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NOTES

Employment Law: *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*: A Clear Rule of Deterrence or an Invitation to Litigate? The Supreme Court Rules on Employer Liability for Supervisory Sexual Harassment

I. Introduction

In the 1982 best-seller *In Search of Excellence*, management consultants Tom Peters and Robert Waterman issued these simple words of advice to companies aspiring to obtain the status of excellence: "Treat people as adults; [t]reat them as partners; treat them with dignity; treat them with respect . . . [t]here [is] hardly a more pervasive theme in . . . excellent companies than respect for the individual." This advice, if followed by every company, from upper to lower management, would do away with the need for terms such as "tangible action," "aided in agency," and "quid pro quo" in the employment context. This, however, is not the case. Whether the off-color joke, sexual innuendo, or the supervisor who conditions a promotion on sex, it is inevitable that some level of offensive behavior will always exist in the workplace that might lead an individual to make a claim of sexual harassment. It is the litigation of such claims that has brought about different terms and types of harassment, as well as several differing theories of employer liability for supervisory harassment. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court attempted to bring uniformity to the law of employer liability for supervisory sexual harassment by implementing the policies that underlie Title VII.

In *Burlington*, the Court downplayed the judicially created distinction between quid pro quo and hostile environment sexual harassment, and established a rule that an employer may be held vicariously liable for a supervisor's sexual harassment of an employee, even if the employee does not suffer any tangible change in her

4. For purposes of this note, "her" or "she" will be used to refer to the employee, and "him" or "his" to refer to the supervisor. It must be noted, however, that the gender of the plaintiff making a discrimination claim under Title VII is not limited to females. See 42 U.S.C. § 2000e-2(a)(1) (1994); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3rd Cir. 1977); Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316 (D.C. Fla. 1972). Additionally, in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998), the Supreme Court held that discrimination consisting of same-sex sexual harassment is actionable under Title VII.
In the companion case, *Faragher*, the Court provided an affirmative defense to employers in cases where no tangible employment action is taken. To escape liability, an employer must prove that it took reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of the remedial procedures provided by the employer.

In the wake of *Burlington* and *Faragher*, some employers might argue that the Supreme Court has swung the pendulum too far to the left, necessarily forcing employers to create a work environment where trust is nonexistent and video surveillance and constant supervision are the norm. This is likely not the type of environment Peters and Waterman had in mind when they envisioned the "excellent company." However, employers need not worry nor become paranoid; the status of excellence is still obtainable. The purpose of this note is to show that, with *Burlington* and *Faragher*, the Supreme Court swung the pendulum to the middle and implemented Congressional intent behind Title VII to promote conciliation, avert litigation, and most importantly, deter sexual harassment in the workplace.

Before analyzing *Burlington* and *Faragher*, Part II of this note reviews the law of employer liability for gender discrimination prior to *Burlington* and *Faragher*. Part III of this note recounts the facts, holding, and reasoning of the Court in *Burlington* and *Faragher*, while Part IV analyzes the Court's decisions in the two cases. Part V of this note discusses the implications the cases have on Oklahoma law; specifically, how the cases indirectly expose the inadequacies of Oklahoma's antidiscrimination laws. Part VI concludes this note.

II. Law Prior to Burlington and Faragher

The development of the law on sexual harassment began with Title VII of the Civil Rights Act of 1964 (the Act). Enacted primarily to address racial prejudice, the Act made it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." Because gender-based discrimination was a late addition to Title VII, little legislative history was available to assist courts in applying Title VII.

5. *See Burlington*, 118 S. Ct. at 2270.
7. In his dissent, Justice Thomas opined that the only way for employers to prevent sexual harassment and thus avoid liability under the majority decisions in *Burlington* and *Faragher* is by taking "extraordinary measures" such as video and audio surveillance, which would "revolutionize the workplace in a manner incomprehensible with a free society." *Burlington*, 118 S. Ct. at 2273 (Thomas, J., dissenting). Chief Judge Posner of the Seventh Circuit Court of Appeals opined the same, stating that employers could not prevent harassment in the workplace without going to extreme expense and sacrificing the privacy of their employees by putting them under constant video surveillance. *See Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 511 (7th Cir. 1997) (Posner, C.J., concurring in part, dissenting in part), *aff'd sub nom.*, *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).
8. *See supra* note 1 and accompanying text.
to sexual harassment claims. As a result, the case law that developed in the mid-1970s on employer liability for sexual harassment was far from uniform.

Several cases illustrate this non-uniformity between the circuits. In Barnes v. Costle, the United States Court of Appeals for the District of Columbia Circuit held, as a general rule, an employer is chargeable under Title VII for the discriminatory acts of its supervisory personnel. The Barnes court recognized that an employer can escape responsibility for the supervisor's conduct if the conduct "contravene[s] employer policy without the employer's knowledge and the consequences are rectified when discovered." In Tompkins v. Public Service Electric & Gas Co., the Third Circuit Court of Appeals concluded that the standard for employer liability was negligence, finding liability only when the employer has "actual or constructive knowledge" of the supervisor's sexual harassment and "does not take prompt and


12. This note will not address what type of conduct is pervasive enough for an individual to bring a sexual harassment claim. For a discussion of the type of conduct which triggers a claim, see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive . . . is beyond Title VII's purview."); Meritor, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.") (internal quotation marks and citation omitted); Anita Bernstein, Treating Sexual Harassment with Respect, 111 HARV. L. REV. 445 (1997) (advocating a respectful person standard for defendants charged with hostile environment sexual harassment); Kellie A. Kalbac, Through the Eye of the Beholder: Sexual Harassment Under the Reasonable Person Standard, KAN. J.L. & PUB. POL'Y, Spring 1994, at 160 (examining the different approaches currently used by courts to determine whether conduct was severe or pervasive enough to create a hostile work environment); Toni Lester, The Reasonable Woman Test in Sexual Harassment Law — Will It Really Make a Difference?, 26 IND. L. REV. 227 (1993) (arguing for the application of the reasonable woman test to sexual harassment cases); Leah R. McCaslin, Note, Harris v. Forklift Systems, Inc.: Defining the Plaintiff's Burden in Hostile Environment Sexual Harassment Claims, 29 TULSA L.J. 761 (1994) (examining plaintiff's burden in sexual harassment cases); Joseph M. Pelliciotti, Sexual Harassment in the Workplace: A Consideration of Post-Vinson Approaches Designed to Determine Whether Sexual Harassment is Sufficiently Severe or Pervasive, 5 DEPAUL BUS. L.J. 215 (1993) (considering approaches that have been developed by courts in determining what conduct is sufficiently severe or pervasive). Furthermore, this note will not discuss employer liability for sexual harassment committed by co-employees. For a discussion of co-employee sexual harassment, see Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir. 1998) (refusing to apply Burlington and Faragher to cases of sexual harassment by co-employees); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998) (finding employer liability for sexual harassment by co-employee if employer has actual or constructive knowledge of harassment, and fails to adequately respond to the same); Henderson v. Whirlpool Corp., 17 F. Supp. 2d 1238, 1244 n.4 (N.D. Okla. 1998) (refusing to extend Burlington and Faragher to cases of sexual harassment by co-employees).


14. See id. at 993.

15. Id. In a concurring opinion, Judge MacKinnon looked to agency law, reasoning that vicarious liability should be imposed on employers only if the employee alleges that others in the agency aided and abetted in retaliating against her, with knowledge of her complaints, thus ratifying the supervisory harassment. See id. at 1001.

