability the Court set forth in *Faragher* and *Ellerth*.[84] The Commission emphasized that the affirmative defense implements "clear statutory policy" and complements Congress's Title VII enforcement efforts.[85] The Commission also clarified that because an employer is subject to vicarious liability if a supervisor committed the harassment, it is first necessary to determine whether the harasser had supervisory authority over the victim.[86] Determining whether the harasser had such authority is based on his or her job function and the specific facts of the case.[87] Specifically, a person qualifies as a supervisor if he or she has authority to (1) undertake or recommend tangible employment actions affecting the victim, or (2) direct the victim's daily work activities.[88] If the harasser has no supervisory authority over the employee, a different liability standard for coworker harassment will apply.[89]

The EEOC further articulated what employers should do to meet the affirmative defense. To satisfy the first prong, "it generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures."[90] As the Court noted in *Ellerth*, this is "not necessary in every instance as a matter of law,"[91] but in the absence of this standard, it will be difficult for the employer to prove it exercised reasonable care in both preventing and remedying sexual harassment.[92] An employer should provide each employee with a copy of its anti-harassment policy, which should be written in a way that all employees will comprehend.[93] Other reasonable measures include posting the policy where it can be easily seen and including the policy in employee handbooks.[94] On top of these measures, the employer should offer anti-harassment training for all employees.[95]

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82. D. Frank Vinik et al., *The "Quiet Revolution" in Employment Law & Its Implications for Colleges and Universities*, 33 J.C. & U.L. 33, 36 (2006); *see also Faragher*, 524 U.S. at 806 ("[Title VII's] 'primary objective' . . . is not to provide redress but to avoid harm.").

83. Vinik et al., *supra* note 82, at 36–37.

84. EEOC, VICARIOUS EMPLOYER LIABILITY, *supra* note 65.

85. *Id.* (quoting *Faragher*, 524 U.S. at 806).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* The liability standard for coworker harassment is outside the scope of this Comment.

90. *Id.*

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

92. EEOC, VICARIOUS EMPLOYER LIABILITY, *supra* note 65.

93. *Id.*

94. *Id.*

95. *Id.*

The Commission also set forth the minimum elements that should be contained in an employer's anti-harassment policy: (1) a clear explanation of prohibited conduct; (2) assurance that employees will be protected against retaliation for reporting; (3) a clearly described complaint process that provides accessible avenues of complaint; (4) assurance that the employer will protect confidentiality; (5) a complaint process that provides a prompt, thorough, and impartial investigation; and (6) assurance that the employer will take immediate and appropriate action if it determines harassment has occurred.[96] Moreover, supervisors should be continuously monitored, and an employer should keep record of all complaints of harassment.[97]

To satisfy the second prong, the employer must prove that the employee unreasonably failed to use any complaint procedure.[98] The Commission emphasized that determining whether the employee unreasonably failed to act should depend on the particular circumstances and resources available to the employee at the time.[99] Significantly, the Commission noted:

> An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process. The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.[100]

Moreover, a fear of retaliation, obstacles to complaining, and an ineffective complaint procedure may also be considered reasonable explanations for delays in reporting.[101]

C. Faragher-Ellerth—*Subsequent Application*

Although the Supreme Court's purposes in handing down its decisions in *Faragher* and *Ellerth* were to respond to the post-*Meritor* circuit split and clarify the exact standard for employer liability, it left questions unanswered.[102] For example, *Faragher* and *Ellerth* do not fully clarify what exactly employers must do to escape liability for a supervisor's sexual harassment or what exactly constitutes an employee's unreasonable failure to take advantage of anti-harassment procedures.[103] Because the Supreme Court did not establish a bright line rule defining what is reasonable on behalf of both the employer and employee,[104] courts have often found for the employer if there is a decent anti-harassment policy in place and if the employee either failed or waited to report the

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (footnote omitted).

101. *Id.*

102. *See* Davida S. Perry & Brian Heller, *Harassment in the Workplace 20 Years After* Faragher, 32 WESTLAW J. EMP. 12 (2018).

103. *See id.* ("[O]ver the past two decades, applying the defense has proven to be problematic. . . . [W]hat is 'reasonable' or 'effective' has been left wide open to interpretation. While the lower federal courts have sought to clarify these vague terms, the overall impact has been that employers have been rewarded for years for doing the bare minimum to address the serious and devastating problem of sexual harassment.").

104. *Id.*

harassment.[105] Part II.C.1 provides multiple circuit courts' analyses of the first prong of the *Faragher-Ellerth* defense. Part II.C.2 discusses the second prong.

1. The First Prong

Some circuits have found that if the employer has an anti-harassment policy in place and it is regularly enforced, the employer has acted reasonably in accordance with the first prong of the defense.[106] For example, the Fourth Circuit was one of the first circuits to apply the *Faragher-Ellerth* defense in *Brown v. Perry*.[107] In *Brown*, the plaintiff was sexually harassed by her supervisor on two separate occasions.[108] After the second instance of harassment, she filed an official complaint pursuant to her employer's anti-harassment policy.[109] In response to her complaint, the employer issued a restraining order and the supervisor was suspended for thirty days.[110] The court concluded that the employer met the first prong and exercised reasonable care in preventing and correcting sexual harassment because it had an official anti-harassment policy and internal complaint procedure in place.[111] The court reasoned that both the policy and the complaint procedures were neither "defective" nor "dysfunctional" but rather "reasonably designed and reasonably effectual."[112]

In *Savino v. C.P. Hall Co.*,[113] decided shortly after the Supreme Court's decisions in *Faragher* and *Ellerth,* a supervisor sexually harassed the plaintiff for months and reprimanded her whenever she rebuffed his sexual advances.[114] In applying the *Faragher-Ellerth* defense, the Seventh Circuit determined that the employer satisfied the first prong of the defense because it had a sexual harassment policy posted in the office, which included detailed instructions for reporting harassment.[115]

A few months later, in another Seventh Circuit case, *Hill v. American General Finance, Inc.*,[116] the court held that while the plaintiff's employer's anti-harassment policies certainly were not perfect and "[left] room for improvement, the policies got the job done."[117] The employee testified that she was not aware of the anti-harassment

105. *See, e.g.*, Cooper v. CLP Corp., 679 F. App'x 851, 854–55 (11th Cir. 2017) (finding the employer satisfied both prongs of the *Faragher-Ellerth* defense, despite the fact that the victim filed an informal complaint to the district manager).

106. *See, e.g.*, Szwalla v. Time Warner Cable LLC, 670 F. App'x 738, 739 (2d Cir. 2016); *see also* Perry & Heller, *supra* note 102 ("On many occasions, merely having paperwork in order has protected employers from having to answer for their conduct. . . . [M]any employers argued that merely having a policy against sexual harassment was enough to insulate them from liability, even though the Supreme Court specifically held otherwise.").

107. 184 F.3d 388, 394–96 (4th Cir. 1999).

108. *Brown*, 184 F.3d at 390–91.

109. *Id.* at 391–92.

110. *Id.* at 392, 397.

111. *Id.* at 396–97.

112. *Id.* at 396.

113. 199 F.3d 925 (7th Cir. 1999).

114. *Savino*, 199 F.3d at 929.

115. *Id.* at 932–33.

116. 218 F.3d 639 (7th Cir. 2000).

