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Burlington Industries, Inc. v. Ellerth: An Affirmative Defense Against Employer Liability for Supervisory Harassment

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Casenotes

Burlington Industries, Inc. v. Ellerth: An Affirmative Defense Against Employer Liability for Supervisory Harassment

In *Burlington Industries, Inc. v. Ellerth*,[1] the Supreme Court held that an employer is vicariously liable for its supervisor's harassment that creates a hostile work environment,[2] subject only to the affirmative defense that the employer "exercised reasonable care to prevent and correct" the harassment and that the "employee unreasonably failed to

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1. 118 S. Ct. 2257 (1998). In a companion case, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293-94 (1998), the Supreme Court held the City of Boca Raton vicariously liable for its supervisor's harassment and determined that the City was not allowed to assert the affirmative defense set forth by the Court because the City failed to effectively disseminate its sexual harassment policy. This casenote, which discusses the affirmative defense, focuses solely on *Burlington* because the Court determined that Burlington would have the opportunity to assert the affirmative defense on remand.

2. Courts recognize two forms of sexual harassment under Title VII: (1) quid pro quo, and (2) hostile environment. Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1110 (N.D. Ill. 1996). Quid pro quo sexual harassment occurs when a supervisor "conditions tangible employment benefits on submission to sexual demands." *Id.* Hostile environment harassment "unreasonably interfer[es] with [the] individual's work performance or creat[es] an intimidating, hostile or offensive working environment." *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)). This casenote focuses solely on hostile environment sexual harassment created by a supervisor.

take advantage" of the employer's remedial procedure or corrective opportunities offered after the fact.[3]

I. FACTUAL BACKGROUND

In 1993 Kimberly Ellerth ("Ellerth") began working for Burlington Industries, Inc. ("Burlington") as a merchandising assistant for the Chicago office. Ellerth's immediate supervisor was Mary Strenk Fitzgerald ("Fitzgerald"), and Fitzgerald's supervisor was Theodore Slowik ("Slowik"). As merchandising assistant, Ellerth spoke with Slowik on the phone, on average, once per week. She also traveled to training-related sessions where she would see Slowik. Ellerth received a promotion to the position of sales representative in February 1994. Her new immediate supervisor was Patrick Lawrence, and his supervisor was Slowik.[4]

During her employment, Ellerth endured numerous occasions of harassment from Slowik.[5] He told "offensive" jokes[6] in her presence, commented on her legs repeatedly,[7] and touched her knee during a lunch meeting.[8] During one conversation, Slowik commented, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington."[9] Ellerth interpreted this comment to mean that Slowik would cause problems for her at Burlington if she did not have sex with him.[10] While sitting in Ellerth's office making phone calls, Slowik told her, "[i]t's nice to have my butt where your butt was, Kim."[11] On another occasion, Ellerth contacted Slowik to get permission to do a favor for a customer, to which Slowik replied, "I don't have time for you right now, Kim, unless you're telling me—unless you want to tell me what you are wearing."[12] Ellerth called Slowik again to try to get permission, and

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3. 118 S. Ct. at 2270.

4. 912 F. Supp. at 1106.

5. *Id.* Ellerth claimed that Slowik's harassing conduct began during her pre-employment interview and continued throughout her employment at Burlington. *Id.*

6. *Id.* at 1108. Ellerth could not remember the content of many of Slowik's jokes. However, she did remember that one joke involved a blonde, a limo, and sex. *Id.*

7. *Id.* at 1107-08. On one occasion, Slowik, Ellerth, and Angelo Brenna, Burlington's vice-president of international sales, were walking to the office when Slowik commented that Ellerth had nice legs and then turned to Brenna and asked, "[w]hat do you think, Angelo?" *Id.* at 1107. During a phone conversation in 1994, Slowik stated that it "must be hard for a woman like you, Kim, to have a job like that—a woman with great legs." *Id.* at 1108.

8. *Id.* at 1107.

9. *Id.*

10. *Id.*

11. *Id.* at 1108.

12. *Id.* at 1108-09.

