CURRENT DEVELOPMENTS IN THE LAW

A Survey of Federal Cases Involving Employer Vicarious Liability for Sexual Harassment

This section presents a broad selection of cases recently decided in the federal court system, but it is not intended to be a comprehensive collection.

Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998). THE SUPREME COURT HELD THAT AN EMPLOYER MAY BE SUBJECT TO VICARIOUS LIABILITY TO A VICTIMIZED EMPLOYEE FOR AN ACTIONABLE HOSTILE WORK ENVIRONMENT CREATED BY A SUPERVISOR EVEN WHEN THE SUPERVISOR'S HARASSMENT DOES NOT CULMINATE IN A "TANGIBLE EMPLOYMENT ACTION".

I. INTRODUCTION

The plaintiff, a former employee of Burlington Industries Inc., invoked Title VII of the Civil Rights Act of 1964[1] against Burlington Industries, Inc. seeking damages, arguing that she was subjected to constant sexual harassment by her supervisor.[2] Hostile work environment sexual harassment, distinguished from quid pro quo sexual harassment, is actionable under Title VII if it is severe or pervasive enough to alter an employee's terms or conditions of employment.[3] The Supreme Court held that an employer is subject to vicarious liability to a victimized employee for a hostile work environment created by a supervisor with authority over the employee.[4] When the supervisor's harassment culminates in a "tangible employment action", such as discharge, demotion, or undesirable reassignment, no affirmative defense is available to the employer.[5] When no "tangible employment action" is taken, however, the employer may raise an affirmative defense comprising two necessary elements: (a) that the employer exercised reasonable care to 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.[6]

---

[1] 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq.

[2] Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2262 (1998).

[3] *See id.* at 2264 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

[4] *See id.* at 2270.

[5] *See id.*

[6] *See id.*

II. BACKGROUND

The plaintiff worked as a salesperson in one of Burlington's divisions from March 1993 to May 1994.[7] The plaintiff's supervisor, Ted Slowik, was a mid-level manager with authority to make hiring and promotion decisions subject to the approval of his supervisor.[8] Slowik was not the plaintiff's immediate supervisor.[9] Slowik allegedly made repeated boorish and offensive remarks and gestures, several of which could be construed as threats to deny the plaintiff tangible job benefits.[10] Among several other incidents, in March 1994 during a promotion interview, Slowik expressed reservations because the plaintiff was not "loose enough" and rubbed the plaintiff's knee.[11] The plaintiff did, however, receive the promotion.[12] Slowik told the plaintiff "you're going to be out there with men who work in factories, and they certainly like women with pretty butts/legs."[13] Other comments made by Slowik included: "I don't have time for you right now, Kim—unless you want to tell me what you are wearing," and "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier."[14] In May 1994, the plaintiff quit.[15] During her tenure at Burlington, the plaintiff did not inform anyone in authority about Slowik's conduct, despite knowing that Burlington had a policy against sexual harassment.[16]

In October 1994, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"), the plaintiff filed suit in the United States District Court for the Northern District of Illinois, alleging Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII.[17]

The district court granted summary judgment in favor of the Burlington, noting that the plaintiff did not use Burlington's internal complaint procedures.[18] The Seventh Circuit Court of Appeals reversed in a decision that produced eight separate opinions and no consensus for a controlling rationale. The judges did agree that the plaintiff's case was founded on vicarious liability, not failure to comply with a duty of care (under which a court would apply a negligence standard to the employer's conduct).[19]

---

[7] *See id.* at 2262.

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *Id.*

[14] *Id.*

[15] *See id.*

[16] *See id.*

[17] *See id.* at 2263.

[18] *See id.*

[19] *See id.*

III. ANALYSIS

A. *Employer's Vicarious Liability In Cases Where A Tangible Employment Action is Taken*

Section 703(a) of Title VII states that an employer may not: "(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex."[20] An employee's claim establishes "quid pro quo" sexual harassment in violation of Title VII if an employer demands sexual favors from an employee in return for a job benefit.[21] An employee may establish a "hostile environment" claim if the employer's sexually demeaning behavior alters terms or conditions of employment in violation of Title VII, although a "hostile environment" claim requires harassment that is severe or pervasive.[22] Because the plaintiff's claim involved only unfulfilled threats, the Court categorized the claim as a hostile work environment claim, which requires a showing of severe or pervasive conduct.[23] The Supreme Court accepted the district court's finding that Slowick's conduct was severe and pervasive.[24]

The Court decided the issue of whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat.[25] Relying on general common law principles of agency, the Supreme Court found that sexual harassment by a supervisor is generally not conduct "within the scope of employment" because a supervisor acting out of gender-based animus or a desire to fulfill sexual urges acts based on personal motives rather than the objectives of the employer.[26] An employer can, however, be liable for an employee's harassment where its own negligence is a cause of the harassment even though the sexual harassment is outside the scope of employment.[27] With respect to sexual harassment, an employer is negligent if the employer knew or should have known about the conduct and failed to stop it.[28] An employer can also be subject to vicarious liability for intentional torts committed by its employees. Vicarious liability attaches when the employee uses apparent authority or when the employee is "aided in accomplishing the tort by the existence of the agency relation" (the "aided in the agency relation

---

[20] *See id.* at 2264 (citing 42 U.S.C. § 2000e-2(a)(1)).

[21] *See id.*.

[22] *See id.* (citing *Meritor*, 477 U.S. at 65).

[23] *See id.* at 2265.

[24] *See id.*

[25] *See id.*

[26] *See id.* at 2266-67.

[27] *See id.* at 2267.

[28] *See id.*

standard.").[29]

The aided-in-the-agency-relation standard requires more than simply the existence of an employment relationship.[30] Employer vicarious liability attaches when a discriminatory act results in a "tangible employment action."[31] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[32] As a general proposition, only a supervisor or other person acting with the authority of the employer can inflict the direct economic harm that results from a tangible employment action.[33] "A tangible employment decision requires an official act of the enterprise, a company act."[34] Thus, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer, because the requirements of the aided-in-the-agency-relation standard will always be met when a supervisor takes a tangible employment action against a subordinate.[35]

B. *Employer's Affirmative Defenses*

The Court declined to give a definitive answer as to whether the agency relation aids in the commission of supervisor harassment that does not culminate in a tangible employment action.[36] The Court did rule, however, that the labels "quid pro quo" and "hostile work environment" are not controlling for purposes of establishing employer liability.[37] The Court held that in cases where no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages comprising two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[38] No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[39] The Court stated that it adopted its holding in order to accommodate the agency principles of vicarious liability and Title VII's policies of encouraging forethought by employers and saving action by objecting employees.[40]

---

[29] *See id.*
[30] *See id.* at 2268.
[31] *See id.*
[32] *Id.*
[33] *Id.* at 2269.
[34] *Id.*
[35] *See id.*
[36] *See id.*
[37] *See id.* at 2265, 2271.
[38] *See id.* at 2270.
[39] *See id.*
[40] *See id.*

Even though the plaintiff did not allege that she had suffered a tangible employment action at the hands of Slowik, Burlington is subject to vicarious liability for Slowik's conduct. Burlington does, however, have the opportunity to assert and prove the affirmative defense to liability.[41] The Court thus affirmed the judgment of the court of appeals.[42]

C. *Concurrence*

Justice Ginsburg concurred in the judgment, agreeing with the Court's ruling that "the labels quid pro quo and hostile work environment are not controlling for purposes of establishing employer liability."[43]

D. *Dissent*

Justice Thomas, joined by Justice Scalia, warned that the majority failed to explain how employers can rely on the affirmative defense in order to avoid vicarious liability.[44] The dissent argued that the standard of employer liability applied in hostile work environment sexual harassment cases should be the same standard applied in hostile work environment race discrimination cases, because both are forms of employment discrimination under Title VII.[45] The dissent explained that in race discrimination cases employer liability turns on whether a supervisor takes an adverse employment action because of race.[46] If a supervisor takes an adverse employment action because of race, causing the employee a tangible job detriment, the employer is vicariously liable for resulting damages.[47] When a supervisor creates a hostile work environment, however, he does not act for the employer.[48] Thus, if an employee alleges a racially hostile work environment, the employer is liable only for negligence: that is, only if the employer knew, or in the exercise of reasonable care should have known, about the harassment and failed to take remedial action.[49] Liability in racial discrimination cases has only been imposed when the employer is blameworthy in some way.[50] The dissent argues that the same standard should apply in sexual harassment cases.[51]

In this case, the plaintiff alleged a hostile work environment but never alleged that Burlington was negligent in permitting the harassment to occur.[52] The com-

