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Employer and Employee Reasonableness Regarding Retaliation under the Ellerth/Faragher Affirmative Defense

Ann M. Henry†

Mark, a store manager, allows the store's assistant managers to assume his supervisory duties when he is not at the store. Julie, an assistant manager, complains to the district manager that Mark is creating a sexually hostile work environment. Subsequently, Mark continues to allow the other assistant managers to take over his supervisory role, but in retaliation for her complaint to the district manager, he no longer allows Julie to do so, depriving her of the opportunity to acquire experience valuable for promotion opportunities. Additionally, although Julie's performance evaluations have been positive during the four years at her job, her evaluation after reporting sexual harassment is highly critical of her performance. The Fourth, Fifth, and Eighth Circuits would hold that such actions are insufficient to constitute retaliation under Title VII.¹ This Comment will show why these circuits are incorrect in their interpretation and application of the law, and propose an appropriate retaliation standard for sexual harassment cases under the Ellerth/Faragher affirmative defense.

To be liable for retaliation, an employer must take an adverse employment action.² In the above example, although Mark

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¹ See Page v Bolger, 645 F2d 227, 233 (4th Cir 1981) ("Title VII, most notably § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions."); Mattern v Eastman Kodak Co, 104 F3d 702, 707 (5th Cir 1997) (holding that Title VII addresses only ultimate employment decisions like hiring, firing, granting leave, promotion, and compensation); Ledergerber v Stangler, 122 F3d 1142, 1144 (8th Cir 1997) (stating that an employment decision that has only a tangential effect on the plaintiff's employment is not an adverse employment action).

² To put forth a prima facie case of retaliation, the plaintiff must show that she has engaged in a protected activity, that she suffered an adverse employment action, and that a causal link exists between the adverse action and the protected activity. Wyatt v City of Boston, 35 F3d 13, 15 (1st Cir 1994); Quina v Green Tree Credit Corp, 159 F3d 759, 769 (2d Cir 1998); Robinson v Pittsburgh, 120 F3d 1286, 1299 (3d Cir 1997); McNairn v Sullivan, 929 F2d 974, 980 (4th Cir 1991); Messer v Meno, 130 F3d 130, 140 (5th Cir 1997);
had a retaliatory motive, the Fourth, Fifth, and Eighth Circuits do not classify his conduct as adverse employment actions. By the reasoning of these circuits, a change in job duties and negative evaluations do not constitute adverse employment actions, even if retaliatory in nature, because they are not ultimate employment decisions.

The Fourth, Fifth, and Eighth Circuits' reasoning in support of the ultimate employment decision test does not conform with the language or purpose of Title VII's retaliation provision. The retaliation provision contains no language limiting the scope of the statute to ultimate employment decisions. Moreover, it runs counter to the spirit and incentive structures of the Supreme Court's recent decisions in *Burlington Industries, Inc v Ellerth* and *Faragher v City of Boca Raton.* Ellerth and Faragher establish a two-pronged affirmative defense for employers when an employee accuses a supervisor of creating a hostile work environment but has not suffered a tangible employment action as a result. Under Ellerth and Faragher, an employee's claim fails if she does not make reasonable use of the employer's grievance process.

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 Elliot Ledergerber, 122 F3d 1144 (10th Cir 1998). See Part II.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, 257 (1964), codified at 42 USC § 2000e-3(a) (1994). “No limiting language appears in Title VII’s retaliation provision.” *McDonnell v Cisneros,* 84 F3d 256, 258 (7th Cir 1996).

**Footnotes:**

1. *Page,* 645 F2d at 233; *Mattern,* 104 F3d at 707; *Ledergerber,* 122 F3d at 1144.

2. The Fourth, Fifth, and Eighth Circuits require that an adverse employment action take the form of an ultimate employment decision. *Page,* 645 F2d at 233; *Mattern,* 104 F3d at 707; *Ledergerber,* 122 F3d at 1144. Ultimate employment decisions include hiring, firing, promoting, compensating, and permitting leave. See *Page,* 645 F2d at 233.

3. The retaliation provision provides that:

   It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, 257 (1964), codified at 42 USC § 2000e-3(a) (1994). “No limiting language appears in Title VII’s retaliation provision.” *McDonnell v Cisneros,* 84 F3d 256, 258 (7th Cir 1996).


procedure. Yet actions short of ultimate employment decisions will likely be sufficient to chill employees from filing complaints because such actions interfere with the employee's employment opportunities. Instead of using the ultimate employment decision standard, when deciding whether an employment decision rises to the level of actionable retaliation, courts should consider whether the actions affect the employee's current ability to perform her job or whether the employee's future employment opportunities are affected.

Claims of employer retaliation are relevant to the Ellerth/Faragher affirmative defense for two reasons. First, courts will have to decide whether an employer who takes a retaliatory action has behaved unreasonably under the first prong of the affirmative defense. Second, courts will have to consider whether an employee behaves unreasonably when she fails to complain of harassment for fear of retaliation, given a broader definition of adverse employment actions than the ultimate employment decision test.

Part I of this Comment explains the Ellerth and Faragher decisions and outlines the current state of Title VII retaliation law. Part II critiques the Fourth, Fifth, and Eighth Circuits' reasoning underlying the ultimate employment decision standard and argues that courts should protect employees from a wide range of retaliatory action. Part III examines employer and employee reasonableness with respect to retaliation under the Ellerth/Faragher affirmative defense assuming a broad definition of adverse employment action. Part III concludes that an employer who retaliates should fail the first prong of the affirmative defense. An employee who can prove specific threats of retaliation should have the opportunity to prove that she acted reasonably in accord with the second prong of the defense.

I. THE ELLERTH/FARAGHER AFFIRMATIVE DEFENSE

Before Burlington Industries, Inc v Ellerth and Faragher v City of Boca Raton, lower courts divided over when to hold an employer liable for a supervisor’s sexual harassment of employees. In Ellerth and Faragher, the Supreme Court established a

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13 Compare Harrison v Eddy Potash, Inc, 112 F3d 1437, 1444 (10th Cir 1997) (holding employer not liable for sexual harassment of supervisor because the behavior was outside the scope of the employment), with Kauffman v Allied Signal, Inc, 970 F2d 178,
standard of employer liability for sexual harassment perpetrated by supervisors.\(^4\)

### A. The Ellerth and Faragher Opinions

The Supreme Court held in Ellerth and Faragher that when a supervisor creates a sexually hostile work environment resulting in a tangible employment action taken against the employee, such as firing or failure to promote, the employer is vicariously liable for the supervisor's behavior.\(^5\) The Court reasoned that when a supervisor uses authority to take an action against the employee, the supervisor acts as the employer's agent.\(^6\)

When an employee suffers no tangible employment action, the Court constructed a different standard of liability. In this situation, the employer can avoid vicarious liability if it prevails on the Court's newly-created affirmative defense.\(^7\) The affirmative defense has two prongs. First, the employer must show that it took reasonable steps to prevent harassment.\(^8\) The Court stated that a sexual harassment policy and complaint procedure would typically satisfy the first requirement.\(^9\) When a complaint arises, the employer must follow its complaint procedure and act quickly to investigate and terminate sexual harassment committed by its supervisors.\(^10\)

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184-85 (6th Cir 1992) (holding that supervisor who sexually harasses acts within the scope of employment).

\(^11\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.

\(^12\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.

\(^13\) Ellerth, 118 S Ct at 2289 ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.").

\(^14\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2292–93 ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages.").

\(^15\) Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293 ("The defense comprises 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.").

\(^16\) Ellerth, 118 S Ct at 2270 ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); see also Faragher, 118 S Ct at 2293.

\(^17\) "The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior." Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293 (emphasis added).
The second prong of the defense requires the employer to prove "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 prong of the affirmative defense also focuses on the employer's harassment policy. The Court stated that the employee's failure to use the employer's complaint procedure generally is sufficient to show the employee's unreasonable behavior. Additionally, the Court stated that the employer could offer other evidence of the employee's unreasonableness, but did not describe what such evidence might entail.

In *Faragher*, the Court had its first opportunity to apply the affirmative defense and held the employer liable for harassment. The plaintiff, Beth Ann Faragher, a lifeguard, alleged that two supervising lifeguards harassed her through unwelcome touching and offensive remarks. Although the City of Boca Raton, her employer, had a sexual harassment policy, it failed to distribute this policy to any employees in Faragher's department. The Court also found the policy ineffective because it provided no means through which an employee could bypass the harassing supervisor in making complaints. Therefore, the Court held that the employer failed to meet its burden of proving either prong of the affirmative defense.