Slowik refused her request but asked her if she was "wearing shorter skirts yet . . . because it would make [her] job a whole heck of a lot easier."[13]

Burlington had a policy against sexual harassment, which was included in the employee handbook.[14] Ellerth had read the policy in the handbook but did not report Slowik's harassing conduct to her supervisors. Her husband advised her against informing her supervisors about the conduct because he feared that she might lose her job.[15] Ellerth claimed that she did complain to a few Burlington employees, but each denied[16] that Ellerth ever discussed Slowik's harassing conduct.[17]

On May 31, 1994, Ellerth informed her supervisor that she was quitting her job but did not mention Slowik's harassing conduct. In a June 21, 1994 letter, however, she did inform him that she had quit because of Slowik's harassment.[18] Ellerth filed a sexual harassment charge with the Illinois Department of Human Rights ("IDHR") and the Equal Employment Opportunity Commission ("EEOC").[19] In her charge, Ellerth claimed she felt she had to quit her job because Slowik's harassment created an "abusive work environment."[20] On November 30, 1994, the EEOC sent Ellerth a right to sue letter and she filed a Title VII[21] sexual harassment suit against Burlington.[22]

At trial the district court examined Ellerth's claim to determine whether the harassment created a hostile environment,[23] and, if so,

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13. *Id.* at 1109.

14. *Id.* The policy stated "if you have any questions or problems, or if you feel you have been discriminated against, you are encouraged to talk with your supervisor or human resources representative or use the grievance procedure promptly." *Id.* at 1118.

15. *Id.* at 1109.

16. *Id.* at 1109 n.6.

17. *Id.* at 1109.

18. *Id.*

19. Ellerth v. Burlington Indus., Inc., 102 F.3d 848, 853 (7th Cir. 1996).

20. *Id.*

21. The relevant portion of Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994).

22. 102 F.3d at 853.

23. *Burlington*, 912 F. Supp. at 1110-11. The court used the United States Supreme Court's language in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), in this determination. *Id.* In *Harris*, the Supreme Court determined that for harassment to create an actionable hostile environment, it has to be more than "merely offensive," but need not cause psychological injury to the victim. *Id.* at 21. The Court held that an environment can be classified as "hostile" by looking at all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or

whether Burlington was liable.[24] The court concluded that a reasonable jury could find that Slowik's conduct "materially altered the conditions of [Ellerth's] employment" and took away her right to a work environment "free from discriminatory intimidation, ridicule and insult."[25] The court then analyzed Burlington's liability for Slowik's harassing conduct by considering three different agency theories for employer liability.[26] First, the court determined that Slowik's conduct was outside the scope of employment because he was not "motivated . . . by a purpose to serve Burlington."[27] Next, the court analyzed Burlington's negligence in regard to Slowik's conduct and found that Burlington was not negligent because it had a sexual harassment policy, and Ellerth failed to use the policy.[28] Finally, the court found that Burlington was not liable to Ellerth on the theory that Slowik was acting on behalf of Burlington because Ellerth was "fully aware that Slowik had exceeded the bounds of his authority."[29] The court granted Burlington's motion for summary judgment.[30]

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humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. The Court determined that the harassment not only must be subjectively unwelcome to the particular plaintiff, but also, objectively hostile from the standpoint of a reasonable person in order to be actionable under Title VII. *Id.* at 22. The Court did not resolve whether the hypothetical reasonable person from whose vantage the environment should be judged may be a reasonable woman when the plaintiff is female. *Id.* at 22-23.

24. 912 F. Supp. at 1113-24. Prior to this discussion, the court examined the timeliness of Ellerth's complaint and held that she could not take advantage of the continuing violation doctrine, which allows time-barred complaints to be actionable if they are "'related closely enough to constitute a continuing violation.'" *Id.* at 1111. The court limited Ellerth's claim to harassing events that happened after December 20, 1993. *Id.* at 1111-13.

25. *Id.* at 1114. The court dismissed Burlington's arguments that there were only a few incidents of harassment after December 20, 1993, and that the harassment was not "severe or pervasive enough" because it was long distance. *Id.* at 1114-15.

26. *Id.* at 1115-21.

27. *Id.* at 1116-17.

28. *Id.* at 1117-19.

29. *Id.* at 1120-21.