---

[41] *See id.* at 2271.
[42] *See id.*
[43] *Id.*
[44] *See id.* at 2273-74.
[45] *See id.* at 2271, 2275.
[46] *See id.* at 2272.
[47] *See id.*
[48] *See id.*
[49] *See id.*
[50] *See id.*
[51] *See id.*
[52] *See id.* at 2273.

pany had a policy against sexual harassment, but the plaintiff did not tell anyone with authority over Slowik about his behavior.[53] Therefore, the dissent concluded, Burlington cannot be liable under a negligence standard because Burlington neither had knowledge of Slowik's alleged conduct nor did it fail to exercise reasonable care by not knowing about his alleged conduct.[54]

IV. CONCLUSION

By declining to adopt a negligence standard for employer liability in sexual harassment cases, the Supreme Court subjects employers to greater potential liability and uncertainty as to the extent of their liability for sexual harassment by supervisors. The Court held that an employer may be subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with authority over the employee, even when the supervisor's harassment does not culminate in a tangible employment action. Therefore, the Court affirmed the judgment of the court of appeals and remanded to the district court to decide whether the plaintiff should be allowed to amend her pleading or supplement her discovery.[55]

David Monassebian

Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998). THE SUPREME COURT HELD THAT UNDER TITLE VII, AN EMPLOYER IS VICARIOUSLY LIABLE TO A VICTIMIZED EMPLOYEE FOR ACTIONABLE DISCRIMINATION CAUSED BY A SUPERVISOR, BUT SUBJECT TO AN AFFIRMATIVE DEFENSE LOOKING TO THE REASONABLENESS OF THE EMPLOYER'S CONDUCT AS WELL AS THAT OF THE PLAINTIFF VICTIM.

I. INTRODUCTION

The plaintiff, Beth Ann Faragher, sued the city of Boca Raton for sexual harassment based on the conduct of her supervisors, Bill Terry and David Silverman.[1] Under Title VII of the Civil Rights Act of 1964, "[i]t shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge 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."[2] The Supreme Court held that an employer is subject to vicarious liability under Title VII to a victimized employee for actionable discrimination caused by a supervisor.[3] However, the employer may raise an affirmative defense that looks to the reasonableness of employer's conduct in seeking to

---

[53] *See id.*

[54] *See id.*

[55] *See id.* at 2271.

[1] Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2280 (1998).

[2] 42 U.S.C. § 2000e-2(a)(1).

[3] *See Faragher*, 118 S. Ct. at 2280.

prevent and correct harassing conduct and to the reasonableness of the employee's conduct in seeking to avoid harm.[4] In this case, the Supreme Court held that the City did not exercise reasonable care to prevent the harassing behavior and was, therefore, vicariously liable to Faragher.[5]

II. BACKGROUND

Between 1985 and 1990, Faragher was an ocean lifeguard for the Marine Safety Section of the Parks and Recreation Department of the City of Boca Raton, Florida.[6] In 1992, she brought an action against her supervisors, Bill Terry and David Silverman, and the city of Boca Raton, asserting claims under Title VII, 42 U.S.C. § 1983, and Florida law.[7] The complaint alleged that Terry and Silverman created a "sexually hostile atmosphere" at the beach and, as agents of the city, their conduct amounted to discrimination in the "terms, conditions, and privileges" of her employment.[8]

The United States District Court for the Southern District of Florida concluded that Terry and Silverman's conduct was sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment.[9] The Court ruled that there were three justifications for holding the city liable for the harassment of its supervisory employees: 1) the City had "knowledge, or constructive knowledge" of the harassment, 2) Terry and Silverman were acting as agents when they committed the harassing acts, and 3) a third supervisor's knowledge of the harassing conduct, combined with his inaction, was further basis for finding the City liable.[10]

A panel of the Court of Appeals for the Eleventh Circuit reversed the judgment against the City.[11] The panel ruled that 1) Terry and Silverman were not acting within the scope of their employment when they engaged in the harassment, 2) they were not aided in their actions by the agency relationship, and 3) the City had no actual or constructive knowledge of the harassment.[12]

The court of appeals, sitting en banc, adopted the panel's conclusion and held that

> an employer may be indirectly liable for hostile environment sexual harassment by a superior: 1) if the harassment occurs within scope of the superior's employment; 2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or 3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his

---

[4] *See id.*

[5] *See id.* at 2294.

[6] *See id.* at 2280.

[7] *See id.*

[8] *See id.* (citing 42 U.S.C. § 2000e-2(a)(1)).

[9] *See* Faragher v. City of Boca Raton, 864 F. Supp. 1552 (S.D. Fla. 1994).

[10] *See id.* at 1562-63.

[11] *See* Faragher v. City of Boca Raton, 76 F.3d 1155 (11th Cir. 1996).

[12] *See id.* at 1166-67.

subordinate.[13]

III. ANALYSIS

A. *An Employer's Vicarious Liability under Title VII Pre-*Faragher

Sexual harassment so "severe or pervasive" as to "alter the condition of [the victim's] employment and create an abusive working environment" violates Title VII.[14] A sexually objectionable environment is one that a reasonable person would find abusive, and one that the victim in fact did perceive to be so.[15] Courts determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance."[16] Conduct must be extreme to amount to a change in the terms and conditions of employment.[17]

Supreme Court cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive.[18] District courts and courts of appeals have held employers liable in several situations.[19] First, courts have found an employer liable when the employer had actual knowledge of the harassing conduct but did nothing to stop it.[20] Courts have also found employer liability under Title VII where the employers have discriminated in employment actions, such as hiring, firing, compensation, and work assignment.[21]

There are several reasons for holding an employer liable for the harassing conduct of its supervisors.[22] Some courts have found an employer liable when a supervisor makes discriminatory employment decisions because he "merges" with the employer and his act becomes that of the employer.[23] Other courts have suggested that the employer is liable because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing,

---

[13] Faragher v. City of Boca Raton, 111 F.3d 1530, 1534-35 (1997).

[14] *Faragher*, 118 S.Ct. at 2283 (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

[15] *See id.* (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993)).

[16] *Id.* (citing *Harris*, 510 U.S. at 23).

[17] *See id.* at 2284.

[18] *See id.*

[19] *See id.*

[20] *See id. See, e.g.*, Katz v. Dole, 709 F.2d 156, 251 (4th Cir. 1983) (upholding employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment").

[21] *See id.* (citing *Meritor*, 477 U.S. at 70-71).

[22] *See id.* at 2285.

[23] *See id.*

promotion, and the like.[24] Others have suggested that vicarious liability is appropriate because the supervisor who discriminates in this manner is aided by the agency relationship.[25]

The Supreme Court confirmed these results in *Meritor Savings Bank, FSB v. Vinson*, the only case that addresses the standards of employer liability under Title VII.[26] In affirming the court of appeals' holding that a hostile atmosphere resulting from sex discrimination is actionable under Title VII, the Supreme Court held agency principles relevant in assigning employer liability.[27] The Court observed that Congress intended the courts to look to agency law in devising standards of employer liability in those instances where employer liability was not otherwise obvious.[28]

The Court recognized that Title VII does not make employers automatically liable for sexual harassment by their supervisors.[29] The Court, however, rejected two limitations on employer liability.[30] The existence of a company grievance procedure or the absence of actual notice of the harassment on the part of the upper management does not automatically relieve the employer of liability, but is relevant to the question of liability.[31]

B. *The Standard for Employer Vicarious Liability Under Title VII*

The court of appeals rejected three possible grounds for holding the City of Boca Raton vicariously liable for the hostile environment created by Faragher's supervisors.[32]

1. Scope of Employment

Courts of appeals have typically held, or assumed, that sexual harassment is outside the scope of employment[33] and have likened hostile environment sexual harassment to the classic "frolic and detour" for which an employer is not vicarious liable.[34]

The Supreme Court concluded that the proper analysis requires an inquiry into "whether or not it is just that the loss resulting from the servants acts should be considered as one of the normal risks to be borne by the business in which the

---

[24] *See id. See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do . . . .")

[25] *See id. See, e.g.*, Nichols v. Frank, 42 F.3d 503, 514 (9th Cir. 1994).

[26] *See id.* (citing *Meritor*, 477 U.S. at 57).

[27] *See id.* (citing *Meritor*, 477 U.S. at 70-72).

[28] *See id.* (citing *Meritor*, 477 U.S. at 72).

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.* at 2286.