16. 568 F.2d 1044 (3d Cir. 1977).
appropriate remedial action after acquiring such knowledge." 17 In Miller v. Bank of America, 18 the Ninth Circuit Court of Appeals refused to apply a negligence standard and instead turned to the doctrine of respondeat superior. 19 The Miller court rejected an employer's contention that it was not liable for its supervisor's harassment of an employee because the employer had a grievance procedure and a policy prohibiting harassment. 20 The court reasoned that "the . . . rule, that an employer is liable for the torts of its employees, acting in the course of their employment, . . . [is] just as appropriate here as in other cases . . . where . . . the actor is the supervisor of the wronged employee." 21

In 1980, the Equal Employment Opportunity Commission (EEOC) issued regulatory guidance on sexual harassment and employer liability that essentially amounted to strict liability. 22 Under the EEOC guidelines, an employer is "responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 23

As differing rules on liability emerged, two different forms of sexual harassment also emerged — quid pro quo and hostile environment. 24 Generally, quid pro quo harassment "occurs in situations where submission to sexual demands is made a condition of tangible employment benefits," such as promotion or discipline. 25 Hostile work environment harassment, sometimes called environmental harassment, occurs where discriminatory comments, advances, touching, ridicule, and the like make the workplace hostile or abusive. 26

In a 1982 decision, Henson v. City of Dundee, 27 the Eleventh Circuit Court of Appeals issued the first published federal decision recognizing the distinction between quid pro quo and hostile environment harassment. 28 The court ruled that an employer may be held vicariously liable for the acts of its supervisors in a quid pro quo sexual harassment case, but an employer would be subject to a negligence standard in a hostile environment case. 29 The Eleventh Circuit found that when a plaintiff seeks

17. Id. at 1048-49.
18. 600 F.2d 211 (9th Cir. 1979).
19. See id. at 213.
20. See id.
21. Id.
23. 29 C.F.R. §1604.11(c) (1998).
27. 682 F.2d 897 (11th Cir. 1982).
28. See id at 908-99; see also Scalia, supra note 24, at 310.
29. See Henson, 682 F.2d at 910. In Henson, Barbara Henson, a dispatcher in the City of Dundee...
to hold an employer responsible for the hostile environment created by a supervisor, the plaintiff must show "that the employer knew or should have known of the harassment in question and failed to take prompt remedial action."30 The court found that a plaintiff alleging sexual harassment can demonstrate an employer's knowledge of the harassment by showing she complained to higher management about the supervisor's harassment, or the plaintiff can impute constructive knowledge by showing the pervasiveness of the harassment giving rise to the inference of knowledge.31

The *Henson* court refused to impute liability automatically on employers because the ability of any person to create a hostile environment is not necessarily enhanced by any degree of authority which the employer has conferred on that individual.32 "When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means," because in creating a hostile environment, the supervisor is acting outside the actual or apparent scope of his authority.33 Therefore, the court reasoned that a supervisor's conduct "cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee."34

In contrast, the Eleventh Circuit stated that the reason for holding employers strictly liable in quid pro quo cases is "readily apparent."35 When an employer gives supervisory personnel authority to fire employees, the employer must also accept responsibility to remedy any harm caused by the unlawful exercise of that authority.36 "The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action."37

Distinguishing quid pro quo from hostile environment harassment, the *Henson* court reasoned that a quid pro quo case is "fundamentally different [because] the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose [and thus] acts within the scope of his actual or apparent authority to 'hire, fire, discipline or promote.'"38 Because the supervisor is acting within the scope of authority with which the employer has entrusted him, each time a supervisor makes an employment decision it is fair that his conduct be imputed to the source of his authority.39

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police department, claimed that she was sexually harassed by her supervisor, the Dundee Chief of Police, during her two years of employment. She alleged this harassment led to a hostile working environment and ultimately to her resignation. The trial court ruled that Henson's claim of a hostile working environment was not cognizable under Title VII. See id. at 900.

30. *Id.* at 905.
31. *See id.*
32. *See id.* at 910.
33. *Id.*
34. *Id.*
35. *Id.* at 909.
36. *See id.*
38. *Id.* at 910 (quoting Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979)).
39. *See id.*
With the ground work sufficiently laid by the circuit courts, in 1986 the United States Supreme Court decided Meritor Savings Bank, FSB v. Vinson, marking the first time the Supreme Court would consider what standard of liability should apply to employers for sexual harassment committed by their supervising employees.

In Meritor, Mechelle Vinson brought a Title VII action against her employer, Meritor Savings Bank, and her supervisor, alleging the supervisor constantly subjected her to sexual harassment during her four years of employment with Meritor. The federal district court found that Meritor could not be held liable for the acts of the supervisor because it had a policy against discrimination. Furthermore, the district court held that because Vinson never complained to anyone about the alleged harassment, Meritor was without notice and thus could not be held liable.

The D.C. Circuit Court of Appeals reversed the district court's decision and held that an employer is strictly liable for a supervisor's sexual harassment of subordinates. The D.C. Circuit was the first circuit court to endorse and apply EEOC guidelines, reasoning that supervisors are agents of employers for Title VII purposes because, as supervisors, they have the authority and power to "coerce, intimidate and harass." The Supreme Court affirmed the holding on different grounds.

When the Supreme Court granted certiorari to hear Meritor, then EEOC Chairman and current Justice Clarence Thomas lobbied the Solicitor General to submit an amicus brief that supported employers. The brief took the position of the district court. With respect to hostile environment harassment claims, the brief argued:

[A]n employer should not be liable unless it knew or had reason to know of the sexually offensive atmosphere. . . . [A]n employer in our view should generally be able to insulate itself from liability by publicizing a policy against sexual harassment and implementing a procedure designed to resolve sexual harassment complaints.

The amicus brief recognized vicarious liability for quid pro quo harassment under the EEOC guidelines, but, as to hostile environment harassment claims, the brief stated that "the usual basis for a finding of agency will often disappear. By definition, the supervisor in such circumstances is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim."49

41. See id. at 60.
42. See id. at 62.
43. See Meritor, 477 U.S. at 63.
46. Justice Thomas wrote the dissenting opinion in Burlington and Faragher.
48. Id. at 126-27 (quoting Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 6-7, Meritor (No. 84-1979)).
49. Id. at 127 (quoting Brief for the United States and the Equal Employment Opportunity
The Supreme Court, however, expressly declined to issue a definitive rule on employer liability, choosing instead to provide guidance to the courts.\textsuperscript{50} The Court reasoned that Congress intended courts to look to principles of agency law for guidance when determining employer liability under Title VII.\textsuperscript{51} In making this pronouncement the Court cited generally the Restatement (Second) of Agency,\textsuperscript{52} but the Court did not issue an explicit command that the Restatement be used as the framework for evaluating sexual harassment under Title VII.\textsuperscript{53} The Court reasoned that the court of appeals erred in its conclusion that "employers are always automatically liable for sexual harassment" by supervisory employees because "Congress' decision to define 'employer' to include any 'agent' of an employer surely evinces an intent to place some limits on the acts of employees for which employers . . . are to be held responsible" under Title VII.\textsuperscript{54} The Court went further, stating that employers without notice are not necessarily insulated from liability, and the existence of a grievance procedure that is not invoked by a plaintiff employee will not insulate an employer from liability.\textsuperscript{55}

After Meritor, courts continued to hold employers strictly liable for quid pro quo sexual harassment.\textsuperscript{56} Notwithstanding Meritor's guidance in hostile environment harassment cases, courts continued to disagree about the appropriate standard for employer liability in such cases.\textsuperscript{57} One year after the Meritor decision, the Tenth Circuit Court of Appeals, in Hicks v. Gates Rubber Co.,\textsuperscript{58} looked to the Restatement (Second) of Agency for the proper standard of employer liability in a hostile environment case.\textsuperscript{59} The court found that an employer may be held liable if negligent or reckless, or if the supervisory employee was aided in accomplishing the harassment.