30. *Id.* at 1124. The court stated that harassment cases are unfortunate because:

> they strikingly illustrate that in spite of whatever social enlightenment our nation might have achieved in the wake of the civil rights movement, the various antidiscrimination laws enacted by Congress, and such consciousness raising events in our nation's history as the Anita Hill/Clarence Thomas hearings, the nation's workplaces are still filled with those who are all eager to exploit their positions of authority and act motivated by discriminatory animus.

Id. at 1123.

Ellerth appealed, arguing the district court had misapplied the agency theories for employer liability.[31] The court of appeals found that Slowik's conduct was within the scope of employment, and therefore, Burlington was liable for Slowik's harassment.[32] The court stated that, under the common law of agency, Burlington had a duty to "monitor the supervisory employees to whom it has entrusted special powers."[33] The court found that Ellerth had presented enough information to survive Burlington's summary judgment motion, and it therefore reversed and remanded.[34]

The United States Supreme Court granted certiorari to determine when an employer can be held liable for a supervisory employee's sexual harassment that creates a hostile work environment.[35] The Supreme Court affirmed the court of appeals reversal, holding that an employer is vicariously liable for its supervisor's harassing conduct, subject to an affirmative defense composed of two elements.[36] In order to avoid liability altogether, the employer would have to prove by a preponderance of the evidence: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[37] Consequently, the Court found that Burlington could be vicariously liable for Slowik's conduct, but it remanded to allow Burlington to develop the facts necessary to establish the affirmative defense.[38]

II. LEGAL BACKGROUND

Most circuit courts faced with the question have held that supervisors and other high officials cannot be held individually liable for their

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31. *Burlington*, 102 F.3d at 854. Ellerth argued that her harassment claim should have been analyzed under both hostile environment and quid pro quo theories of sexual harassment. *Id.* at 854-55. The court of appeals held that Ellerth's claim did include a quid pro quo element, citing a number of occasions on which Slowik refused to give Ellerth permission for projects unless she complied with his wishes. *Id.* at 855.

32. *Id.* at 859-60. The court compared the present case with *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995), in which the supervisor's harassing conduct occurred mainly during working hours and in the workplace. *Id.* Although some of Slowik's conduct occurred outside of the workplace, it was in conjunction with business activities. *Id.*

33. 102 F.3d at 860.

34. *Id.* at 863.

35. *Burlington*, 118 S. Ct. at 2262.

36. *Id.* at 2270.

37. *Id.*

38. *Id.* at 2271.

harassment.[39] The standards governing employer liability, therefore, become crucial to recovery when the victim is harassed by a supervisor.[40] In *Meritor Savings Bank v. Vinson*,[41] the Supreme Court declined to announce particularized standards for employer liability in sexual harassment cases.[42] It did, however, reverse the United States Court of Appeals for the District of Columbia, which found employers could be held strictly liable for hostile environment harassment by a supervisory employee.[43] On the other hand, the Court found that even an employer with an established grievance policy who received no notice of a supervisor's harassment is not conclusively insulated from potential liability, particularly if the procedures require a complaint to be made to the alleged harasser.[44] Without specifying standards, the Court suggested that agency principles[45] should be used as a guide in the area of employer liability.[46]

The United States Court of Appeals for the Eleventh Circuit has expanded on the *Meritor* agency analysis and decided cases regarding employers' liability for supervisory sexual harassment. In *Sparks v. Pilot Freight Carriers, Inc.*,[47] for example, the Eleventh Circuit held that an employer is liable for a supervisor's conduct if the supervisor uses his authority while harassing the victim.[48] The court determined that the relevant question was not whether the supervisor was an agent for general purposes, but whether the supervisor had agent status respecting the activity during the harassment, or the means by which he

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39. HAROLD S. LEWIS, JR., LITIGATING CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION CASES, West's Employment Law Series, § 5.3 n.15 (1996). *Compare* Ball v. Renner, 54 F.3d 664 (10th Cir. 1995) *and* Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) *with* Wathen v. General Elec., 115 F.3d 400 (6th Cir. 1997); Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996); Stults v. Conoco, Inc., 76 F.3d 651 (5th Cir. 1996); *and* Williams v. Banning, 72 F.3d 552 (7th Cir. 1995).