[33] *See id.*

[34] *See id.* at 2287.

servant is employed."[35] An employer can reasonably anticipate the possibility of harassing conduct occurring in the workplace, and one might justify assigning the burden of this behavior to the employer as one of the costs of doing business.[36]

Conversely, the Supreme Court recognized that there is no reason to suppose that Congress wants courts to ignore the distinction between acts that fall within the scope of employment, and frolics and detours from the course of employment.[37] Also, the court recognized that by judging employer liability for co-worker harassment under a negligence standard, courts have implicitly treated such harassment as outside the scope of common employees' duties.[38]

2. The Agency Relationship

The court of appeals also rejected vicarious liability on the part of the City because "an employer is not subject to liability for torts of his servants acting outside the scope of their employment unless . . . he was aided in accomplishing the tort by the existence of the agency relationship."[39] Faragher argued that the City's agency relationship aided her supervisor's ability to carry out the harassment.[40] She argued that supervisors can abuse the power conferred on them by the City to: 1) keep subordinates in their presence while they make offensive statements, and 2) deter resistance or complaint.[41]

The Supreme Court agreed with Faragher that under Title VII an employer can be held vicariously liable for tortious conduct of a supervisor made possible by abuse of his supervisory authority.[42] The Court noted that the aided-by-agency-relation principle, embodied in Restatement section 219(2)(d), provides an appropriate starting point for determining an employer's liability.[43] When a supervisor discriminates in the terms and conditions of a subordinate's employment, his actions necessarily draw upon his superior position.[44] The Court distinguished supervisory harassment from co-worker harassment by noting that a victim can walk away or tell a co-worker where to go, but may be unwilling to offer such responses to a supervisor.[45] The Court noted further that the employer has a greater opportunity to guard against misconduct by supervisors, through screening, training, and monitoring.[46]

---

[35] *Id.* at 2288.

[36] *See id.*

[37] *See id.*

[38] *See id.* at 2289.

[39] *Id.* (citing Rest. § 219(2)(d)).

[40] *See id.*

[41] *See id.*

[42] *See id.* at 2290.

[43] *See id.*

[44] *See id.* at 2291.

[45] *See id.*

[46] *See id.*

In order to square this Title VII theory with *Meritor*'s holding that an employer will not be automatically liable for harassment by a supervisor, the Supreme Court placed a limitation on employer liability.[47] The Court adopted an affirmative defense that requires employers to show that they had exercised reasonable care to avoid and eliminate harassment, and that the employee failed to act with reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided.[48]

The primary objective of Title VII is not to provide redress but to avoid harm.[49] By recognizing the employer's affirmative obligation to prevent violations of Title VII and giving credit to employers who make reasonable efforts to discharge their duty, the affirmative defense, outlined by the Court, comports with employer incentives provided by the legislature.[50] Likewise, an employer that provides an effective mechanism for reporting and resolving sexual harassment complaints, should not be held liable to an employee who has unreasonably failed to avail herself of the employer's preventative apparatus.[51] The Court stated that if the victim could have avoided the harm, no liability should be found against the employer who has taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.[52]

The Supreme Court held that an employer is vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.[53] A defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[54] The defense comprises of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[55] No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[56]

The Supreme Court reversed the judgment of the court of appeals and remanded the case for reinstatement of the district court's judgment.[57] The district court found that the hostile environment rose to an actionable level and was at-

---

[47] *See id.*

[48] *See id.* at 2292.

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.* at 2293.

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See id.* at 2294.

tributable to Terry and Silverman.[58] The district court also found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to monitor the conduct of supervisors like Terry and Silverman.[59] Thus, the City did not exercise reasonable care to prevent the supervisors' harassing conduct and cannot avail itself of the affirmative defense.[60]

C. *Dissent*

Justice Thomas, joined by Justice Scalia, dissented from the majority opinion, and argued that absent an adverse employment consequence, an employer cannot be held vicariously liable if a supervisor creates a hostile work environment.[61] Because Faragher suffered no adverse employment consequence, the city should not be vicariously liable for Terry and Silverman's conduct.[62] Further, the district court made no finding of the City's negligence, and the court of appeals did not directly consider the issue.[63] The dissent argued that the majority improperly concluded that the City was negligent as a matter of law for its failure to disseminate its sexual harassment policy.[64] The City should be allowed to show either: 1) there was a reasonably available avenue through which petitioner could have complained to a city official who supervised Terry and Silverman, or 2) it would not have learned of the harassment even if the policy had been distributed.[65] Petitioner would bear the burden of proving the City's negligence.[66]

IV. CONCLUSION

The Supreme Court held that, under Title VII, an employer is vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee. A defending employer may raise an affirmative defense by proving, by a preponderance of the evidence, that: 1) it exercised reasonable care in preventing and promptly correcting any sexually harassing behavior, and 2) that the plaintiff employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In this case, because the City of Boca Raton

---

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.*

did not take reasonable care in preventing the sexually harassing conduct of Terry or Silverman, it is vicariously liable to Faragher.

Brett D. Beecham

Williamson v. City of Houston, No. 96-21110, 1998 WL 413493 (5th Cir. July 22, 1998). THE FIFTH CIRCUIT HELD THAT A SUPERVISOR'S KNOWLEDGE OF A POLICE OFFICER'S SEXUAL HARASSMENT OF ANOTHER OFFICER WAS PROPERLY IMPUTED TO THE CITY.

I. INTRODUCTION

The plaintiff, Linda Williamson, sued the City of Houston under Title VII of the Civil Rights Act of 1964[1] for hostile work environment sexual harassment and for retaliation against her for reporting the harassment.[2] A jury found the City liable and awarded Williamson back pay and compensatory damages.[3] The City appealed.[4] The circuit court affirmed the lower court's ruling and held that the City's claim was undermined by two recent Supreme Court decisions[5] which held that employers are vicariously liable for the harassing behavior of supervisory personnel.[6]

II. BACKGROUND

Linda Williamson began working as a police officer in the Houston police department in 1983.[7] In 1990, she began working in the Organized Crime Squad, with Doug McLeod, whom she alleged harassed her on a daily basis for the next eighteen months.[8] Williamson repeatedly asked McLeod to stop and also repeatedly complained to her supervisor, Michael Bozeman.[9] Williamson met with Bozeman ten to twelve times to discuss the matter.[10] Bozeman temporarily reassigned Williamson, but the harassment by McLeod continued.[11]

In April 1992, Williamson requested a transfer out of the Criminal Division

---

[1] 42 U.S.C. § 2000e et. seq.

[2] Williamson v. City of Houston, No. 96-21110, 1998 WL 413493, *1 (5th Cir. July 22, 1998).

[3] *See id.*

[4] *See id.*

[5] *See* Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

[6] *See Williamson*, 1998 WL 413493, at *3 (citing *Burlington Indus.*, 118 S.Ct. 2257; *Faragher*, 118 S.Ct. 2275).

[7] *See id.* at *1.

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

because of her problems with McLeod.[12] Bozeman directed Williamson to complain to the Internal Affairs Division ("IAD"), which she did.[13] McLeod was then transferred out of the Criminal Division.[14] Williamson also filed a complaint with the IAD stating that Bozeman had retaliated against her for filing the harassment complaint.[15] Williamson was then transferred to a less desirable position.[16]

The IAD concluded that Williamson's charges were not sustained and issued a written reprimand to McLeod.[17] No disciplinary action was taken against Bozeman.[18] Williamson filed a complaint with the EEOC, which led to this suit.[19] The jury found the City of Houston liable under Title VII for hostile work environment sexual harassment and for retaliation against Williamson.[20] The jury awarded Williamson back pay and compensatory damages.[21] The district court also awarded her attorney's fees and costs and expenses.[22] The City appealed.[23]

III. ANALYSIS

A. *The City's First Claim*

The City first claimed that the notice element of the sexual harassment claim was not met.[24] The City claimed that it did not have notice that Williamson was being harassed until she filed her complaint with the IAD in April, 1992.[25] Williamson argued that the complaints she made to Bozeman and Bozeman's observations of McLeod's behavior provided notice to the City before April, 1992.[26] The court found that the City's contention had no merit and found that there was substantial evidence to support a finding that Bozeman had notice of the harassment.[27]

B. *The City's Second Claim*

The City next claimed that Bozeman's knowledge should not have been im-

---

[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] *See id.*
[26] *See id.*
[27] *See id.*

puted on the City.[28] The court found that the City's position was undermined by two recent Supreme Court decisions.[29] In *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court held that employers are vicariously liable for the harassing behavior of their supervisory personnel.[30]

The court further found that the City was alternatively liable for negligently allowing harassment.[31] The court pointed to several other courts which have found that employers are directly liable for negligently allowing sexual harassment.[32]

The court concluded that Bozeman's knowledge should be imputed to the City and found that this conclusion was supported by the City's sexual harassment policy.[33] The policy states that if supervisors cannot resolve the problem, they are to report it to the Director of Affirmative Action.[34] The court found that this policy indicates that the Director has the authority to accept notice.[35]

The City argued that because supervisors are to go to the Director of Affirmative Action, and not to the City, then knowledge cannot be imputed to the City.[36] The court dismissed this claim, stating that employers cannot use their own policies to insulate them from liability, especially in cases where the policies have been followed.[37]

Finally, the court ruled that the evidence presented was sufficient to support the jury's findings that Williamson was harassed on the basis of her sex, that the harassment affected a term, condition, or privilege of her employment, that the City retaliated against her for reporting the harassment, and that she lost overtime pay as a consequence.[38]

IV. CONCLUSION

The court concluded that a supervisor's knowledge of a police officer's sexual harassment of another officer was properly imputed to the City by the lower court and therefore affirmed the lower court's award of damages. The court also found that the City's arguments were undermined by two recent Supreme Court

---

[28] *See id.*

[29] *See* Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

[30] *See id.*

[31] *See Williamson v. City of Houston*, No. 96-21110, 1998 WL 413493, *1 (5th Cir. July 22, 1998).

