Limiting Expert Testimony about Sexual Harassment Policies

Jayesh Shah
Jayesh.Shah@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1999/iss1/15

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Limiting Expert Testimony about Sexual Harassment Policies

Jayesh Shah†

Rule 702 of the Federal Rules of Evidence permits expert witnesses to give testimony about "scientific, technical, or other specialized knowledge [if it] will assist the trier of fact to understand the evidence or to determine a fact in issue." This Rule balances the broad range of permissible expert testimony with a requirement that it be both relevant and reliable. Trial judges act as gatekeepers in enforcing Rule 702.

In sexual harassment actions based on claims of a hostile work environment, the tension between liberal admissibility and concerns about unreliability and confusion can be dramatic. Current law provides the affirmative defense that the employer exercised reasonable care to prevent and correct the supervisor's harassment. To evaluate the viability of such a defense, prudent parties hire experts to evaluate the employer's sexual harassment policy, its method for disseminating the policy, and its conduct of an internal investigation. This defense raises important practical and theoretical questions. First, is an expert's evaluation reliable and relevant? Second, is such testimony confusing? Third, what guidelines might allow the court to limit the scope of the expert's testimony?

Federal courts have not adequately addressed these issues. Although in a few cases district courts have excluded this

† A.B. 1991, University of Chicago; M.A. 1994, Johns Hopkins University; J.D. Candidate 2000, University of Chicago.

1 FRE 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").


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

4 See Part II C 1.

5 See Part II C 2.

6 See Part IV A.
type of testimony, courts more often permit experts to testify at trial. For litigants, attempting to introduce favorable expert testimony may simply be part of trying a sexual harassment case. But to perform its gatekeeping function, the trial court must consider how the proposed evidence assists the trier of fact in analyzing factual and legal issues in a hostile work environment claim.

This Comment argues that courts should narrowly admit expert testimony regarding harassment policies and investigations. The 1998 Supreme Court decisions in Burlington Industries, Inc v Ellerth and Faragher v City of Boca Raton have significantly altered the structure of sexual harassment litigation. By grounding liability for a supervisor's sexual harassment on the reasonableness of both the employer and the employee, the Court has enhanced the importance of factual inquiry and of jury determinations in establishing and policing the boundaries of Title VII liability. In determining whether an employer exercised reasonable care to prevent and remedy sexual harassment, the trier of fact will rely primarily on simple threshold questions that a jury can understand without the aid of an expert. A jury can also resolve more difficult factual questions, such as the adequacy of an employer's investigation, without an expert. Overuse of expert testimony in these cases undermines Title VII's purpose of eliminating discrimination and instead tries to reward the party with the most impressive experts.

---

7 Perkins v General Motors Corp, 129 FRD 655, 667 (W D Mo 1990) (refusing to qualify plaintiff's expert on issue of whether defendant failed to take "specific steps . . . to create an environment free from sexual harassment"); see also Lipsett v University of Puerto Rico, 740 F Supp 921, 924–25 (D PR 1990) (refusing to qualify same expert on a number of issues related to sexual harassment).
12 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
13 Harris v Forklift Systems, Inc, 510 US 17, 21–22 (1993) (adopting "reasonable person" standard for determining whether harassment "is sufficiently severe or pervasive to alter the conditions of the victim's employment and an abusive working environment") (internal citation and quotation marks omitted); Equal Employment Opportunity Commission, Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed Reg 51266, 51267 (1993).
LIMITING EXPERT TESTIMONY

Part I of this Comment describes how courts evaluate and limit certain non-scientific expert testimony based on unreliability, lack of fit, and providing legal conclusions. Part II evaluates the rise of expert testimony about employer responses to sexual harassment, and some courts' attempts to limit or exclude such testimony. Part III addresses the recently created affirmative defense in hostile work environment cases, and explains why this defense should preclude much current expert testimony regarding employer reasonableness. Finally, Part IV argues that courts should sharply limit the scope of expert testimony as to employer reasonableness based upon public policy concerns centering on the role of the jury and Title VII's objectives.

I. REQUIREMENTS FOR ADMISSIBILITY OF EXPERT TESTIMONY

Rule 702's broad scope of potentially admissible expert testimony is consistent with long-standing judicial practice. Dean Wigmore described the test for whether a skilled witness could render an opinion as follows: "On this subject can a jury from this person receive appreciable help?" Rule 702's requirement that expert testimony "assist the trier of fact" reflects this test. The drafters of Rule 702 recognized that an expert gives the jury crucial facts or assists them in drawing inferences that it needs to reach the correct verdict. In deciding whether expert testimony assists the jury, courts analyze the testimony's reliability, its methodological fit to the facts of the case, and the factual basis for its conclusions.