In summary, *Ellerth* and *Faragher* established a two-pronged affirmative defense for employers when a supervisor creates a hostile working environment. The defense requires the employer to prove that it promulgated a sexual harassment policy and complaint procedure and that the employee unreasonably failed to avail herself of the procedure.

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21 *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
22 *Ellerth*, 118 S Ct at 2270:

And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

See also *Faragher*, 118 S Ct at 2293.
23 *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
24 *Faragher*, 118 S Ct at 2293.
25 Id at 2280.
26 Id.
27 Id.
28 *Faragher*, 118 S Ct at 2293.
29 *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
30 *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
B. Employer Retaliation

The first prong of the affirmative defense enunciated in El-lerth and Faragher raises the following question: should an employer retain the affirmative defense when it retaliates against an employee who utilizes the employer’s complaint procedure? Deciding whether an employer has taken a retaliatory action requires examining Title VII’s anti-retaliation provisions to determine what kind of employee action the retaliation provision protects, as well as what employer actions it forbids.

1. Protected Activity under Title VII’s Retaliation Provision.

Section 704 of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

An employee can establish a prima facie case of retaliation if she has engaged in protected activity, suffered an adverse employment action, and established a causal link between the protected activity and the adverse employment action. If the plaintiff puts forward a prima facie case, the employer must provide a legitimate, non-retaliatory reason for taking the adverse action in order to avoid liability. Once the employer meets its burden of production by articulating a legitimate reason for its decision, the

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31 42 USC § 2000e-3(a).
32 Id.
33 Wyatt v City of Boston, 35 F3d 13, 15 (1st Cir 1994); Quinn v Green Tree Credit Corp, 159 F3d 759, 760 (2d Cir 1998); Robinson v Pittsburgh, 120 F3d 1286, 1299 (3d Cir 1997); McNairn v Sullivan, 929 F2d 974, 980 (4th Cir 1991); Messer v Meno, 130 F3d 130, 140 (5th Cir 1997); Johnson v United States Department of Health & Human Services, 30 F3d 45, 47 (6th Cir 1994); Knox v Indiana, 93 F3d 1327, 1333 (7th Cir 1996); Coffman v Tracker Marine, LP, 141 F3d 1241, 1245 (8th Cir 1998); Strother v Southern California Permanente Medical Group, 79 F3d 859, 868 (9th Cir 1996); Sauers v Salt Lake County, 1 F3d 1122, 1128 (10th Cir 1993); Wideman v Wal-Mart Stores, Inc, 141 F3d 1453, 1454 (11th Cir 1998); Passer v American Chemical Society, 935 F2d 322, 331 (DC Cir 1991) (applying Title VII retaliation standards to an Age Discrimination in Employment Act case).
34 See, for example, Fennell v First Step Designs, Ltd, 83 F3d 526, 535 (1st Cir 1996).
plaintiff must prove that the employer’s reasons are pretext for retaliation to prevail on her claim.  

The retaliation provision contains a participation clause and an opposition clause. Under the participation clause, an employee is protected when she participates in an Equal Employment Opportunity Commission ("EEOC") investigation. The clause covers activity such as filing an EEOC charge or serving as a witness in an EEOC investigation.

The opposition clause proscribes a broader range of employer conduct than the participation clause. The opposition clause protects plaintiffs who file informal or formal discrimination and harassment complaints with their employers, an important factor for the plaintiff who follows the Supreme Court’s admonition in Ellerth and Faragher to comply with her employer’s sexual harassment grievance procedure. In addition to protecting a plaintiff who follows formal internal grievance procedures, the opposition clause also protects “informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.” For example, the plaintiff in Pharr v Rockford Housing Authority, sent a letter to her supervisor stating that she believed a reprimand she received was “the result of the racist and sexist climate that has developed within Rockford Housing Authority and which you foster. I am a black female and my rights have been violated.” The district court concluded that this letter was protected activity.

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1 Id.
2 42 USC § 2000e-3(a) (making it unlawful to discriminate against an employee either “because he has opposed any practice made an unlawful employment practice by this subchapter or participated in any manner in an investigation, proceeding or hearing under this subchapter”).
3 Clover v Total System Services, Inc, 157 F3d 824, 829 (11th Cir 1998) ("Investigation... under this subchapter means an unlawful employment practice investigation conducted by the Equal Employment Opportunity Commission (EEOC) or its designated representative. It does not mean an employer's in-house investigation."). See also Kaible v US Computer Group, Inc, 27 F Supp 2d 373, 378 (E D NY 1998) (holding that statements made to company's attorney in connection with an EEOC charge fell within the participation clause).
5 Barber v CSX Distribution Services, 68 F3d 694, 702 (3d Cir 1995); Sumner v United States Postal Service, 899 F2d 203, 209 (2d Cir 1990).
6 Sumner, 899 F2d at 209.
8 Id at *5.
9 Id at *13-14.

While courts generally agree about the standards for evaluating whether a plaintiff engages in protected activity, the circuits have split over what constitutes an adverse employment action necessary to satisfy the plaintiff's prima facie case of retaliation. The Fourth, Fifth, and Eighth Circuits define adverse employment actions as "ultimate employment decisions," including hiring, firing, demotion, promotion, granting leave, and determining compensation.4

The Fourth Circuit, although not in the context of a retaliation case, originated the ultimate employment decision standard that other circuits have adopted. In Page v Bolger,45 the plaintiff sued the Postmaster General for violating § 717 of Title VII.46 The plaintiff, who was black, argued that an all-white review commission discriminated against him when they denied him a promotion, even though policies provided that one of the commission members should be black or female.47 He contended that the Postmaster General's decision to depart from the affirmative action program for appointing members to the commission constituted a discriminatory personnel action.48

To define "personnel action," as used in § 717, the Fourth Circuit looked at the types of actions § 703(a)(1) of Title VII forbids. Section 703(a)(1) makes it an unlawful employment practice to discriminate in hiring, firing, compensation or other terms, condition, and privileges of employment.49 The court noted that § 703 "has consistently focused on the question of whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating."60 Additionally, the

" Page v Bolger, 645 F2d 227, 233 (4th Cir 1981); Mattern v Eastman Kodak Co, 104 F3d 702, 707 (5th Cir 1997); Ledergerber v Stangler, 122 F3d 1142, 1144 (8th Cir 1997) ("A transfer involving only minor changes in working conditions and not reduction in pay or benefits will not constitute an adverse employment action.").
4 Id at 228. Section 717 provides that "[a]ll personnel actions affecting employees ... in the United States Postal Service ... shall be made free from any discrimination based on race." Civil Rights Act of 1964 § 717, Pub L No 88-352, as added, Pub L No 92-261, 86 Stat 111, codified at 42 USC § 2000e-16(a) (1994).
4 Page, 645 F2d at 228.
4 Id at 232.
4 Civil Rights Act of 1964 § 703, 78 Stat 253, 255, codified at 42 USC § 2000e-2(a)(1) (1994). The full text states that "[I]t shall be an unlawful employment practice 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 privileges of employment, because of such individual’s race, color, religion, sex, or national origin."
4 Page, 645 F2d at 233.
Fourth Circuit stated that there are some interlocutory employment decisions that neither § 717 nor any of Title VII's provisions are designed to reach.\(^\text{51}\)

Like the Fourth Circuit, the Fifth Circuit in *Mattern v Eastman Kodak Co*,\(^\text{52}\) looked to § 703 for aid in interpreting another provision of Title VII, in this case, § 704, the retaliation provision.\(^\text{53}\) Both § 704 and § 703(a)(1) use the term "discriminate."\(^\text{54}\) Therefore, in interpreting § 704, the Fifth Circuit looked for guidance in § 703.\(^\text{55}\) Because § 703 uses the term "discriminate" in connection with hiring, refusal to hire, discharge, and compensation, the Fifth Circuit concluded that the term "discriminate" in § 704 should be interpreted to prohibit only these same actions when taken in retaliation.\(^\text{56}\) However, the Fifth Circuit overlooked the fact that § 703(a)(1) also forbids discrimination in the terms and conditions of employment,\(^\text{57}\) which supports the view that Title VII should reach more than ultimate employment decisions.\(^\text{58}\) In *Mattern*, the Fifth Circuit held that hostility from other employees was not an ultimate employment decision sufficient to constitute an adverse employment action.\(^\text{59}\)

\(^\text{51}\) Id.

\(^\text{52}\) 104 F3d 702 (5th Cir 1997).