[32] *See id.* (citing Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994); Hunter v. Allis-Chalmers Corp. Engine Div., 797 F.2d 1417 (7th Cir. 1986)).

[33] *See Williamson*, at *4.

[34] *See id.*

[35] *See id.*

[36] *See id.* at *5.

[37] *See id.*

[38] *See id.*

decisions, which held that employers are vicariously liable for the harassing behavior of their supervisory personnel.

Jessica J. Nagle

Whitmore v. O'Connor Management, Inc., No. 97-1273, 1998 WL 481077 (8th Cir. Aug. 19, 1998). THE EIGHTH CIRCUIT HELD THAT PLAINTIFF'S TITLE VII SEXUAL HARASSMENT CLAIM AGAINST O'CONNOR MANAGEMENT, INC., WAS BARRED BY THE STATUTE OF LIMITATIONS. THE COURT ALSO HELD THAT PLAINTIFF DID NOT PRODUCE SUFFICIENT EVIDENCE TO RAISE AN ISSUE OF MATERIAL FACT THAT GENERAL GROWTH HAD SUBJECTED HER TO A HOSTILE ENVIRONMENT OR THAT GENERAL GROWTH WAS ON NOTICE OF THE ACTIONABLE SEXUAL HARASSMENT. FURTHERMORE, THE COURT HELD THAT PLAINTIFF'S MISSOURI HUMAN RIGHTS ACT CLAIMS FAILED BECAUSE PLAINTIFF HAD NOT OBTAINED THE RIGHT-TO-SUE LETTER THAT MO. ANN. STAT. § 213.111.1 REQUIRES.

I. INTRODUCTION

Plaintiff, Bettie Whitmore, an employee at the Ward Parkway Shopping Center ("the mall") brought suit against her employers, O'Connor Management, Inc., ("O'Connor") the first manager of the mall, and General Growth Management ("General Growth"), the subsequent manager of the mall[1] for sexual harassment under Title VII of the Civil Rights Act of 1964[2] and the Missouri Human Rights Act ("MHRA").[3] The plaintiff alleged that throughout her employment, her co-worker, Marcel Bartee created a sexually hostile environment.[4] The district court entered summary judgment in favor of both employers on the Title VII claims and dismissed the plaintiff's MHRA claims.[5] The Eighth Circuit affirmed the district courts judgment.[6] The Eighth Circuit held that plaintiff's Title VII claim against O'Connor was barred by the statute of limitations[7] and that the plaintiff did not produce sufficient evidence to establish that General Growth had subjected her to a hostile environment or that they had notice of Bartee's continuing sexual harassment activities.[8] Furthermore, the Eighth Circuit held that plaintiff's MHRA claims failed because she had not obtained the right-to-sue letter that the statute required.[9]

---

[1] *See* Whitmore v. O'Connor Management, Inc., No. 97-1273, 1998 WL 481077, *1 (8th Cir. Aug. 19, 1998).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.* at *1.

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

II. BACKGROUND

Plaintiff stated that since her employment at the Mall in April 1991, she was sexually harassed while at work by her co-worker Bartee.[10] Plaintiff contended that she reported these incidents to the lead person in maintenance, Mr. Wesley. Mr. Wesley reported the incidents to Mr. Sweeney, the building superintendent, but no action was taken to investigate the problem.[11] Plaintiff also contended that Bartee sexually assaulted her on two occasions in August 1992.[12] The plaintiff reported these two incidents to the operation manager, Mr. Redford, who investigated the event.[13] After investigation, O'Connor suspended Bartee for ten days and warned him to stay away from the plaintiff and not to retaliate against her.[14] Plaintiff also reported the assaults to the police.[15]

On January 31, 1993 O'Connor ceased managing the mall. After five months, General Growth began managing the mall and hired the plaintiff and Bartee.[16] Don Benson, the general manager of the mall, and Glen Hibben, the operation manager, learned about Bartee's sexual assaults on the plaintiff.[17] Soon after General Growth began managing the mall, Bartee's sister approached the plaintiff at work and threatened her because the plaintiff got Bartee in trouble. The plaintiff reported Bartee's sister's threat to Mr. Hibben.[18] Bartee continued working for General Growth even after he was convicted of third degree sexual abuse. Bartee was ordered to stay away from the plaintiff.[19] Bartee, however, would watch the plaintiff while she worked and would make derogatory comments about the plaintiff to others.[20] Mr. Hibben admitted that he knew about Bartee's derogatory comments about the plaintiff but that he did not follow up on it because it was "hearsay."[21]

Plaintiff brought suit against both employers. Plaintiff contended that her employers maintained a hostile environment by subjecting her to sexual harassment from Bartee.[22] The district court entered summary judgment in favor of both employers and dismissed plaintiff's MHRA claims. Plaintiff appealed and claimed that the district court erred in granting summary judgment in favor of O'Connor and General Growth and in dismissing her MHRA claims.[23] The Eighth Circuit

---

[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] *See id. at* *2.
[17] *See id.*
[18] *See id.*
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.*

affirmed the district court's judgment in favor of both employers.[24] The court held that the statute of limitation barred plaintiff's Title VII sexual harassment claim against O'Connor.[25] Furthermore, the court held that plaintiff did not produce sufficient evidence to establish that General Growth was on notice of activities that constituted actionable sexual harassment.[26] The Eighth Circuit also affirmed the dismissal of plaintiff's MHRA claims because plaintiff had not obtained the right-to-sue letter required by the Missouri statute.[27]

III. ANALYSIS

A. *Statute of Limitation Barred Plaintiff's Title VII Claim*

Plaintiff attempted to avoid the statute of limitations bar to her Title VII claim against O'Connor by contending that O'Connor remained responsible for actions that continued after it ceased managing the mall.[28] Plaintiff contended that O'Connor was liable under predecessor liability.[29] The court declined to accept this theory because there was no sale of a business creating a predecessor-successor relation between the two corporations.[30] Plaintiff also argued that the relevant period began on the day she filled out the EEOC questionnaire rather than on the day she filed her formal charge.[31] The court held that the general rule in Title VII cases is that unverified intake questionnaires do not constitute a formal charge.[32]

B. *Lack of Proof of Notice of the Sexual Harassment Activities*

Plaintiff contended that she produced sufficient evidence to show that she was subjected to a hostile environment when she worked for General Growth and that they were on notice of the environment.[33] The court held that the district court correctly granted summary judgment to General Growth on plaintiff's Title VII claim because General Growth lacked proof of notice of Bartee's continuing sexually harassing behavior.[34] The court noted that plaintiff in her affidavit with the EEOC charge, admitted that she had not reported any of Bartee's conduct to General Growth's management.[35] Further, although the record demonstrated that

---

[24] *See id.* at *1.

[25] *See id.* at *2-3.

[26] *See id.* at *3.

[27] *See id.* at *4. *See also* MO. ANN. STAT. § 213.111.1.

[28] *See id.* at *2.

[29] *See id.*

[30] *See id.*

[31] *See id.* at *3.

[32] *See id.* (citing Lawrence v. Cooper Communities, Inc., 132 F.3d 447, 450 (8th Cir. 1998); Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir. 1998)).

[33] *See id.* at *2.

[34] *See id.* at *3.