A. Reliability

Despite the general tendency toward liberal admissibility, courts have expressed concern that some expert testimony may prove unreliable and mislead or confuse the jury. The Court of Appeals of the District of Columbia voiced this concern in the landmark 1923 case of Frye v United States. The criminal defendant Frye unsuccessfully tried to introduce as proof of his innocence the results of a "systolic blood pressure deception test" —

---

15 FRE 702.
16 FRE 702 Advisory Committee Notes ("An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge.").
17 293 F 1013 (DC Cir 1923).
an early form of lie detector test. The Court of Appeals affirmed the trial court's exclusion of the test results. Acknowledging the difficulty of differentiating “experimental” from “demonstrable” scientific testimony, the court formulated the following test: in order for scientific testimony to be admissible, the theory must have gained “general acceptance” in its field.

According to many courts and commentators, the so-called Frye test was too stringent to balance the probative value of expert testimony with the possibility of confusion. Frye's validity came into further doubt following the adoption of the Federal Rules of Evidence. The Supreme Court took up these issues in Daubert v Merrill Dow Pharmaceuticals, Inc, in which it rejected the Frye rule. Daubert held that the Rules of Evidence required a more “flexible” inquiry into admissibility than the “general acceptance” test.

Like Frye, the Daubert decision expressed concern about the reliability of expert testimony. It indicated that trial judges must perform a “gatekeeping role” and exclude unreliable or irrelevant testimony. Daubert established a four-factor test that federal judges must use when evaluating purportedly scientific testimony: (1) whether the theory is testable, (2) whether it has been subjected to peer review, (3) the known or potential error rate, and (4) whether the theory has been generally accepted.

---

18 Id at 1013.
19 Id at 1014.
20 Id.
21 293 F at 1014.
23 See, for example, Downing, 753 F2d at 1237 (Frye “reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence”); see also Daubert, 509 US at 587 n 5 (collecting cases and articles).
25 Id at 589 (overruling Frye).
26 Id at 594.
27 Id at 595 (“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”), quoting Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 FRD 631, 632 (1991).
28 509 US at 597.
29 Id.
30 Id at 593–94.
Daubert did not indicate, however, whether and to what extent these factors may be applied to non-scientific testimony.\textsuperscript{31}

Lower courts disagreed about the applicability of the Daubert factors to non-scientific testimony. Several circuits held that the Daubert factors are inconsistent with non-scientific testimony.\textsuperscript{32} Other circuits disagreed and applied Daubert factors in excluding non-scientific testimony.\textsuperscript{33} Another circuit declared that the Daubert factors were relevant to all expert testimony,\textsuperscript{34} particularly that involving the quantitative social sciences.\textsuperscript{35} Some commentators suggested that courts evaluating the reliability of non-scientific testimony should not apply Daubert, but instead consider a return to the Frye test.\textsuperscript{36}

The Supreme Court addressed the controversy about non-scientific testimony in Kumho Tire Co, Ltd v Carmichael.\textsuperscript{37} The trial court in Kumho excluded the testimony of the plaintiffs' expert, a tire analyst, because the expert's methodology for analyzing tire failure failed to satisfy any of the Daubert factors of reliability.\textsuperscript{38} The trial court also rejected the plaintiffs' argument that Daubert is inapplicable to expert testimony presented as "technical analysis" rather than "scientific evidence."\textsuperscript{39} The Eleventh

\textsuperscript{31} Id at 590 n 8 ("Our discussion is limited to the scientific context because that is the nature of the expertise offered here.").

\textsuperscript{32} See Carmichael v Samyang Tire, Inc, 131 F3d 1433, 1435 (11th Cir 1997) (Daubert factors inapplicable to testimony based on experience rather than scientific methodology), revd as Kumho Tire Co, Ltd v Carmichael, 119 S Ct 1167 (1999); McKendall v Crown Control Corp, 122 F3d 803, 806 (9th Cir 1997) (same); Compton v Subaru of America, 82 F3d 1513, 1519 (10th Cir 1996) (same).

