Waiver of Attorney-Client and Work-Product Privileges in Hostile Environment Sexual Harassment Cases

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When an employer receives a complaint of sexual harassment from an employee, internal policies and procedures usually dictate that the employer launch an investigation. In the course of this investigation, legal counsel may assist the employer by interviewing individuals with information relevant to the claim, taking extensive notes, and preparing memorandums with findings and conclusions. If employees file Title VII claims against employers, should courts allow them to depose the attorneys involved or subpoena documents created during the internal investigation?

To answer this question, a court must follow a two-step process. First, the court must determine whether any attorney-client or work-product privileges exist. Second, after the court finds the existence of a valid privilege, it must determine whether the employer waived any of its privileges through an affirmative act. This Comment examines the issue of waiver in light of the Supreme Court’s decisions in Burlington Industries, Inc v Ellerth\(^1\) and Faragher v City of Boca Raton,\(^2\) which created an affirmative defense for employers undertaking proper prophylactic and remedial measures for sexual harassment claims.\(^3\) The primary issue focused on is whether an employer waives privileges regarding the communications or work product from its investigation of sexual harassment charges simply by raising the affirmative defense outlined in Ellerth and Faragher. The outcome of courts' decisions on this issue will have dramatic ramifications in determining the ability of both employees and employers to succeed in

\[^{\dagger}\] B.S.N.E. 1996, North Carolina State University; J.D. Candidate 2000, University of Chicago.
\(^{1}\) 118 S Ct 2257 (1998).
\(^{2}\) 118 S Ct 2275 (1998).
\(^{3}\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
sexual harassment litigation and will affect significantly how employers respond to claims of sexual harassment.

This Comment argues that courts generally should not find that employers waive their privileges simply by asserting the Ellerth/Faragher defense. Rather, courts should narrowly construe this type of implied waiver, often referred to as “at issue” waiver in the sexual harassment context. Equity and fairness are the guiding principles behind waiver, and underlie courts’ decisions to interpret waiver narrowly in this area. A narrow view would allow plaintiffs access to all necessary information to present their case, while still allowing employers to support their affirmative defense with evidence of specific prophylactic and remedial actions. Additionally, a narrow construction of waiver best implements the applicable law because it protects important privileges without introducing an unfair advantage to employers. Further, this Comment demonstrates that a narrow construction of waiver reinforces the purposes of Title VII by encouraging employers to take strong steps to prevent and correct sexual harassment.

Part I outlines the current application of privileges and implied waiver in the context of sexual harassment law. It specifically examines the attorney-client and work-product privileges. It then discusses the circumstances under which courts have applied implied waiver in sexual harassment cases, as well as in other similar situations.

Part II examines the foundation of waiver rooted in the principles of equity and fairness. It concludes that, based on the objective nature of the Ellerth/Faragher affirmative defense and the fact that employers only have the single affirmative defense, a narrow interpretation upholds the qualities of equity and fairness embodied in the doctrine of waiver. It allows the plaintiff access to all information necessary for the case, while permitting employers to present their only affirmative defense without waiving privileges.

Part III discusses the incentives created by both broad and narrow constructions of waiver in the sexual harassment context. It demonstrates how narrowly construing the scope of waiver provides employers with the correct incentives to take proactive care and respond promptly to claims of sexual harassment, thus leading to the best social outcome.
I. PRIVILEGE IN SEXUAL HARASSMENT LAW

After the Supreme Court's decisions in *Burlington Industries, Inc v Ellerth* and *Faragher v City of Boca Raton*, employers face vicarious liability for sexual harassment perpetrated by supervisors. The Court tempered the severity of this vicarious liability by holding that employers may assert an affirmative defense when the sexual harassment fails to result in "tangible employment action" to the alleged victim. Employers can raise this affirmative defense for purposes of rebutting both liability and damages, and must meet a preponderance of the evidence standard.

Employers must satisfy two requirements in order to maintain this affirmative defense. First, employers must demonstrate that they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Second, employers must show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." This Comment focuses on whether an employer waives attorney-client or work-product privileges in attempting to fulfill the first prong of the affirmative defense.

A. Attorney-Client Privilege

Since the time of early common law in England, the attorney-client privilege has served as one of the cornerstones of legal ethics. The attorney-client privilege developed because courts recognized that the privilege was necessary for the practice of law. The doctrine has evolved to include the following requirements:

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4 118 S Ct 2257 (1998).
5 118 S Ct 2275 (1998).
4 Ellerth, 118 S Ct at 2270 (defining supervisors as those "with immediate (or successively higher) authority over the employee"); see also Faragher, 118 S Ct at 2293.
7 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293. The Court expounded that examples of "tangible employment action" included "discharge, demotion, or undesirable reassignment." Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
8 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
9 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
10 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
11 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
13 See *Hunt v Blackburn*, 128 US 464, 470 (1888) ("[A]ttorney-client privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of
(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\footnote{United States v United Shoe Machinery Corp, 89 F Supp 357, 358-59 (D Mass 1950) (emphasis added). See also Better Government Bureau, Inc v McGraw, 106 F3d 582, 600 (4th Cir 1997); In re Grand Jury Investigation, 599 F2d 1224, 1233 (3d Cir 1979); John F. Savarese and Carol Miller, Protecting Privilege and Dealing Fairly With Employees While Conducting An Internal Investigation, 1057 PLI/Corp 459, 467 (1998).}

Rather than delve into the ocean of issues involved in determining whether attorney-client privilege has been established, this Comment focuses on the fourth prong quoted above — whether privilege has been waived. Thus, for purposes of this Comment, the attorney-client privilege will be deemed established.

B. Work-Product Privilege

The work-product privilege complements the attorney-client privilege by guarding “against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”\footnote{FRCP 26(b)(3).} However, this privilege only applies to “discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative.”\footnote{Id.} In Hickman v Taylor,\footnote{329 US 495 (1947).} the Supreme Court officially recognized the work-product privilege, and denied litigants access to materials specifically prepared by an adverse party’s counsel in preparation for possible litigation. The Court reasoned that attorneys should remain “free from unnecessary intrusion by opposing parties and their coun-
sel, so that attorneys remained unobstructed from preparing their "legal theories and plan[ning their] strategy." Moreover, the Hickman Court reasoned that the absence of a work-product privilege would create perverse incentives and encourage attorneys to stop taking written notes.