\(^\text{53}\) Id at 708–09.

\(^\text{54}\) Compare 42 USC § 2000e-3(a), making it

an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title],

with 42 USC § 2000e-2(a)(1), making it an unlawful employment practice

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 privileges of employment, because of such individuals' race, color, religion, sex, or national origin.

\(^\text{55}\) *Mattern*, 104 F3d at 709.

\(^\text{56}\) Id.

\(^\text{57}\) See note 54 and accompanying text.

\(^\text{58}\) See Melissa A. Essary and Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 Mo L Rev 115, 141 ("However, the Fifth Circuit's ultimate employment decision standard appears to contradict even the plain language of the substantive antidiscrimination clause. Under the statute, discrimination in the 'terms and conditions' of employment is as actionable as the easily identifiable actions of hiring and firing."). For further discussion of Title VII's language, see Part II A.

\(^\text{59}\) Contrast id at 707 with *Gunnell v Utah Valley State College*, 152 F3d 1253, 1264–65 (10th Cir 1998) (holding that co-worker hostility and harassment could constitute adverse employment actions if the harassment were severe and the employer organized or acquiesced in the harassment).
The Eighth Circuit applied the ultimate employment decision test in *Ledergerber v Stangler*. The Eighth Circuit stated that in order to establish a prima facie case of retaliation, the plaintiff has to show that she suffered an adverse employment action that "effectuated a material change in the terms or conditions of her employment." The plaintiff in this case could not demonstrate a materially adverse action when her employer reassigned her staff after she filed a complaint of racial discrimination. In the Eighth Circuit's view, although replacing the plaintiff's staff "may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII."

In contrast to the Fourth, Fifth, and Eighth Circuits, the Eleventh Circuit recently defined adverse employment action more broadly. In *Wideman v Wal-Mart Stores, Inc.*, the court concluded that the plaintiff's employer retaliated against her when her manager reprimanded her, delayed authorizing medical treatment, and asked co-workers to give negative statements about the plaintiff. The Eleventh Circuit reasoned that the language of § 704 does not limit retaliatory discrimination to ultimate employment actions. Additionally, the court viewed its interpretation as more consistent with Title VII's purposes than the ultimate employment decision approach. If employers can retaliate so long as they do not discharge or demote an employee,

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62 122 F3d 1142 (8th Cir 1997).
63 Id at 1144.
64 Id.
65 Id.
66 Id.
67 Other circuits also define adverse employment actions broadly. See *Wyatt v City of Boston*, 35 F3d 13, 15–16 (1st Cir 1994) (recognizing that adverse actions include discharges, demotions, disadvantageous transfers or assignments, denials of promotions, undeserved negative evaluations, and toleration of harassment by co-workers); *Hampton v Borough of Tinton Falls Police Dept*, 98 F3d 107, 116 (3d Cir 1996) (holding that a transfer or assignment that does not result in a tangible loss constitutes an adverse action); *Smart v Ball State University*, 89 F3d 437, 441 (7th Cir 1996) ("Adverse employment action has been defined quite broadly in this circuit."); *Strother v Southern California Permanente Medical Group*, 79 F3d 859, 869 (9th Cir 1996) (finding adverse employment actions when employer denied plaintiff the opportunity to attend educational seminars, excluded her from meetings, subjected her to harassment from co-workers, and gave her a more demanding work schedule).
68 141 F3d 1453 (11th Cir 1998).
69 Id at 1455–56.
70 Id at 1456 (“Read in the light of ordinary understanding, the term ‘discriminate’ is not limited to ‘ultimate employment decisions.’”). See also *Passer v American Chemical Society*, 935 F2d 322, 331 (DC Cir 1991) (noting that a parallel anti-retaliation provision in the ADEA "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion").
employees may still be unwilling to complain of harassment for fear of other forms of retaliation, the court reasoned.\(^{68}\)

C. Plaintiff's Failure to Follow Grievance Procedures Because of Fear of Retaliation.

The second prong of the Ellerth/Faragher affirmative defense raises the question of whether an employee's fear of retaliation is a reasonable justification for failing to avail herself of an employer's sexual harassment complaint procedure. Several courts applying the new affirmative defense have concluded that the employee acted unreasonably when failing to complain of harassing behavior out of fear of retaliation. For example, this fact pattern emerged in Sconce v Tandy Corp,\(^{69}\) and the court granted the defendant's motion for summary judgment.\(^{70}\) The employee, Nicole Sconce, and the employer conceded that Sconce's supervisor subjected her to a hostile working environment by touching her and making offensive comments.\(^{71}\) Even though Sconce knew Tandy had a sexual harassment policy, she never reported this conduct, claiming that her supervisor threatened to terminate her if she filed a complaint.\(^{72}\) After Tandy granted her request for a transfer to another store, Sconce filed a complaint with the EEOC, which led Tandy to initiate its own investigation.\(^{73}\) As a result of the investigation, Tandy reprimanded the supervisor and ordered him not to have any contact with Sconce.\(^{74}\)

On these facts, the district court in Sconce concluded that the plaintiff's failure to report the harassment was unreasonable.\(^{75}\) Sconce feared retaliation if she complained to her employer, but the court pointed out that Tandy's policy allowed her to bypass filing a complaint with her immediate supervisor, who was also the harasser.\(^{76}\) The district court worried that allowing an employee to avoid reporting harassment any time the employee feared retaliation would undermine the affirmative defense.\(^{77}\) In this case, the court required additional evidence to justify Sconce's fears, such as evidence that Tandy's procedures were

\(^{68}\) 141 F3d at 1456.
\(^{70}\) Id at 778.
\(^{71}\) Id at 775.
\(^{72}\) Id at 778.
\(^{73}\) 9 F Supp 2d at 775.
\(^{74}\) Id.
\(^{75}\) Id at 778.
\(^{76}\) Id.
\(^{77}\) 9 F Supp 2d at 778.
ineffective or unfairly administered. Because Sconce could offer no such evidence, the district court concluded that she acted unreasonably in failing to report harassing conduct and granted summary judgment in favor of Tandy.

In a factually similar case, the district court in Fierro v Saks Fifth Avenue held that the plaintiff acted unreasonably when he failed to report racial harassment. It applied the El-lerth/Faragher affirmative defense to a racially hostile work environment claim. As in Sconce, the plaintiff in Fierro was aware of the employer's harassment policy yet failed to file a complaint because he "was afraid of repercussions. If you start to conflict with you [sic] manager, before you know it its [sic] not a very pleasant outcome." Fierro did not produce evidence that other employees suffered retaliation when they used the defendant's complaint procedure. He also could not explain what repercussions he feared. The district court determined that Fierro's unsupported assertions of fear of retaliation did not create a genuine issue of material fact. Thus, the defendant prevailed on the affirmative defense and won summary judgment.

Johnson v Brown serves as an example of the facts necessary to establish a reasonable fear of retaliation. In Johnson, the plaintiff, Michelle Johnson, accused her supervisor of sexual harassment. Johnson did not complain of harassment that began in September 1990 until January 1992. In addition to repeated offensive remarks, harassing incidents included Johnson's supervisor locking her in a room and exposing himself to her, trying to separate her legs as she moved from her desk to a typewriter, and rubbing his body up against her. The district court found it reasonable that her failure to report resulted from her supervisor's threats of termination. Although the court did not explicitly

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**Footnotes:**

78 Id.
79 Id.
80 13 F Supp 2d 481 (S D NY 1998).
81 Id at 493.
82 Id at 492.
83 Id.
84 13 F Supp 2d at 492.
85 Id.
86 Id at 493.
87 Id.
89 Id at *1.
90 Id at *2, *6.
91 Id at *3–4.
92 1998 US Dist LEXIS 12689 at *12–13. Although the district court found Johnson's delay in reporting harassment reasonable, the court nevertheless failed to find the em-
state what the supervisor said to Johnson, the court's finding of credibility of Johnson's fear of termination suggests that Williams made specific threats to terminate Johnson.

Most courts have ruled against plaintiffs claiming that they failed to report sexual harassment out of a fear of retaliation because the plaintiffs have offered no evidence to support their fears. Before a court will find a plaintiff's fear of retaliation reasonable, courts have required some evidence supporting the plaintiff's belief that her employer would retaliate, such as actual threats to retaliate, past evidence of retaliation, or unfair administration of complaint procedures. Speculation of retaliation fails to excuse an employee who decides not to complain to her employer.