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Commission as Amici Curiae at 22-24, Meritor (No. 84-1979)).
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50. See Meritor, 477 U.S. at 72-73. The Court declined to make such a ruling based on the fact that it was never decided whether Vinson's supervisor made any sexual advances toward Vinson, and whether those advances, if any, were unwelcome or sufficiently pervasive enough to constitute a condition of employment. See id.
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51. See id.
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52. See id.; see also RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).
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54. Meritor, 477 U.S. at 72 (citing 42 U.S.C. §2000e(b)).
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55. See id. Vinson claimed she never attempted to use Meritor's complaint procedure to report her supervisor because she was afraid of him.
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56. See Phillips, supra note 11, at 1237-38.
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57. See id.; see also Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2282 (1998) ("Since our decision in Meritor, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees.").
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58. 833 F.2d 1406 (10th Cir. 1987).
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through the existence of the agency relation. While the Tenth Circuit looked to the Restatement as cited by the Supreme Court in Meritor, the Eleventh Circuit applied the doctrine of respondent superior. In Steele v. Offshore Shipbuilding, Inc., the Eleventh Circuit, while noting that the Meritor Court rejected automatic liability for hostile environment harassment, held that an employer may be held liable for supervisory harassment only where the employer "knew or should have known of the harassment and failed to take prompt action against the supervisor."

The Second Circuit adopted a more restrictive version of the standard adopted by the Tenth Circuit. In Karibian v. Columbia University, the Second Circuit Court of Appeals reasoned that under agency principles, employer liability could not be reduced to a "universal formula." The Second Circuit, while not adopting a negligence theory, held that an employer is liable for supervisory sexual harassment "if the supervisor uses his actual or apparent authority to further the harassment, or if he is otherwise aided in accomplishing the harassment by the existence of the agency relationship." Meanwhile, in Nichols v. Frank, the Ninth Circuit Court of Appeals held that the proper analysis for finding employer liability in hostile environment cases is what "management-level employees knew or should have known, not whether an employee was acting within the 'scope of employment.'" The Supreme Court would not attempt to clarify the issue until Burlington and Faragher.

III. Statement of the Cases

A. Facts

1. Burlington Industries, Inc. v. Ellerth

Kimberly Ellerth was an employee at Burlington Industries for a little over one year, during which time she alleged she was subjected to constant sexual harassment by her supervisor, Ted Slowik. Ellerth emphasized three incidents as threats to her tangible job benefits. The first incident occurred on a business trip where Slowik invited Ellerth to a hotel lounge. Because Slowik was her supervisor, Ellerth

60. See id. at 1418. In the Tenth Circuit, negligence remains a viable theory for imposing liability on employers for supervisory sexual harassment after Burlington and Faragher. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998); Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270-71 (10th Cir. 1998).
61. 867 F.2d 1311 (11th Cir. 1989).
62. Id. at 1316.
63. 14 F.3d 773 (2d Cir. 1994).
64. Id. at 779.
65. Id.
66. 42 F.3d 503 (9th Cir. 1994).
67. Id. at 508; see also Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995); Hirschfeld v. New Mexico Corrections Dept, 916 F.2d 572 (10th Cir. 1990).
68. See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2262 (1998). Slowik was a mid-level manager with the power to make hiring and promotion decisions, subject to the approval of his supervisor.
69. See id.
70. See id.
claimed she felt compelled to accept his offer.\textsuperscript{71} Ellerth gave no encouragement to the crude remarks made by Slowik, to which Slowik responded by stating, "You know, Kim, I could make your life very hard or very easy at Burlington."\textsuperscript{72} The second incident occurred a year later when Ellerth was under consideration for a promotion.\textsuperscript{73} Slowik suggested during the promotion interview that Ellerth was not "loose enough," a comment that was followed by his rubbing her knee.\textsuperscript{74} The third incident occurred when Ellerth made a work related phone call to Slowik, to which he responded by stating, "I don't have time for you right now, Kim — unless you want to tell me what you're wearing."\textsuperscript{75}

Throughout her employment, Ellerth was aware that Burlington maintained a policy against sexual harassment and had read the policy in her employee handbook.\textsuperscript{76} Ellerth claimed, however, that she did not inform anyone of authority about Slowik's conduct out of fear that it would jeopardize her job.\textsuperscript{77} A short time after the third incident, Ellerth quit her job and filed a sexual harassment suit against Burlington, alleging the company created a hostile work environment and forced her constructive discharge in violation of Title VII.\textsuperscript{78}

The district court granted summary judgment to Burlington. Applying a negligence standard, the district court found that Burlington neither knew nor should have known about the harassing conduct.\textsuperscript{79} The Seventh Circuit reversed in a decision that produced eight differing opinions.\textsuperscript{80}

2. Faragher v. City of Boca Raton

Beth Ann Faragher worked for five years as a lifeguard for the City of Boca Raton, Florida.\textsuperscript{81} The immediate supervisors of the lifeguards were Bill Terry and David Silverman.\textsuperscript{82} During the five year period Faragher was employed, both Terry and Silverman repeatedly touched Faragher and other female employees without invitation, and made comments and vulgar references to the women about their bodies and other sexual matters.\textsuperscript{83} Faragher never formally complained to higher management about Terry or Silverman, and although the City had a sexual harassment policy in place,

\begin{itemize}
\item \textsuperscript{71} See id.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} See id.
\item \textsuperscript{74} Id. Ellerth received the promotion. See id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} See id.
\item \textsuperscript{77} See id.
\item \textsuperscript{78} See id. at 2263.
\item \textsuperscript{79} See id.
\item \textsuperscript{80} See Jansen v. Packaging Corp. of Am., 123 F.3d 490 (7th Cir. 1997) (per curiam), aff'd, Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). There was general agreement in the Seventh Circuit regarding whether or not to impose liability on employers for supervisory sexual harassment; however, there was a wide divergence on the court regarding the correct standard for imposing liability.
\item \textsuperscript{81} See Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2279 (1998).
\item \textsuperscript{82} See id. at 2279.
\item \textsuperscript{83} See id. at 2281.
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it failed to disseminate it to the lifeguards or their supervisors.\textsuperscript{84} Faragher resigned from her job and brought an action against Terry, Silverman, and the City of Boca Raton, alleging that Terry and Silverman created a sexually hostile work environment in violation of Title VII.\textsuperscript{85} Faragher sought a judgment against the City asserting that Terry and Silverman were the City's agents and their conduct amounted to discrimination in the "terms, conditions, and privileges" of her employment.\textsuperscript{86}

The district court held the City vicariously liable for the harassment committed by Terry and Silverman. The court reasoned that the harassment was pervasive enough to support an inference that the City had knowledge or constructive knowledge of it, and that the City was liable under agency principles because Terry and Silverman were acting as the City's agents when they committed the acts.\textsuperscript{87} The Eleventh Circuit reversed, holding that Terry and Silverman were acting outside the scope of their employment when they engaged in the harassment and that they were not aided in their actions by the agency relationship.\textsuperscript{88}

B. Issue and Holding

The issue before the Supreme Court in \textit{Burlington} was whether an employer may be held vicariously liable when a supervisory employee "makes explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat."\textsuperscript{89} The Court answered in the affirmative, holding that an employer may be held vicariously liable for a supervisor's sexual harassment of an employee, even if the employee does not suffer any tangible change in her employment status.\textsuperscript{90}

In the companion case \textit{Faragher}, the issue before the Court was the standard of employer liability for supervisory sexual harassment in cases where the harassment amounts to a hostile work environment.\textsuperscript{91} The Court held that an employer is subject to vicarious liability for supervisory sexual harassment creating a hostile work environment.\textsuperscript{92} The Court provided employers with an affirmative defense to liability where an employer can prove that it took reasonable care to prevent and remedy the harassment, and that the employee unreasonably failed to take advantage of the remedial procedures provided by the employer.\textsuperscript{93}