C. Self-Critical Analysis

Self-critical analysis, or the self-evaluative privilege, represents another, yet much less often recognized, privilege. This privilege allows companies in certain situations to protect internal findings developed during intensive external self-evaluations. Litigants often assert the self-critical analysis privilege when claiming that permitting discovery of internal evaluations would thwart desirable social policies of self-review and self-correction.

Parties have raised the issue of self-critical analysis to a limited extent in discrimination and sexual harassment lawsuits. However, self-critical analysis appears less important than attorney-client and work-product privileges in the sexual harassment context because courts generally permit a lesser showing of need for a party to overcome it. If litigants can overcome the attorney-client and work-product privileges, they will likely not be thwarted by self-critical analysis. Thus, this Comment will focus

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18 Id at 510–11.
19 Id at 511.
20 Id ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").
21 Savarese and Miller, Protecting Privilege, 1057 PLI/Corp at 484 (cited in note 14).
23 See Bredice v Doctors Hospital, Inc, 50 FRD 249, 251 (D DC 1970) ("Absent evidence of extraordinary circumstances, there is no good cause shown requiring disclosure of the minutes of [the hospital staff's meetings regarding a patient's death] . . . . These committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest.").
24 See, for example, Harding v Dana Transport, Inc, 914 F Supp 1084, 1099, 1101 (D NJ 1996) (holding that defendant's assertion of self-critical analysis failed to apply where the "plaintiffs . . . do not seek discovery of a generalized company review. . . . [but rather . . . the investigation concerned only those allegations related to the plaintiffs' complaints"]; but see Flynn v Goldman, Sachs & Co, 1993 US Dist LEXIS 12801, *6 (S D NY) (relying on the self-critical evaluation privilege to refuse a production order because "[t]he goal of eliminating any barriers to the full participation of women in the highest levels of corporate America is well served by encouraging such self-critical assessments, and that goal should not be undermined absent a compelling showing of need").
on the more firmly fortified attorney-client and work-product privileges.

D. “At Issue” Waiver of Attorney-Client and Work-Product Privileges

Individuals often waive privileges by either intentional or inadvertent disclosure of privileged information. However, the form of waiver primarily discussed in this Comment is “at issue” waiver. “At issue” waiver is an implicit type of waiver triggered when a party makes an assertion that principles of fairness and equity then allow the full disclosure and examination of the asserted subject matter by the opposing party. American courts have long recognized this form of waiver, demonstrated by opinions dating from as early as the nineteenth century. Courts often enumerate the common characteristics of “at issue” waiver to include: “(1) a litigant asserting a privilege; (2) placing ‘at issue’ the protected communication through an affirmative act such as a claim of an affirmative defense; and (3) making the protected communication relevant information and necessary to the original claim of the adversary.”

Although the courts considering waiver usually discuss the attorney-client and work-product privileges separately, many find that the waiver applies equally to both privileges. This similar

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25 See McCafferty’s, Inc v Bank of Glen Burnie, 179 FRD 163, 167 (D Md 1998).
27 Id. See also United States v Bilzerian, 926 F2d 1285, 1292 (2d Cir 1991); United States v Exxon Corp, 94 FRD 246, 249 (D DC 1981).
28 See, for example, Hunt v Blackburn, 128 US 464, 470–71 (1888) (holding that the litigant waived privilege by raising the issue that her lawyer had deceived her in an earlier case).
30 See Peterson v Wallace Computer Services, Inc, 984 F Supp 821, 826 (D Vt 1997) (finding that where “[a]s discussed with regard to the attorney-client privilege, the investigative notes and memoranda in this case are vital . . . in order to refute [the defendant’s] claimed adequacy of its investigation. . . . and therefore the work product doctrine will not preclude disclosure”); Harding v Dana Transport, Inc, 914 F Supp 1084, 1096–99 (D NJ 1996) (holding that waiver exists for both attorney-client and work-product privileges). See generally Westinghouse Electric Corp v Republic of the Philippines, 951 F2d 1414, 1429 (3d Cir 1991) (citations omitted) (holding that because “of the general principle that evidentiary privileges are to be strictly construed . . . . [and that] the work-product doctrine recognizes a qualified evidentiary protection, in contrast to the absolute protection afforded by the attorney-client privilege . . . . [that] the standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege.”).
treatment of the two distinct privileges results largely from applying the same principles of equity and fairness entailed within the doctrine of “at issue” waiver.\textsuperscript{31}

1. \textit{General Application of “At Issue” Waiver.}

As discussed above, “at issue” waiver applies to both the work-product and attorney-client privileges.\textsuperscript{32} Examining the legal landscape in which waiver commonly arises provides both a general background of the important legal issues behind “at issue” waiver and a useful framework for examining “at issue” waiver in sexual harassment cases.

Waiver almost certainly occurs when parties name their attorneys as witnesses.\textsuperscript{33} For example, parties in patent cases commonly are forced to defend the legitimacy of infringement actions, and they often name their attorneys to testify concerning their good faith in filing the suits.\textsuperscript{34} Common sense, as well as principles of equity and fairness, dictates that a party cannot place its attorney on the stand, ask the desired questions, and then claim privilege when opposing counsel cross-examines the attorney. Likewise, waiver usually occurs when a party relies on the advice of counsel as a defense.\textsuperscript{35}

\textsuperscript{31} \textit{Harding}, 914 F Supp at 1099 (holding that waiver of both attorney-client and work-product privileges occurred because “[justice requires that the plaintiffs be permitted to respond to the defenses asserted with a full spectrum of information”).

\textsuperscript{32} \textit{In re Sealed Case}, 676 F2d 793, 811 (DC Cir 1982). See also \textit{Harding v Dana Transport, Inc}, 914 F Supp 1084, 1098-99 (D NJ 1996).

\textsuperscript{33} See, for example, \textit{Handguards, Inc v Johnson & Johnson}, 413 F Supp 926, 929 (N D Cal 1976) (holding that “[t]he deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice”); \textit{Northbrook Excess & Surplus Ins Co v Procter & Gamble Co}, 1988 US Dist LEXIS 288, *3 (N D Ill) (“By designating those attorneys as trial witnesses, P&G has waived both [attorney-client and work-product] privileges, but only with respect to the subjects on which they will testify at trial.”) (citation omitted).