40. LEWIS, *supra* note 39.

41. 477 U.S. 57 (1986).

42. *Id.* at 72. The Court refused to settle the issue of employer liability because there were too many abstract factors in the record, such as whether any sexual advances were made, whether the advances were unwanted, and whether the conduct was pervasive enough to impute knowledge of the conduct to the employer. *Id.*

43. *Id.* at 72-73.

44. *Id.*

45. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 219-37 (1958).

46. 477 U.S. at 72. The Court looked to Congress for guidance on the issue of employer liability. In 42 U.S.C. § 2000e(b), Congress included agent in its definition of employer. *Id.*

47. 830 F.2d 1554 (11th Cir. 1987).

48. *Id.* at 1559. In this case, the court found that Long, the supervisor, constantly reminded Sparks of his authority to terminate her employment. *Id.* at 1560.

harassed the victim.[49] In reaching this conclusion, the court looked to the EEOC's amicus brief in *Meritor*.[50] The EEOC had argued an employer should be directly liable for a supervisor's conduct when the "'supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates.'"[51]

In *Steele v. Offshore Shipbuilding, Inc.*,[52] the Eleventh Circuit distinguished an employer's liability in hostile environment harassment cases from its liability for a supervisor's or manager's "quid pro quo" sexual harassment.[53] The court emphasized that the *Sparks* decision, which held an employer vicariously and strictly liable, applied only to those hostile environment cases where there was also quid pro quo sexual harassment.[54] In *Steele*, the court determined that while an employer's liability in pure hostile environment sexual harassment cases may be vicarious, an employer can be held vicariously and strictly liable only in cases involving quid pro quo harassment.[55] The court found defendant not liable for its supervisor's conduct because it took immediate action once its high managerial officials had notice of the harassment.[56]

The United States Court of Appeals for the Eighth Circuit refused to hold an employer liable for its supervisor's offensive actionable conduct if the employer, after receiving notice, took prompt corrective action. The circuit court in *Todd v. Ortho Biotech, Inc.*[57] concluded that holding an employer strictly liable for its supervisor's actions discourages the employer from instituting a sexual harassment policy and investigating employees' complaints of harassment.[58] The court found that strict

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49. *Id.* at 1558-60.

50. *Id.* at 1559.

51. *Id.* In following the EEOC recommendation, the court recognized that the EEOC proposition was not an official regulation, but was consistent with the EEOC guidelines found in 29 C.F.R. § 1604.11(c). *Id.* at 1559 n.8.

52. 867 F.2d 1311 (11th Cir. 1989).

53. *Id.* at 1315-16. In quid pro quo sexual harassment, "an employer alters an employee's job conditions as a result of the employee's refusal to submit to sexual demands." *Id.* at 1315. In hostile environment sexual harassment, the conduct interferes with the employee's work and creates "'an intimidating, hostile, or offensive environment.'" *Id.*

54. *Id.* at 1316-17. The court also distinguished *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988), as a case involving hostile environment and quid pro quo harassment. *Id.* at 1316.

55. *Id.* at 1316.

56. *Id.* at 1317.

57. 138 F.3d 733, 737 (8th Cir. 1998).

58. *Id.*

liability is "inconsistent with [Title VII's] ultimate goal, which is to eliminate sex discrimination, not simply to 'point a finger at deep pockets upon the incident of harassing behavior.'"[59] Significantly, the court appeared to relieve defendant of liability even though plaintiff had complained of the supervisor's unlawful conduct.[60]

The United States Court of Appeals for the Eleventh Circuit in *Farley v. American Cast Iron Pipe Co.*[61] determined that an employer who does not have a harassment policy or has an ineffective policy is vicariously liable for its supervisor's acts if the conduct is "so severe and pervasive as to confer constructive knowledge."[62] However, an employer who has effectively disseminated its sexual harassment policy has met its obligation, and it is then up to the employee to take advantage of the remedial procedures established by the employer.[63] The court held that defendant had an effective and well-disseminated policy that "preclude[d] a finding of constructive knowledge regarding [its supervisor's] behavior."[64] Once an employer has disseminated its antiharassment policy, it is absolutely immune from liability for its supervisor's harassment.[65]