II. DEFINING ADVERSE EMPLOYMENT ACTION BROADLY

The Ellerth and Faragher decisions heighten the importance of employers adopting and employees utilizing internal grievance procedures. To encourage employees to use grievance procedures, employers must protect them from retaliation. A liberal definition of adverse employment action best suits the goal of encouraging employees to bring sexual harassment complaints to the attention of their employers. Courts should define adverse employment actions broadly in order to fit with Title VII's prohibition of employment discrimination generally, not merely em-

employer liable because it incorrectly applied the affirmative defense. Under Ellerth and Faragher, the employer must prove both that it reasonably responded to complaints and that the employee behaved unreasonably in failing to use the employer's complaint procedure. Here, since the court found that Johnson's delay was not unreasonable, the employer should have been held liable.

Plaintiffs seek to justify this failure by claiming a fear or repercussion from Brown if they reported his behavior. This allegation is based merely on conclusory assertions that Wilson and Jones felt they would get into trouble if they reported Brown's behavior. As such, it is insufficient to withstand a motion for summary judgment.

Id at 1386 (citations omitted); Montero v AGCO Corp, 19 F Supp 2d 1143, 1146 (E D Cal 1998) (holding plaintiff's fear of retaliation an insufficient reason to wait two years before complaining of harassment).


Sconce, 9 F Supp 2d at 778.

Id. See also Fierro, 13 F Supp 2d at 492.

See Beverly W. Garafalo, Practical Guidelines for Employers, 13 No 2 Corp Counsellor 3 (July 1998) ("Thus, while employers in recent years have been diligent in adopting sexual harassment policies, preventative measures, adequate complaint procedures and an effective response are now more important than ever.").
ployment discrimination which results in ultimate employment
decisions. Finally, a broad interpretation of adverse employment
action also accords with the liberal reading courts have given to
other aspects of the retaliation provision.99

A. Title VII's Language

A broader definition of adverse employment action better ac-
cords with Title VII's language. Unlike Title VII's substantive
discrimination provisions, no limiting language appears in the
retaliation provision.99 For instance, § 703 of Title VII makes it an
unlawful employment practice
to fail or refuse to hire or to discharge any individual, or
otherwise to discriminate against any individual with re-
spect to his compensation, terms, conditions or privileges
of employment, because of such individual's race, color,
religion, sex, or national origin.100

In contrast, the retaliation provision makes it an unlawful em-
ployment practice for an employer to discriminate against some-
one who has participated in a Title VII enforcement proceeding or
opposed conduct made unlawful under Title VII.101 As the Sev-
enth, Eleventh, and D.C. Circuits have demonstrated, the retalia-
tion provision contains no language restricting adverse actions to
those enumerated in § 703.102 The absence of limiting language
suggests that Congress intended the retaliation provision to pro-
hibit a broader range of conduct than the substantive discrimina-
tion provisions.103 Consequently, the language of the statute sup-
ports the view that adverse employment actions include a broad
range of conduct beyond ultimate employment decisions.

Although the language of the statute as a whole supports a
broad definition of adverse employment action, the Fifth Circuit
nonetheless used the language of the statute to reach its holding
that § 704 prohibits retaliation only when it rises to the level of
an ultimate employment decision.104 To interpret the term "discrimi-
erate" in § 704, the Fifth Circuit looked to § 703(a), Title

98 See Part II D.
99 See McDonnell v Cisneros, 84 F3d 256, 258 (7th Cir 1996).
101 42 USC § 2000e-3(a).
102 Wideman v Wal-Mart Stores, Inc, 141 F3d 1453, 1456 (11th Cir 1998); McDonnell,
84 F3d at 258; Passer v American Chemical Society, 935 F2d 322, 331 (DC Cir 1991).
103 McDonnell, 84 F3d at 259.
104 Mattern v Eastman Kodak Co, 104 F3d 702, 708–09 (5th Cir 1997).
VII's main provision prohibiting employment discrimination.\(^\text{105}\) Section 703(a)(1) makes it an unlawful employment practice for an employer to discriminate in hiring, firing, compensation, or other terms, conditions, and privileges of employment.\(^\text{106}\) Additionally, § 703(a)(2) makes it an unlawful employment practice for an employer

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.\(^\text{107}\)

The Fifth Circuit noted that while § 703(a)(1) uses the term “discriminate” in connection with actions such as firing and compensating, § 703(a)(2) forbids practices that merely tend to affect employment opportunities.\(^\text{108}\) Because § 703(a)(1), like § 704, uses the term discriminate while § 703(a)(2) does not, the Fifth Circuit concluded that § 703(a)(1) should control its interpretation of § 704, the retaliation provision.\(^\text{109}\) According to this reasoning, because § 703(a)(1) limits discrimination to ultimate employment decisions like hiring, firing, and compensation, it should also limit the retaliation provision to prohibit employer conduct only when it takes the form of an ultimate employment action.\(^\text{110}\)

The Fifth Circuit's statutory reading is unpersuasive. The court distinguishes between acts that discriminate and acts that limit, segregate, or classify employees based on race, sex, religion, or national origin. The Fifth Circuit calls the harm resulting from § 703(a)(2) violation “vague harms” because a violation can arise from action that only “tend[s] to deprive any individual of employment opportunities or otherwise adversely affect his status as employee.”\(^\text{111}\) However, the distinction between acts that discriminate and acts that limit, segregate, or classify is misplaced. The Fifth Circuit's reading implies that acts that limit, segregate,
or classify result from something other than discrimination, rather than what they really are, a specific form of discrimination. The proper question before the Fifth Circuit was not what it means to discriminate, but whether the statute prohibits a particular form of discrimination or adverse employment action, however slight that adverse action may be.

B. Ellerth and Faragher's Incentive to Resolve Sexual Harassment Complaints Internally

Broadening the definition of adverse employment action not only better reflects the language of Title VII, it also effectuates the purposes of Title VII that the Supreme Court emphasized in Ellerth and Faragher. In these decisions, the Supreme Court stated that preventing employment discrimination is one of the main purposes of Title VII. While providing remedies to discrimination victims represents an important goal of Title VII, the statute best serves its function when it prevents discrimination from occurring in the first place. Thus, the Ellerth/Faragher affirmative defense focuses on preventing and remediating sexual harassment through an employer's internal sexual harassment policy and complaint procedure.

Courts have emphasized that Congress intended to encourage employers and employees to conciliate rather than litigate their grievances involving discrimination within the workplace. An informal resolution in the workplace will often be more productive in resolving a complaint than going directly to the EEOC and initiating a costly and adversarial proceeding against the employer.

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112 Burlington Industries, Inc v Ellerth, 118 S Ct 2257, 2270 (1998); Faragher v City of Boca Raton, 118 S Ct 2275, 2292 (1998) (Title VII's "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").

113 Ellerth, 118 S Ct at 2270 ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."); Faragher, 118 S Ct 2275, 2292 (1998) (same).

114 Id ("Were employer liability to depend in part on an employer's effort to create such [sexual harassment complaint] procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context."); Faragher, 118 S Ct at 2292 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.").

115 Hearn v R R Donnelley & Sons Co, 460 F Supp 546, 548 (N D Ill 1978) ("To require the initiation of an adversarial or formal investigative proceeding as a condition precedent to the applicability of § 704(a) would frequently be so disruptive as to be counterprodu-
Each prong of the *Ellerth/Faragher* affirmative defense encourages internal resolution of sexual harassment complaints. The first prong of the affirmative defense encourages and in some cases requires an employer to adopt a sexual harassment policy and grievance mechanism.\(^\text{117}\) When asserting the affirmative defense, an employer must prove that:

it exercised reasonable care to prevent and correct promptly any sexually harassing behavior .... While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.\(^\text{118}\)

A sexual harassment policy serves two purposes. First, the policy defines for employees the term sexual harassment and thus sets boundaries on their behavior.\(^\text{119}\) Second, an effective grievance procedure gives the employee a means to report harassing behavior as it occurs.\(^\text{120}\) If an employee comes forward, she gives the employer the opportunity to stop harassment, discipline the harasser, and prevent further harm. An employer who does not enact an internal complaint procedure increases the chance that it will be unable to prove that it behaved reasonably and thus increases its risk of liability.\(^\text{121}\) Thus, the affirmative defense gives the employer a financial incentive to enact an effective complaint procedure.\(^\text{122}\)

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\(^{117}\) *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.

\(^{118}\) *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.