\textsuperscript{34} \textit{Northbrook Excess & Surplus Ins Co}, 1988 US Dist LEXIS 288 at *3 (showing that where the defendants put their lawyers on the witness stand in order to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were, therefore, brought in good faith, the defendants waive attorney-client privilege as to communications relating to the issue of the good-faith prosecution of the patent actions); \textit{Leybold-Heraeus Technologies, Inc v Midwest Instrument Co}, 118 FRD 609, 614 (E D Wis 1987) (holding “that many of the documents which . . . [plaintiff’s attorney] participated in, either as a recipient of communication or the communicator as to prior art or as to the good faith belief in the validity of the patents in question and the good faith in maintaining the lawsuits of both the present litigation and the [previous] case, should be made available for discovery to [the defendants]”).

\textsuperscript{35} See \textit{Panter v Marshall Field & Co}, 80 FRD 718, 721 (N D Ill 1981) (ruling that when "a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel’s advice was sought"); \textit{Donovan v Fitzsimmons}, 90 FRD 583, 588 (N D Ill 1981) (holding that "to the extent that the ‘advice of counsel’ is a critical area of inquiry in
Courts have expanded “at issue” waiver to include the much broader category of cases in which a party places its state of mind at issue. The most common example of “at issue” waiver in this context exists when a party claims a good faith defense based on advice or communications from counsel. These cases allow waiver because fairness and necessity require the disclosure of privileged communications that may provide the only evidence available for examining a party’s state of mind.

Overall, the common theme resonating through the application of “at issue” waiver is that if parties assert a claim that places privileged information necessary to the opposing party “at issue,” then principles of equity and fairness dictate disclosure of the privileged information. This generally occurs where parties place advice of counsel or their state of mind at issue, rather than simply asserting a set of facts.

2. Application of “At Issue” Waiver in Sexual Harassment Cases.

The basis for sexual harassment claims of “hostile work environment” flows from Title VII of the Civil Rights Act of 1964, which provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

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this case, the interests in attorney privacy must yield to the need of the Department . . . to discover this material”); Wender v United Services Auto Assn, 434 A2d 1372, 1374 (DC 1991) (stating that “[w]e therefore hold that USAA, by asserting its reliance on counsel as a material element of its defense, waived the attorney-client privilege in this lawsuit.”).

36 See McLaughlin v Lunde Truck Sales, Inc, 714 F Supp 916, 919 (N D Ill 1989) (finding waiver because the party asserted good faith and “inject[ed] their former counsel’s affidavit in support of their good faith defense”); Dawson v New York Life Insurance Co, 901 F Supp 1362, 1369–70 (N D Ill 1995) (allowing waiver of attorney-client privilege because the party injected a good faith defense, and even though the party did not explicitly rely on attorney advice for defense, the good faith defense had put privileged communications at issue); Connell v Bernstein-Macaulay, Inc, 407 F Supp 420, 423 (S D NY 1976) (holding that where a party claimed estoppel based on detrimental reliance, the party waived attorney client privilege regarding privileged communications that “would shed light on the validity of claim of estoppel”).

37 Vincent S. Walkowiak, Attorney-Client Privilege in Civil Litigation 152 (ABA 2d ed 1997) (“By pleading reliance on the advice of counsel as a defense, a party typically seeks to disprove the alleged existence of a culpable ‘state of mind.’”).

privileges of employment, because of such individual's race, color, religion, sex, or national origin.\(^9\)

In *Meritor Savings Bank, FSB v Vinson*,\(^40\) the Supreme Court held that common law principles of agency governed employer liability for sexual harassment.\(^41\) However, *Meritor* left open the application of these principles, admitting that "such common-law principles may not be transferable in all their particulars."\(^42\) This led to a split among the circuit courts regarding the application of agency principles in the sexual harassment context. The Supreme Court has attempted to reconcile this split through its decisions in *Burlington Industries, Inc v Ellerth*\(^43\) and *Faragher v City of Boca Raton*.\(^44\)

During the uncertain application of agency principles predating *Ellerth* and *Faragher*, some circuits established the standard that employer "liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action."\(^45\) This represented a negligence standard that bears little resemblance to the vicarious liability standard later established in *Ellerth* and *Faragher*, but it closely parallels the "reasonableness" affirmative defense established by those two cases.\(^46\)

Resembling the newly formed affirmative defense, some courts applying the negligence standard prior to *Ellerth* and *Faragher* held that employers could avoid liability by demonstrating the reasonableness of their investigations and proper remediying of the harassment.\(^47\) However, as employers began asserting this affirmative defense, the courts debated whether raising the defense actually waived attorney-client and work-

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\(^9\) Id at § 2000e-2(a), (a)(1).
\(^40\) 477 US 57 (1986).
\(^41\) Id at 72.
\(^42\) Id.
\(^43\) 118 S Ct 2257, 2264–65 (1998).
\(^44\) 118 S Ct 2275, 2282 (1998).
\(^46\) *Faragher*, 118 S Ct at 2293 (holding that affirmative defense requires a showing that the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior").
\(^47\) See *Harding v Dana Transport, Inc*, 914 F Supp 1084, 1094 (D NJ 1996) (finding that "an employer may avoid liability if its procedures for investigating and remediating alleged discrimination are sufficiently effective"); *Bouton v BMW of North America, Inc*, 29 F3d 103, 107 (3d Cir 1994) (stating that "under negligence principles, prompt and effective action by the employer will relieve it of liability").
product privileges, and if so, how far such waiver extended. Although different substantive law provided the context for these earlier cases, the similarity of the affirmative defense suggests that these privilege decisions should have precedential value for the newly formed and untested affirmative defense established under *Ellerth* and *Faragher*.

Some of the earlier decisions held that once employers attempted to use their investigation as a defense, a very broad waiver occurred and that employers waived privileges regarding all information concerning the investigation. These courts argued that allowing the attorney-client privilege to prevail would create a rule that unfairly leaves the relevance of such materials entirely up to the defendant's litigation strategy. In describing this reasoning, courts often repeated the maxim that defendants cannot use their privileges "as both a sword and a shield." This analysis follows from the proposition that privileges should be used solely in a defensive posture and not as an offensive method of litigation.