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  \item \textsuperscript{84} See id.
  \item \textsuperscript{85} See id. at 2279.
  \item \textsuperscript{86} \textit{Id.} (citing 42 U.S.C. § 2000e-2(a)(1)).
  \item \textsuperscript{87} See \textit{Faragher v. City of Boca Raton}, 864 F. Supp. 1552, 1563-64 (S.D. Fla. 1994).
  \item \textsuperscript{88} See \textit{Faragher v. City of Boca Raton}, 111 F.3d 1530, 1537 (11th Cir. 1997) (en banc), rev'd, 118 S. Ct. 2275 (1998).
  \item \textsuperscript{89} \textit{Burlington}, 113 S. Ct. at 2265.
  \item \textsuperscript{90} See id. at 2270.
  \item \textsuperscript{91} See \textit{Faragher}, 118 S. Ct. at 2279.
  \item \textsuperscript{92} See id. at 2292-93.
  \item \textsuperscript{93} See id. at 2293.
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C. Reasoning of the Court

1. Burlington

In Burlington, the Court began its analysis by downplaying the significance between the terms quid pro quo and hostile work environment harassment, noting that the terms are not creatures of statute but rather first appeared in academic literature before entering into the decisions of the courts of appeals.44 According to the Court, the terms are helpful in making "a rough demarcation" between cases in which threats are carried out and cases in which they are not.45 Beyond this, however, the Court found that the terms are of "limited utility."46 Specifically, the Court stated "[t]o the extent [the terms] illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII."47 The Court then turned to employer liability.

Justice Kennedy, delivering the opinion of the Court, began with the premise established by the Court in Meritor. This premise was that Congress, in express terms, "directed federal courts to interpret Title VII based on agency principles."48 The Court looked to the Restatement (Second) of Agency as a "useful beginning point for a discussion of general agency principles."49 Following the Restatement,50 the Court reasoned that an employer may be subject to liability when the supervisor's tortious act is committed within the scope of employment.51 The Court determined, however, that as a general rule supervisory sexual harassment is not conduct within the scope of employment.52

44. See Burlington, 118 S. Ct. at 2264.
45. Id.
46. Id.
47. Id. at 2265. Justice Ginsburg agreed with the majority holding that the "labels quid pro quo and hostile environment harassment are not controlling for purposes of establishing employer liability."
Id. at 2271 (Ginsburg, J., concurring).
48. Id.
49. Id. at 2266.
50. The Restatement provides:
(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
   (a) the master intended the conduct or the consequences, or
   (b) the master was negligent or reckless, or
   (c) the conduct violated a non-delegable duty of the master, or
   (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
RESTATEMENT (SECOND) OF AGENCY § 219 (1957).
51. See Burlington, 118 S. Ct. at 2266. The Restatement defines conduct to be within the scope of employment when actuated by a purpose to serve the employer. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957).
52. See Burlington, 118 S. Ct. at 2267.
The *Restatement* provides four situations in which an employer is subject to liability for the torts of employees acting outside the scope of employment.\(^{103}\) The Court looked most critically at two instances, the first being where "the master was negligent or reckless."\(^{104}\) Under this situation, the Court found an employer is negligent and therefore liable, under Title VII, if it knew or should have known about the supervisor's conduct and failed to stop it.\(^{105}\) The Court went no further in analyzing the negligence standard because Ellerth sought to invoke "the more stringent standard of vicarious liability."\(^{106}\)

The second situation the Court analyzed under the *Restatement* is where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."\(^{107}\) The Court divided this situation into two separate standards; first, the "apparent authority standard" and second, the "aided in the agency relation standard."\(^{108}\) The Court quickly dismissed application of the apparent authority standard to Ellerth's case, finding that such a standard arises in rare situations when it is alleged that "there is a false impression that the actor was a supervisor, when in fact he was not."\(^{109}\) The Court then turned to the "aided in the agency relation standard," finding the standard to require something more than the mere existence of the employment relation itself.\(^{110}\)

The Court reasoned that when a tangible employment action is taken against a subordinate, the "aided in the agency relation standard" will always be met because such action necessarily requires a company act that in most cases is documented and subject to review by upper-management.\(^{111}\) Thus, in such cases there is no question that more than the "mere existence of the employment relation aids in the commission of the harassment."\(^{112}\) An employer empowering a supervisor as an agent with the power to make economic decisions affecting subordinates cannot escape liability under agency principles.\(^{113}\)

Relying on the "aided in the agency relation standard," the Court went into great detail to articulate a rule of vicarious liability for supervisory sexual harassment in cases where tangible employment action is taken, stating:

A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury . . . .

Tangible employment actions fall within the special province of the

\(^{103}\) See Restatement (Second) of Agency § 219.

\(^{104}\) Restatement (Second) of Agency § 219(2)(b).

\(^{105}\) See Burlington, 118 S. Ct. at 2267.

\(^{106}\) Id.

\(^{107}\) Restatement (Second) of Agency § 219(2)(d).

\(^{108}\) See Burlington, 118 S. Ct. at 2267.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Id. at 2269.

\(^{112}\) Id.

\(^{113}\) See id.

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supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting employees under his or her control.\textsuperscript{114}

The Court reasoned:

\[ \text{[W]hatever the exact contour of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability, as Meritor itself acknowledged.}\textsuperscript{115}

The Court then turned to the more difficult task of determining whether the agency relation aids in the commission of harassment which does not result in tangible employment action. The Court viewed the issue from two different sides, reasoning that on one hand, a supervisor is always aided by the agency relation because his or her power and authority gives his conduct a "threatening character."\textsuperscript{116} On the other hand, the Court reasoned that a supervisor's harassment might be the same as that of a co-employee and as such the supervisor's status makes little difference.\textsuperscript{117}

The Court attempted to avoid these tensions by reasoning that in cases of supervisory harassment it was bound by its holding in Meritor — that agency principles constrain the imposition of vicarious liability.\textsuperscript{118} The Court determined, however, that, although Meritor "suggested" such a limitation on liability stemmed from agency principles, it could look at other considerations as well.\textsuperscript{119} Specifically, the Court stated that "[t]he aided in the agency relation standard . . . is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgement."\textsuperscript{120} Looking to "other considerations," the Court reasoned that

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.\textsuperscript{121}

\textsuperscript{114} Id. at 2269.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} See id.
\textsuperscript{118} See id. at 2270.
\textsuperscript{119} See id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
Following this rationale, the Court held that employers may be held vicariously liable for a supervisor's sexual harassment of a subordinate, even if the subordinate does not suffer any tangible change in her job status.\textsuperscript{122}

2. Faragher

In \textit{Faragher}, the Court addressed the standard of employer liability for supervisory sexual harassment that results in a hostile environment. At the outset, the Court recognized the difficulties the courts of appeal have had in deriving standards of employer liability for supervisory sexual harassment since \textit{Meritor}, specifically pointing to the divergence in approaches to standards of liability under agency law.\textsuperscript{123} While noting these difficulties, the Court reasoned that Congress had, in effect, adopted the Court's holding in \textit{Meritor} because it had amended Title VII after \textit{Meritor}\textsuperscript{124} without modifying the \textit{Meritor} holding.\textsuperscript{125} Thus, the Court began its analysis by stating that "\textit{Meritor}'s statement of law is the foundation on which we build today."\textsuperscript{126}

As it did in \textit{Burlington}, the Court turned to the "aided in agency relation standard" as the appropriate starting point for determining employer liability for hostile environment sexual harassment, because, in some sense, a "harassing supervisor is always assisted in his misconduct by the supervisory relationship."\textsuperscript{127} The Court noted that the "aided in agency" standard is merely a starting point because "our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) [of the Restatement] into Title VII. Rather, it is to adapt agency concepts to the practical objectives of Title VII."\textsuperscript{128} With the "aided in agency" standard as the starting point, the Court reasoned:

When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise — [which may be] to hire and fire, and to set work schedules and pay rates — does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion." Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have

\textsuperscript{122} See \textit{id.}.
\textsuperscript{125} See \textit{Faragher}, 118 S. Ct. at 2286.
\textsuperscript{126} Id. at 2286.
\textsuperscript{127} Id. at 2290.
\textsuperscript{128} Id. at 2291 n.3.
greater opportunity and incentive to screen them, train them, and monitor their performance.129

However, while finding sufficient reasons to hold employers vicariously liable for supervisory sexual harassment, Justice Souter, writing the majority opinion, refused to recognize vicarious liability for hostile environment harassment unless the Court could square such a holding with Meritor's express limitation that an employer is not "automatically" liable for sexual harassment caused by its supervisor.130

The Court articulated two alternatives that could square the holding in Meritor with the position that a supervisor, aided in agency, can subject his employer to vicarious liability.131 The first alternative would be to require proof of an affirmative invocation of supervisory authority by the harassing supervisor.132 The other alternative would be to provide the employer with an affirmative defense to liability in certain circumstances, even when an actionable hostile environment has been created by a supervisor.133

The Court reasoned that plaintiffs and defendants would be poorly served under the first alternative134 because the line between affirmative and merely implicit uses of supervisory power is too difficult to ascertain.135 The Court recognized that "[s]upervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist."136 According to the Court, such a rule would create a temptation to litigate, when the primary objective of Title VII is prevention and avoidance, not redress.137

The Court stated that employers need "to take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment."138 The Court reasoned that Title VII would be implemented sensibly by crediting employers who make reasonable efforts to prevent harassment and not rewarding a plaintiff who could have avoided harm but failed to do so.139 Based on this premise, the Court held that an employer is subject to vicarious liability for supervisory sexual harassment creating a hostile work environment.140 However, to credit employers for taking reasonable efforts to prevent harassment, the Court provided employers with an affirmative defense to liability where an employer can prove that it took reasonable care to prevent and remedy the

129. Id. at 2290.
130. See Faragher, 118 S. Ct. at 2291.
131. See id.
132. See id.
133. See id.
134. See id. at 2292.
135. See id. at 2291.
136. Id. at 2291-92.
137. See id. at 2292.
138. Id. (citing 29 C.F.R. § 1604.11(f) (1997)).
139. See id.
140. See id. at 2292-93.
harassment, and the employee unreasonably failed to take advantage of the procedures provided by the employer.141

IV. Analysis

In Burlington, the Court went to great lengths to analyze agency law in developing a rule of employer liability for supervisory sexual harassment. According to the Court, the basis for this analysis was Congress' decision to include the term "agent" in its definition of employer, which the Court determined to be an explicit instruction to interpret Title VII based on agency principles.142 As the Court admitted, however, looking to agency principles for guidance in defining employer liability has led to considerable disagreement in the courts of appeal.143 After gleaning the "aided in the agency relation standard" from the Restatement, the Court hesitated to explain it and readily admitted that it does not fully understand the standard. For example, in articulating a rule of vicarious liability for supervisory sexual harassment in cases where tangible employment action is taken, the Court stated that "whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability."144 In other words, the ends justify the means.

This failure to understand the "aided in the agency relation standard" becomes even more evident in cases where no tangible employment action is taken. After discussing the Restatement and its various parts, the Court stated that "[t]he aided in the agency relation standard . . . is a developing feature of agency law, and we hesitate to render a definitive explanation of our understanding of the standard in an area where other important considerations must affect our judgement."145 In this case, those "other considerations" were the policies that underlie Title VII. As recognized by the Court, these policies are to deter sexual harassment in the workplace and encourage employers to create antiharassment policies and effective grievance mechanisms — in short, to promote deterrence rather than litigation.

In Faragher, the Court based its decision on those same principles of deterrence. At first glance, it appears that Meritor and the agency law it pronounces is the foundation on which the majority builds. It is a shaky foundation at best. Justice Souter's majority opinion represents an attempt to distance the Court from the principles that it pronounced in Meritor, without expressly overruling Meritor. Meritor stood for the proposition that employer liability for supervisory sexual harassment is to be determined from agency law principles, and expressly held that an employer cannot be held vicariously liable for such harassment. Under Faragher, employer liability for supervisory sexual harassment was determined based upon the objectives

141. See id. at 2293.
143. See id. at 2263.
144. Id. at 2269 (emphasis added).
145. Id.
that Title VII serves, and the Court expressly held that employers may be held vicariously liable for such harassment.

The majority recognized at the outset that the courts of appeal have struggled under the agency law principles expressed in Meritor to "derive manageable standards to govern employer liability for hostile environment" supervisory sexual harassment.\textsuperscript{146} This is precisely why the Court granted certiorari. One would hope that the Court would not base its decision in Faragher on the very principles that failed to serve their purpose in the first instance. Fortunately, the Court did not do so. In fact, one can infer that Justice Souter had hoped that Congress, in amending Title VII, would have modified the Meritor decision. Justice Souter found this to be "conspicuous," and stated that because of it, the Court was "bound" to honor Meritor.\textsuperscript{147} The Court did so only by manipulating Meritor's principles and molding them into a reasoned conclusion.

The Court noted in Meritor that it had admonished courts to "find guidance in the common law of agency, as embodied in the Restatement."\textsuperscript{148} The Court claimed to do the same in Faragher, only to the extent that it used the Restatement as a "starting point" for determining employer liability for supervisory sexual harassment. This is because its obligation is not "to make a pronouncement of agency law in general or to transplant [the Restatement] into Title VII. Rather, it is to adapt agency concepts to the practical objectives of Title VII."\textsuperscript{149} The Court stated that Title VII's primary objective is prevention and avoidance, not redress. This is the foundation on which the Court builds. The Court's objective was to implement the purposes underlying Title VII; to do so its holding had to influence conduct.

Thus, while Meritor held that an employer cannot automatically be held liable for supervisory sexual harassment, the Court, to realize its objectives, held that employers may in fact be held vicariously liable. Bound by the constraints of Meritor, however, the Court provided an affirmative defense to allow employers to escape automatic liability. In essence, the Court's holding that employers may be held vicariously liable for supervisory sexual harassment in hostile environment cases, subject to an affirmative defense, influences conduct by forcing employers to take affirmative action to prevent supervisory harassment. The necessary result was that the Court squared its holding with Meritor, and further achieved its objectives to promote deterrence rather than litigation.

What about the agency law concepts expressed in Meritor that the Court struggled to make sense of in Burlington? In Faragher, the Court used those agency concepts to explain the relationship between employers, their supervisory employees, and subordinates, and gave a detailed summation of why employers should be held responsible for the actions of their supervisory employees. Beyond this, however, agency law seems to disappear in the opinion, while the objectives underlying Title VII come to the surface. As set forth above, the recognition of vicarious liability

\textsuperscript{146} Faragher, 118 S. Ct. at 2282.
\textsuperscript{147} See id. at 2291 n.4.
\textsuperscript{148} Id. at 2282.
\textsuperscript{149} Id. at 2291 n.3 (emphasis added).
promotes prevention and avoidance, thus acting as a deterrent. These are the objectives underlying Title VII. Therefore, in *Faragher*, the Court did not abandon agency law as it necessarily did in *Burlington*, but rather manipulated its concepts into reasons for liability, while ultimately resting liability on Title VII's objectives.