\(^{119}\) See Michael F. Kleine, *Practical Advice for Employers in Anticipation of Faragher's Outcome*, 6 No 2 Empl L Strategist 1, 6 (1998) ("Sexual harassment means different things to different people. An employer should not leave to supervisors and other employees the determination of what behavior will be considered harassment. Accordingly, the policy should define harassment and provide examples of sexually harassing conduct.").

\(^{120}\) *Faragher*, 118 S Ct at 2292 ("An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense.").

\(^{121}\) See, for example, id at 2293 (employer liable for sexual harassment when it did not distribute its sexual harassment policy to all employees). *Faragher* does not explicitly require that an employer create a sexual harassment policy to avoid liability, explaining that a formal harassment policy may not be necessary for a small employer. Id.

\(^{122}\) *Ellerth*, 118 S Ct at 2270 ("Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context."); *Faragher*, 118 S Ct at 2292
However, even the most well-written sexual harassment policy will prove ineffective unless employees take advantage of it. The second prong of the affirmative defense promotes internal resolution of complaints by giving the employee an incentive to report harassment, encouraging her to try to resolve her grievance before resorting to Title VII's remedies. As demonstrated by *Sconce v Tandy*, if an employee files a complaint with the EEOC before notifying the employer of harassing behavior, the employee decreases the likelihood that she will recover under Title VII. Thus, *Ellerth* and *Faragher* give the employee a financial incentive to use her employer's grievance procedures. If the employee delays in using or fails to use the policy, she risks losing part or all of her opportunity to recover damages.

Although the affirmative defense gives employees a financial incentive to utilize their employers' complaint procedures, that incentive may not be enough if employers can retaliate through harassment or reprimands. A more liberal definition of adverse employment action is necessary because, in many occupations, an employee's duties depend on the work assignments she receives from her supervisor. However, the ultimate employment decision standard does not reach an employer's work assignment decisions. For example, an advertising executive relies on her boss to let her work on a big account. A partner in a law firm asks an associate to work on a complex transaction. In these examples, the supervisor determines the quality of work experiences and skills that the employee acquires. If the employee alleges to her employer that her supervisor subjected her to a hostile work environment, the supervisor could be subject to disciplinary action, which would give the supervisor a motive to retaliate against the complainant. The supervisor could retaliate by altering the

(affirmative defense "give[s] credit [ ] to employers who make reasonable efforts to discharge their duty.").

123 *Ellerth*, 118 S Ct at 2270 ("[L]imiting employer liability could encourage employees to report harassing conduct before it becomes severe and pervasive."); *Faragher*, 118 S Ct at 2292.


125 Id at 778.

126 *Faragher*, 118 S Ct at 2292 ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so."). See also *Dull v Saint Luke's Hospital of Duluth*, 21 F Supp 2d 1022, 1027 (D Minn 1998) (stating that plaintiff's failure to complain could limit her damages).


128 See, for example, *Kotcher v Rosa & Sullivan Appliance Center, Inc*, 957 F2d 59, 62 (2d Cir 1992) (harassing supervisor transferred and demoted). See also *Sample Sexual Harassment Policies*, 520 PLI/Lit 431, 451 (1995) (listing referral to counseling, oral or
complaining employee’s job duties to insure that her career advancement stops. The advertising executive’s supervisor can assign her to small accounts with limited exposure that demand little creativity. The partner can give the associate menial work, ensuring that she will not have the necessary experience to stay on the partnership track.

In the above examples, the employee does not suffer an immediate economic harm. Her job title and compensation remain the same. Yet after filing an internal complaint, her job responsibilities differ significantly from those before she filed a complaint. She is in a worse position than her co-workers because she complained of sexual harassment. If an employee knew beforehand that she would receive less desirable job assignments, she might not report the harassment. If she does not complain, the employee would be worse off than her co-workers who were not victims of harassment. Permitting an employer to take limited retaliatory action without risking punishment jeopardizes Title VII’s goal of “make whole” relief. Title VII’s enforcement procedures cannot make an employee whole if the employer can put the employee in a worse position with respect to her career advancement than if she had not reported the harassment. Therefore, courts should interpret Title VII’s retaliation provisions liberally so that employees feel they can follow Ellerth and Faragher’s instruction to use internal complaint procedures without making themselves targets for retaliation.

C. Title VII Reaches Conduct Other Than Ultimate Employment Decisions

Contrary to the Fourth, Fifth, and Eighth Circuits’ assertion that Title VII was intended only to reach ultimate employment decisions, Title VII forbids many employment actions that fall short of ultimate employment decisions. Otherwise, a cause of action for a hostile work environment would not exist. An employee subjected to a hostile work environment does not suffer from discharge, demotion, or decreases in compensation. Rather, a hostile work environment is actionable because it interferes

written reprimands, transfer, suspension, termination, and referral to the criminal justice system as possible disciplinary actions against violators of sexual harassment policy).


130 Page v Bolger, 645 F2d 227, 233 (4th Cir 1981); Mattern v Eastman Kodak Co, 104 F3d 702, 707 (5th Cir 1997); Ledergerber v Stangler, 122 F3d 1142, 1144 (8th Cir 1997).
with the individual’s working conditions. In addition to forbidding conduct even when it does not cause economic harm, Title VII permits a plaintiff not suffering psychological harm to recover.

The Ellerth and Faragher decisions strengthen the view that Title VII applies to conduct short of ultimate employment decisions. Ellerth and Faragher hold that an employee may recover from an employer for a hostile work environment created by a supervisor even if the employee suffered no tangible employment action. The Supreme Court explained that tangible employment actions include decisions such as hiring, firing, and failure to promote, actions that the Fourth, Fifth, and Eighth Circuits also include in their list of ultimate employment decisions. If the employer does not take such an action, however, an employee can still hold the employer liable for sexual harassment provided that the employer cannot prove the affirmative defense. Just as an employee need not suffer an ultimate employment decision to prove discrimination by her employer, an employee should not have to demonstrate an ultimate employment decision to prove retaliation, a form of discrimination. As the Supreme Court first noted in Meritor Savings Bank, FSB v Vinson, the language of Title VII is not limited to economic or tangible discrimination. The phrase terms, conditions, or privileges of employment evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment. If an employer cannot alter the terms and conditions of employment based on sex, then it should not be permitted to do so in response to an employee’s complaint of sexual harassment. The Fourth, Fifth and Eighth Circuits misread the statute when they conclude that Title VII was designed only to reach ultimate employ-

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131 Meritor Savings Bank, FSB v Vinson, 477 US 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”) (citation omitted) (alteration in original).


133 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.

134 Ellerth, 118 S Ct at 2268 (“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.”). See also Faragher, 118 S Ct at 2284.

135 Page, 645 F2d at 233; Mattern, 104 F3d at 707; Ledergerber, 122 F3d at 1144.

136 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.


138 Id at 64 (citations and internal quotation marks omitted).
ment decisions. Congress designed Title VII to address discrimination, whether or not it results in ultimate employment decisions. A broad view of adverse employment actions is most consistent with the Supreme Court's interpretation of Title VII.

D. Broad Interpretations of Other Aspects of Retaliation Law

A more liberal definition of adverse employment action than the ultimate employment decision test better fits with courts' interpretations of other definitions within Title VII's retaliation provision. The opposition clause in § 704 forbids an employer from retaliating when an employee "has opposed any practice made an unlawful employment practice by this subchapter." The Ninth Circuit explained that a literal reading of the statute would protect an employee only when the conduct she opposed actually violated the statute. For example, if an employee filed an internal complaint of sexual harassment and her employer responded by firing her, the employer's action would be legal under a literal reading of the statute so long as the alleged sexual harassment did not meet the "severe and pervasive" standard.

A literal interpretation of the statute, however, would chill legitimate opposition to discrimination. Furthermore, a strict reading of the opposition clause would result in more complaints to the EEOC. The participation clause protects employees when they participate in an EEOC investigation or hearing, regardless of whether the underlying charge has merit. Thus, a narrow reading of the opposition clause would lead to more EEOC charges since employees need not worry about the strength of their case if they file an EEOC charge. The belief that "resolution of such charges without governmental prodding should be

139 Page, 645 F2d at 233 (4th Cir 1981); Mattern, 104 F3d at 707; Ledergerber, 122 F3d at 1144.
140 Meritor, 477 US at 64 (indicating that Title VII is intended "to strike at the entire spectrum of disparate treatment between men and women in employment.") (citation omitted).
141 42 USC § 2000e-3(a)(1).
142 Sias v City Demonstration Agency, 588 F2d 692, 695 (9th Cir 1978).
144 Sias, 588 F2d at 695 ("Such a narrow interpretation, however, would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances.").
145 Id.
146 Id at 695 ("It is well settled that the participation clause shields an employee from retaliation regardless of the merit of his EEOC charge.").
147 Id.
encouraged" warrants a broader reading of the opposition clause. Consequently, the opposition clause protects an employee so long as she has a reasonable belief that the activity she opposes violates Title VII.