\textsuperscript{33} See Watkins v Telsmith, Inc, 121 F3d 984, 992–93 (5th Cir 1997) (excluding experience-based engineering testimony as to defects in product design); Peitzmeier v Hennessy Industries, Inc, 97 F3d 293, 297–98 (8th Cir 1996) (same).

\textsuperscript{34} See Tyus v Urban Search Management, 102 F3d 756, 263–64 (7th Cir 1996) (holding Daubert factors applicable, although not always determinative, in evaluating testimony based on experience or training).

\textsuperscript{35} See People Who Care v Rockford Board of Education, 111 F3d 528, 534 (7th Cir 1997).


\textsuperscript{37} 119 S Ct 1167 (1999).

\textsuperscript{38} Carmichael v Samyang Tires, Inc, 923 F Supp 1514, 1522 (S D Ala 1996).

\textsuperscript{39} Id at 1521–22.
Circuit disagreed, finding the *Daubert* reliability factors inapplicable to this testimony because the expert relied on "his experience in analyzing failed tires," not on scientific principles like physics and chemistry.\(^4^0\)

Reversing the Eleventh Circuit, a unanimous Supreme Court held that "*Daubert*’s general principles apply" to all expert testimony,\(^4^1\) and that the trial court has the discretion to apply *Daubert* factors when evaluating experienced-based testimony.\(^4^2\) The Court noted both the difficulty and undesirability of maintaining a bright-line distinction between "‘scientific’ . . . and ‘technical’ or ‘other specialized’ knowledge."\(^4^3\) The Court noted that *Daubert* was never meant to constitute "a definitive checklist or test,"\(^4^4\) and that *Daubert* factors such as error rate and general acceptance may be helpful even for testimony based purely on experience.\(^4^5\)

The *Kumho* decision thus directs trial courts to evaluate the quality of the expert testimony, not draw categorical distinctions between science and other areas of expertise. For example, courts may continue to permit both beekeepers and aeronautical engineers to testify as expert witnesses regarding bumblebee flight.\(^4^6\) Because trial judges must scrutinize both types of expert testi-

\(^{40}\) Carmichael, 131 F3d at 1435.
\(^{41}\) Kumho, 119 S Ct at 1175.
\(^{42}\) Id at 1176.
\(^{43}\) Id at 1176, quoting FRE 702.
\(^{44}\) 119 S Ct at 1175, quoting Daubert, 509 US at 593.
\(^{45}\) 119 S Ct at 1176 (noting that a trial court could ask "a witness whose expertise is based purely on expertise, say, a perfume tester able to distinguish among 140 different odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable").
\(^{46}\) See Kumho, 119 S Ct at 1178 ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). The example comes from *Berry v City of Detroit*, 25 F3d 1342 (6th Cir 1994), in which the Sixth Circuit contrasted the testimony of beekeepers and aeronautical engineers as follows:

> [I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. . . . On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. . . . [T]he beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Id at 1349–50.
mony, they thus may exclude both scientific and non-scientific expertise that fails to satisfy the *Daubert* reliability factors.\(^{47}\)

B. “Fit” of Expert Testimony to the Facts

Apart from reliability, courts have looked to whether an expert’s conclusions fit an important issue in the case. *Daubert* quoted from a Third Circuit opinion setting forth as a test “whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.”\(^{48}\) Although it is similar to relevance, “fit” specifically requires that the expert’s method be appropriate for analyzing the issue in dispute.\(^{49}\) Like the “assistance” requirement of Rule 702, “fit” makes admissibility dependent on how well the expert testimony explains the unique facts of a particular case.\(^{50}\) For example, when an expert simulates a crash but fails to replicate key features such as velocity and height, the expert’s testimony fails the fit test because it fails to address key facts of the case.\(^{51}\)

Given the broad discretion that district courts have in assessing the reliability of non-scientific testimony,\(^{52}\) fit may be as important as reliability in judicial gatekeeping. In one case, a tax evasion defendant tried to introduce expert testimony that being a minister’s wife was inconsistent with independently reviewing the accuracy of a joint tax return.\(^{53}\) The court properly excluded this testimony, because the expert’s description of a minister’s wife’s duties did not bear on whether the defendant could file an accurate tax return.\(^{54}\) Even though the expert may have testified

---

\(^{47}\) *Kumho*, 119 S Ct at 1179 (Scalia concurring) (“[T]rial-court discretion in choosing the manner of testing expert reliability . . . is discretion to choose among reasonable means of excluding expertise that is *fausse* and science that is junky.”).