There was a great deal of confusion among the courts of appeals regarding an employer's liability for its supervisor's harassing conduct. Congress had left the courts to determine the issue in light of agency law principles. The Supreme Court acknowledged this confusion in the lower courts and granted certiorari in the companion cases *Burlington* and *Faragher* to establish guidelines for employer liability.[66]

III. RATIONALE OF THE COURT

Writing for a seven to two majority,[67] Justice Kennedy delivered the opinion in *Burlington*.[68] He began by reviewing the *Meritor* decision and the evolution of the distinction between quid pro quo and hostile

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59. *Id.*

60. *Id.* at 736-38.

61. 115 F.3d 1548 (11th Cir. 1997).

62. *Id.* at 1554.

63. *Id.* The court stated that the Eleventh Circuit "places upon the employer an obligation to make reasonable efforts to know 'what is going on' with respect to its own employees." *Id.*

64. *Id.* at 1553.

65. *Id.* at 1554.

66. *Burlington*, 118 S. Ct. at 2262; *Faragher*, 118 S. Ct. at 2282.

67. 118 S. Ct. at 2261. Justice Ginsburg concurred in the Court's definition of quid pro quo and hostile environment sexual harassment, as well as the Court's rule on an employer's liability for a supervisor's harassing conduct. *Id.* at 2271.

68. *Id.* at 2262.

environment sexual harassment.[69] After *Meritor*, courts of appeals began to hold employers vicariously and strictly liable for quid pro quo harassment, which caused many victims to try to frame or describe their claims as quid pro quo rather than as hostile environment sexual harassment.[70] In *Burlington*, the Court limited the strict liability category (while simultaneously renaming it "tangible terms")[71] by holding, contrary to a Second Circuit decision,[72] that a threat to plaintiff's tangible terms of employment must be consummated for the claim to be considered one about "tangible terms" that therefore triggers strict employer liability.[73]

Justice Kennedy stated that the Court intended to use *Meritor* agency principles to determine Burlington's liability for hostile environment discrimination by a supervisor.[74] First, the Court analyzed an employer's conduct in relation to the scope of employment.[75] The Court determined that, in general, an employer is not liable for a supervisor's harassing conduct under the scope of employment theory because the conduct does not serve an employer's purpose.[76] Second, the Court looked at the "aided in agency" theory, applicable when the supervisor uses his authority to sexually harass subordinate employees.[77] The Court determined that the aided in agency theory requires, in addition to the employment relationship, a tangible employment action.[78] When the harassment results in a tangible employment action, the employer is vicariously and strictly liable because it has empowered the supervisor

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69. *Id.* at 2264-65.

70. *Id.*

71. *Id.* at 2268.

72. Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994). The court in *Karibian* held that an employer can be liable when a higher-level supervisor uses his authority to harass a victim, regardless of internal complaint procedures or knowledge. *Id.* at 780.

73. *Burlington*, 118 S. Ct. at 2268. The Court determined that a tangible employment action in this case would have taken the form of a denial of a promotion or a raise. *Id.*

74. *Id.* at 2265.

75. *Id.* at 2266-67.

76. *Id.* The Court acknowledged that there are circumstances in which the supervisor mistakenly believes that he is serving his employer. *See* Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1075 (M.D. Ala. 1990) (the supervisor believed his sexual harassment was furthering the employer's policy against promoting women). 118 S. Ct. at 2266-67.

77. 118 S. Ct. at 2268. The Court distinguished the aided in agency rule from the apparent authority rule. *Id.* at 2267-68. Under the aided in agency theory, the supervisor "misuse[s] actual power," whereas under the apparent authority theory, the supervisor attempts to use authority he does not have. *Id.*

78. *Id.* at 2268. The Court acknowledged that there was no tangible employment action in *Burlington*. *Id.*

to make job altering decisions.[79] However, when no tangible employment action is taken for an employee's refusal to submit to the sexual demands, an employer's liability is less certain.[80]