Courts have given a broad reading to the participation clause as well. In *McDonnell v Cisneros*, one of the plaintiffs alleged that his employer retaliated against him for failing to prevent a co-worker from filing a complaint. The court concluded that the participation clause protected the plaintiff's action. The Seventh Circuit acknowledged that a literal reading of the participation clause would not protect the plaintiff in this case. In addition, the literal reading would allow an employer to retaliate against all employees if the employer thought that one employee made a charge but did not know which employee. The court observed that "[i]t does no great violence to the statutory language to construe 'he has made a charge' to include 'he was suspected of having made a charge' and 'he allowed a charge to be made.'"

Additionally, the Supreme Court recently resolved an ambiguity in the statutory language of § 704 by holding that the statute protects former employees as well as current employees. Title VII defines an employee as "an individual employed by an employer." In *Robinson v Shell Oil Co*, the Court concluded that the statute was ambiguous as to whether an employee included in § 704 also meant a former employee. Therefore, the Supreme Court examined the purposes of Title VII generally and the retaliation specifically to aid its interpretation. It noted that § 703 protects employees from discriminatory discharge. If the statute protected only current employees from retaliation, then an employer could retaliate against an employee he fired by

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148 *Hearth*, 436 F Supp at 689.
149 Id ("When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.").
150 84 F3d 266 (7th Cir 1996).
151 Id at 261–62.
152 Id at 262.
153 Id.
154 84 F3d at 262.
155 Id (citation omitted).
159 Id at 345.
160 Id.
161 Id, citing 42 USC § 2000e-2(a)(1).
giving negative references to future employers.\textsuperscript{162} Further, employers would have an incentive to fire employees they suspect might bring Title VII claims if the employer believed that post-employment retaliation would prevent the discharged employee from filing an EEOC complaint.\textsuperscript{163} The Court concluded that extending to former employees the coverage of § 704 was most consistent with "a primary purpose of anti-retaliation provisions: Maintaining unfettered access to statutory remedial mechanisms."\textsuperscript{164}

Courts have interpreted the retaliation clauses liberally in order to effectuate Title VII's goal of eliminating discrimination.\textsuperscript{165} To further that goal, the retaliation provisions must enable employees to complain broadly of discrimination without fear of risking their jobs,\textsuperscript{166} even if a court later determines that the employee's complaint lacks legal merit.\textsuperscript{167} Additionally, courts have read the statute as protecting a wide range of employee opposition and participation. Consistent with this reading, the statute should prohibit a wide range of retaliatory actions. Allowing an employer to retaliate in a number of subtle ways undermines the judicial interpretations of the range of protected activity. An employee can protest discrimination through a variety of means, but an employer's ability to change the employee's work assignments or reprimand the employee undermines the otherwise broad protection of the retaliation provisions and chills the incentive of employees to come forward and report sexual harassment.

E. A Test to Define Adverse Employment Actions

The language, purposes, and judicial interpretations of Title VII all support the view that employment decisions short of discharge, failure to promote, and lowering compensation should

\textsuperscript{162} See Robinson, 519 US at 346.
\textsuperscript{163} Id (noting the "perverse incentive . . . to fire employees who might bring Title VII claims").
\textsuperscript{164} Id.
\textsuperscript{165} See, for example, Sias, 588 F2d at 695.
\textsuperscript{166} See Note, Terminate, Then Retaliate: Title VII Section 704(a) and Robinson v. Shell Oil Co., 75 NC L Rev 376, 400 (1996) ("The primary legislative purpose behind section 704(a) is to remove the deterrent effect that fear of employer reprisal has on employees who might question employment conditions.").
\textsuperscript{167} EEOC v Crown Zellerbach Corp, 720 F2d 1008, 1013 (9th Cir 1983) ("It is not necessary, however, that the practice be demonstrably unlawful; opposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice.").
constitute adverse employment actions if they are retaliatory. Courts need a different test to determine whether an employer has taken an adverse employment action because the ultimate employment decision standard inadequately protects an employee from retaliation who follows Ellerth and Faragher's directive and files a sexual harassment complaint with her employer. If an adverse employment action includes only termination, demotion, granting leave, or changing compensation, an employee who files a complaint leaves herself vulnerable to retaliation in the form of less desirable work assignments, poor evaluations, transfer, or additional harassment. Such actions might not have an immediate effect on the employee's salary, but they could slow or impede career advancement by making the employee's job intolerable. In addition to any economic or psychological injuries from the initial harassment, the complainant faces a second punishment in the form of retaliation. When a victim files an internal complaint, the sexual harassment may stop, but the work environment may be no less oppressive and abusive.

The test most consistent with the language and purpose of Title VII would require the plaintiff to show that "her future employment had been affected or that her ability to do her job had been impaired," termed the current ability/future opportunity test. Instead of protecting employees from a few narrow categories of retaliation, the current ability/future opportunity standard would protect employees from all employer decisions made in retaliation that adversely affect the plaintiff's current or future employment. This standard proscribes a broader range of activity than the narrow Fourth, Fifth, and Eighth Circuit standard that forbids retaliatory action only in the form of ultimate employ-

169 See Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987) ("One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.").
170 McCoy v. Macon Water Authority, 966 F. Supp. 1209, 1220 (M.D. Ga. 1997). In McCoy, the quoted language is used in connection with deciding whether an employer's action altered the terms and conditions of employment so that it constitutes an adverse employment action. I reject the terms and conditions test used in McCoy because the statutory language does not require that retaliatory action alter the terms and conditions of employment. See 42 U.S.C. § 2000e-3 (1994). However, courts can use the quoted language more liberally to prohibit retaliatory action that would not be prohibited under a narrower "terms and conditions" test. For instance, the district court in McCoy stated that retaliatory harassment must be sufficiently severe and pervasive to alter the terms and conditions of employment. McCoy, 966 F. Supp. at 1220–21. Under my interpretation, harassment would not have to be severe and pervasive to constitute a violation of 42 U.S.C. § 2000e-3.
ment decisions.\textsuperscript{171} However, it does not go so far as to allow an employee to have a valid retaliation claim for any negative decision in the workplace. A plaintiff must connect the employer's action to a future job detriment or to a current inability to perform her job. The employee cannot sustain a retaliation claim simply because she receives work that she does not like. Title VII cannot eliminate all workplace tension,\textsuperscript{172} but it does prohibit manifestations of workplace hostility sufficient to interfere with an employee's work.

Although the current ability/future employment test will require courts to question the motivation behind a broader range of employer decisions, the inquiry itself is identical to that already required under current law.\textsuperscript{173} If the employee establishes a prima facie case of retaliation, then the employer has the burden of producing a legitimate, non-retaliatory reason for its employment decision.\textsuperscript{174} If the employer offers a legitimate reason, then the court must consider whether that reason is pretext for discrimination.\textsuperscript{175} Protecting a broad range of adverse actions does not change this inquiry. The only difference is that an employer will have to justify its decisions to transfer or give poor evaluations to an employee just as an employer now has to justify its decision to terminate, demote, or change an employee's compensation. While some cases may be difficult, this fact alone does not require denying relief to an employee whose transfer or reprimand is obviously retaliatory.

The greater difficulty with a broad adverse action definition is deciding which actions adversely affect the employee's present or future employment opportunities. The task of deciding whether an action is adverse is difficult, but not entirely speculative. For example, applying the current ability/future employment opportunity standard to the case of work assignments, a plaintiff could show that the quality of work assignments she re-

\textsuperscript{171} See text accompanying note 1.
\textsuperscript{172} Oncale v Sundowner Offshore Services, Inc, 523 US 75, 80 (1998) (stating that Title VII is not a "general civility code").
\textsuperscript{173} One commentator argues that the ultimate employment test is more difficult for courts to apply because courts are not equipped to tell whether a decision is "ultimate." Instead, he argues that courts should evaluate whether retaliatory actions affect the terms and conditions of employment because the language of Title VII already requires courts to decide whether actions affect the terms and conditions of employment. Ernest Lidge, The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse, 47 U Kan L Rev 333, 386–90 (1999).
\textsuperscript{174} See note 34 and accompanying text.
\textsuperscript{175} See note 35 and accompanying text.
ceived differed before and after her complaint. Alternatively, she could show that the quality of work assignments she received differed from that of work assigned to her co-workers who did not raise sexual harassment complaints. To prove that the change in responsibilities was adverse, the employee could demonstrate that the change in assignments threatens her chance for pay increases, promotions or some other future employment opportunity. She could point to others in her position whom her employer promoted and the qualifications and work experiences of those employees.