117. *Hill*, 218 F.3d at 643.

policies nor the complaint procedure.[118] However, the court concluded that the employer satisfied the first prong of the *Faragher-Ellerth* defense because there was a set of employee handbooks in a "public access type place" where the employees could find the anti-harassment policy.[119]

In *Leopold v. Baccarat, Inc.*,[120] the Second Circuit determined a complaint procedure that instructed employees to speak to "any officer of the company" if there was an incident of sexual harassment was enough to satisfy the first prong of the *Faragher-Ellerth* defense.[121] Although the plaintiff argued the policy was unreasonable because it failed to guarantee confidentiality and non-retaliation, the court concluded that neither of these two features were necessary to meet the defense.[122] In another Second Circuit case, *Douyon v. New York City Department of Education*,[123] the court reiterated that the mere "'existence of an antiharassment policy' is usually sufficient to demonstrate reasonable care."[124]

2. The Second Prong

Courts have also reasoned that an employee's delay in reporting is enough to prove the employee unreasonably failed to utilize the complaint procedures in place.[125] For example, in *Walton v. Johnson & Johnson Services, Inc.*,[126] the plaintiff was sexually harassed and assaulted by her supervisor for about three months.[127] Despite the fact that the plaintiff reported the most recent incident five days after it took place, the court concluded that her failure to report the first incident of harassment for two and a half months was sufficient to find that she unreasonably failed to take advantage of the office's anti-harassment policy and procedures.[128]

Courts are also reluctant to give much weight to a delay caused by an employee's fear of retaliation. In *Hill*, the court reasoned that although the plaintiff stated she was afraid of retaliation as a result of reporting her supervisor for sexual harassment, mere apprehension or fear of retaliation alone does not eliminate the requirement that the employee must report the harassment.[129] The plaintiff sent an anonymous complaint to her human resources department about her supervisor's inappropriate behavior and sexual comments but then waited a few months to come forward and report it in

118. *See id.* at 644.

119. *Id.*

120. 239 F.3d 243 (2d Cir. 2001).

121. *Leopold*, 239 F.3d at 245.

122. *Id.*

123. 665 F. App'x 54 (2d Cir. 2016).

124. *Douyon*, 665 F. App'x at 58 (quoting Ferraro v. Kellwood Co., 440 F.3d 96, 102 (2d Cir. 2006)).

125. *See, e.g.*, Savino v. C.P. Hall Co., 199 F.3d 925, 936–37 (7th Cir. 1999); *see also* Margaret E. Johnson, *"Avoiding Harm Otherwise": Reframing Women Employees' Responses to the Harms of Sexual Harassment*, 80 TEMP. L. REV. 743, 790–91 n.282 (2007) (listing numerous cases where courts have found that a delay in reporting was unreasonable).

126. 347 F.3d 1272 (11th Cir. 2003).

127. *Walton*, 347 F.3d at 1275–78.

128. *Id.* at 1290.

129. Hill v. Am. Gen. Fin. Inc., 218 F.3d 639, 643–44 (7th Cir. 2000).

person.[130] Therefore, the court determined the fact that the plaintiff did not immediately report her sexual harassment was enough to prove that she acted unreasonably and to satisfy the second prong of the defense, despite her fear of retaliation.[131]

In *Baldwin v. Blue Cross/Blue Shield of Alabama*,[132] the plaintiff stated that she did not report her harassment right away because she feared being fired.[133] The Eleventh Circuit emphasized that her employer's policy required her to promptly report harassment and determined that her three-month delay in reporting was "anything but prompt."[134] The court reasoned that victims are ultimately faced with a choice in responding to sexual harassment: "[A]ssist in the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII claim."[135] In *Minix v. Jeld-Wen, Inc.*,[136] another Eleventh Circuit case, the court reiterated that "absent an extreme situation, a failure to promptly report the [sexual] harassment" is enough for the employer to meet the second prong of the defense.[137]

In *Leopold v. Baccarat, Inc.*, the court reasoned that the plaintiff acted unreasonably by failing to report her supervisor's sexual harassment.[138] Although the plaintiff had argued that she did not file a complaint for fear of retaliation, the court concluded that "[a] credible fear must be based on more than the employee's subjective belief" and "[e]vidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints."[139] Because the facts were insufficient to establish the plaintiff's fear as credible, the court reasoned, the plaintiff failed to take advantage of the company's complaint procedure and the employer met its burden of proving the second prong of the defense.[140]

As these cases highlight, with little guidance from the Supreme Court on what is *reasonable*, lower courts have predominately found for the employer if it had an established anti-harassment policy in place and if the employee did not immediately report sexual harassment after it took place.[141] But in the wake of the #MeToo movement and its emphasis on why victims often do not report harassment,[142] one court has reconsidered what is reasonable.

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130. *See id.* at 641–42.

131. *See id.* at 643–44.

132. 480 F.3d 1287 (11th Cir. 2007).

133. *See Baldwin*, 480 F.3d at 1296.

134. *Id.* at 1307.

135. *Id.*

136. 237 F. App'x 578 (11th Cir. 2007).

137. *Minix*, 237 F. App'x at 586.

138. Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001).

139. *Id.*

140. *Id.*

141. *See* Perry & Heller, *supra* note 102.

142. *See, e.g.*, Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), http://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html [https://perma.cc/34ZC-B6PE].

D. Third Circuit's Reliance on the #MeToo Movement in Minarsky

In July 2018, in *Minarsky v. Susquehanna County*, the Third Circuit chipped away at the *Faragher-Ellerth* defense with its interpretation of what constitutes reasonable behavior.[143] Basing its decision in part on the #MeToo movement, the court strayed away from the common refrain and determined that failure to report sexual harassment is not per se unreasonable.[144] Thus, the court reasoned, an employee's failure or delay in reporting should not automatically meet the second element of the defense.[145] Furthermore, the court noted that an employer having an anti-harassment policy in place may not necessarily be enough on its own.[146] The court concluded that given the facts of the case, a jury should decide both elements of the *Faragher-Ellerth* test because a jury is in the best position to judge the reasonableness of both the employer and the sexually harassed employee's actions in certain cases.[147]

Plaintiff Sheri Minarsky worked as a part-time administrative assistant for the Susquehanna Department of Veteran's Affairs, and Thomas Yadlosky was her supervisor.[148] She took the job to pay for her daughter's cancer treatment.[149] She alleged that soon after she started working in September 2009, Yadlosky began to sexually harass her.[150] He would hug and kiss her, massage her shoulders, call her house constantly, send her sexually explicit emails, and ask her overly personal questions.[151] Minarsky tried to ignore his behavior and jokingly protested when he touched her, but the harassment continued.[152] Whenever she rejected his advances, he would become "nasty" toward her.[153]

Minarsky became aware that other women had similar unwanted encounters with Yadlosky and that he had been reprimanded for a prior incident.[154] On two separate occasions, his supervisor, Sylvia Beamer, chief county clerk, became aware of Yadlosky's inappropriate behavior toward other women and reprimanded him.[155] In 2009, he embraced a female employee and approximately two years later, he hugged and kissed the director of elections without her consent.[156] Despite Beamer's awareness of these incidents, "there was no further action or follow-up, nor was there any notation or report placed in [his] personnel file."[157]

Susquehanna County had a "General Harassment Policy" in place that prohibited harassment based upon "sex, age, race, religion, national origin, ethnicity, disability,

143. Minarsky v. Susquehanna Cty., 895 F.3d 303, 313 (3d Cir. 2018).
144. *See id.* at 313–14, 313 n.12.
145. *Id.*
146. *Id.* at 312–13.
147. *Id.* at 317.
148. *Id.* at 306.
149. *See id.* at 314–15.
150. *Id.* at 306.
151. *Id.* at 306–07.
152. *Id.* at 307.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

sexual preference and any other protected classification."[158] An employee could report any harassment to his or her supervisor, and if the supervisor was the source of the harassment, the employee could report to either the chief county clerk or county commissioner.[159] Minarsky was given a copy of the policy on her first day of work.[160]

Minarsky averred she did not report the harassment for fear of retaliation.[161] She testified that Yadlosky warned her not to trust the county commissioner or the chief county clerk and that they could easily terminate her position.[162] She also knew about the prior incidents of sexual harassment and could see that reporting had proved unsuccessful.[163] Eventually in 2013, after her doctor recommended that she report the harassment, Minarsky sent an email to Yadlosky, in which she wrote,

> I want to just let you know how uncomfortable I am when you hug, touch and kiss me. I don't think this is appropriate at work, and would like you to stop doing it. I don't want to go to Sylvia [chief county clerk] . . . . I would rather resolve this ourselves.[164]

Around the same time, a coworker overheard Minarsky's friend speaking about the harassment with a fellow employee and reported it to the chief county clerk.[165] At first, Minarsky objected to being interviewed because she was afraid she would lose her job.[166] Once she was interviewed, Yadlosky admitted to the allegations and was terminated.[167] The county subsequently hired a human resources director.[168] Despite his termination, Minarsky quit her job a few years later, stating that after Yadlosky was fired, her workload increased and her new supervisor made her uncomfortable by asking her what happened between her and Yadlosky and who else she had caused to be fired.[169]

Minarsky subsequently filed a sexual harassment claim against Susquehanna County.[170] The district court, relying on the general consensus and "[g]uidance from other courts," concluded that Susquehanna County met the *Faragher-Ellerth* defense because Minarsky was aware of its anti-harassment policy and the county quickly responded to her complaint by interviewing and terminating Yadlosky.[171] The court also found that Minarsky unreasonably failed to avail herself of the county's anti-harassment policy by waiting over three years to report the harassment.[172]

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158. *Id.* at 308.