[35] *See id.*

General Growth was on notice of Bartee's conduct, the conduct they were on notice of occurred before General Growth took over management of the mall.[36] The court also noted that although evidence indicated that Mr. Wesley knew of some of Bartee's actions while General Growth managed the mall, Mr. Wesley was not a part of General Growth's management.[37] Moreover, the court stated that Mr. Hibben's knowledge about Bartee's sister threatening the plaintiff and Bartee defaming the plaintiff is not sufficient to put General Growth on notice that Bartee continued to harass the plaintiff.[38]

The court held that in cases not involving vicarious liability, employees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employers can be held responsible for failing to correct that behavior.[39] The court stated that the record did not contain evidence that supports a finding that General Growth was on notice of Bartee's actions while under their management.[40]

C. *Dismissal of Plaintiff's Claims under MHRA*

Plaintiff contended that the district court erred in dismissing her claims under the MHRA because she failed to obtain a right-to-sue letter from the Missouri Human Rights Commission.[41] Plaintiff contended that the right to sue letter from the state agency was unnecessary because of the work-sharing agreement between the state agency and the EEOC.[42] The court held that the work-sharing agreement does not obviate the need for a right-to-sue letter. The court also held that the Missouri courts would consider a right-to-sue letter as a condition precedent to bring an action under the MHRA.[43]

D. *Dissent in Part*

Justice John R. Gibson dissented in part from the court's opinion because he found that the record presented an issue of fact as to whether General Growth had actual or constructive knowledge that Bartee was harassing the plaintiff during the time General Growth managed the mall.[44] Justice Gibson found that under Title VII, an employee's work environment is evaluated as a whole, rather than by viewing particular events in isolation from each other.[45] Thus, he found

---

[36] *See id.*

[37] *See id.*

[38] *See id.* at *4.

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*.

[43] *See id.* (citing Vankempen v. McDonnell Douglas Corp., 923 F.Supp. 146, 148-49 (E.D. Mo. 1996)).

[44] *See id.* at *5.

[45] *See id.* at *5 (citing Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1997) ("A work environment is shaped by the accumulation of abusive conduct, and the resulting

that General Growth's managers knowledge of plaintiff's earlier ordeal is relevant to how those managers' should have responded to later developments involving the same harasser and the same victim.[46]

Justice Gibson stated that an employer may have notice of a situation without the victim reporting it herself.[47] Moreover, Justice Gibson found that plaintiff's EEOC affidavit mentioned that she reported to General Growth the threat by Bartee's sister.[48] Justice Gibson also found that the record demonstrated that Wesley was General Growth's agent for the purpose of reporting complaints.[49] Justice Gibson found that Wesley had supervisory authority over Bartee and that it was Wesley's duty to report problems with Bartee to higher people in command.[50] Moreover, Justice Gibson found that plaintiff reported enough to put General Growth on notice about the staring because Hibben had knowledge about the problem and he knew about Bartee's defamatory statements towards plaintiff.[51] Justice Gibson also found that since Hibben knew that plaintiff had already suffered sexual harassment from Bartee, and Hibben failed to do anything about it, the jury could find that Hibben's failure to investigate reports of further misconduct was willful blindness.[52]

Justice Gibson held that a jury could find that Hibben should have taken further action since Hibben offered to have plaintiff escorted to her bus by security guards after plaintiff reported Bartee's sister's threats to him. Justice Gibson also found that the standard for negligence liability is that the employer knew or should have known of the harassment and failed to remedy it.[53] Justice Gibson held that this case presents a jury issue as to whether General Growth should have known of Bartee's conduct.[54]

IV. CONCLUSION

The Eighth Circuit held that the statute of limitations barred plaintiff's Title VII sexual harassment claim against O'Connor[55] and plaintiff did not produce sufficient evidence to establish that General Growth was on notice of activities that constituted actionable sexual harassment.[56] The Eighth Circuit also affirmed

---

harm cannot be measured by carving it 'into a series of discrete incidents.' ")).

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.* at *7 (citing Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996); Hall v. Gus. Const. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988); Adler v. WalMart Stores, Inc., 144 F.3d 664, 673-75 (10th Cir. 1998)).

[54] *See* Whitmore v. O'Connor Management, Inc., No. 97-1273, 1998 WL 481077 at *7 (8th Cir. Aug. 19, 1998).

[55] *See id.* at *2-3.

[56] *See id.* at *3.

the dismissal of plaintiffs MHRA claims because plaintiff had not obtained the right-to-sue letter required by the Missouri statute.[57]

This case resolves that when an employer ceases being an employer and an employee continues to be sexually harassed by another employee, the employer may be barred from a Title VII claim by the statute of limitations. Furthermore, an employer may be held liable for co-worker hostile environment to sexual harassment if the employee bringing a Title VII claim produces sufficient evidence to establish that the employer was on notice of activities that constituted actionable sexual harassment. This case also resolves that in order to bring a Missouri Human Rights Act claim one must obtain a right-to-sue letter required by Missouri.

Marilyn Zuleyka Farquharson

Gunnell v. Utah Valley State College, No. 96-4155, 1998 WL 488796 (10th Cir. Aug. 19, 1998). THE COURT OF APPEALS FOR THE TENTH CIRCUIT HELD THAT IN VIEW OF TWO RECENT SUPREME COURT DECISIONS CONCERNING THE AVAILABILITY OF AN AFFIRMATIVE DEFENSE TO EMPLOYERS FOR SEXUAL HARASSMENT ENGAGED IN BY ITS SUPERVISORY EMPLOYEES, IT WAS IMPROPER FOR THE DISTRICT COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF'S TITLE VII SEXUAL HARASSMENT CLAIM; THAT AN EMPLOYEE REQUESTING FMLA LEAVE DOES NOT POSSESS GREATER PROTECTION FROM BEING FIRED THAN SHE HAD PRIOR TO MAKING SUCH A REQUEST; AND THAT AN EMPLOYER IS LIABLE FOR RETALIATORY CONDUCT BY ITS NON-SUPERVISORY-LEVEL EMPLOYEES ONLY IF ITS SUPERVISORY-LEVEL EMPLOYEES WERE INVOLVED IN THE RETALIATORY ACTIONS.

I. INTRODUCTION

The plaintiff, Rosalie Gunnell, brought suit against her former employer, Utah Valley State College ("UVSC"), and certain of defendant's supervisory employees, alleging that she was sexually harassed and retaliated against in violation of Title VII of the Civil Rights Act of 1964,[1] and that she was not granted a leave of absence for medical reasons in violation of the Family and Medical Leave Act of 1983[2] ("FMLA").[3] Plaintiff appeals from the grants of summary judgment in favor of the defendants on Title VII and FMLA claims.[4] The plaintiff also contends that the district court improperly instructed the jury on the liability of an employer for retaliatory acts committed by its employees because it con-

---

[57] *See id.* at *4.

[1] 42 U.S.C. §§ 2000e-2(a), 3(a) (1994).

[2] 29 U.S.C.A. § 2601 (West Supp. 1998).

[3] Gunnell v. Utah Valley State College, No. 96-4155, 1998 WL 488796 (10th Cir. Aug. 19, 1998).

[4] *See id.* at *1.

fined liability to retaliatory acts committed by supervisory-level employees.[5]

On plaintiff's Title VII sexual harassment claim, the court of appeals ruled that in light of the Supreme Court's recent rulings in *Faragher v. City of Boca Raton*[6] and *Burlington Industries v. Ellerth*[7] concerning the availability of an affirmative defense to an employer for sexual harassment by its supervisory-level employees, it was improper for the district court to grant summary judgment on the Title VII claim in favor of defendants.[8] Instead, the sexual harassment claim should be remanded to the district court for evaluation of the claim under the standards set forth in *Faragher* and *Burlington Industries*.[9]

On plaintiff's FMLA claim, the court of appeals affirmed the district court's grant of summary judgment in favor of the defendants, finding that an employee who requests FMLA leave does not thereby obtain a greater protection against being fired for reasons unrelated to her FMLA request. Since plaintiff contended only that defendants interfered with her FMLA rights by terminating her employment (and thereby effectively denying plaintiff FMLA leave), and not that defendants fired her because of her request for FMLA leave. The reason for plaintiff's termination of employment was unrelated to the FMLA, and thus defendants did not violate the FMLA. On plaintiff's claim that the district court improperly instructed the jury on her Title VII retaliation claim, the court of appeals affirmed the district court's jury instruction.[10] The court of appeals stated that an employer can only be liable for retaliatory acts taken by its non-supervisory-level employees if its supervisory-level employees either: (1) arranged the harassment; or (2) knew about the harassment and permitted it to continue so as to "condone and encourage" the retaliatory actions.[11] The court of appeals further stated that before an employer can be vicariously liable, there must be "involvement" by its supervisory-level employees in retaliatory conduct.[12] Consequently, the court of appeals ruled that the district court's jury instruction, which limited employer liability to retaliatory conduct by supervisory-level employees, was proper, since it notified the jury that it would have to find that supervisory-level employees were involved in retaliatory conduct before defendants could be held liable.[13]

II. BACKGROUND

The UVSC employed the plaintiff as a secretary in its plant-operation department. In April 1993, plaintiff complained to USVC's personnel director that two of her immediate supervisors had subjected her to sexual acts and communica-