To prove the adverse effect of an undeserved evaluation or reprimand, the employee could show that the action lessens her chances of advancement. She would have to point to other employees who received poor evaluations and who did not get pay raises or promotions. If an employee can continue to advance in the company even with a poor evaluation, then the evaluation would not be an adverse employment action.

In determining whether an evaluation or reprimand is undeserved, the court can look to the timing of the decision. A reprimand or evaluation that quickly follows a complaint suggests that it might be retaliatory.\(^7\) If an employee's annual evaluation is not due for another four months and a supervisor completes a negative evaluation a week after the employee files a sexual harassment complaint, the evaluation might not accurately reflect the employee's performance because the employer departed from its usual evaluation schedule. A court can also look to the employee's past evaluations as a benchmark. Of course, this does not mean that an employee's evaluations must remain constant, but a dramatic departure from past evaluations, otherwise unexplained, could raise an inference of retaliation. Additionally, the employee can compare her performance to that of other employees. For example, the complainant can point to other employees with a similar performance record who did not receive reprimands or negative evaluations because they did not complain of harassment.

The current ability prong of the current ability/future opportunity test would prohibit retaliatory harassment. As the Supreme Court recognized in *Meritor*, harassment can interfere with the terms and conditions of employment\(^7\) and thus fall un-

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\(^7\) *Wrenn v Gould*, 808 F2d 493, 501 (6th Cir 1987) (causal connection between the protected activity and adverse action “may be demonstrated by the proximity of the adverse action to the protected activity”).

der the current ability/future opportunity test because it interferes with an employee's ability to perform her job. Although the Tenth Circuit in *Gunnell v Utah Valley State College*\(^{178}\) held that retaliatory harassment can constitute an adverse employment action, the current ability/future opportunity standard covers more harassing conduct than the court in *Gunnell* prohibited. *Gunnell* prohibited retaliatory harassment only when it was so severe or pervasive as to alter a term or condition of employment.\(^{179}\) The language of § 704 suggests that harassment need not be so severe as to alter a term or condition of employment since the words “terms and conditions” are lacking from § 704.\(^{180}\) To qualify as an adverse employment action, retaliatory harassment need only affect the employee's current ability to perform her job. Harassment that interferes with her work, even if not severe and pervasive, should constitute an adverse employment action. If the retaliation clauses do not prohibit harassment, then the employer could subject the complaining employee to retaliatory harassment rather than sexual harassment. Despite complaining of sexual harassment, the employee remains in an abusive work environment. If Title VII does not forbid retaliatory harassment, then it cannot meet its goal of eliminating employment discrimination and harassment.

While a broad definition of adverse employment action will require courts to engage in a more fact-intensive inquiry in cases that reach the courts, it may not dramatically increase the number of complaints filed with the EEOC and eventually adjudicated in court because of *Ellerth* and *Faragher*'s incentive for employers to adopt effective sexual harassment complaint procedures in order to avoid Title VII liability.\(^{181}\) *Ellerth* and *Faragher* require the employee to use complaint procedures in order to preserve a legal claim.\(^{182}\) Greater protections from retaliation will make employees more willing to use the employer's complaint procedure. The employer has an incentive under *Ellerth* and *Faragher* to investigate and try to correct harassment of supervisors in order to preserve its affirmative defense.\(^{183}\) With these inducements, parties are more likely to address their complaints internally and not through the legal system.

\(^{178}\) 152 F3d 1253 (10th Cir 1998).
\(^{179}\) Id at 1264–65.
\(^{180}\) See Part II A.
\(^{181}\) *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
\(^{182}\) *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
\(^{183}\) *Ellerth*, 118 S Ct at 2270; *Faragher*, 118 S Ct at 2293.
Moreover, even if the number of retaliation and sexual harassment complaints rises, this possibility alone does not justify the ultimate employment decision test. Such an increase will likely mean that courts are hearing claims supported by the language and purpose of Title VII rather than trivial claims outside the scope of Title VII. The current ability/future opportunity test does not mean that employees will file retaliation actions for any employer action they find disagreeable. As one commentator noted, "If the at-issue changes in terms and conditions of employment are truly minor, . . . [m]any people will not be willing to go through the hassles of filing an EEOC charge and dealing with the investigators for something that is truly insignificant."

III. THE ELLERTH/FARAGHER AFFIRMATIVE DEFENSE AND RETALIATION

Both prongs of the Ellerth/Faragher affirmative defense potentially present a court with questions involving retaliation. First, courts will have to decide whether an employer that retaliates against an employee should be able to prove that it acted reasonably to prevent and correct sexual harassment. Second, courts will have to consider whether an employee behaves unreasonably when she fails to report harassment because she fears retaliation.

A. Employer Reasonableness

An employer who retaliates against an employee for reporting sexual harassment should lose the Ellerth/Faragher affirmative defense. The defense requires the employer to prove that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." For most employers, a sexual harassment policy and complaint procedure is necessary to satisfy this prong. However, to show that the employer behaved reasonably, it is not enough for the employer merely to have a sexual harassment complaint procedure on record. As one district

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184 Lidge, 47 U Kan L Rev at 409 (cited in note 173) ("Although the imposition of the [ultimate employment decision requirement] may help clear court dockets or EEOC files, such a desire should have 'no appropriate role in interpreting the contours' of a substantive statutory civil right.").

185 Id at 407–08.

186 Burlington Industries, Inc v Ellerth, 118 S Ct 2257, 2270 (1998); Faragher v City of Boca Raton, 118 S Ct 2275, 2293 (1998).

187 See Faragher, 118 S Ct at 2293 (suggesting that a small employer would not necessarily need a sexual harassment policy in order to show reasonableness).
court noted, "Reasonableness requires more than issuing a policy."\(^{188}\) The employer must show that it enforced the policy by taking reasonable steps to prevent and correct sexual harassment.\(^{189}\) Retaliating against an employee who files a sexual harassment complaint is not a reasonable step in addressing a complaint because Title VII makes retaliation unlawful.\(^{190}\) If retaliation occurs, the employer has shown that it has not adopted a reasonable or effective complaint mechanism. When an employer retaliates, it takes away by its actions what it promised on paper in its policy. An effective complaint procedure should "divest a harassing supervisor of any power he has over the victimized employee."\(^{191}\) A supervisor accused of harassment should not have the ability to make decisions adverse to the complainant’s employment interests as long as he is under investigation for harassment. For small employers, it may be difficult to arrange alternative supervision for the complainant, but Title VII already exempts the smallest employers from coverage.\(^{192}\) Employers can use a number of means to prevent the supervisor from further harassing or retaliating against the complainant. For instance, employers have authorized temporary transfers away from the harassing supervisor.\(^{193}\) In some cases, employers can rearrange working schedules so that the supervisor and harasser do not work at the same time.\(^{194}\)

The supervisor has the strongest motive to retaliate against the complainant because of the potential punishment many sexual harassment policies provide for harassers.\(^{195}\) However, others who know about the employee’s complaint may be in a position to retaliate against the employee as well. Many sexual harassment policies identify several individuals with whom an employee can

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\(^{189}\) Id.

\(^{190}\) 42 USC § 2000e-3.

\(^{191}\) Scone v Tandy Corp, 9 F Supp 2d 773, 778 (W D Ky 1998).

\(^{192}\) 42 USC § 2000e(b) (1994) ("The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.").

\(^{193}\) Johnson v Brown, 1998 US Dist LEXIS 12689, *7 (N D Ill) (plaintiff temporarily transferred from job as secretary for hospital’s chief of police to the hospital’s medical administration service).

\(^{194}\) See, for example, Steiner v Showboat Operating Co, 25 F3d 1459, 1464 (9th Cir 1994) (employer changed employee’s shift to get her away from her supervisor; however, the court questioned why the employer altered the employee’s shift rather than the alleged harasser’s shift).

\(^{195}\) See note 128.
file complaints. Thus, the individual to whom the employee complains and those who investigate her complaint could retaliate against the employee. This situation calls into question the adequacy of the employer's complaint procedure even more so than if the supervisor were to retaliate. If the employees entrusted with administering a complaint procedure do not do so fairly, then the employer has not demonstrated an effective policy to prevent and correct sexual harassment.