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.* at 308–09.

166. *Id.* at 309.

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.*

171. Minarsky v. Susquehanna Cty., No. 3:14-CV-2021, 2017 WL 4475978, at *6 (M.D. Pa. May 22, 2017), *vacated and remanded* 895 F.3d 303 (3d Cir. 2018).

172. *Id.*

The Third Circuit did not agree with the district court's interpretation.[173] In its analysis of the first prong of the *Faragher-Ellerth* defense, the court concluded that the county failed to prove it acted reasonably, even though it had a sexual harassment policy and reporting procedures in place that were made known to all employees.[174] The court reasoned that although Yadlosky was reprimanded twice and ultimately fired, his termination could be considered insufficient to constitute a reasonable response, considering that testimony revealed a pattern of unwanted sexual advances toward multiple women.[175]

The court focused on the culture in the office and noted, "[k]nowing of [Yadlosky's] behavior . . . should someone have ensured that [Minarsky] was not being victimized? Was his termination not so much a reflection of the policy's effectiveness, but rather, did it evidence the County's exasperation, much like the straw that broke the camel's back?"[176] The court reasoned that because the county clearly had indicators of the harassment, it essentially "turned a blind eye toward" Yadlosky's sexual misconduct.[177] And because there was a dispute of material fact, the court concluded that a jury would be best to determine the issue of the county's reasonableness.[178]

In its interpretation of the second element, despite finding that Minarsky "remained silent and did nothing to avoid further harm,"[179] the court cited the recent #MeToo movement to support its holding that Minarsky had not necessarily acted unreasonably by failing to report that she was being sexually harassed by her supervisor.[180] Significantly, in a footnote, the court acknowledged that the appeal came in the midst of a "veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims . . . [who] asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred."[181] The court, relying on recent studies conducted during the #MeToo movement and the recent EEOC 2016 Select Task Force Report, concluded that more often than not, victims of sexual harassment do not report it, especially in instances where the harasser yields control over the victim's employment.[182] Moreover, the court noted that because sexual harassment in the workplace is highly circumstantial and fact specific, the reasonableness of a particular employee's actions is best for a jury to decide in certain cases.[183] Here, a jury could decide that Minarsky had a legitimate fear that she would lose her job, which prevented her from reporting.[184]

Although in *Faragher* and *Ellerth* the Supreme Court emphasized that the second prong is tied to Title VII's objective of avoiding harm rather than providing redress, the

173. *Minarsky*, 895 F.3d at 312–13.
174. *Id.*
175. *Id.* at 312.
176. *Id.* at 313.
177. *Id.* at 312–13.
178. *Id.* at 313.
179. *Id.*
180. *See id.* at 313 n.12.
181. *Id.*
182. *See id.*
183. *Id.* at 314.
184. *Id.* at 317.

Third Circuit reasoned that it could not ignore Minarsky's testimony as to why she did not report the "prolonged, agonizing harassment."[185] The court took note of her fear of retaliation and losing her job, especially because she needed the money for her daughter's cancer treatment.[186] It emphasized that Yadlosky used his position of control over her to harass her constantly and became nasty toward her whenever she rejected his advances.[187] The court highlighted that "the degree of control and specific power dynamic can offer context to the plaintiff's subjectively held fear of speaking up."[188]

The court also gave credence to the fact that Minarsky found out the county knew about Yadlosky's behavior and "merely slapped him on the wrist," thus making a complaint feel futile.[189] Specifically, the court acknowledged that there may be "a certain fallacy" behind the notion that reporting a supervisor's harassment will put a stop to it.[190] In reality, victims "anticipate negative consequences or fear that the harassers will face no reprimand" and therefore choose not to report the harassment.[191] On remand, the court emphasized that the trial judge should instruct the jury that an employee's fears must be specific, not generalized, to defeat the *Faragher-Ellerth* defense.[192]

III. DISCUSSION

While it is clear that much work remains to combat sexual harassment in the workplace, *Minarsky* is certainly a step in the right direction. The Third Circuit's decision in *Minarsky* is a key example of how the #MeToo movement is shaping the law. One of the biggest lessons from the #MeToo movement is that women typically do not immediately report their harassment but hold onto it for many years because of fear.[193] By acknowledging that fact, *Minarsky* is a meaningful decision for sexual harassment victims across the nation.

However, *Minarsky* has a message for employers too. Employers cannot escape liability by merely offering evidence of an anti-harassment policy; the policy must be effective in promoting and maintaining a safe and transparent office culture.[194] And that office culture shift is at the core of the Third Circuit's decision.[195] The #MeToo movement now has the attention of the federal judiciary, and with this decision, the Third Circuit has made it apparent that it is about time employment law catches up with the momentum of the #MeToo movement.

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185. *Id.* at 313, 316.

186. *Id.* at 314–15.

187. *Id.* at 314.

188. *Id.*

189. *Id.* at 316.

190. *Id.* at 313 n.12.

191. *Id.*

192. *Id.* at 315 n.16.

193. *See* Emanuella Grinberg, *This Is Why People Hesitate To Report Sexual Misconduct*, CNN (Sept. 25, 2018, 5:00 PM), http://www.cnn.com/2018/09/17/health/why-people-hesitate-to-report-sexual-misconduct/index.html [https://perma.cc/8A4Q-SD5H].

194. See *infra* Part III.B for a discussion of effective anti-harassment policies.

195. *See Minarsky*, 895 F.3d at 313 n.12 (emphasizing that an office culture where the harasser wields control over the victim's employment or work environment can lead the victim to choose not to report the harassment out of fear).

This Discussion emphasizes why *Minarsky* is an impactful decision in the midst of the #MeToo movement. Part III.A provides statistics and behavioral studies that highlight the reasons why victims do not report their harassment. Part III.B discusses how employers should respond to *Minarsky* and mold a safe workplace culture through effective policies and procedures. Finally, Part III.C reflects on *Minarsky*'s overall legal and cultural implications and also responds to its critics.

A. The Psychological Effects of Harassment and a Justified Failure To Report

Many courts fail to reflect the circumstance-specific reality of workplace sexual harassment due to the rigid and cursory *Faragher-Ellerth* analysis. Following the approach of most courts, when a victim fails to swiftly report her harassment, and the court finds that her employer had a decent anti-harassment policy in place, her failure to report is fatal to her claim.[196] *Minarsky* acknowledged the psychology behind sexual harassment and made an effort to mold the law to reflect the reality of workplace sexual harassment victims.[197] To date, most courts have given little credence to an employee's delay in reporting based on fear.[198] Instead of quickly dismissing a victim of sexual harassment because she did not immediately report it, the Third Circuit recognized that the court must dig deeply into *why* she did not report.[199] By encouraging a jury to step into Sheri Minarsky's shoes, take her mental state into consideration, examine her work environment, and determine whether her fears were grounded, the court's decision reflects the goals of the #MeToo movement at its core.[200]

1. The Numbers Behind the Movement

The majority of victims simply do not report workplace harassment.[201] A recent online study created by a nonprofit organization called Stop Street Harassment found that thirty-eight percent of the women interviewed experienced sexual harassment at work.[202] A 2015 study found that one-third of women have been sexually harassed during their lifetimes, and seventy-one percent have never reported it.[203] Another poll from ABC News-Washington Post, cited in the *Minarsky* opinion,[204] reported that more than half of American women have experienced unwanted sexual advances from men, and one quarter of these advances are from men who have held influence over their

196. See *supra* Part II.C for a discussion of this rationale.

197. *Minarsky*, 895 F.3d at 313 n.12.