The Court held an employer could be vicariously liable for pure hostile environment cases, like the case at hand, but recognized an affirmative defense consisting of two elements that the employer must plead and prove by a preponderance of the evidence.[81] The defense requires the employer to "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior."[82] Additionally, it requires the employer to prove that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."[83] This affirmative defense is not applicable when the harassment results in a tangible employment action, for which liability is strict as well as vicarious.[84] The Court held that Burlington was vicariously liable for Slowik's hostile environment harassment but could assert the affirmative defense in subsequent proceedings on remand.[85]

Justice Thomas, joined by Justice Scalia, dissented, contending that the standard for employer liability should be as restrictive as in cases of racial harassment.[86] The dissent stated that an employer should be liable only if the harassment victim proves that the employer negligently allowed the supervisor's harassing conduct to occur.[87] "Negligence," in turn, requires proof that the "employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action"—a test the *Burlington* majority rejected for harassment by supervisors but reaffirmed in dictum for employer liability for unlawful harassment by coworkers.[88]

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79. *Id.* at 2269. The Court drew an analogy between the ability for a coworker to break another coworker's arm and the ability for that same coworker to alter another coworker's job status. *Id.*

80. *Id.* The Court acknowledged that, in one view, a supervisor will always be aided by his power, while in another view, the supervisor's power may have little effect on his ability to harass employees. *Id.*

81. *Id.* at 2270.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 2271.

86. *Id.* (Thomas J., dissenting). A post-*Burlington* decision strongly suggests that *Burlington* liability applies to discrimination of racial harassment in the same terms as in cases of sexual harassment. *See* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998).

87. 118 S. Ct. at 2271.

88. *Id.* at 2272. According to Justice Thomas, Burlington was not negligent because Ellerth failed to complain about Slowik's conduct, and, therefore, Burlington had no knowledge of the harassment. *Id.* at 2273.

IV. IMPLICATIONS

Before *Burlington*, the EEOC and the circuit courts required employers to meet only a version of the first or second prongs of the new compound affirmative defense. In *Todd v. Ortho Biotech, Inc.*,[89] the Eighth Circuit held that an employer was not liable for a supervisor's sexual harassment in hostile environment cases unless the employer "'knew or should have known of the harassment yet failed to take proper remedial action.'"[90] The court determined that an employer had a complete defense once it took "timely and appropriate remedial action" to correct the harassment; the court did not affirmatively require the employer to show that plaintiff had bypassed fair and available internal complaint procedures.[91]

Conversely, the Eleventh Circuit in *Farley v. American Cast Iron Pipe Co.*[92] permitted another employer to assert a defense against liability, even when the harassment was sufficiently pervasive to give rise to constructive knowledge, provided only that plaintiff had failed to complain under an antidiscrimination policy that was well-disseminated, comprehensive, and provided alternate methods of complaint procedures.[93] The court determined that once the employer disseminated such an antiharassment policy, it was absolutely immune from liability for its supervisor's harassment if plaintiff failed to invoke it, regardless of the nature of the employer's response to the complaint.[94]

Burlington appears to have changed these results, and it certainly creates additional questions. First, because the employer must meet the second as well as the first prong, the defense previously granted in cases like *Todd*, which was based solely on the employer's prompt and effective corrective action, is no longer available. This defense is no longer viable because under *Burlington*, the prospective plaintiff can effectively undermine the employer's response-based defense simply by utilizing, or not unreasonably failing to utilize, the employer's preventive mechanisms.[95] Thus, in one post-*Burlington* case, the court recognized that

89. 138 F.3d 733 (8th Cir. 1998).

90. *Id.* at 737.

91. *Id.* The court upheld the jury's finding that Ortho took prompt corrective action after it learned of the harassing conduct, and the court subsequently dismissed the Title VII claim. *Id.* at 737-38. Todd appealed to the Supreme Court, and it remanded the case for further consideration in light of the *Burlington* and *Faragher* cases. Todd v. Ortho Biotech, Inc., 119 S. Ct. 33 (1998).

92. 115 F.3d 1548 (11th Cir. 1997).

93. *Id.* at 1554.