Whether an employer loses the affirmative defense when co-workers retaliate presents a more difficult question. Co-worker reaction to a complaint might manifest itself in harassment of the complainant. Even the most effective policy cannot alleviate all workplace tension. The Tenth Circuit concluded that an employer could be liable for co-worker retaliatory harassment if the employer organized or acquiesced in the harassment, or, in other words, when it knew or should have known of the harassment. Accordingly, an employer should not lose the affirmative defense as a result of co-worker harassment of which it was unaware. However, an effective complaint procedure can minimize the opportunity for co-worker harassment by preventing co-workers from finding out about a sexual harassment complaint. A complaint procedure should maintain the complainant's confidentiality whenever possible. In some cases, co-workers may have to participate in an investigation because they were witnesses to allegedly harassing conduct. If co-workers must participate in an investigation, the individuals investigating the complaint should inform co-workers that the complaint is to remain confidential.

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196 See, for example, Cadena v Pacesetter Corp, 18 F Supp 2d 1220, 1225 (D Kan 1998) (employer's policy allowed employees to bring sexual harassment complaints to their immediate supervisor, the supervisor's supervisor, the Vice President of Human Resources, the Director of Human Resources, or to any member of management the same sex as the complainant).

197 See note 172.


199 See, for example, Sample Sexual Harassment Policies, 520 PLL/Lit at 450 (cited in note 128):

To the extent possible, the sexual harassment investigative proceedings will be conducted in a manner to protect the confidentiality of the complainant, the alleged harasser and all witnesses. All parties involved in the proceedings will be advised to maintain strict confidentiality, from the initial meeting to the final agency decision, to safeguard the privacy and reputation of all involved.
and that the employer will not tolerate co-worker retaliation. An employer who facilitates co-worker retaliation by making an employee's sexual harassment complaint widely known should lose the Ellerth/Faragher affirmative defense.

Denying the affirmative defense to an employer does not allow an employee to recover twice for retaliatory conduct. Rather, when an employer loses the affirmative defense because it retaliates, the employee can recover for the harm created due to sexual harassment and the additional harm of retaliation. When an employer responds unreasonably to the employee's complaint, it should be liable for the damages the sexual harassment caused the employee. Apart from the sexual harassment damages, the employer who retaliates should also be liable for the harm the retaliation caused the employee.

B. Employee Reasonableness

Turning to the second prong of the affirmative defense, should an employee who fails to complain of sexual harassment for fear of retaliation nonetheless be able to show that she behaved reasonably under Ellerth and Faragher? The Ellerth/Faragher defense does not require an employee to complain in every case in order to preserve a sexual harassment complaint. For example, in Faragher itself, the plaintiff did not complain to her employer. The failure to complain, however, was not unreasonable because the employer did not provide the plaintiff with a channel through which to complain since it did not distribute its sexual harassment policy to the plaintiff's department.

Requiring that an employee use her employer's complaint procedures in every case could leave employees susceptible to retaliation. Many employees attribute their failure to report harassment to their fear of retaliation. Allowing an employee to recover for harassment even if she does not follow her employer's grievance procedure risks undermining the defense. Any plaintiff wishing to sue her employer could file a complaint directly with the EEOC and avoid her employer's complaint procedures if she simply claims that she feared employer retaliation.

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200 Id; see also id at 451 ("It shall be a violation of this policy for any employee or non-employee to take reprisals against any person because she or he has filed a complaint . . . or assisted in any proceeding under this policy.").
201 Faragher, 118 S Ct at 2281.
202 Id at 2293.
203 See Part I C. This Comment does not address whether an employee is reasonable when she fails to report harassment for reasons other than a fear of retaliation.
Nonetheless, an employee should have the opportunity to prove that she acted reasonably in failing to report harassment when her supervisor has made specific threats of retaliation if the employee reported the harasser’s conduct. When a supervisor threatens to retaliate, the supervisor undermines the employer’s written policy through his actions. If a supervisor threatens the employee with termination, for example, the employee should not have to decide between reporting harassment or losing her job. In contrast, an employee who fails to complain because she thinks that her employer will retaliate but has no evidence of threats to support her belief should be found to have behaved unreasonably.

Determining whether a supervisor has threatened an employee presents difficult issues of proof because the issue will likely turn on the supervisor’s word against the employee’s word. However, the question of whether a supervisor threatened an employee is no more difficult for a factfinder to determine than determining whether the supervisor harassed the employee. Once the factfinder determines that the plaintiff has proven supervisor threats, then it should consider whether the plaintiff’s failure to complain as a result of those threats was reasonable. Accordingly, the district court in Fierro v Saks Fifth Avenue properly found that the plaintiff could not prevail on the second prong of the affirmative defense because he could offer no specific threats of retaliation but only unsupported speculations that his employer would retaliate.

In evaluating employee reasonableness, the nature of the threat itself represents the most important factor in deciding whether an employee acts reasonably when she fails to report harassment because of threats of retaliation. For instance, if an employee quits her job because a supervisor threatens her with violence if she reports harassment, the employee should not be deemed unreasonable for not having followed her employer’s grievance process before bringing her complaint to the EEOC. The interest in employee safety should outweigh the interest in resolving complaints through internal employer mechanisms.

Lesser threats might not warrant a finding of employee reasonableness for failing to report harassment. Although Title VII should prohibit all retaliatory actions that inhibit the plaintiff’s current or future job abilities, this does not mean that all of

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204 13 F Supp 2d 481 (S D NY 1998).
205 Id at 492.
206 See Part II E.
those actions are equally harmful. Consequently, a plaintiff is more likely to demonstrate her reasonableness when she is threatened with termination than when she is threatened with less desirable job duties.

As the district court in *Sconce* noted, courts should consider the employer's grievance procedure in determining employee reasonableness. In *Sconce*, the harassing supervisor threatened the plaintiff with termination if she reported harassment. Although the plaintiff's failure to complain of harassment was not automatically unreasonable, the court concluded that because the employer's policy permitted Sconce to complain to someone other than her immediate supervisor, her failure to report harassment was unreasonable. Thus, an employee's fear of retaliation in the form of termination might be reasonable, but a well-designed grievance mechanism can alleviate the employer's fear by divesting the threatening supervisor of any power over the complainant. However, the court in *Sconce* also recognized that an employer's grievance procedure in practice may operate differently than as written. Accordingly, even if the procedure provides the employee with a number of channels through which to complain to ensure that her supervisor cannot retaliate, an employee should still prevail on the second prong of the affirmative defense if she can show that the grievance procedures were not fairly administered. To prove that the procedures did not operate fairly, the plaintiff could present evidence of how the complaint procedures failed to function properly in the past.

Considering the employee's sexual harassment policy in assessing the employee's reasonableness ensures that employers who create a well-crafted sexual harassment policy in compliance with *Ellerth* and *Faragher* are rewarded for their efforts. If the quality of the complaint procedure is not relevant, then an employer with an effective policy and an employer with a deficient policy or no policy at all would be equally liable under Title VII even though they are not equally culpable since the former employer has undertaken more effort to prevent and stop sexual harassment.

In summary, speculative fears of retaliation cannot justify an employee's failure to complain of sexual harassment. When an employee can prove that her supervisor made specific threats of
retaliation, however, the employee should not be found automatically unreasonable when she fails to complain of harassment. The employee's reasonableness will turn on the particular circumstances of her employment. The nature of the threat, the degree of the harassment, and the effectiveness of the employer's harassment policy should all weigh in the determination of the employee's reasonableness.

**CONCLUSION**

*Ellerth* and *Faragher* emphasize Title VII's primary importance as a preventive measure. An effective sexual harassment policy can prevent sexual harassment from occurring. In order for employees to feel comfortable using that policy, however, they must be assured that their employment status will not suffer as a result of bringing a complaint. To ensure that an employee will not suffer a loss of employment status in any way, § 704 of Title VII must prohibit as adverse employment actions a wide range of employer conduct. In deciding whether an employment action is an adverse employment action, courts should ask whether it affects the employee's current ability to perform her job or her future employment opportunities.

When an employee files a sexual harassment complaint and the employer retaliates, the employer should lose the *Ellerth/Faragher* affirmative defense because it has promulgated an inadequate sexual harassment policy. Assessing employee reasonableness when she does not complain of harassment requires a more fact specific inquiry. When the employee proves that her supervisor threatened to retaliate, the employee should be able to offer evidence to show that she acted reasonably.