198. See *supra* Part II.C for a discussion of these cases.

199. *See Minarsky*, 895 F.3d at 313 & n.12.

200. *See* Fortin, *supra* note 142 (discussing how survivors of sexual harassment and sexual assault have used the hashtag "#WhyIDidntReport" to expose the fear and shame that often discourages women from reporting).

201. Margaret Gardiner, *Why Women Don't Report Sexual Harassment*, HUFFINGTON POST (July 21, 2016, 4:29 PM), http://www.huffingtonpost.com/margaret-gardiner/why-women-dont-report-sex_b_11112996.html [https://perma.cc/6P9M-TJ7Q].

202. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), http://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/8976-69JJ].

203. Gardiner, *supra* note 201.

204. *Minarsky*, 895 F.3d at 313 n.12.

employment.[205] This translates to almost thirty-three million American women harassed at work.[206] And yet, according to a recent meta-analysis, only one-quarter to one-third of victims report their harassment, and only two to twenty percent of victims actually follow through with filing a formal complaint.[207] A 2016 EEOC Select Task Force study found that approximately seventy-five percent of women who have experienced harassment did not report it or file a complaint, but instead "avoid[ed] the harasser, den[ied] or downplay[ed] the gravity of the situation, or attempt[ed] to ignore, forget, or endure the behavior."[208] They failed to report the harassment because "they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation."[209] These studies demonstrate the frequency with which women experience workplace harassment and the corresponding infrequency with which they report it.

According to the ABC News-Washington Post poll, among the women who have personally experienced sexual harassment at work, ninety-five percent stated that their male harassers went unpunished.[210] The same poll reported that seventy-five percent of Americans find that sexual harassment in the workplace is a problem in American society.[211] A similar ABC News-Washington Post poll from 1992, taken a year after Anita Hill's testimony against Supreme Court Justice Clarence Thomas, found that eighty-five percent of Americans thought sexual harassment in the workplace was a serious problem.[212] Twenty-five years later, the numbers have not changed much.[213] Moreover, despite the prevalence of sexual harassment in the workplace and the public outcry of the #MeToo movement, in 2018 alone, there were 13,055 charges of sexual harassment filed with the EEOC[214]—a number dwarfed by the thirty-three million women sexually harassed in the workplace.[215] It is apparent that while sexual harassment occurs at a high rate, repercussions for harassers do not reflect the high volume of harassment in the workplace.

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205. Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds*, ABC NEWS (Oct. 17, 2017, 7:00 AM), http://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721 [https://perma.cc/2SZ5-H525].

206. *Id.*

207. Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 484, 485 tbl.2 (Julian Barling & Cary L. Cooper eds., 2008).

208. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at v.

209. *Id.*

210. Langer, *supra* note 205.

211. *Id.*

212. *Id.*

213. *See id.*

214. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2018*, *supra* note 47. It is important to note, however, that between 2017, when the #MeToo movement began, and 2018, there was a slight increase in reporting. In fiscal year 2017, there were 12,428 sexual harassment charges filed with the EEOC. In 2018, this number increased to 13,055. *Id.*

215. Langer, *supra* note 205.

2. The "Reasonable" Woman Does Not Always Report

Studies show women handle and respond to workplace harassment in different ways.[216] Many women often try to ignore or tolerate the harassment, particularly when it is less severe.[217] Some women attempt to appease or "put off" their harassers with humor or excuses and avoid directly confronting him or her about the harassment.[218] Like Sheri Minarsky,[219] many victims seek social support and talk to their coworkers or friends about their harassment.[220] Some women take an assertive approach by directly confronting their harassers and asking him or her to stop,[221] as Minarsky did with her email to Yadlosky.[222] Significantly, and rather unfortunately, the most *infrequent* response among victims is seeking institutional or organizational relief, such as informing a supervisor or filing a formal complaint.[223] Women see these options more as a tool of last resort, as opposed to an easy, readily available solution.[224]

Behavioral science research highlights that inherent gender differences may account for the way women are likely to respond to sexual harassment.[225] Some studies have shown that women often prefer informal methods of dispute resolution, as opposed to formal reporting procedures.[226] Other studies have emphasized that women naturally have a greater tendency to passively ignore conflict in an attempt to maintain social relationships, rather than actively address the situation.[227] A recent gender study revealed three reasons why it is difficult for women to report sexual harassment in the workplace: (1) fear of retaliation, (2) the bystander effect, and (3) a masculine culture that permits and tolerates sexual harassment.[228]

a. Fear of Retaliation

Faced with the question of why they do not report their harassment, many women have responded that they were simply afraid.[229] Fear—of retaliation, of not being believed, of losing one's job, of being ridiculed—is the most common reason women do not report workplace sexual harassment.[230] Women who keep quiet in the wake of

216. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 119–21 (1995).

217. *Id.* at 119–20, 124.

218. *Id.* at 120.

219. Minarsky v. Susquehanna Cty., 895 F.3d 303, 308 (3d Cir. 2018).

220. Fitzgerald et al., *supra* note 216, at 120.

221. *Id.* at 121.

222. *Minarsky*, 895 F.3d at 308.

223. Fitzgerald et al., *supra* note 216, at 121.

224. *See id.*

225. *See id.* at 125.

226. Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 430 (2011).

227. *Id.*

228. Stefanie K. Johnson et al., *Why We Fail To Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment [https://perma.cc/CTG7-AG59].

229. *See id.*

230. Fitzgerald et al., *supra* note 216, at 122.

harassment feel as if they do not have a choice in the matter.[231] Fear of retaliation forces many women to endure harassment for the sake of maintaining employment.[232] In one study, in which 138 state employees were interviewed, about sixty-two percent experienced some form of retaliation, such as poor job evaluations, promotion denials, or transfers, as a result of reporting harassment.[233] In another study, one-third of victims employed by the U.S. Navy were ridiculed by their peers after reporting sexual harassment.[234]

Sheri Minarsky feared she would lose her job if she reported Yadlosky—a job she needed to pay for her daughter's cancer treatment.[235] Yadlosky told her not to trust the very people she was supposed to report to because they would terminate her.[236] And notably, Minarsky's fear of retaliation was certainly understandable because she *did* experience retaliation when her new supervisor increased her workload and made judgmental inquiries after Yadlosky was fired.[237] Minarsky's story exemplifies how fear certainly factors into a woman's decision not to report her harasser.

b. The Bystander Effect

The bystander effect is another reason victims may fail to speak out against sexual harassment in the workplace.[238] The bystander effect supports that people are less likely to help a victim when other people are present and are more likely to abide by the status quo.[239] It occurs for two reasons: diffusion of responsibility and social influence.[240] Furthermore, bystanders' own fear of retaliation factors in as well.[241] For example, in *Gantt v. Sentry Insurance*,[242] the plaintiff was demoted because he spoke up and supported a coworker's sexual harassment claim.[243]

In Sheri Minarsky's case, the women in the office were accustomed to Yadlosky's behavior.[244] His yearly attempt to kiss all the female employees under the mistletoe at

231. *See id.* at 123 ("[D]espite pervasive public opinion that women should 'handle' harassment assertively, confront the perpetrator immediately, and report him to appropriate authorities, reactions to such responses are generally not favorable for those who actually 'blow the whistle.'").