94. *Id.*

95. *Burlington*, 118 S. Ct. at 2270.

an employer could no longer escape liability simply by claiming that it did not know or have reason to know of the harassment; it would also have to show the plaintiff's unreasonable failure to invoke a fair internal complaints system.[96]

Second, after *Burlington*, an employer may no longer assert the defense, as under *Farley*, just because plaintiff fails to utilize its discrimination policy. This result occurs because the first prong requires the employer to show that it took steps to "prevent and correct promptly any sexually harassing behavior" in addition to showing the plaintiff's unreasonable failure to use a fair complaints procedure.[97] This result of the *Burlington* majority's formulation of the compound defense, to some degree, cuts against its stated policy of encouraging employers to institute harassment policies.[98] Of course, the employer will still have a practical incentive to institute such policies, for they will usually provide the company with notice of unlawful conduct that in turn can lead to appropriate corrective action. This procedure can limit, but no longer eliminate, the employer's liability for damages.

Third, does the first prong require the employer to *"prevent and correct"* its supervisor's unlawful conduct?[99] The few court decisions after *Burlington* are split on this issue. Some post-*Burlington* decisions have required the employer to take only preventive actions to meet the first prong of the affirmative defense.[100] After *Burlington*, however, other lower courts have required the employer to take both preventive *and corrective* measures.[101] In one post-*Burlington* decision, the court

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96. *See* Vandermeer v. Douglas County, 15 F. Supp. 2d 970, 980-81 (D. Nev. 1998) (finding that the employer had to meet both prongs of the affirmative defense to escape liability).

97. 118 S. Ct. at 2270.

98. *Id.*

99. *Id.* (emphasis added).

100. *See* Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (finding an employer's requirement that employees read and sign a copy of its sexual harassment policy "effectively promulgated" the policy); Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998) (holding an employer can effectively disseminate its harassment policy by including it in the employee handbook); Nuri v. PRC, Inc., 13 F. Supp. 2d 1296, 1308 (M.D. Ala. 1998) (finding that employee awareness "of the policy is so crucial to having a policy that is effective").

101. *See* Marsicano v. American Soc'y of Safety Eng'rs, No. 97 C 7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998) (finding an employer had successfully met the first prong by instituting a sexual harassment policy, meeting with the harasser after the complaint was lodged, and reassigning the victim to minimize her contact with the harasser); Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 821 (W.D.N.Y. 1998) (analyzing the first prong of the defense as two separate components—prevention and correction); Lancaster v. Sheffler Enters., 19 F. Supp. 2d 1000, 1003 (W.D. Mo. 1998) (holding that "[s]imply forcing all new employees to sign a policy does not constitute 'reasonable care'" to prevent and correct the

explicitly held that an employer must take action to both prevent and correct the harassment—formerly, prevention alone sufficed in that circuit.[102] Perhaps employers should now sometimes be required to prove only prevention, not correction. After all, an employee's unreasonable failure to complain of harassment—which the employer will have to prove under the Supreme Court's second prong—makes it unlikely that the employer will have received the notice it needs to take steps to "correct" its supervisor's conduct unless it happened to receive that notice informally through the grapevine. At least in cases where an employer receives no formal or informal notice of the harassment, courts may find that it has met the first prong simply by having taken reasonable steps to "prevent" harassment through a well-disseminated antiharassment policy.

Fourth, what actions must an employer take to "prevent" the harasser's conduct? Most post-*Burlington* decisions require employers to effectively disseminate their sexual harassment policies by having employees read and sign a copy of the sexual harassment policy,[103] by posting the sexual harassment policies,[104] or by including the harassment policy in the employee handbook.[105] The procedures must also provide alternative avenues to complain of harassing conduct, so that employees will not be deterred by having to complain directly to a harassing supervisor.[106] One post-*Burlington* court, however, suggested that issuing a policy was not enough to prevent sexual harassment.[107]

Fifth, what does an employer have to do to "correct" the unlawful conduct of its supervisor? One post-*Burlington* case determined that the employer's immediate confrontation of the alleged harasser was sufficient to meet the first prong of the affirmative defense.[108] Another

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harassment); Brandrup v. Starkey, No. CIV 97-1208-KI, 1998 WL 943301, at *10 (D. Or. Sept. 8, 1998) (finding that a complaint procedure requiring the victim to complain to her harasser does not constitute "reasonable care" to correct the harassment).