In his dissent, Justice Thomas took issue with the majority in *Burlington* and *Faragher*, characterizing the majority's rule of vicarious liability as "manufactured." He opined that the majority holding "is a whole-cloth creation that draws no support from the legal principles on which the Court claims it is based." Here, Justice Thomas was referring to the majority's use of agency law and the "aided in the agency relation standard." He reasoned that liability under the standard depends upon the alleged victim's belief that her supervisor, by sexually harassing her, is conducting official company business. "In this day and age, no sexually harassed employee can reasonably believe that a harassing supervisor is conducting the official business of the company or acting on its behalf." Justice Thomas further reasoned that "[a]lthough the Court implies that it has found guidance in both precedent and statute its holding is a product of willful policymaking, pure and simple." Indeed it was — only to the extent that *Burlington* and *Faragher* implemented the policies underlying Title VII.

One has to believe, as Justice Souter suggested, that if Congress had dealt with *Meritor* and the agency principles that it embodies when it amended Title VII, the waters would be much clearer. Instead, the Court was forced to distance itself from agency law in *Burlington* and *Faragher*, which it accomplished with varying degrees of success. The end result is that agency law and the Restatement are alive and well in Title VII jurisprudence. Of course, one could argue that *Burlington* and *Faragher* represent an attempt by the Supreme Court to please all interested entities. With the inclusion of agency law in its analysis, the Court provides legal scholars and academics with a subject of debate, while its holdings provide practitioners with a seemingly straightforward test with which to litigate claims. Courts should approach the Restatement in the context of Title VII with caution, and in doing so, take heed to the opinion of Chief Judge Posner of the Seventh Circuit Court of Appeals who best described the interrelationship of the Restatement with Title VII. Judge Posner opined that the Restatement is unworkable in the context of Title VII:

The . . . Restatement . . . was promulgated 40 years ago, before Title VII was enacted and before the concept of sexual harassment had emerged as a distinct legal concept. There is nary a hint in the text or legislative

150. Justice Thomas was joined in his dissent by Justice Scalia. See *Burlington*, 118 S. Ct. at 2271; *Faragher*, 118 S. Ct. at 2294.
151. *Id.* at 2271 (Thomas, J., dissenting).
152. *Id.* at 2273.
153. See *id.* at 2274.
154. *Id.*
155. *Id.* (emphasis added).
156. See, *e.g.*, *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998); *Harrison v. Eddy Potash*, Inc., 158 F.3d 1371 (10th Cir. 1998).
history of Title VII that Congress intended to incorporate the Restatement by reference. It would have been loopy to do so. The Restatements are intended to provide a compact statement of common law principles. The essence of the common law method of rulemaking is supleness and flexibility facilitating adjustment to altered circumstances, and is inconsistent with treating any statement of common law principles as a petrified text.\(^{157}\)

In Judge Posner's view, courts should look to and examine the social policies that Title VII serves, rather than "teasing out the meaning of words in a text composed with other problems in mind."\(^{158}\)

Ultimately, the Supreme Court did examine those policies. Burlington and Faragher both recognized Title VII's purpose to deter conduct and promote internal conciliation rather than to invite litigation in the courts by providing an act under which sexual harassment claims may be brought. The Court's holdings in both Burlington and Faragher implemented this purpose. Employers place their supervisors in a position where the supervisor is cloaked with power over subordinate employees. The extent of that power will vary from case to case, but as such, an employer has a duty to make certain that its supervisors do not abuse this power. Additionally, employers have a duty to provide employees with a work environment that is not consumed with offensive conduct and where advancement is not conditioned on sexual acts. The Supreme Court, by subjecting employers to vicarious liability, forces them to take affirmative steps to prevent sexually harassing conduct by their supervisors.\(^{159}\) In cases where tangible employment action is taken, knowledge will be imputed to the employer because such action necessarily requires a company act. As such, the employer can take adequate measures and implement internal controls to prevent

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158. Id. at 509. Judge Posner went further in his argument against the application of the Restatement to Title VII, opining: [H]ad the Supreme Court told us to use the . . . Restatement . . . as the framework for evaluating sexual harassment under Title VII, I would bow to its command. It did not; but by citing the Restatement [in Meritor] it gave lawyers and judges a straw to grasp at. The straw has broken in their hand. The Restatement turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the Restatement to employers' liability for sexual harassment by supervisory employees. The judges and lawyers who insist that the Restatement of Agency is The Way either are disingenuous, wishing to conceal their true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, without need to examine the social policies that the law might be thought to be serving.

supervisors from conditioning promotion, hiring, or the like on sex. Any failure to so
do may result in liability.

The Supreme Court has also placed a burden on employers to establish internal
grievance mechanisms and complaint procedures. In cases where no tangible
employment action is taken, a victimized employee has a duty to make her employer
aware of the supervisor's harassing conduct through the use of internal grievance
mechanisms and complaint procedures. Any unreasonable failure to do so will allow
the employer to escape liability. Therefore, the Court has placed a burden on the
employee to inform the employer of the harassment, allowing the employer the
opportunity to remedy the conduct or face liability.160 Additionally, in placing this
burden on employees, the Court deterred frivolous and groundless sexual harassment
lawsuits by litigious employees who would otherwise bring such claims. Indeed, with
Burlington and Faragher, the Supreme Court swung the pendulum to the middle of
the field of supervisory sexual harassment.

V. Implications for Oklahoma Law

The implications of Burlington and Faragher for Oklahoma law are somewhat
subtle in the context of this analysis. The purpose of Part V of this note is not to
render an opinion of how Oklahoma courts should apply Burlington and Faragher, but
rather illustrate how the two cases expose the inadequacies of substantive Oklahoma
law regarding employment discrimination — more specifically, supervisory sexual
harassment.

Comparable to the federal Title VII statutes in Oklahoma is the Oklahoma Anti-
Discrimination Act.161 The stated purpose of the Oklahoma Act is to "provide for
execution within the state of Oklahoma of the policies embodied in [Title VII]."162
By making such a broad statement of purpose, the Oklahoma Legislature has, in
effect, given Congress the authority to dictate the policies underlying the Oklahoma
Act, such that the Oklahoma Act will constitute a state equivalent to Title VII.

The policies that embody Title VII were set forth by the Supreme Court in
Burlington and Faragher. Those policies, as analyzed in detail above, essentially
amount to deterrence and prevention, but not redress. Burlington and Faragher, by
holding employers vicariously liable for supervisory sexual harassment subject to an
affirmative defense where no tangible action is taken, necessarily influence employers
to deter and prevent harassment. Thus, by implication, the purpose of the Oklahoma

160. In cases where tangible employment action has been taken, the Tenth Circuit Court of Appeals
has interpreted Burlington and Faragher to mean that liability is imputed on the employer, even if the
employer ultimately stops further harassment. See Gunnell v. Utah Valley State College, 152 F.3d 1253,
1261 (10th Cir. 1998); see also Indest v. Freeman Decorating, Inc., 164 F.3d 258, 266 (5th Cir. 1999)
(holding that in cases where no tangible action has been taken, an employer cannot be held vicariously
liable if the employer, upon gaining knowledge of sexual harassment, moves promptly to investigate and
stop the same).

161. 25 OKLA. STAT. §§ 1101-1102 (1991); id. § 1201; id. § 1301 (Supp. 1998); id. §§ 1302-1311

162. Id. § 1101 (1991).
Act in the context of supervisory sexual harassment is to deter and prevent such harassment. The following analysis proceeds under this premise.