232. *See* Kim, *supra* note 226, at 452 (noting employees often did not report harassment out of fear of "hurting one's career, and the considerable risk employees take when they stand up against their employer").

233. Pamela Hewitt Loy & Lea P. Stewart, *The Extent and Effects of the Sexual Harassment of Working Women*, 17 SOC. FOCUS 31, 40 (1984).

234. AMY L. CULBERTSON ET AL., ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY 17 (1992), http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2+doc=GetTRDoc.pdf&AD=ADA248546 [https://perma.cc/8F4V-5MTZ].

235. *See* Minarsky v. Susquehanna Cty., 895 F.3d 303, 314–15 (3d Cir. 2018).

236. *See id.* at 308.

237. *Id.* at 309.

238. *See* Johnson et al., *supra* note 228.

239. *Id.*

240. *Id.* If other people are present, people are more likely to think someone else is taking care of the problem. *Id.* People often observe others' behavior as the correct behavior and if no one intervenes, people consider that to be the status quo. *Id.*

241. *Id.*

242. 824 P.2d 680 (Cal. 1992).

243. *Gantt*, 824 P.2d at 683.

244. *See* Minarsky v. Susquehanna Cty., 895 F.3d 303, 307, 312 (3d Cir. 2018).

the holiday party was nothing out of the ordinary.[245] Minarsky heard that there was no change in Yadlosky's behavior after identical incidents of harassment were reported.[246] And women who worked for the county testified to witnessing Yadlosky treat numerous employees inappropriately.[247] Even Yadlosky's supervisors, Chief County Clerk Beamer and Commissioner Warren, had fallen victim to his inappropriate tactics.[248] Considering Yadlosky faced no serious repercussions when he harassed the people responsible for disciplining him, it is likely the bystander effect took its hold on the office and the women put up with the harassment because, for them, it was business as usual.

c. Masculine Culture

Power dynamics are often at play as well.[249] Studies show that when a workplace's power imbalance is gendered (e.g., a company's administrative assistants are women and the executives are men), sexual harassment may occur at a higher rate.[250] Employees in more junior positions are less likely to report sexual harassment.[251] Additionally, some women who work in a heavily male-dominated industry may downplay or ignore harassment as a way to fit in and be "one of the guys."[252] For example, ABC News recently highlighted the experience of Pam Norman, a woman who works for a mostly male FedEx Ground facility in Missouri.[253] She put up with harassment from her supervisor, who tried to drive her out of the overly masculine workplace, for years.[254] She never reported it and stated, "I'm going to tough it out. I went this far and I'm not going to turn back."[255]

As Sheri Minarsky's supervisor, Yadlosky maintained control over her employment and used that position to threaten and manipulate her.[256] He knew she needed the job to pay for her daughter's cancer treatment and used it against her.[257] And significantly, even though Yadlosky's bosses were women, they ignored his pattern of manipulative conduct

245. *Id.* at 306–07.

246. *See id.* at 307.

247. *See id.* at 312 ("In addition to the mistletoe incidents and his advances toward Rachel Carrico and Connie Orangasick, Yadlosky had also made inappropriate physical advances to two of the women in authority, Chief Clerk Beamer and Commissioner Warren.").

248. *See id.* (discussing that Yadlosky tried to embrace Beamer and had attempted to hug and kiss Warren approximately ten times).

249. *See* Johnson et al., *supra* note 228.

250. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 28 (citing Meg A. Bond, *Prevention of Sexism*, *in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014)).

251. *See id.* (citing *Written Testimony of Daniel Werner*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 17, 2015), http://www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm [https://perma.cc/JW3C-L6VU]).

252. Johnson et al., *supra* note 228.

253. Keturah Gray et al., *Working Women Share Stories of Sexual Harassment While on the Job,* ABC NEWS (Apr. 20, 2018, 5:22 AM), http://abcnews.go.com/beta-story-container/GMA/News/working-women-share-stories-sexual-harassment-job/story?id=54449605 [https://perma.cc/TQX6-WLRE].

254. *Id.*

255. *Id.*

256. Minarsky v. Susquehanna Cty., 895 F.3d 303, 307 (3d Cir. 2018).

257. *See id.* at 307, 314–15.

and left Minarsky feeling powerless.[258] In an environment where blatant sexual harassment is watered down to "boys will be boys," women may feel helpless as they watch their harassers merely get a slap on the wrist for their behavior.[259]

3. The Affirmative Defense Is Not One Size Fits All

In light of the facts and the numerous studies done on sexual harassment victims, the Third Circuit recognized that Sheri Minarsky's failure to report for three years was not necessarily unreasonable.[260] A clean-cut, objective reasonableness analysis does not reflect the circumstance-specific nature of her situation. By refusing to both apply the *Faragher-Ellerth* defense in a cursory manner and conclude she acted unreasonably by not reporting her harassment, the court made clear that sexual harassment allegations should be taken seriously and the circumstances of each unique case must be carefully considered.[261] The court took Minarsky's fears over losing her job into account.[262] It took note of the previous incidents of sexual harassment in the office and the futility of reporting,[263] and it recognized the inherent office power dynamics at play.[264] Studies show that there are a number of legitimate reasons why victims hold back and wait to report.[265] And by giving credence to those reasons, *Minarsky* is an impactful step in employment law within the #MeToo era.

B. A Wake-Up Call for Employers—Pressure and Compliance

According to the precedent among most courts, employers will meet the first prong of the *Faragher-Ellerth* defense if they had decent anti-harassment policies and procedures in place.[266] But after *Minarsky*, it is no longer enough for employers to have merely a boilerplate anti-harassment policy in place, aimed at shielding themselves from litigation.[267] They must actively deal with the pervasiveness of sexual harassment.[268] The Third Circuit zeroed in on the fact that there was evidence of a pervasive pattern of sexual harassment in the office that was not properly dealt with.[269] Multiple women had previously come forward about Yadlosky.[270] The county clerk herself experienced

258. *See id.* at 307, 316.

259. *See* Johnson et al., *supra* note 228.

260. *Minarsky*, 895 F.3d at 316–17.

261. *See id.*

262. *See id.* at 314 (recognizing the "fear of Yadlosky's hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; . . . the futility of reporting[;] . . . [and] the pressing financial situation she faced with her daughter's cancer treatment").

263. *Id.* at 313 n.12 ("[A] certain fallacy . . . underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.").

264. *Id.* at 314 ("[T]he degree of control and specific power dynamic can offer context to the plaintiff's subjectively held fear of speaking up . . . .").

265. See *supra* Part III.A.2 for the discussion of these studies.

266. See *supra* Part II.C for the discussion of these decisions.

267. *See Minarsky*, 895 F.3d at 312–13.

268. *See id.*

269. *See id.*

270. *Id.* at 312.

unwanted touching.[271] But nothing changed.[272] By pointing out these details, the Third Circuit looked past the seemingly decent anti-harassment policy on paper and focused instead on the office culture and its blatant failure to respond to Yadlosky's policy-violating conduct.[273] By finding a dispute of material fact and sending the issue of the county's reasonableness to a jury,[274] the Third Circuit put employers on notice that obtaining summary judgment on the *Faragher-Ellerth* defense will no longer be so simple. Employers are going to be held to a higher standard in the Third Circuit, and accordingly, employers will have to prove to the court that they are making a good faith effort in preventing and responding to sexual harassment in their workplaces to escape liability.[275]

A lengthy delay in an employee's report of sexual harassment may point to serious issues with an employer's anti-harassment policies and procedures.[276] For example, in Sheri Minarsky's case, her fear of retaliation was so strong and the prospect of the problem being properly handled so futile that she kept quiet and endured the harassment for over three years.[277] Thus, employers must specifically address fear of reporting. Employers should be incentivized to have effective policies and procedures in place that allow employees to feel that they can come forward confidently and report their harassment. Because Susquehanna County turned a blind eye to Yadlosky's pattern of conduct, its anti-harassment policy was not necessarily reasonable in the Court's eyes—no matter how good it looked on paper.[278] Therefore, in the wake of *Minarsky*, employers should keep a watchful eye out for signs of harassment and focus first on preventive, rather than corrective efforts.[279] Employers should get at the root of the problem and work toward building an encouraging workplace culture where employees can report instances of harassment quickly and confidently.