Other courts have held, however, that either no waiver occurs or that strict limits should be placed on the privileged information that becomes waived. These courts argued for a narrow

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49 See *Harding*, 914 F Supp at 1094–95 (holding that by using its investigation as a defense the employer waived attorney-client privilege to all documents and agents involved in the investigation); and *Rauland-Borg*, 961 F Supp at 211 (ruling that since employer "placed the reasonableness of its conduct" following the sexual harassment complaint at issue, it "must reveal the legal advice it received" from outside counsel); *Peterson v Wallace Computer Services, Inc*, 984 F Supp 821, 826 (D VT 1997) (holding that, although investigation memos and notes are protected by attorney-client privilege, raising adequacy of investigation as a defense waived the privilege).

50 *Harding*, 914 F Supp at 1095.

51 Id at 1096. See also *Garfinkle v Arcata National Corp*, 64 FRD 688, 699 (S D NY 1974); *United States v Workman*, 138 F3d 1261, 1264 (8th Cir 1998); *Frontier Refining, Inc v Gorman-Rupp Co, Inc*, 136 F3d 695, 704 (10th Cir 1998). Also, at least one case following the Supreme Court's pronouncements in *Faragher* and *Ellerth* has employed this logic. See *Brownell v Roadway Package Systems, Inc*, 1999 US Dist LEXIS 11799, *25 (N D NY) ("Bly arguing that it 'fully and fairly' investigated Plaintiff's allegations while objecting to the production of statements obtained in the course thereof, Defendant is attempting to use the privilege as both a sword and a shield.").

52 See, for example, *United States v Bilzerian*, 926 F2d 1285, 1292 (2d Cir 1991) (holding that a party "may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes").

53 See *Ryall v Appleton Electronic Co*, 153 FRD 660, 663 (D Colo 1994) (finding that since the employer already provided information regarding its investigation, no implied waiver of privilege occurred); *Pray v New York City Ballet Co*, 1998 US Dist LEXIS 2010, *7 (S D NY) (holding no implied waiver of communications before or after the investigation because defendant only asserted a defense based on the specific corrective actions
construction of the scope of waiver based on the same ideas of equity and fairness, finding that the plaintiffs had no need for the privileged communications and that allowing waiver would be unfair to the employers. For example, in Ryall v Appleton Electronic Co, the court stated that waiver occurs only when an employer actually uses interview notes at trial. This allowed employers to assert a reasonable investigation as a defense, while retaining their privilege over the materials resulting from such an investigation unless they directly introduced the privileged communications or work product.

Thus courts establishing both broad and narrow interpretations of waiver rely on the same principles of equity and fairness. The question is which interpretation better applies these principles. The answer determines whether raising a defense based on a reasonable investigation and remedy waives the specific "facts" gathered in an investigation, or whether asserting this affirmative defense opens the floodgates to all communications and work product generated by attorneys as a result of the investigation. This Comment argues that a narrow and restricted application of waiver represents the best interpretation of the doctrine and produces the best social results.

that it took, and the defense "depends only on the nature of the action itself"); Kaiser Foundation Hospitals v Superior Court, 78 Cal Rptr 2d 543, 550 (Cal App 1998) (holding that when "the employee has been afforded full discovery of all aspects of that investigation with the exception of specified communications and documents protected by the attorney-client and work-product doctrine, then no waiver of either the attorney-client privilege or the work-product doctrine has been made"); Derderian v Polaroid Corp, 121 FRD 9, 13 (D Mass 1988) (preventing plaintiff from deposing the employer's in-house counsel concerning an investigation of sex discrimination charges unless content of investigation already revealed).

54 See Kaiser, 78 Cal Rptr 2d at 548 (holding that where "a defendant has produced its files and disclosed the substance of its internal investigation ... and only seeks to protect specified discrete communications ... disclosure of such privileged communications is simply not essential for thorough examination of the adequacy of the investigation or a fair adjudication of the action") (emphasis added); Pray, 1998 US Dist LEXIS 2010 at *5 (finding that "[p]laintiffs have all the facts [concerning the investigation] ... and can contest defendant's assertion that its response was sufficient"); Ryall, 153 FRD at 663 (stating that the defendant "has provided all of the witness statements ... has permitted Ryall to reopen the depositions of these witnesses ... [and] Ryall can now construct a fairly complete picture of the actions Appleton took to investigate her claim.").

55 153 FRD 660 (D Colo 1994).

56 Id at 663 (stating that "[i]n deed, were Appleton to use this information at trial, it would waive any work-product immunity or attorney-client privilege.").
II. EQUITY AND FAIRNESS SUGGEST A NARROW SCOPE OF “AT ISSUE” WAIVER

Principles of equity and fairness represent the foundation of “at issue” waiver. Generally, courts apply fairness principles to prevent parties from using certain privileged communications to their benefit, while simultaneously employing privilege to protect the remaining communications. As with all fairness arguments, however, there are two sides that require fair treatment. By mechanically granting waiver, a court fails to examine the larger picture because it fails to recognize that an improper grant of waiver violates principles of equity and fairness just the same as an improper failure to grant waiver. In essence, looking at fairness from only one perspective provides little traction in analyzing where the line should be drawn in protecting privileges.

Some courts have held that simply asserting a particular defense fails to sufficiently place privileged communications “at issue” in order to constitute waiver, but rather that waiver only occurs when a party introduces particular privileged communications. This position supports the argument that merely asserting the affirmative defense established under Ellerth and Faragher does not result in automatic waiver. The simple fact that documents would be useful to an opposing party does not justify the waiver of a privilege. However, the question arises whether employers can support their affirmative defense claims without placing privileged communications “at issue.”

In answering this question, the larger picture of “at issue” waiver reveals that a narrow construction is most consistent with the guiding principles of equity and fairness. Thus, the law should allow employers to assert the affirmative defense established under Burlington Industries, Inc v Ellerth and Faragher v City of Boca Raton, as well as to support this defense with evi-

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87 See Bierman v Marcus, 122 F Supp 250, 252 (D NJ 1954) (stating that “the most important consideration is fairness” in deciding whether waiver has occurred).
88 Id. See also Colan v Cutler-Hammer, Inc, 1983 US Dist LEXIS 13523, *7 (N D Ill) (noting that “[t]he underlying policy is one of fairness; a party may not affirmatively interject attorney advice as a critical issue and then hide behind the attorney-client privilege or work-product immunity to resist discovery on that issue.”).
89 National Union Fire Ins Co v Continental Illinois Group, 1988 WL 79521, *1 (N D Ill) (stating that “[t]he waiver rule is much more narrow. It occurs when a party puts communications within the privilege in issue.”).
90 See Standard Chartered Bank PLC v Ayala Intl Holdings (US), Inc, 111 FRD 76, 81 (S D NY 1986) (stating that “the substance of its confidential communications with its attorneys might reveal some of what Ayala knew. But those are not reasons to void the attorney-client privilege.”).
waiver of their proactive or remedial actions, without waiving their attorney-client or work-product privileges.