A. Federal Preemption

A threshold issue is whether Title VII preempts the Oklahoma Act. The Supreme Court has held that federal law may preempt state law in three different ways. First, Congress may preempt state law in express terms. Second, Congress' intent to preempt state law "may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." Third, state law may be preempted where it conflicts with federal law by either making compliance with federal and state law a physical impossibility or where it stands as an obstacle to accomplishing and executing the full purposes and objectives of Congress. The first two alternatives may be discarded within this analysis because Congress addressed these alternatives in Title VII, which explicitly disclaims any intent to categorically preempt state law or to occupy the field of employment discrimination to the exclusion of state law. Congress also addressed the third alternative in Title VII, providing that analogous state laws are preempted by Title VII only to the extent that they conflict with or are inconsistent with Title VII. Thus, the Oklahoma Act can be preempted by Title VII only to the extent that it conflicts with or is inconsistent with Title VII.

In *Tate v. Browning-Ferris, Inc.*, the Oklahoma Supreme Court held that Title VII does not preempt the Oklahoma Act. Although neither party in *Tate* raised the preemption issue, the court addressed it as a "critical prerequisite" to its analysis. While holding that Title VII did not preempt state law, the Oklahoma Supreme Court recognized that under Title VII, state laws will be preempted only when they conflict...

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164. See id.
165. Id.
166. See id. at 281.
167. See id. Title VII provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.


Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Id. § 2000e-7.
168. See Guerra, 479 U.S. at 281.
170. See id. at 1222.
171. Id.
with Title VII. In holding that Title VII did not preempt Oklahoma state law, the Oklahoma Supreme Court, paraphrasing the U.S. Supreme Court reasoned that Title VII is a floor "beneath which federally provided protection may not drop rather than a ceiling above which it may not rise." The court recognized that remedies for employment discrimination under state law may be both different from and broader than those provided by Title VII. Thus, accepting the Oklahoma Supreme Court's holding that Title VII does not preempt the Oklahoma Act and that remedies under the Oklahoma Act may be different from those under Title VII, the analysis turns to remedies.

B. A Statutory Private Right of Action

The major difference between Title VII and the Oklahoma Act is remedial. Title VII provides a private right of action for employment discrimination as well as compensatory and punitive damages. The only private right of action provided by the Oklahoma Act, in the context of employment discrimination, is for discrimination based on handicap. Any other remedies for employment discrimination under the Oklahoma Act are administrative.

The Oklahoma Human Rights Commission is the state agency charged with enforcing claims brought under the Oklahoma Act. The Commission is vested with the power to receive, investigate, conciliate, hold hearings on, and pass upon complaints alleging violations of the Oklahoma Act. The Commission may seek enforcement of its orders in court and its decisions are subject to judicial review. The

172. See id.
173. Id. at 1222-23 (citing Guerra, 479 U.S. at 285).
174. See id. at 1223. An Illinois court held that Burlington and Faragher did not apply to its state's Human Rights Act because the state act imputed strict liability on employers regardless of whether the employer knew of the offending conduct, whereas Title VII recognizes that employers are not automatically liable based on Burlington and Faragher. See Webb v. Lustig, 700 N.E.2d 220, 227 (Ill. Ct. App. 1998). Thus, the state act recognized broader relief to the exclusion of federal law.
175. Though the Oklahoma Supreme Court reached the correct result regarding preemption, one has to question the clarity of its reasoning, particularly in light of the fact that the court took it upon itself to address the issue. The court's reasoning gives the false impression that a state's remedial scheme cannot be more restrictive than that provided by Title VII while its holding states that the same may be both different from and broader than Title VII. Perhaps the court should have stated that state protection from discrimination cannot conflict with Title VII by permitting that which Title VII does not, but may provide greater protection by permitting less than Title VII allows. See supra note 167. Such a statement would have clarified the court's reference to Title VII being a "floor" rather than "ceiling." Thereafter, the ultimate conclusion that a state's remedial scheme may be both different from and broader than Title VII, would not imply that such a scheme may not provide for more restrictive enforcement procedures than those provided by Title VII. Stated in more simplified terms, state law cannot permit more than Title VII allows, but a state's remedial scheme may be different from Title VII.
177. See id. § 1981a.
180. See id. § 1501.
181. See id. § 1501(A)(3).
relief provided by the Oklahoma Act includes temporary injunctions and restraining orders, cease and desist orders, the hiring or reinstatement of employees, and costs and attorneys fees. The Oklahoma Act does not provide for compensatory or punitive damages. Thus, the remedies provided by the Oklahoma Act are sufficiently limited in comparison to those provided by Title VII. However, simply because the statute does not provide for a private right of action does not mean that such action is foreclosed in Oklahoma because Oklahoma recognizes the public policy, common law tort action.

C. The Common Law Tort Action

Oklahoma courts have long followed the at-will rule in employment. Generally stated, this rule holds that an employer may discharge an employee for good cause or no cause without being guilty of a legal wrong. In the 1989 case Burk v. K-Mart Corp., the Oklahoma Supreme Court adopted the public policy exception to the at-will termination rule. The court held that this exception will apply only in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as set forth in constitutional, statutory, or case law.

Turning back to Tate v. Browning-Ferris, Inc., the main issue before the Oklahoma Supreme Court was whether a retaliatory discharge upon an employee's complaint of racial discrimination was actionable under the Burk public policy exception. The court answered in the affirmative and held that such a discrimination claim was actionable as a "state law claim for tortious employment discrimination under Burk.

The Tate court began its reasoning with the premise that a racially motivated discharge comes under the protection of Burk because such action clearly offends public policy. The court noted that the Oklahoma Anti-Discrimination Act does not provide a private right of action for individuals aggrieved by racial discrimination and that such claims are properly brought before the Oklahoma Human Rights Commission. The court articulated two reasons for holding that a common law tort action existed under Oklahoma common law. First, the court reasoned that Oklahoma

182. See id. § 1502.1.
183. See id. § 1505.
187. See Burk, 770 P.2d at 28.
189. See id. at 1225.
191. See Tate, 833 P.2d at 1225.
192. See id. at 1229.
law does not allow legislative abrogation of common law by implication, and as such the legislature would have to textually express its desire to occupy a field of discrimination law to the exclusion of all other law.193 Since the legislature did not express this desire within the statute, the court found the state tort action under the public policy exception supplemental to the Oklahoma Act.194 Second, the court reasoned that because a private right of action was provided in the Oklahoma Anti-Discrimination Act only for discrimination based on handicap, a holding that the statute established the sole remedy for racial discrimination would "create a dichotomous division of discrimination remedies contrary to . . . the Oklahoma Constitution."195 The court stated that the Oklahoma Constitution "absolutely interdicts the passage of special law that would sanction disparate remedies for those who complain of employment discrimination."196

Four years later in List v. Anchor Paint Manufacturing, Co.,197 the Oklahoma Supreme Court distinguished Tate by holding that the public policy exception did not create a state law tort action in the case of a constructive discharge based on age discrimination. In List, the plaintiff employee, C.R. List, claimed he was demoted because of his age and that such demotion was an attempt to create working conditions that were so intolerable that they would force his resignation.198 As a result, List, claiming his work environment was intolerable, resigned and brought action against his former employer based on the Burk tort exception to the employment at-will doctrine.199 List claimed that his employer's actions constituted a wrongful discharge in violation of public policy as set forth in the federal Age Discrimination in Employment Act and the Oklahoma Anti-Discrimination Act.200 The Oklahoma Supreme Court distinguished Tate from the situation in List, noting that while similar in some respects, the two cases differ significantly.201 The List court found similarities in that both the plaintiffs in Tate and List claimed violation of their rights as protected by federal antidiscrimination statutes.202 Distinguishing the cases, the court reasoned that the statutory remedies available to the plaintiff in Tate were significantly limited compared to those available to the plaintiff in List.203 The Oklahoma Supreme Court recognized that had it held in Tate that the plaintiff was not entitled to assert a common law cause of action, he would have had no right to a jury trial because neither the Oklahoma Act nor the federal act provided for such a remedy. Consequently, his remedies would have been limited to back pay and he would have had no right to additional compensatory or punitive damages.204 The

193. See id. at 1225-26.
194. See id. at 1230-31.
195. Id. at 1229.
196. Id. at 1230.
198. See id. at 1013.
199. See id.
200. See id.
201. See id.
202. See id.
203. See id.
204. See id. Congress amended Title VII in 1991 to provide for compensatory and punitive damages.
court reasoned that the plaintiff in List, however, would be entitled to a jury trial and punitive damages, and thus was afforded greater statutory remedies than the plaintiff in Tate because the statutes governing age discrimination provided for such action.  