---

[5] *See id.* at *7.
[6] 118 S.Ct. 2275 (1998).
[7] 118 S.Ct. 2257 (1998).
[8] *See Gunnell*, 1998 WL 488796, at *6.
[9] *See id.*
[10] *See id.* at *11.
[11] *See id.* at *10.
[12] *See id.* at *11.
[13] *See id.*

tions.[14] The personnel director conducted an investigation of plaintiff's complaint, while the plaintiff took a leave of absence.[15] One of the supervisors admitted that some of the alleged conduct occurred, but denied other instances.[16] During the plaintiff's leave of absence, the Associate Vice President for Facilities told the two supervisors and other directors that they were not to retaliate against the plaintiff when she returned to work.[17] In May, 1993, the personnel director informed plaintiff that if she did not return to work before May 24, her employment would be terminated.[18]

Instead of returning to work, the plaintiff took sick leave from May 24 through July 8 because of work-related stress and anxiety.[19] During her sick leave, the plaintiff filed two internal written grievances alleging sexual harassment in accordance with USVC's employee grievance policy.[20] USVC's grievance committee ruled that although two of plaintiff's immediate supervisors engaged in improper conduct, the plaintiff should nevertheless return to work.[21]

The plaintiff returned to work in July 1993, and remained there until November 9, 1993.[22] Although the sexual harassment ceased, plaintiff alleged that during this period, her working conditions deteriorated.[23] On September 17, 1993, plaintiff filed a notice of discrimination with the Utah Anti-Discrimination Division ("UADD").[24] On November 9, the Associate Vice President for Facilities put the plaintiff on probation for creating a "hostile work environment" through excessive complaining and lack of cooperation with her co-workers.[25] Upset at being placed on probation, plaintiff left work.[26] Later that day, plaintiff informed the personnel director that she left work due to sickness, and that she intended to take a medical leave.[27] Plaintiff also filed a supplement to her UADD complaint alleging a continuing pattern and practice of sexual harassment.[28] Plaintiff reported sick from November 10 through November 13.[29] On November 13,

---

[14] *See id.* at *1. These acts and communications included "gestures, comments, obscene jokes, pictures, and unwelcome physical contact such as hugs." *Id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.* at *2.

[23] *See id.* Plaintiff complained that she was delegated fewer responsibilities, her colleagues treated her badly, and her office equipment was not on the same level as that of other workers. *See id.*

[24] *See id.* Plaintiff only checked off the box marked "retaliation" on the notice of discrimination. *See id.*

[25] *See id.* at *3.

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.*

defendant's personnel director sent plaintiff a letter terminating her employment because of "insubordination and disruptive behavior."[30]

On plaintiff's Title VII sexual discrimination claim, the district court ruled that the sexual harassment ceased immediately upon plaintiff's complaint to USVC's personnel director.[31] On plaintiff's FMLA claim, the district court found that plaintiff failed to meet the requirements for obtaining FMLA leave.[32] The district court also found that plaintiff failed to show a connection between her request for FMLA leave and her termination.[33] After a trial on plaintiff's Title VII retaliation claim, the jury found in favor of defendants.[34] Plaintiff appeals from the district court's grants of summary judgment and the jury instructions with respect to the Title VII retaliation claim.[35]

III. ANALYSIS

A. *Plaintiff's Title VII Sexual Harassment Claim*

The court of appeals first discussed whether the district court erred in granting summary judgment in favor of defendants on plaintiff's Title VII sexual harassment claim.[36] The district court stated three reasons for granting summary judgment in favor of defendants on plaintiff's Title VII sexual harassment claim.[37] The district court found: "(1) [plaintiff] failed to appeal the decision of the university's grievance committee within the university system; (2) the sexual harassment stopped after [plaintiff] complained about it to the personnel director; and (3) [plaintiff's] Utah Anti-Discrimination Division complaint addressed only the retaliation issue."[38] Contrary to the district court, the court of appeals found that a Title VII plaintiff does not have to exhaust all of her employer's internal grievance mechanisms prior to bringing suit.[39] Therefore, the court of appeals found that even though plaintiff did not appeal the USVC's grievance committee's ruling, the district court erred in relying on this factor in granting summary

---

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.* at *4. Plaintiff also contended that the district court's jury instruction on the Title VII retaliation claim was erroneous. The district court charged the jury that defendant could be liable only for acts of its management and supervisory-level personnel. Plaintiff contended that the instructions should have provided that defendant is liable for retaliation if management-level employees either knew or should have known about the occurrence of retaliatory acts. *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *Id.*

[39] *See id.* (citing Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1453-54 (10th Cir. 1997); Johnson v. Greater Southeast Commun. Hosp. Corp., 951 F.2d 1268, 1276 (D.C. Cir. 1991)).

judgment to the defendants.[40]

Regarding the plaintiff's UADD complaint, the court concluded that although plaintiff's initial filing with the UADD referred only to retaliation, her subsequent supplement was sufficient to provide notice to parties of an alleged Title VII violation.[41]

The court of appeals then turned to the issue of whether summary judgment was appropriate because the sexual harassment against the plaintiff stopped once the plaintiff complained to the personnel director.[42] As stated by the Supreme Court, an employer is vicariously liable to an employee if a supervisor of the employee creates a "hostile environment."[43] In addition, an employer whose supervisory-level employees have harassed subordinates is liable even if the employer eventually precluded further harassment.[44] If, however, no "tangible employment action" is taken with respect to the employee alleging sexual harassment, the employer may claim an affirmative defense by showing that: (1) it "exercised reasonable care to prevent and correct promptly" any sexual harassment; and (2) the plaintiff "unreasonably failed" to avail herself of these protections.[45] Because the record on appeal showed that the alleged harasser was arguably the plaintiff's supervisor, the court of appeals found that the principles of employer liability set forth in *Faragher*[46] and *Burlington Industries*[47] apply to this case.[48] In light of the Supreme Court's recent elaboration on employer liability for sexual harassment by a supervisor, the court of appeals reversed summary judgment in favor of defendants and remanded to allow the district court to evaluate plaintiff's claim in accordance with the Supreme Court's rulings.

B. *Plaintiff's FMLA Claim*

The court of appeals proceeded to address whether the district court correctly granted summary judgment in favor of defendants on plaintiff's FMLA claim.[49] The district court provided three reasons for granting summary judgment in defendants' favor on plaintiff's FMLA claim.[50] Because the court of appeals affirmed the district court based on the third reason, it did not address the other

---

[40] *See id.*

[41] *See id.* at *5.

[42] *See id.*

[43] *See id.* at *6. (citing *Faragher*, 118 S. Ct. at 2292-93; *Burlington Indus.*, 118 S. Ct. at 2270).

[44] *See id.*

[45] *Id.*

[46] 118 S.Ct. 2275.

[47] 118 S.Ct. 2257.

[48] *See Gunnell*, 1998 WL 488796, at *6.

[49] *See id.*

[50] *See id.* The District court's three reasons were: "(1) [plaintiff] had not given UVSC proper notice of her need for medical leave; (2) [plaintiff] failed to supply proper certification of her need for medical leave; and (3) [plaintiff] did not show that her request for FMLA leave was connected to her termination."

two reasons.[51] The FMLA requires employers to grant employees up to twelve weeks of leave in any given year if the leave is for one of the statutorily prescribed reasons.[52] When the leave ends, the employee must be reinstated to her position or a position with the same pay, benefits, and other terms or conditions of employment.[53]

An employee who requests FMLA leave does not have any greater protection from being fired for reasons unrelated to the FMLA request than she would have prior to making such a request.[54] Since plaintiff contends only that USVC interfered with her FMLA rights by terminating her employment (and thereby effectively denying plaintiff FMLA leave), and not that USVC fired her because of her request for FMLA leave, the court of appeals concluded that the reason for plaintiff's termination of employment was unrelated to her FMLA leave.[55] As such, the court of appeals ruled that the grant of summary judgment in favor of defendants on plaintiff's FMLA claim was proper.[56]

C. *Plaintiff's Contention that the District Court's Jury Instructions on Employer Liability for Sexual Harassment were Erroneous*

Lastly, the court of appeals discussed the plaintiff's claim that the district court's jury instructions on the Title VII retaliation claim were improper because they limited employer liability to retaliatory acts engaged in by its supervisory-level employees.[57] The plaintiff contended that an employer should also be liable if its supervisory employees knew or should have known that the plaintiff's co-workers were intentionally retaliating against her.[58] The court of appeals noted that Tenth Circuit precedent construed the phrase "adverse employment action," extremely broadly.[59] Accordingly, the court of appeals ruled that retaliatory acts and hostility engendered by an employee's colleagues, if "sufficiently severe," may constitute "adverse employment action."[60] The court of appeals further ruled however, that an employer can be liable for the retaliatory acts of non-supervisory-level employees only if its supervisory-level employees: "(1) orchestrate[d] the harassment; or (2) [knew] about the harassment and acquiesce[d] in it in such a manner as to condone and encourage the co-worker's actions."[61] The

---

[51] *See id.* at *7.