102. *See Nuri*, 13 F. Supp. 2d at 1307-08 (finding that the employer's actions to prevent the harassment were not enought to meet the first prong of the affirmative defense).

103. *See Jones*, 20 F. Supp. 2d at 1385.

104. *See* Corcoran v. Shoney's Colonial, Inc., 24 F. Supp. 2d 601, 606 (W.D. Va. 1998).

105. *See* Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 1200-01 (D. Colo. 1998); Speight v. Albano Cleaners, Inc., 21 F. Supp. 2d 560, 562 (E.D. Va. 1998); *Sconce*, 9 F. Supp. 2d at 778; *Marsicano*, 1998 WL 603128, at *7.

106. *See Nuri*, 13 F. Supp. 2d at 1307-08.

107. *See Lancaster*, 19 F. Supp. 2d at 1003 (finding that simply requiring employees to sign a sexual harassment policy was not enough to meet the first prong).

108. *See Corcoran*, 24 F. Supp. 2d at 606 (finding that the employer's act of confronting the harasser was sufficient to correct the harassment). *But see Hollis*, 28 F. Supp. 2d at 821-23 (holding that the employer's confrontation of the harasser in February 1992 after

employer met the first prong of the defense by meeting with the harasser after the complaint was lodged and reassigning the victim to minimize her contact with the harasser.[109] Yet another case held that an employer's instruction to the victim requiring her to complain of the harassment to her harasser was not sufficient to correct the unlawful conduct.[110] On this issue, *Burlington* does nothing to clarify the maze of disparate fact-sensitive holdings in the previous decisions of the lower courts.

Sixth, can the employer prevail on the second prong by showing that an employee unreasonably failed to avail herself of "corrective" opportunities, even though she did take advantage of "preventive" measures? One court has held that an employer met the second prong when the employee failed to take advantage of the corrective measures taken by an employer, even when she had invoked its preventive measures.[111] In *Marsicano v. American Society of Safety Engineers*, the court held that an employer met the second prong of the defense because the employee did not follow through with her complaint and take advantage of the reassignment offered to her by her employer.[112]

Seventh, what constitutes an employee's *unreasonable* failure to take advantage of an employer's preventive actions? A few courts after *Burlington* have found that an employee who failed to complain to the designated authorities acted unreasonably.[113] However, if the employee failed to complain because the employer had not taken steps to make her aware of its harassment policy, she was not acting unreasonably.[114] Has an employee who failed to complain because of fear of repercussions acted unreasonably? Some post-*Burlington* decisions have held that an employee's fear of repercussions from her harasser does not justify her silence.[115] Does an employee's delayed complaint constitute an unreasonable failure? Courts after *Burlington* have held that an

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it received notice in December 1991 or January 1992 was not timely enought to meet the first prong).

109. *See Marsicano*, 1998 WL 603128, at *7.

110. *See Brandrup*, 1998 WL 943301, at *10.

111. *See Marsicano*, 1998 WL 603128, at *7-8.

112. *Id.*

113. *See Duran*, 17 F. Supp. 2d at 1203; *Speight*, 21 F. Supp. 2d at 564.

114. *See Nuri*, 13 F. Supp. 2d at 1307.

115. *See Jones*, 20 F. Supp. 2d at 1386 (holding that a generalized fear is not "reasonable grounds" to justify an employee's failure to complain); *Sconce*, 9 F. Supp. 2d at 778 (holding that an employee's fear alone is not an excuse for her failure to follow the complaint procedure).

employee's failure to complain until months after the harassment does not constitute unreasonable failure.[116]

The decision in *Burlington* changed the requirements for employer liability established by the circuit courts. Now to establish a complete affirmative defense, an employer must prove both that it took steps to prevent and, at least after notice, to correct the harassment and that the plaintiff unreasonably failed to take advantage of the protections it afforded. It is true that the decisions are fact-sensitive; however, we have yet to learn how readily that defense may be maintained.

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116. *See* Greene v. Dalton, 164 F.3d 671, 674 (D.C. Cir. 1999) (finding that an employee should not be punished "merely for being dilatory"); *Corcoran*, 24 F. Supp. 2d at 606 (holding that it is "far from uncommon for those subjected to such remarks to ignore them when they are first made").