A. Differentiating Between Types of “Reasonableness” Defenses.

An important distinction should be recognized between two types of reasonableness defenses — subjective and objective. While the two defenses are similar, they differ in important respects that suggest different treatment under the equitable principles of “at issue” waiver.

A subjective reasonableness test asks whether a party believes that she was acting reasonably and delves into her state of mind or scienter. A defense based on subjective reasonableness inquires into the reasons and purposes a party had for undertaking certain actions. In essence, subjective reasonableness is a search for good or bad faith.

Objective reasonableness represents a second and very different type of reasonableness test. A defense based on objective reasonableness looks at the facts provided and allows the judge or jury, through their fact-finding roles, to decide the reasonableness of such a defense based solely on the facts of the case, and on whether a reasonable person in the position of the party would have undertaken similar actions. Whether a party believes that she acted reasonably is irrelevant to the decision-maker.

1. The Ellerth and Faragher Affirmative Defense Represents an Objective Reasonableness Regime.

While the Supreme Court held that an employer may raise an affirmative defense under Burlington Industries, Inc v Ellerth61 and Faragher v City of Boca Raton,62 it did not explicitly state whether this defense should be based on an objective, subjective, or a combined standard.63 Nevertheless, the language of

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61 118 S Ct 2257 (1998)
62 118 S Ct 2275 (1998)
63 See Faragher, 118 S Ct at 2292–94; Ellerth, 118 S Ct at 2270–71. It should be noted that courts interpret Title VII as establishing both an objective and subjective general standard for plaintiffs filing hostile work environment claims. Faragher, 118 S Ct at 2283 (holding that “in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so”). See also Oncale v Sundowner Offshore Services, Inc, 523 US 75, 81 (1998); Harris v Forklift Systems, Inc, 510 US 17, 21–22 (1993); Red Mendoza v Borden, Inc, 158 F3d 1171, 1177 (11th Cir 1998).
the two decisions strongly implies that an objective standard applies.\textsuperscript{64}

The Court stated that “a proven effective mechanism for reporting and resolving complaints of sexual harassment” serves to meet the first prong of the affirmative defense.\textsuperscript{65} Use of terms such as, “proven” and “effective” implies that the Court favors objective factors. The Court further indicated in \textit{Faragher} that the defendant failed to meet the requirements of the affirmative defense because it “entirely failed to disseminate its policy . . . [and because] its officials made no attempt to keep track of the conduct of supervisors.”\textsuperscript{66} Again, determining whether an employer disseminated a policy or tracked supervisors’ conduct requires only objective factors, not a party’s subjective intent.

Overall, these factors focus on the actions employers take, not the intentions or motives for such actions, demonstrating the Court’s intent to use objective criteria for the affirmative defense outlined under \textit{Faragher} and \textit{Ellerth}.\textsuperscript{67}

2. Implications of the Differences between Objective and Subjective Reasonableness.

A simplified example can illustrate the important differences between objective and subjective reasonableness and demonstrate why principles of fairness suggest applying waiver differently under each standard. Suppose that an employer’s attorney investigates a claim of sexual harassment. The attorney then prepares a report of the validity of the sexual harassment claim and proposes proper remedial measures. However, the employer chooses to ignore the advice of counsel, perhaps thinking the harassment less serious, and takes much lighter remedial actions against the alleged harasser. Unsatisfied, the employee files a sexual harassment lawsuit. The employer then asserts a reasonableness

\textsuperscript{64} \textit{Faragher}, 118 S Ct at 2292 (stating that an employer could avoid liability by demonstrating that it “had exercised reasonable care to avoid harassment and to eliminate it when it might occur”); \textit{Ellerth}, 118 S Ct at 2270 (indicating that although not necessary as a matter of law, the fact “that an employer had promulgated an anti-harassment policy with complaint procedure” provided strong evidence of meeting the reasonable care standard).

\textsuperscript{65} \textit{Faragher}, 118 S Ct at 2292.

\textsuperscript{66} Id at 2293.

\textsuperscript{67} It should be noted that issues of subjective intent become important with respect to punitive damage claims, but this Comment addresses the affirmative defense only as applied to liability and normal damages. See § 42 USC 1981a(b)(1) (1994) (“A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”).
defense supported by evidence of the remedial actions that it un-
dertook in response to the sexual harassment claims. Then sup-
pose that the plaintiff attempts to discover all communications
and work product concerning the employer's remedial action since
the employer placed its remedial actions "at issue" by asserting
the defense.

Under a subjective reasonableness regime, a plaintiff must
show that the employer lacked good faith to counter the em-
ployer's asserted defense. Simply knowing what remedial actions
were taken by the employer would provide no avenue for the
plaintiff to prove bad faith. Further, cross-examining fact wit-
tesses, such as the alleged victim, alleged harasser, or co-
workers, might provide little additional help in making the re-
quired showing. Under the subjective reasonableness rule, prin-
ciples of fairness and equity require a broad waiver of privileged
communications and work product to provide fully the plaintiff an
opportunity to rebut the defense. If the court grants broad
waiver, the attorney's report would become discoverable and the
attorney could even serve as a fact witness, allowing the plaintiff
meaningful evidence and a fair chance to contest the employer's
claims that it took subjectively reasonable remedial measures.

However, under an objective reasonableness regime, the
plaintiff has no need to know that the employer chose to imple-
ment remedial measures less stringent than those recommended
by his attorney. The issue simply turns on whether the actions
taken by the employer, in light of the surrounding circumstances
of the harassment, constitute "reasonable care to prevent and
correct promptly any sexually harassing behavior." Even if the
employer acted in bad faith, its defense will succeed if the meas-
ures it takes still meet objectively reasonable criteria. However, if
the employer's actions demonstrate a lack of reasonable care
based on objective criteria, such as a failure to disseminate an
effective sexual harassment policy or to track complaints, then
the plaintiff has all the evidence necessary to rebut the defense,
and has no need for the privileged communications regarding bad
faith.