[52] *See id.*

[53] *See id.* (citing 29 U.S.C.A. § 2614(a)(1)).

[54] *See id.* (citing 29 C.F.R. § 825.216(a); Vargas v. Globetrotters Eng. Corp., 4 F. Supp. 2d 780, 783 (N.D. Ill. 1998); Carillo v. National Council of the Churches of Jesus Christ, 976 F. Supp. 254, 256 (S.D.N.Y. 1997)).

[55] *See id.* at *7.

[56] *See id.*

[57] *See id.*

[58] *See id.* at *9.

[59] *See id.* at *10 (citing Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996)).

[60] *See id.*, at *10.

[61] *Id.* (citing Knox v. State of Ind., 93 F.3d 1327, 1334 (7th Cir. 1996)).

court of appeals held that the district court's jury instructions were proper since they properly notified the jury that it would have to conclude that defendant's supervisory-level employees were involved in the retaliatory conduct of non-supervisory-level employees, before defendants could be held liable.[62]

IV. CONCLUSION

The Court of Appeals for the Tenth Circuit held that two recent Supreme Court decisions, *Faragher v. City of Boca Raton*[63], and *Burlington Industries v. Ellerth*[64], mandate that the grant of summary judgment in favor of defendants on a plaintiff's Title VII sexual harassment claim be reversed and remanded for further proceedings consistent with those two decisions. Thus, any future cases involving employer liability for sexual harassment engaged in by its supervisory-level employees must apply the standards set forth in *Faragher* and *Burlington Industries*. The court of appeals also held that an employee requesting FMLA leave does not have any greater protection from termination than she possessed before making such a request. Finally, the court of appeals held that an employer is liable for retaliatory actions by its non-supervisory-level employees only if its supervisory-level employees were involved in the retaliatory conduct.

Richard Ng

Gesber v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). THE SUPREME COURT HELD THAT A STUDENT WHO HAS BEEN SEXUALLY HARASSED BY A TEACHER MAY NOT RECOVER DAMAGES FROM THE SCHOOL DISTRICT UNDER TITLE IX VIA AN IMPLIED RIGHT OF ACTION UNLESS A SCHOOL OFFICIAL WITH AUTHORITY TO INSTITUTE CORRECTIVE MEASURES HAD ACTUAL NOTICE OF THE MISCONDUCT AND WAS INTENTIONALLY INDIFFERENT TO IT.

I. INTRODUCTION

The plaintiffs, Alida Star Gesber and her parents, sued the Lago Vista Independent School District for damages under Title IX.[1] Plaintiffs alleged, and defendant conceded, that Gesber was sexually harassed by her teacher.[2] Plaintiffs contended that the school district should be held liable based on the theory of respondeat superior or, in the alternative, based on a theory of constructive notice.[3] The Supreme Court rejected these theories and held that, in order to hold a school district liable for damages when a teacher sexually harasses a student, the Title IX plaintiff must show that a school official with authority to rectify the

---

[62] *See id.* at *11.

[63] 118 S.Ct. 2275.

[64] 118 S.Ct. 2257.

[1] Gesber v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998).

[2] *See id.*

[3] *See id.* at 1995.

problem had actual notice of the discrimination.[4] Furthermore, the Court required the plaintiff to demonstrate that said official intentionally failed to take corrective action.[5]

II. BACKGROUND

In 1991, plaintiff Alida Star Gesber joined a book club led by one of defendant's high school teachers, Frank Waldrop.[6] Waldrop made inappropriate sexual comments to students, but no complaints were made.[7] The following year, Gesber started high school and was placed in one of Waldrop's classes.[8] Waldrop continued to make sexually suggestive comments to students and, over time, directed more of his attention toward Gesber.[9] In the spring of 1992, Waldrop initiated a sexual relationship with Gesber that continued for some time.[10] In October of 1992, some parents complained to the principal about Waldrop's inappropriate classroom behavior.[11] Soon thereafter, the principal met with Waldrop, who denied acting inappropriately but nonetheless apologized and promised that it would not happen again.[12] The principal reported the meeting to the school guidance counselor but did not report it to the school district's Title IX coordinator.[13] In January of 1993, Waldrop and Gesber were caught having sexual intercourse by a police officer.[14] Waldrop was arrested and subsequently terminated from employment.[15]

Plaintiffs sued the school district and Waldrop in state court seeking compensatory and punitive damages.[16] The claims against the school district were brought under Title IX, Rev. Stat. § 1979, 42 U.S.C. § 1983, and state tort law while the claims against Waldrop were grounded primarily on state law.[17] The case was removed to federal court where summary judgment was granted for the school district on all claims. The district court held that actual or constructive notice of the discrimination was necessary to hold the school district liable.[18] The claims against Waldrop were remanded to state court.[19]

Plaintiffs appealed the Title IX claim and the Court of Appeals for the Fifth

---

[4] *See id.* at 2000.
[5] *See id.*
[6] *See id.* at 1993.
[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] *See id.* at 1993-94.
[19] *See id.* at 1993.

Circuit affirmed the district court decision.[20] The court of appeals reaffirmed an earlier decision that refused to hold a school district liable in the absence of actual knowledge of the discrimination by a district employee who had power to end the discrimination and failed to do so.[21]

III. ANALYSIS

The Court began its analysis by noting that Title IX proscribes discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance."[22] Although the statutory enforcement mechanism is administrative,[23] the Court previously held that Title IX may also be enforced through an implied private right of action.[24] Subsequently, the Court established that a school district may be liable in monetary damages when a student is sexually harassed by a teacher.[25] Therefore, in order to resolve the case before it, the Court needed only to "define the contours of that liability."[26]

First, the Court looked to the language of the statute for guidance. The plaintiffs argued that Title IX should be interpreted the same as Title VII which holds employers vicariously liable for the actions of their agents.[27] The Court noted that Title VII expressly grants a private right of action and damages to victims of discrimination, whereas Title IX is silent on the issue.[28] Because the private right of action under Title IX is judicially implied, the Court stated that it must carefully shape "a sensible remedial scheme" so as not to "frustrate the purposes" of the statute.[29] The Court concluded that holding a school district liable in damages absent actual notice of the discrimination would "frustrate the purposes" of Title IX.[30]

To clarify what the purposes of Title IX are, the Court examined the pre-enactment legislative intent. According to the Court, the purposes are "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."[31] Title IX operates by conditioning receipt of federal funding "on a promise by the recipient not to discriminate."[32] The Court saw this as a contractual relationship intended

---

[20] *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (1997).

[21] *See Gesber*, 118 S. Ct. at 1994 (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997)).

[22] 20 U.S.C. § 1681(a).

[23] *See id.* at § 1682.

[24] *See Gesber*, 118 S. Ct. at 1994 (citing Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)).

[25] *See id.* (citing Franklin v. Gwinnett County Public Schs., 503 U.S. 60 (1992)).

[26] *Id.*

[27] *See id.*

[28] *See id.* at 1996.

[29] *Id.* at 1995.

[30] *Id.* at 1997.

[31] *Id.* (citing Cannon v. University of Chicago, 441 U.S. 677, 704 (1979)).

[32] *Id.*

to protect people from discriminatory practices.[33] The Court contrasted this with Title VII, which simply prohibits discrimination under all circumstances and aims to compensate victims of past discrimination.[34] Because the aim of Title IX is not compensation, and the Title IX framework is based on Congress' spending power,[35] the Court took care to ensure that recipients of federal funding have notice of the possibility of damages before holding them liable for such an award.[36]

The Court noted that the administrative enforcement mechanism of Title IX requires that, before enforcement proceedings begin, actual notice of the discrimination be given to the school district and that a determination be made indicating that voluntary compliance is not possible.[37] The Court then reasoned that it would be absurd to have such safeguards surrounding the express statutory enforcement system while allowing for significant liability without actual notice under a judicially implied enforcement system.[38]

The Court fashioned the remedial scheme for an implied private right of action after that of the express enforcement mechanism.[39] The Court formulated a test to determine when a school district may be held liable for the sexual harassment of a student by a teacher. First, a school district official with power to "take corrective action to end the discrimination" must have had actual notice of the discrimination.[40] Second, even if actual notice is shown, a plaintiff must demonstrate that the official deliberately failed to act upon this knowledge.[41]

The Court then applied this test to the plaintiffs case and found that plaintiffs failed to show actual notice.[42] The Court stated that the minimal knowledge of the principal concerning Waldrop's conduct was insufficient to constitute notice of the sexual relationship between Waldrop and Gesber.[43] Furthermore, the Court explained that Waldrop's own knowledge was irrelevant under the circumstances.[44] Finally, the Court noted that the school district's failure to have an adequate grievance procedure concerning sexual harassment was not enough to establish actual knowledge and deliberate indifference.[45]

---

[33] *See id.*

[34] *See id.*

[35] U.S. CONST., Art. I, § 8, cl. 1.