The Bureau of Labor Statistics found that seventy percent of employers provide anti-sexual harassment training and ninety-eight percent of employers have anti-sexual harassment policies in place.[280] And yet, the fact that thirty-three million women have been sexually harassed at work shows that there is much work to be done on the part of employers.[281] Employers should take steps to promote the accessibility and convenience of internal reporting procedures and the capabilities of their human resources departments.[282] Once there is a report of harassment, it should be promptly responded to

271. *Id.*

272. *See id.* at 307.

273. *See id.* at 313.

274. *Id.* at 313, 317.

275. *See id.* at 311, 313 ("[T]he existence of a functioning anti-harassment policy *could* prove the employer's exercise of reasonable care so as to satisfy the first element of the affirmative defense.").

276. *See id.* at 315.

277. *Id.* at 314.

278. *See id.* at 312–13.

279. *See* EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 37.

280. Johnson et al., *supra* note 228.

281. *See* Langer, *supra* note 205.

282. *See* Johnson et al., *supra* note 228 ("Individuals need clear HR systems through which they can report observations and experiences of sexual harassment.").

and thoroughly investigated.[283] Once harassment is found to have occurred, the harasser must be immediately and proportionately disciplined.[284]

Part III.B.1 discusses anti-harassment policies. Anti-harassment policies and procedures should not be used as a risk management tool or a way to escape liability.[285] They must be comprehensive, effective, and actually *change* the workplace environment as well as decrease the likelihood of reporting delays.[286] Instead of being viewed as a last resort, filing a formal report with an employer should be seen as an easily-accessible, commonsense option for victims.[287]

Part III.B.2 notes the importance of anti-harassment training. Because employers themselves cannot possibly be aware of every single instance of harassment, all employees should be thoroughly trained on sexual harassment and how to respond to it.[288] But it is not enough to have a training in place.[289] Employers must evaluate the *quality* of their training and experiment with various training methods in order to mold a responsive office culture.[290]

1. Effecting Change Through Anti-Harassment Policies

Holistic prevention against sexual harassment begins with an established anti-harassment policy.[291] "Employees in workplaces without [harassment] policies report the highest levels of harassment."[292] The *Faragher-Ellerth* defense does not articulate what exactly constitutes a reasonable anti-harassment policy.[293] However, in drafting anti-harassment policies, employers may look to the parameters set out by the

283. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 38.

284. *Id.* at 37–38.

285. *See* Francis Achampong, *Policy Implications of Rules Governing Harassment and Discrimination Complaints in Private and Federal Employment*, 20 HOFSTRA LAB. & EMP. L.J. 51, 72 (2002) ("[T]he government attempts to achieve its policy objective through the remedial scheme of providing victims of employment discrimination with equitable relief, compensatory and punitive damages, and attorney's and expert's fees under Title VII. This scheme induces private employers to adopt and implement risk management programs which minimize their risk of employment practices liability and maximize the value of their firms to drive economic growth." (footnote omitted)).

286. *See* Wilkinson et al., *supra* note 54 ("In addition to editing their policies and procedures, employers have taken steps to affect broader cultural change. For instance, some employers have cut back on alcohol at company events or offered more food options to offset it. Others have engaged professionals or other employees to be alert for any suspicious behaviors and patrol company functions.").

287. *See* EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 37–38 ("[T]he words of the policy itself should be simple and easy to understand. . . . The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation.").

288. *See id.* at 33–34.

289. *Id.* at 45.

290. *Id.*

291. *See id.* at 33–34.

292. *Id.* at 38 (citing James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301 (1998)).

293. See *supra* notes 102–104 and accompanying text for a discussion of the vagueness of the term "reasonable" and how employers have benefitted from it.

EEOC for guidance. The EEOC supplies an anti-harassment policy checklist for employers to use in formulating a comprehensive policy, which includes

(1) a statement that harassment based on any protected characteristic is unacceptable,
(2) a comprehensible description of prohibited conduct,
(3) a description of a reporting system that is easily accessible and provides multiple avenues to report,
(4) a statement assuring that the response to a report will be prompt, thorough, and impartial,
(5) a statement stressing confidentiality,
(6) a statement assuring that the employer will promptly take proportionate corrective action, and
(7) an assurance of protection against retaliation.[294]

But it is not enough to merely have a policy in place. The policy must be properly disseminated and implemented effectively.[295] The EEOC has emphasized that if an "employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment."[296] Thus, the Third Circuit properly determined that, although the county quickly responded to Minarsky's complaints against Yadlosky by firing him, its response to the previous reports of harassment was not a sufficiently reasonable response.[297] It is not enough that Minarsky received a copy of the county's anti-harassment policy and procedures on her first day of work—employees must be aware that their company's anti-harassment procedures actually *work*.[298]

Surface level compliance will not satisfy the employer's burden.[299] Significantly, while having a thorough anti-harassment policy is the first step employers should take, as *Minarsky* reflects, it is not enough on its own.[300] One study reported that the presence of an anti-harassment policy alone does not necessarily lead to a reduction in the amount

294. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHECKLIST FOR EMPLOYERS, http://www.eeoc.gov/eeoc/task_force/harassment/upload/checklist2.pdf [https://perma.cc/K8J5-SDK5].

295. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 38 ("EEOC's position . . . is that employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy.").

296. EEOC, VICARIOUS EMPLOYER LIABILITY, *supra* note 65.

297. Minarsky v. Susquehanna Cty., 895 F.3d 303, 312–13 (3d Cir. 2018).

298. *See id.* at 308; *see also* EEOC, VICARIOUS EMPLOYER LIABILITY, *supra* note 65 ("Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.").

299. *See* Minarsky, 895 F.3d at 313.

300. *See id.* at 311; EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 36 ("If employers put a metric in a manager's performance plan about responding appropriately to harassment complaints, but then do nothing else to create an environment in which employees know the employer cares about stopping harassment and punishing those who engage in it—it is doubtful that the metric on its own will have much effect.").

of harassment in the workplace.[301] Accordingly, anti-harassment policies should not be used merely as a shield against litigation. For example, a 2013 employment law letter published by a Florida law firm argued that employers should update their policies with the main goal of avoiding litigation and defending against lawsuits.[302] The letter emphasized, "[r]eviewing your policies and procedures may seem burdensome at the outset, but the time invested in taking proactive steps to ensure legal compliance can pay tremendous dividends in the long run."[303] Similarly, the *New York Practice Series* suggests that avoiding litigation should be an employer's first priority because "litigation is stressful, distracting, time-consuming, and expensive."[304]

Instead of focusing solely on risk management, employers should make an effort to actually impact office culture and get to the root of the problem. Only a "true commitment by the employer to actively influence the work environment" may reduce harassment.[305] Therefore, employers can make a dent in the pervasive culture of sexual harassment only when they "make[] a concerted . . . and highly visible effort to deal with the problem."[306]

In 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace co-chairs, Chai Feldblum and Victoria Lipnic, released a report on workplace harassment that discussed actions employers can take to improve reporting policies and procedures.[307] Specifically, they highlighted that employers should offer multi-faceted reporting policies and procedures that provide various methods of reporting and multiple points of contact.[308] In Sheri Minarsky's case, this type of multi-faceted reporting may have made reporting far less intimidating, considering she was supposed to report harassment to two people she did not trust.[309] Additionally, Feldblum and Lipnic recommended that reports of harassment are kept strictly confidential and the privacy of the accuser and the accused should be protected as much as possible.[310]

2. Molding a Responsive Workplace Through Effective Training

Another way an employer may encourage a workplace where harassment is readily reported is by establishing effective anti-harassment training, which can be accomplished through various measures, including live training, videos, written handbooks, and online

301. 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, 41 (2003) [hereinafter Grossman, *Culture of Compliance*].