This hypothetical presents the unusual situation where an
employer completely ignores the advice of counsel. However, the

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For purposes of this example it makes no difference whether the privileged infor-

mation represents privileged communications protected by attorney-client privilege or
documents protected under the work-product doctrine.

Burlington Industries, Inc v Ellerth, 118 S Ct 2257, 2270 (1998); Faragher v City of
Boca Raton, 118 S Ct 2275, 2293 (1998).
rarity of this scenario only provides greater support for narrowly applying waiver. The example demonstrates how even when privileged communications represent damaging evidence of intent, principles of equity and fairness do not support sweeping waiver. The employer gains no unfair advantage through the use of the privilege because the plaintiff can obtain all necessary evidence to disprove the objective reasonableness of the employer's actions even though the privilege remains in full effect.

A variation of the above hypothetical further distinguishes the two types of reasonableness regimes. The crucial difference between the objective and subjective tests comes into sharp focus when an employer takes the advice of counsel and performs remedial measures that it truly believes represent the proper response. Under a subjective analysis, good faith represents a defense. Under an objective analysis, the only relevant information concerns whether the employer took objectively reasonable actions, and evidence of good or bad faith is valueless. Thus, there is no reason for courts to force the waiver of unnecessary information.

The different requirements for factual information when using objective and subjective standards demonstrate why courts should apply waiver differently under each regime. While a subjective test requires broad waiver in order to allow for fairness to the plaintiff, an objective test requires narrow waiver in order to allow for fairness to the employer. Since Ellerth and Faragher suggest the use of an objective reasonableness test, courts should construe waiver narrowly to meet the equity and fairness requirement of the doctrine of "at issue" waiver.

B. Principles of Fairness and Equity After Ellerth and Faragher

Burlington Industries, Inc v Ellerth71 and Faragher v City of Boca Raton72 changed the landscape of employer liability for sexual harassment claims based on the hostile environment created by supervisors.73 Formerly, many circuits held that "liability exists where the defendant knew or should have known of the har-

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70 See part II A 1.
71 118 S Ct 2257 (1998).
72 118 S Ct 2275 (1998).
73 Jason L. Gunter and Tammie L. Rattray, Recent Developments In Employer Liability For Sexual Harassment—Ellerth and Faragher, 72 Fla B J 94 (Oct 1998) (“In this short period of time, the doctrine of sexual harassment has further evolved, necessitating a further discussion of sexual harassment liability in the workplace.”).
assent and failed to take prompt remedial action. This broadly phrased liability permitted more extensive latitude for employers to construct a variety of defenses. However, the Supreme Court, through its decisions in Ellerth and Faragher, established a vicarious liability standard with only one narrowly defined affirmative defense.

This reduction to one specific defense changes the proper application of the principles of equity and fairness underlying waiver. In earlier decisions, courts often suggested that employers chose to assert their reasonable remedial measures as an affirmative defense, thereby implying that they had other defenses. For example, in Harding v Dana Transport, Inc, one of the seminal cases establishing “at issue” waiver in the sexual harassment context, the court stated that “[c]orporate litigants hoping to counter charges of respondeat superior liability may

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75 Harding v Dana Transport, Inc, 914 F Supp 1084, 1093 (D NJ 1996) (stating that the employer’s “eleventh separate defense states that [t]he defendants acted on reasonable grounds and without malice, and, therefore, are not responsible to the plaintiffs for any alleged damages”) (emphasis added); Ryall v Appleton Electronic Co, 153 FRD 660, 661 (D Colo 1994) (stating that “[i]n its sixth affirmative defense, Appleton [the defendant/employer] maintains that it is not liable on Ryall’s claims because it conducted a good faith investigation of her complaints of harassment and took appropriate corrective action”) (emphasis added); Peterson v Wallace Computer Services, Inc, 984 F Supp 821, 825 (D Vt 1997) (stating that the defendant employer asserted a defense based “on the ground that it conducted an adequate investigation”); Worthington v Endee, 177 FRD 113, 118 (N D NY 1998) (stating that “the defendants . . . contend that they took prompt and effective remedial measures following notice of plaintiffs allegations”); Johnson v Rauland-Borg Corp, 961 F Supp 208, 210 (N D Ill 1997) (stating that the employer “intends to defend against Johnson’s sexual harassment claim by arguing that . . . it took reasonable appropriate action by authorizing an outside attorney to investigate”).

76 When “no tangible employment action” occurs against the employee the employer can demonstrate an affirmative defense by showing that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Faragher v City of Boca Raton, 118 S Ct 2275, 2293 (1998); Burlington Industries, Inc v Ellerth, 118 S Ct 2257, 2270 (1998). See also text accompanying notes 1–6.

77 Peterson, 984 F Supp at 825 (“By defending itself on the ground that it conducted an adequate investigation . . . or allegations of sexual harassment, Wallace has, through an affirmative act, placed the nature of its investigation in dispute”); Rauland-Borg, 961 F Supp at 211 (stating that since the employer “placed the reasonableness of its conduct following notification of Johnson’s sexual harassment allegations at issue, it must reveal the legal advice it received”).

78 914 F Supp 1084 (D NJ 1996).
easily avoid [waiver] . . . in the future . . . by refraining from de-
fending themselves on the basis of reasonable investigation. 79

Although this option may have been viable previously be-
cause of other possible avenues of defense, it is no longer an op-
tion under the framework established in Faragher and Ellerth. Thus, if a court permits a broad waiver of privileges when an em-
ployer asserts the reasonableness affirmative defense, then the employer face a Hobson's choice — assert reasonable remedial
actions as a defense and waive any accompanying attorney-client
and work-product privileges, or refrain from asserting that de-
fense to preserve privileges, but face automatic vicarious
liability. 80

The above difference in substantive sexual harassment law
before Ellerth and Faragher demonstrates that earlier cases re-
lied on a different legal landscape for their reasoning. Employers
now face a single affirmative defense option, whereas previously,
courts' broader interpretation allowed more latitude for other
employer defenses. Thus, courts must reevaluate waiver prece-
dent in the wake of Ellerth and Faragher, and recognize that the
shift in substantive law supports a much narrower waiver.