[36] *See Gesber*, 118 S. Ct. at 1998.

[37] *See id.* (citing 20 U.S.C. § 1682).

[38] *See id.* at 1999.

[39] *See id.*

[40] *Id.*

[41] *See id.* ("The premise, in other words, is an official decision by the recipient not to remedy the violation.").

[42] *See id.* at 2000.

[43] *See id.*

[44] *See id.*

[45] *See id.*

A. *Justice Stevens' Dissent*

Justice Stevens disagreed with the weight the majority gave to the fact that the private right of action under Title IX is judicially implied.[46] He recalled precedent which held that, unless otherwise stated, Congress intends to grant all remedies necessary to carry out the purpose of a statute.[47] Also, because Congress amended Title IX twice after the *Franklin*[48] decision, Stevens infers that Congress intended to leave its holding untouched.[49]

Furthermore, Stevens stated that the use of passive voice in Title IX focuses on the victim of the discrimination rather than the particular wrongdoer thereby expanding the scope of the statute beyond that of Title VII.[50] In addition, Stevens noted that the contractual relationship between the school district and the government arising from receipt of federal funds should demand a higher standard than that demanded by Title VII.[51]

B. *Justice Ginsburg's Dissent*

Justice Ginsburg joined Justice Stevens' dissent but wrote separately to propose an affirmative defense to a Title IX charge of sexual harassment where a school has "an effective policy for reporting and redressing such misconduct."[52] Ginsburg further stated that the school district would have the burden of demonstrating that such a policy was publicized so that it would have given the plaintiff a chance to receive help without unnecessary effort, expense, or risk.[53]

IV. CONCLUSION

The Supreme Court held that the misconduct of a teacher will not be attributed to the school district unless a school official had actual knowledge of the conduct and deliberately failed to rectify it. In the case at bar, the Court held that the plaintiffs failed to meet their burden.

Erica J. Schindler

Morse v. Regents of the University of Colorado, No. 96-1555 1998, WL 480102 (10th Cir. Aug. 17, 1998)). THE UNITED STATES COURT OF APPEALS FOR THE

---

[46] *See id.* at 2001 ("As long as the intent of Congress is clear, an implicit command has the same legal force as one that is explicit.").

[47] *See id.* (citing *Franklin*, 503 U.S. at 66).

[48] *Franklin*, 503 U.S. at 74-75 (holding that a school district may be held liable in damages when a student is sexually harassed by a teacher).

[49] *See Gesber*, 118 S. Ct. at 2001.

[50] *See id.* at 2002 (citing Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1047 (1997) (Rovner, J., dissenting)).

[51] *See id.*

[52] *Id.* at 2007.

[53] *See id.*

TENTH CIRCUIT HELD THAT INSTITUTIONAL LIABILITY FOR PURPOSES OF TITLE IX IS PREDICATED UPON THE INSTITUTION'S DELIBERATE INDIFFERENCE TO NOTICE OF MISCONDUCT IN AN INSTITUTIONAL PROGRAM.

I. INTRODUCTION

The plaintiffs, Ms. Angela Morse and Ms. Stacey Handley, filed an action against the University of Colorado, a Title IX federal funding recipient, claiming that while they were enrolled as students in the University's Reserve Officer Training Corps [ROTC] program they were subjected to acts of gender bias and harassment that created a sexually hostile educational environment.[1]

The Tenth Circuit Court of Appeals reviewed de novo the district court's decision to dismiss the Title IX claim for failure to state a claim, concluded that the decision was erroneous, and remanded.[2] The court held that institutional liability for purposes of Title IX is predicated upon the institution's deliberate indifference to notice of misconduct in an institutional program.

II. BACKGROUND

Plaintiffs alleged that a fellow student, acting in his capacity as a higher-ranking cadet in the ROTC program, created a sexually hostile learning environment.[3] Plaintiffs alleged that when they reported the harassment to a superior ROTC officer, he retaliated against them by denying them opportunities in the program and by subjecting them to other acts of sexual harassment.[4] Plaintiffs also stated that when they reported the harassment to University representatives, the University did not respond.[5]

Plaintiffs alleged that Defendants: 1) violated Title IX of the Educational Amendments of 1972[6], 2) denied their due process rights in violation of 42 U.S.C. § 1983, 3) conspired to deny them civil rights in violation of 42 U.S.C. §1985, and 4) violated state law by breaching University equal-employment and affirmative-action policies.[7]

---

[1] Morse v. Regents of the Univ. of Colorado, No. 96-1555, 1998 WL 480102 (10th Cir. Aug. 17, 1998).

[2] *See id.* at *1, *4 (citing Seamons v. Snow, 84 F.3d 1226, 1231 (10th Cir. 1996)).

[3] *See id.* at *1.

[4] *See id.*

[5] *See id.*

[6] To state a Title IX Claim a plaintiff must establish:

(1) that [s]he is a member of a protected group;

(2) that [s]he was subject to unwelcome harassment;

(3) that the harassment was based on sex;

(4) that the sexual harassment was sufficiently severe or pervasive so as to unreasonably alter the conditions of her education and create an abusive educational environment; and

(5) that some basis for the institutional liability has been established.

Id. at *2 (citing *Seamons*, 84 F.3d at 1232).

[7] *See id.* at *1.

Defendants filed a motion to dismiss the Title IX claim arguing that the University was not liable for the acts of members of the ROTC because they were not agents of the university.[8] The district court granted the University's motion to dismiss plaintiff's: 1) Title IX claim for failure to state a claim, 2) state breach-of-policy claim and the section 1983 claim for lack of jurisdiction based on Eleventh Amendment immunity, and 3) § 1985 claim because the University is not a "person" for purposes of that section.[9] This case arises from the plaintiff's appeal of the district court's decision to dismiss the plaintiff's aforementioned claims.

III. ANALYSIS

A. *Standard of Review*

The court reviewed de novo the district court's grant of a motion to dismiss for failure to state a claim. Dismissal for failure to state a claim is inappropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would enable him to relief."[10]

B. *The Standard for Establishing Institutional Liability*

The court rejected the district court's requirement that plaintiffs must allege facts which show that the ROTC members were agents of the University to establish institutional liability under Title IX.[11]

The court held that basing institutional liability for sexual harassment on theories of agency or respondeat superior would frustrate the purposes of Title IX.[12] The court concluded that the institution's liability is predicated upon its "deliberate indifference" to notice of misconduct in an institutional program.[13]

Therefore, to have a valid Title IX claim, plaintiffs must show: 1) they were subjected to quid pro quo sexual harassment or subjected to a sexually hostile environment, 2) they brought the situation to the attention of an official at the educational institution receiving the Title IX funds who had the authority to take corrective action, and 3) the institution's response to the harassment amounted to "deliberate indifference".[14]

---

[8] *See id.*

[9] *See id.*

[10] *Id.* (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[11] *See id.* at *2 (noting that the district court erroneously relied on *Seamons*, 84 F.3d at 1232).

[12] *See id.* (citing Gesber v. Lago Vista Independent School District, 118 S.Ct. 1989 (1998)).

[13] *See id.* (citing *Gesber*, 118 S.Ct. at 1999).

[14] *See id.* at *3, (citing *Gesber*, 118 S.Ct. at 1997).

C. *Plaintiffs' Pleadings Can be Reasonably Read to Assert Institutional Liability*

The court held that the plaintiffs' pleadings reasonably establish the University's liability.[15] The pleadings alleged that the ROTC program is a University sanctioned program and that a student and an ROTC officer, both acting with authority bestowed by the ROTC program, committed the acts forbidden by Title IX.[16] plaintiffs further alleged that they reported the harassment to a University dean and the University Affirmative Action Officer, either or both of whom had the authority to address the alleged discrimination and institute corrective measures on the University's behalf.[17]

The court held that the plaintiff's complaint could reasonably be read to assert that the University is liable to plaintiffs for the harm suffered as a result of the sexual harassment and hostile environment because the University knew of the harassment and did not respond adequately.[18]

Thus, the court held that the dismissal of plaintiffs' Title IX claim pursuant to Federal Rule of Civil Procedure 12(b)(6) was erroneous and remanded for further proceedings in accordance with the decision.[19]

IV. CONCLUSION

The Tenth Circuit Court of Appeals held that institutional liability for purposes of Title IX is predicated upon deliberate indifference to notice of misconduct in an institutional program. In reviewing de novo the district court's grant of the Defendant's motion to dismiss for failure to state a claim, the court held that the Plaintiff's pleadings establish University liability under Title IX.

Christine Pepe

---

[15] *See id.*
[16] *See id.*
[17] *See id.*
[18] *See id.* at *4.
[19] *See id*