302. Harper Gerlach PL, *Are You Taking Steps To Avoid Employment Litigation?*, 24 NO. 12 FLA. EMP. L. LETTER 7 (2013).

303. *Id.*

304. 13A SHARON P. STILLER, NEW YORK PRACTICE SERIES – EMPLOYMENT LAW IN NEW YORK, § 1:22 (2d ed. 2018).

305. Grossman, *Culture of Compliance*, *supra* note 301, at 41.

306. *Id.* (omission in original) (alteration in original) (quoting Gruber, *supra* note 292, at 316).

307. *See* EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 14–15.

308. *See id.* at 41 ("[A] robust reporting system might include options to file complaints with managers and human resource departments, via multi-lingual complaint hotlines, and via web-based complaint processing.").

309. *See* Minarsky v. Susquehanna Cty., 895 F.3d 303, 308 (3d Cir. 2018).

310. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 42.

training.[311] But the training must be actually aimed at making a difference in the office and molding employees' perspectives about workplace harassment.[312] Harassment prevention training should not be used merely as a tool to avoid litigation.[313]

A recent online poll found that seventy-one percent of organizations offer anti-sexual harassment training for employees—but about fifty percent of those polled said the training has not changed in the last three years.[314] Louise Fitzgerald, a psychology professor at the University of Illinois at Urbana-Champaign, has pointed out that a lot of anti-harassment training is ineffective because "ignorance about what constitutes harassment is not the [main] problem"—it is much deeper than that.[315] She emphasized, "[w]e are talking about turning a battleship. That is slow, and it is a lot of work."[316] Elizabeth Tippett, a professor at the University of Oregon School of Law, has pointed out that "[t]here is very little research in sexual harassment training to begin with, so we don't really know what would be persuasive."[317] Fortunately, however, although the effectiveness of training is unclear, studies have shown that employees who receive training may be more likely to file a harassment complaint if the training does not stand alone and is part of an employer's holistic effort to respond to sexual harassment.[318]

In the EEOC Select Task Force Report, Feldblum and Lipnic emphasized the lack of empirical studies done to date on the effectiveness of training itself.[319] Significantly, they noted that "[m]uch of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability."[320] Feldblum and Lipnic offered multiple methods that employers can use to make training more effective.[321] For example, they noted that all employees should receive compliance training, or training that educates employees about what forms of conduct are considered unacceptable in the workplace.[322] Further, compliance training should be specifically tailored to the particular workplace.[323] Compliance training is especially important for

311. Andrew R. Gold & Katharine H. Parker, *Workplace Sexual Harassment Policies: Exercising Reasonable Care in Prevention*, 20 No. 3 ACCA DOCKET 58, 66–67 (2002).

312. *See* EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 69 (stating that employers should allocate resources to train first-line supervisors and middle management to respond effectively to harassment before it reaches a legally actionable level).

313. *See id.* at v–vi; *see also* Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 4–5 (2001) (arguing that the use of anti-harassment training mainly as a means to avoid litigation is faulty because evidence suggests many training programs are ineffective in combating workplace sexual harassment).

314. Megan Cole, *71 Percent of Organizations Offer Sexual Harassment Prevention Training*, ASS'N FOR TALENT DEV. (Nov. 13, 2017), http://www.td.org/insights/71-percent-of-organizations-offer-sexual-harassment-prevention-training [https://perma.cc/3646-6R5B].

315. Rhana Natour, *Does Sexual Harassment Training Work?*, PBS (Jan. 8, 2018, 4:06 PM), http://www.pbs.org/newshour/nation/does-sexual-harassment-training-work [https://perma.cc/474N-YS3C].

316. *Id.*

317. *Id.*

318. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 48.

319. *Id.* at 45.

320. *Id.* at v.

321. *Id.* at 50.

322. *Id.*

323. *Id.*

middle management and first-line supervisors because it stresses their accountability as leaders in the office.[324] Feldblum and Lipnic stressed throughout the report that ensuring accountability is necessary to create an office culture where employees believe that management takes sexual harassment seriously.[325]

Feldblum and Lipnic suggested that instead of offering the same training over and over, employers should offer "training that is varied . . . in style, form, and content."[326] Training should also be consistently evaluated.[327] Additionally, Feldblum and Lipnic suggested using two new approaches to workplace training that have the ability to improve office culture and encourage prompt reporting: bystander intervention training and civility training.[328]

Bystander training is aimed at creating awareness and a sense of collective responsibility among employees so that they can recognize harassment and take action when they realize it is happening.[329] It involves the following four steps: (1) increasing awareness of sexual harassment so employees can identify it when they observe it, (2) teaching employees that they should step in and help if they see harassment taking place, (3) increasing the accountability of employees so that they understand they are responsible for helping victims of harassment, and (4) making sure employees are adequately informed about the process for intervening.[330] Bystander training specifically is a promising step employers may take to decrease reporting delays and change the office culture on a holistic level because it attempts to eradicate the bystander effect problem—if employees are more comfortable with intervention, then they will likely feel less pressured to abide by the status quo.[331]

Feldblum and Lipnic also suggested the importance of civility training as a way to impact office culture.[332] Instead of a training that teaches employers how to recognize harassment for risk management purposes, civility training encourages employees to treat each other with respect and humility.[333] Civility training also encourages employees to report any instances of disrespect to management.[334] Significantly, civility training focuses "on the positive – what employees and managers *should* do, rather than on what they should not do."[335]

In *Minarsky*, the women in the office were used to Yadlosky's inappropriate behavior.[336] In her deposition, Minarsky recounted a time when another employee noticed Yadlosky embracing her from behind and said to him, "I thought you said

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324. *See id.* at 51.

325. *Id.* at v–vi, 51.

326. *Id.* at 52.

327. *Id.* at 53.

328. *Id.* at 54.

329. *Id.* at 57.

330. Johnson et al., *supra* note 228.

331. *See id.* See also *supra* notes 238–43 and accompanying text for a discussion of the bystander effect.

332. EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 54.

333. *Id.* at 54–55.

334. *See id.* at 55.

335. *Id.*

336. *See* Minarsky v. Susquehanna Cty., 895 F.3d 303, 312 (3d Cir. 2018) (stating that Minarsky's testimony revealed a pattern of unwanted advances toward multiple women).

yesterday you're not supposed to do that anymore[,]" referencing the previous incident of sexual harassment against an employee.[337] Yadlosky responded that he could do whatever he wanted, and nothing came from the interaction.[338] If there had been comprehensive bystander training or civility training in place that allowed the employees to recognize Yadlosky's actions as harassment and come forward to report his behavior, Sheri Minarsky would have likely felt more comfortable reporting her harassment, instead of watching other female employees putting up with his behavior.[339]

Ultimately, the precedent set by the Third Circuit in *Minarsky* gives employers a much-needed wake-up call that improvements must be made to their anti-harassment action plans. While there is no quick fix to harassment and more studies are required to determine what works, the only way to get to the root of the problem is by responding to the #MeToo movement and experimenting with various solutions.[340] As the #MeToo movement has made apparent, the ball is in the employer's court to actively change the workplace atmosphere, instead of standing behind ineffective policies and procedures.[341] And unless they do this, as the Third Circuit has made clear, summary judgment will not be in their favor.[342]

C. Minarsky*'s Implications—Where Do We Go from Here?*

Minarsky is merely the beginning. Although the implications of *Minarsky* have yet to be seen, one of the most obvious takeaways is that it will be harder for employers in the Third Circuit to win summary judgment in the context of the #MeToo movement.[343] The Third Circuit made it clear to the lower courts that they need to take a hard look at what they consider reasonable behavior on behalf of both the employer and the employee.[344] As *Minarsky* highlighted, "[t]he cornerstone of [the *Faragher-Ellerth*] analysis is reasonableness."[345] And therefore, because the Third Circuit asserts that reasonableness should be judged by the particular factual circumstances of the case, there is an increased chance that the court will give the determination to a jury to evaluate those circumstances.[346] Part III.C.1 discusses the cultural implications for employers in the wake of *Minarsky*. Part III.C.2 responds to potential criticism of the Third Circuit's decision and explains why *Minarsky*'s modernization of the *Faragher-Ellerth* defense is necessary.