C. A Narrow Construction of Waiver Still Allows Plaintiffs
Access to All Necessary Information

Narrowly construing the waiver of attorney-client and work-
product privileges does not limit plaintiffs' access to crucial in-
formation, because courts must first find that these privileges
apply. A thorough examination of the elements needed to assert
the attorney-client and work-product privileges falls outside the
scope of this Comment. However, these strict requirements must
be recognized as important safeguards against abuse. Such
privileges are not easily attained and do not necessarily apply
broadly to all communications or work product emanating from
employers' responses to sexual harassment complaints.

The fear that employers may use their privileges to hide all
relevant information concerning sexual harassment claims is
misplaced. First, as the Supreme Court stated in Upjohn Co v
United States, 81 attorney-client "privilege only protects disclosure

79 Id at 1099.
80 Employers can of course always defend directly against the plaintiffs' prima facie
cases by denying that any harassment took place, but they have only the one affirmative
defense.
of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.82 Thus, even with the privilege in full effect, plaintiffs can interview all individuals who possess relevant information.83 This is especially important in the context of sexual harassment cases where individual testimony is a primary source of evidence at trial.

Attorney-client privilege also does not “allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure.”84 Further, in order for communications to meet the requirements for privilege, the attorney must provide legal, not business or personal, advice.85

Work product, by its nature, is generally not susceptible to abuse. The work-product doctrine applies only to the “discovery of documents and tangible things otherwise discoverable . . . [and] prepared in anticipation of litigation.”86 The primary concern regarding discovery of work product is not abuse by the party asserting the privilege, but abuse by the opposing party attempting to overcome the privilege.87

Together, the strict requirements necessary for communications to gain access to fall under the protection of attorney-client and work-product privileges provide strong safeguards against employer abuse. These limits, aimed at preventing the abuse of privileges, primarily rest in the initial determination by the courts as to whether the privileges exist. The key point is that waiver represents an independent consideration, undertaken only after courts clearly establish the existence of valid privileges. A narrow construction of waiver simply preserves these established privileges, while allowing plaintiffs access to all necessary information for litigation.

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82 Id at 395.
83 Id at 396, quoting Philadelphia v Westinghouse Electric Corp, 205 F Supp 830, 831 (E D Pa 1962) (“The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”).
84 Radiant Burners, Inc v American Gas Assn, 320 F2d 314, 324 (7th Cir 1963).
85 Id (“It seems well settled that the requisite professional relationship is not established when the client seeks business or personal advice, as opposed to legal assistance.”).
86 FRCP 26(b)(3).
87 FTC v Grolier Inc, 462 US 19, 30 (1983) (Brennan concurring) (“It would be of substantial benefit to an opposing party . . . if the party could obtain work-product generated . . . in connection with earlier, similar litigation against other persons . . . [by getting] the benefit of . . . legal and factual research and reasoning, enabling him to litigate ‘on wits borrowed from the adversary.”) (citation omitted).
III. INCENTIVES CREATED BY A BROAD WAIVER OF PRIVILEGES

As shown above, some cases predating *Faragher v City of Boca Raton* and *Burlington Industries, Inc v Ellerth* held that an assertion of reasonable remedial action constitutes a complete waiver of all communications and work product associated with such actions. However, courts' application of waiver in such a broad context represents a shortsighted view of the broader social context. This improper application results from an ex post perspective in which employers already have undertaken remedial action in response to alleged harassment without the expectation of waiving their privileges. Thus, if courts grant waiver, plaintiffs can take advantage of a great wealth of privileged communications and work product through discovery. However, employers, and certainly their attorneys, represent repeat players in the growing amount of sexual harassment litigation. Thus, it is important to examine the incentives that such judicial decisions place on employers and their attorneys in the long run.

A. A Broad Waiver Creates Negative Incentives for Employers

To properly examine employer incentives, the analysis must switch to an ex ante perspective — how will employers act knowing that an assertion of the *Ellerth/Faragher* affirmative defense waives attorney-client and work-product privileges?

In *Hickman v Taylor*, the Supreme Court recognized that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwrit-
The Court further noted that "inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."

These incentives also affect the decisions of employers as purchasers of legal services. Because clients disfavor paying attorneys' fees for information that ultimately can be used by opposing counsel, they will choose to use attorneys less often. The incentives placed on attorneys serve to further reduce their overall value and usefulness to clients. To minimize the impact of the loss of privileges, attorneys "would cease writing legal memoranda, they would interview witnesses but not take notes, and they would engage in other tactics to raise adversaries' cost of discovering information." Such modified behavior then would make legal services less valuable, since employers would devalue attorney services that provided fewer, or no, written communications or work product. Due to greater emphasis on less accurate and less reliable use of memory and oral communications, the quality of legal work would suffer and employers would again refrain from seeking legal advice as much. Together, these incentives would reduce the demand for legal services. Because the determination of actionable sexual harassment ultimately rests on legal conclusions, experienced lawyers add tremendous value to harassment investigations. If courts enforce a broad waiver, the reduction in employers' use of legal services will result in less rigorous employer investigations.

Scholars dating back to Jeremy Bentham argue that a loss of privilege could be perceived as a positive. This argument rests

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93 Id at 511.
94 Id.
95 See Fischel, 65 U Chi L Rev at 7 (cited in note 12) ("Parties would be less likely to incur costs for legal services if they knew their adversaries would then be entitled to the same services at no cost. The effect would be to reduce the demand for legal services.").
96 Id.
97 Id.
98 Id ("Interviews are less valuable, for example, if nobody takes notes.").
99 Fischel, 65 U Chi L Rev at 7 (cited in note 12) ("Since legal services would be less valuable, fewer services will be demanded and produced.").
100 See Judith E. Harris, Sexual Harassment Investigations, in Basic Employment and Labor Law — In Depth 53, 60 (ALI-ABA 1999) ("The primary advantage to using outside counsel to conduct a sexual harassment investigation is the experience and expertise of an employment lawyer. With knowledge of the legal definition of sexual harassment and familiarity with the way courts have dealt with employer investigations, an attorney may be best suited to conduct the investigation.").
101 See Jeremy Bentham, Treatise On Judicial Evidence, 246-47 (J.W. Paget 1825) (arguing that no privileges should be extended to attorneys. "Who can suffer from a lawyer being compelled to give his evidence? Can an honest and innocent client suffer? Assuredly not; having committed no crime, and intended no fraud, there is neither fraud nor crime to
on the idea that a reduction in the value of legal services tends to hurt parties with more to hide. Thus, the “innocent” have no damaging communications or work product to hide, and the privileges only aid the “guilty” attempting to hide information. However, these arguments primarily focus on the impact of privileges in the context of courtroom disputes.