Therefore, because List had adequate remedies for age discrimination under statute, the court would not extend the Burk common law exception to age discrimination claims.  

Having addressed racial and age discrimination in Tate and List, the Oklahoma Supreme Court's focus turned to sexual harassment in Marshall v. OK Rental & Leasing, Inc. In Marshall, the Oklahoma Supreme Court considered a hostile environment sexual harassment claim under Burk, and held that such a claim was not cognizable under the Burk exception because the plaintiff had adequate statutory remedies.  

The plaintiff, Jody Marshall, brought action against her employer claiming she was constructively discharged from her employment because she was sexually harassed by a co-worker. The court found that its analysis in List controlled — that where the "employee has an adequate statutory cause of action for wrongful discharge which is sufficient to protect . . . her rights, that remedy is exclusive and no common law remedy is available under Burk." The court followed the reasoning of the Maryland Court of Appeals, opining that allowing Marshall to bring a common law tort action under the Burk public policy exception would be a misuse of the exception. The court stated:

In cases of discharge motivated by employment discrimination prohibited by Title VII and [state antidiscrimination statutes] the statutes create both the right, by way of an exception to the terminable at-will doctrine, and remedies for enforcing that exception. Thus, the generally accepted reason for recognizing the [public policy exception] tort, that of vindicating an otherwise civilly unremedied public policy violation, does not apply. Further, allowing full tort damages to be claimed in the name of vindicating the statutory public policy goals upsets the balance between right and remedy struck by the Legislature in establishing the very policy relied upon.  

The Oklahoma Supreme Court reasoned that an employee who alleges she was constructively discharged due to a hostile work environment created by sexual

205. See List, 910 P.2d at 1013.  
206. See id.  
207. 939 P.2d 1116 (Okla. 1997).  
208. See id. at 1119.  
209. See id.  
210. Id. at 1120.  
211. See id. at 1121.  
212. Id. at 1121-22 (quoting Makovi v. Sherwin-Williams Co., 561 A.2d 179, 190 (Md. Ct. App. 1989)).
harassment has adequate remedies under Title VII because Title VII allows for trial by jury and compensatory as well as punitive damages.\textsuperscript{213} Therefore, with adequate remedies provided by statute, the court did not extend the \textit{Burk} exception to claims for hostile work environment sexual harassment.\textsuperscript{214}

While \textit{Marshall} was a hostile environment claim based on sexual harassment by a co-worker, the Oklahoma Supreme Court's analysis and holding apply equally to claims based on supervisory sexual harassment. An individual alleging supervisory sexual harassment may bring a claim under Title VII, which, as set forth by the Oklahoma Supreme Court in \textit{Marshall}, provides for adequate remedies of trial by jury and compensatory and punitive damages. Therefore, based on the reasoning of the Oklahoma Supreme Court, the \textit{Burk} exception will not apply to claims for supervisory sexual harassment.

\textbf{D. The End Result}

As set forth in detail above, in \textit{Burlington} and \textit{Faragher}, the Supreme Court based its rulings on the polices underlying Title VII. Those policies are to influence conduct, to deter sexual harassment in the workplace, and encourage employers to create antiharassment policies and effective grievance mechanisms. The Supreme Court's holdings in \textit{Burlington} and \textit{Faragher} serve to implement this policy of deterrence by holding employers vicariously liable for supervisory sexual harassment. What gave teeth to the Supreme Court's holdings in \textit{Burlington} and \textit{Faragher} are the remedies provided by Title VII — private right of action\textsuperscript{215} and compensatory and punitive damages.\textsuperscript{216}

By implication, the purpose of the Oklahoma Act in the context of supervisory sexual harassment, is to deter and prevent such harassment. The question then becomes whether or not the Oklahoma Act works to deter sexual harassment in the workplace and encourage employers to create antiharassment policies and effective grievance mechanisms. The short answer is that it does not because the Act does not have the same teeth as Title VII.

The administrative remedies provided by the Act, while nothing to ignore, are certainly not going to influence conduct to the same extent as Title VII, given the fact that neither a private right of action nor compensatory or punitive damages are available under the Oklahoma Act or the \textit{Burk} exception. Vicarious liability under \textit{Burlington} and \textit{Faragher} mean nothing to employers if the statute which provides the basis for the claim provides nothing more than mere administrative remedies. The Oklahoma Supreme Court recognized as much in \textit{Tate} and \textit{List}, reasoning that without a right to a jury trial and compensatory or punitive damages, a plaintiff's remedies would have been limited to the administrative slap on the hand provided by the Oklahoma Act.

\textsuperscript{213} See \textit{id.} at 1122.
\textsuperscript{214} See \textit{id.}
\textsuperscript{216} See \textit{id.} § 1981a.
Thus, the only logical conclusion is that the Oklahoma Anti-Discrimination Act has failed its stated purpose to create a state equivalent to Title VII. This should not be cause for alarm, however, because common sense dictates that Oklahoma employers will not harass employers with reckless abandon because of the inadequacy of Oklahoma's antidiscrimination laws. Title VII does not allow for such a result, as any individual could bring action in federal or state court under Title VII.217 However, should the Oklahoma Legislature amend the Oklahoma Act to provide for a private right of action? Alternatively, should the Oklahoma Supreme Court recognize a common law tort action under the Burk exception? One can infer that the Oklahoma Supreme Court does not think so in either case. With Title VII providing adequate remedies for any individual in Oklahoma of which to avail themselves, there is no need for a private right of action or a common law tort action under the Burk exception. Perhaps the Oklahoma Supreme Court is correct in this assertion. An aggrieved individual would be better off in federal district court where the judges are more familiar than state courts with employment discrimination claims. However, to the extent that the Oklahoma Act fails in implementing its stated purpose of deterrence, as recognized by the Supreme Court in Burlington and Faragher, it is something the Legislature should address, lest it leave an ineffective law on the books.

VI. Conclusion

In Burlington and Faragher, the Supreme Court implemented the policies underlying Title VII, which are to promote conciliation, avert litigation, and deter sexual harassment in the workplace. While the Court went to great lengths analyzing agency law, the end result appears straightforward in application. The Court held that an employer may be held vicariously liable for a supervisor's sexual harassment of an employee, even if the employee does not suffer any tangible change in her employment status. The Court provided an affirmative defense to employers in cases where no tangible employment action is taken. Under this defense an employer must prove that it took reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of the procedures provided by the employer.

In establishing this rule, the Court has swung the pendulum to the middle, placing a burden on employers to enact policies, procedures, and grievance mechanisms geared towards deterring, preventing, and providing remedies for sexual harassment in the workplace. In cases where no tangible employment action is taken, an employer does not necessarily have knowledge that the offending conduct has taken place. Thus, those employees claiming to be victims of supervisory harassment in such cases must take the initiative to apprise their employer, giving the employer the opportunity to remedy the problem. In the end, the Supreme Court has served the interests of both parties as companies make it their business to implement the advice of Peters and

217. See Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 825 (1990) (holding that state courts have concurrent jurisdiction over Title VII claims).
Waterman — that all are treated with dignity and respect, and ultimately it is the companies that move closer to achieving excellence.

Bryan J. Pattison