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337. *Id.* at 307.

338. *Id.*

339. *See id.* at 307 & n.4, 308.

340. *See* EEOC, SELECT TASK FORCE REPORT, *supra* note 6, at 42–43.

341. *See* Nicole Lyn Pesce, *The #MeToo Movement Has Changed Policies Across Industries, But There's Still Work To Be Done*, MARKETWATCH (Oct. 4, 2018, 6:59 PM), http://www.marketwatch.com/story/the-metoo-movement-has-changed-policies-across-industries-but-theres-still-work-to-be-done-2018-10-04 [https://perma.cc/RQ8H-ZP55].

342. *See Minarsky*, 895 F.3d at 313, 317.

343. *See id.* at 317.

344. *See id.* at 311–14.

345. *Id.* at 311.

346. *See, e.g.*, Kastanidis v. Pa. Dep't of Human Servs., No. 1:16-CV-1548, 2018 WL 3584976, at *10 (M.D. Pa. July 26, 2018) (citing *Minarsky* and determining that a jury could conclude that the plaintiff's failure to immediately report her harassment was not per se unreasonable).

1. Cultural Implications

Beyond the legal implications of *Minarsky*, the decision has cultural implications as well. As this Comment discusses, the Third Circuit looked beyond the anti-harassment policy on paper and instead focused on the culture of the office and the consistent pattern of Yadlosky's inappropriate behavior.[347] Accordingly, *Minarsky* implicates the increasing challenges employers must face in shielding themselves from liability in sexual harassment cases.[348] According to *Minarsky*, dissemination of an anti-harassment policy and reprimanding a supervisor may not be enough to meet the defense.[349] Instead, employers will have to show the court that their policies and procedures are effective and that complaints are promptly and properly dealt with.[350] Likewise, *Minarsky* makes clear that a pattern of sexual harassment may be a sign of an office culture that is not adequately responding to numerous allegations of sexual misconduct.[351] Ignorance of the harassment will not necessarily shield an employer from liability.[352] Instead, employers need to make a better effort in establishing a safe workplace culture where reporting is encouraged.[353]

2. Responding to *Minarsky*'s Critics

Because it can be argued that *Minarsky* makes summary judgment in favor of the employer less predictable, opponents of the Third Circuit's decision may argue that the standard set by *Minarsky* is vague, uncertain, and ultimately undermines the affirmative defense.[354] These critics will likely find that what was once a straightforward and objective reasonableness analysis has become subjective and arbitrary. For example, Louis R. Lessig, a partner at Brown & Connery, LLP, has argued *Minarsky* is "unnerving" and "basically takes 20 years of case law and turns it on its head" because an employee's failure to report sexual harassment was usually enough to satisfy the second prong of the defense.[355] Furthermore, Lessig asserts that *Minarsky* is an uncomfortable result for employers who have believed that a reporting procedure was enough to meet the first prong of the defense.[356]

It is important to remember that *Faragher* and *Ellerth* are still good law and have been good law for twenty years.[357] But that does not mean that the defense cannot be affected by a cultural shift. Notably, victims of sexual harassment in other circuits are

347. *See Minarsky*, 895 F.3d at 313; *see also supra* Part II.D.

348. *See Minarsky*, 895 F.3d at 312–13, 317.

349. *Id.* at 312–13.

350. *See id.* at 317.

351. *See id.* at 312–13.

352. *See id.* ("Thus, County officials were faced with indicators that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward Yadlosky's harassment.").

353. *See id.* at 317 (discussing fear as a factor in the reasonableness of not reporting analysis).

354. *See id.*

355. Kate Tornone, *From Unclear to Unnerving: 3 Rulings That Could Reshape HR Policies*, HR DIVE (Oct. 10, 2018), http://www.hrdive.com/news/from-unclear-to-unnerving-3-rulings-that-could-reshape-hr-policies/539176/ [https://perma.cc/F6C5-EHP8].

356. *Id.*

357. *See Minarsky*, 895 F.3d at 310–11.

citing *Minarsky* and its recognition of the #MeToo movement in their briefs as well as arguing that they did not act unreasonably for failing to report their harassment.[358]

In defense of *Minarsky*, the foundation of the *Faragher-Ellerth* defense is a reasonableness determination and the Third Circuit has not strayed from that analysis.[359] Moreover, *Minarsky* reflects the guidance of the EEOC set in 1999, a year after the Supreme Court handed down the *Faragher* and *Ellerth* decisions.[360] In its commentary on the *Faragher-Ellerth* defense, the Commission specifically noted that it may be reasonable for an employee to ignore a number of incidents in the hope that it will stop.[361] Additionally, the EEOC stated that fear of retaliation may be a legitimate consideration in determining reasonable behavior on behalf of the employee.[362] Thus, the EEOC recognized twenty years ago that failure to report is not necessarily unreasonable.[363] It is time that the federal judiciary take the lessons learned from the past twenty years of progress made on sexual harassment awareness. And by citing to the #MeToo movement, the Third Circuit has given a voice to countless women who feel that they have no legal recourse when they fail to report their harassment.[364]

Another possible argument against *Minarsky* is that the Third Circuit's decision will unfairly hold employers liable who were genuinely unaware sexual harassment was taking place in their offices.[365] But these concerns highlight the weaknesses of a rigid *Faragher-Ellerth* application.[366] As this Comment emphasizes, sexual harassment in the workplace is a highly circumstance-specific issue that cannot be cut and pasted into a simple, two-part affirmative defense without a thorough consideration of the facts. The Third Circuit recognized that proper application of the standard in Sheri Minarsky's heavily fact-specific case would best fall in the hands of the jury.[367] By giving that determination to a jury, the court gave a clear message to employers—either fix inadequate anti-harassment policies and address issues in office culture or risk ending up in front of a jury.[368] Accordingly, the message to take away from *Minarsky* is not that employers should be watching their employees like hawks because they will be found liable for every instance of undetected sexual harassment. Rather, it encourages employers to give their policies and procedures a second look and determine both why

358. *See, e.g.*, Opening Brief of Appellant Kathy Lackey at 31–32, Lackey v. Surgery Ctr. of Cullman, No. 17-14783-H, 2019 WL 1552594 (11th Cir. Apr. 5, 2019); Brief and Required Short Appendix of Plaintiff-Appellant, Tristana Hunt at 39, Hunt v. Wal-Mart Stores, Inc., No. 18-3403, 2019 WL 1224347 (7th Cir. Mar 7, 2019).

359. *Minarsky*, 895 F.3d at 311.

360. *See* EEOC, VICARIOUS EMPLOYER LIABILITY, *supra* note 65.

361. *Id.*

362. *Id.*

363. *Id.* (recognizing, in 1999, that "[a] determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee *at that time*").

364. *See Minarsky*, 895 F.3d at 313–14, 313 n.12.

365. *See* Johnson, *supra* note 125, at 799.

366. *See id.* ("[E]mployer notice does not necessarily avoid all the harms of sexual harassment and therefore cannot, without more, be a prerequisite for attaching liability to the employer.").

367. *Minarsky*, 895 F.3d at 314–16.

368. *See id.*

their employees are not reporting harassment and what they can do to create a safe, transparent work environment.

IV. CONCLUSION

The past fifty years have seen great strides for victims of workplace sexual harassment. Beginning in the 1970s, the federal courts have slowly caught up with each gradual movement against sexual harassment. The past two years alone have seen millions of women sharing their own experiences with harassment in the workplace. By validating the fear victims face that prevents them from reporting their harassers, the Third Circuit's decision in *Minarsky* has moved the law forward in response to the #MeToo movement, adding one more notch in the fight against workplace sexual harassment's timeline.