Sexual harassment cases provide a context where the importance of fact-gathering precedes the expectation of any legal action. As Faragher pointed out, “[a]lthough Title VII seeks ‘to make persons whole for injuries suffered on account of unlawful employment discrimination,’ its ‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” The Supreme Court in Faragher cited this aim of Title VII as a reason for its vicarious liability standard with an affirmative defense for employers who “prevent violations and ... make reasonable efforts to discharge their duty.”

In the context of Title VII, the courts attempt to provide incentives for employers to take preemptive corrective action. When the structure of sexual harassment law provides incentives for employers to act proactively, then all other legal doctrines applied within that area of law should serve to supplement these incentives, or at a minimum not to erode the incentives in place. However, a broadly construed waiver of privileges serves to reduce employers’ incentives and ability to thoroughly investigate sexual harassment claims. Therefore, as the Supreme Court attempts to fortify the incentives for preemptive employer action regarding sexual harassment, waiver should be interpreted narrowly to protect the underlying goals of sexual harassment law.

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102 Fischel, 65 U Chi L Rev at 12 (cited in note 12). (My argument is similar to Bentham’s but goes further. Whereas Bentham argued the privilege benefited the guilty but was of no value to the innocent, I argue that the privilege in fact harms the innocent.)


104 Bentham, Treatise On Judicial Evidence at 246–47 (cited in note 101); Fischel, 65 U Chi L Rev at 13 (cited in note 12)

105 118 S Ct at 2292, quoting Albemarle Paper Co v Moody, 422 US 405, 417–18 (1975); see also Alexander v Gardner-Denver Co, 415 US 36, 44 (1974) (stating that “[c]ooperation and voluntary compliance were selected as the preferred means” for eliminating discrimination under Title VII).

106 118 S Ct at 2292.
B. Protecting Privileges Provides Positive Incentives for Employer Care

The protection offered by privileges provides incentives for attorneys to undertake thorough investigations and to provide employers with more accurate information.\(^{106}\) These detailed investigations then enable employers to take reasonable remedial actions when addressing sexual harassment allegations. Although information gained from an investigation could provide opportunities for employers to engage in strategic play,\(^{107}\) such types of strategic decisions fail to make sense under the \textit{Ellerth/Faragher} regime for sexual harassment liability.

First, alleviating sexual harassment represents a relatively inexpensive action on behalf of an employer.\(^{108}\) Second, the affirmative defense allows immunity from liability when employers take reasonable actions. Thus, the greater the amount of information that employers gather from investigations, the greater the likelihood that employers will obtain the tools necessary to prevent future sexual harassment and assist employees who are sexually harassed.

Again, an ex ante perspective illuminates the argument. Under which regime would employees rather work: (1) where no privilege exists for employers and thus they perform less exhaustive investigations, but what information they gain can be used by employees in future litigation; or (2) where privilege exists so that employers have incentives to undertake thorough investigations, although employees will not have access to the attorney's communications or work product in future investigations? No empirical evidence currently available answers this question, but it seems that employees would accept the underlying objective of Title VII — that employees prefer a system that encourages employers to take preventive measures and to promptly correct problems, rather than a system that merely offers a cause of action. This likelihood demonstrates why an analysis focused on future litigation proves to be less useful in the sexual harassment context. It seems unlikely that employees would prefer future court action as their primary form of redress, but rather, as Title

\(^{106}\) Fischel, 65 U Chi L Rev at 31 (cited in note 12).

\(^{107}\) See id at 28–32.

\(^{108}\) While no empirical evidence exists directly on point, rough common sense calculations suggest that the expenses in correcting sexual harassment claims are much less than the costs of compliance required by the often cited areas for possible corporate abuse with environmental, tax, and work-place safety regulations. See generally Fischel, 65 U Chi L Rev at 28–32 (cited in note 12).
VII and common sense suggest, that employees prefer for employers to remedy the situation in the first place.

A second important difference between an employer's loss of privilege in the sexual harassment arena and that in other types of cases is that employers internalize the loss of privileges, thereby hurting future employees victimized by harassment. Unlike cases in which the plaintiff has a distant connection to the defendant, in the employment context the two parties — employer and employee — maintain a close relationship. This close and ongoing relationship means that employees will feel the loss of employer incentives to investigate that result from a broad waiver of privileges. Employers will choose to be less proactive with their investigations, and begin to focus more on simply defending from litigation. Thus with a broad waiver of employer privileges, employees will be hurt as a group, even if a particular litigant might be better off.

This analysis parallels the argument used to justify the self-evaluative privilege — that "[l]ong-term accessibility to vital information must not be sacrificed on the altar of immediate discovery needs." The self-evaluative privilege, like the above arguments, protects the future interests of individuals by providing the correct incentives for employers to conduct rigorous self-evaluation. Thus, the privilege rests on the idea that more information and proper care will result from protecting certain internal investigations.

Overall, Title VII and the new standard developed under Ellerth and Faragher place positive incentives on employers to institute both precautionary and remedial measures. However, requiring a broad, sweeping waiver when employers assert the only available affirmative defense erodes many of these incentives by encouraging less serious investigations into sexual harassment. If courts mistakenly grant broad waiver, they will provide short-term gains for a few immediate plaintiffs, while hurting future employees by fashioning a legal structure that creates incentives for less employer prevention and remedial correction of sexual harassment.

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110 Id at 1087–88 ("Implicit in any application of the [self-critical analysis] privilege is an acknowledgement of the self-defeating nature of allowing discovery of frank self-analyses: in the long run, denying protection will stifle more information than will applying the privilege.").
111 Id.
CONCLUSION

Overall, the ideas of fairness and equity that underlie the doctrine of waiver indicate that "at issue" waiver should be limited to a narrow construction after *Ellerth* and *Faragher*. Employees, as a group, actually will be injured in the long run by a broad loss of privilege, while a preservation of the attorney-client and work-product privileges encourage employers to make serious and detailed reviews of alleged sexual harassment charges. Narrow waivers of privilege benefit employees, further the purposes of Title VII, and comport with the recent Supreme Court holdings in *Ellerth* and *Faragher*. Thus, attorney-client and work-product privileges in the context of the *Ellerth* and *Faragher* affirmative defense should be fortified by the protection of these privileges rather than be eroded by a broad waiver of privileges.