\(^{49}\) See *In re Paoli Railroad Yard PCB Litigation*, 35 F3d 717, 743 (3d Cir 1994) (“[Animal studies may be methodologically acceptable to show that chemical X increases the risk of cancer in animals, but they may not be methodologically acceptable to show that chemical X increases the risk of cancer in humans.]”; *Daubert*, 509 US at 591 (“scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes”).

\(^{50}\) See *General Electric Co v Joiner*, 118 S Ct 512, 523 (1997) (Stevens dissenting) (*Daubert* and Federal Rules of Evidence focus on whether “an expert’s conclusions . . . fit the facts of the case and are based on reliable scientific methodology”).


\(^{52}\) See notes 41–47 and accompanying text.

\(^{53}\) *United States v Lilly*, 37 F3d 1222, 1228 (7th Cir 1994).

\(^{54}\) Id.
reliably about the duties of a minister's wife, her testimony did not assist the trier of fact in determining criminal intent. An expert's testimony must be based on a reliable methodology, which cannot ignore important facts at issue in the case.

C. Expert Opinions on Ultimate Issues

Courts place another limitation on expert testimony by requiring that opinions on ultimate issues be supported by a factual basis. By generally allowing experts to testify on ultimate issues, Rule 704 reverses an old common law prohibition. The former rule was based on the belief that an expert who testifies, for example, that the defendant's drug caused plaintiff's injury, "usurp[s] the province of the jury." In practice, under the old rule experts gave substantially the same testimony, and merely couched their conclusions in "odd verbal circumlocutions." Rule 704 acknowledges the futility of this exercise and permits opinions on ultimate issues when a series of opinions leads to the conclusion. The Federal Rules currently prohibit experts only from making legal conclusions.

1. Demonstrating Factual Characteristics.

Rule 704 permits opinions as to ultimate factual issues only when the testimony satisfies the relevance and reliability requirements of Rule 702. Because expert testimony must assist the trier of fact, a bare conclusion such as "Smith was intoxicated," without evidentiary support, is likely inadmissible. But

---

56 See Mid-State Fertilizer Co v Exchange National Bank, 877 F2d 1333, 1339 (7th Cir 1989) ("An 'opinion has a significance proportioned to the sources that sustain it.' An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), quoting Petrogradsky Mejdonarodny Kommerchesky Bank v National City Bank, 170 NE 479, 483 (NY 1930).

54 FRE 704 ("Except as provided in subsection (b) [regarding the mental state of a criminal defendant], testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); see also FRE 704 Advisory Committee Notes ("[T]he so-called 'ultimate issue' rule is specifically abolished by the instant rule.").

57 FRE 704 Advisory Committee Notes, citing John Henry Wigmore, 7 Evidence in Trials at Common Law § 1923 at 17 (Little, Brown 1940).

56 FRE 704 Advisory Committee Notes.

59 Id (distinguishing factual conclusions such as insanity, medical causation, and "intoxication, speed, handwriting, and value" from "inadequately explored legal criteria" such as "capacity to make a will").

60 FRE 704 Advisory Committee Notes ("Under Rules 701 and 702, opinions must still be helpful to the trier of fact.").

61 See McMahon v Bunn-O-Matic Corp, 150 F3d 651, 657–58 (7th Cir 1998) (rejecting expert testimony that "offer[ed] only a bare conclusion" that high-temperature coffee damages "the structural integrity of the styrofoam cup into which the coffee was poured");
the result is different when the expert supports his conclusion with factual information. A better formulation would be: "Smith had been drinking and was unable to control motor functions, and was therefore intoxicated." Here the expert's opinion completes the picture for the jury, assisting them without telling them whether Smith satisfied a legal standard.\(^\text{62}\)

2. *Demonstrating Legal Standards of Care.*

When the expert's ultimate conclusion concerns the appropriate level of care, expert testimony may usurp the judge's rather than the jury's function. Experts are never permitted to make legal conclusions, or testify about what the law is.\(^\text{63}\) Even though expert testimony that a party is negligent might assist the jury, statements of what the law is fall within "the special legal knowledge of the judge."\(^\text{64}\)

When an expert witness attempts to testify that a party acted "reasonably" or exercised "due care," the opinion must be based upon facts. A purely conclusory statement invades the judge's province to define the law for the jury.\(^\text{65}\) Further, if the opinion fails to supply a concrete standard for judging conduct, the testimony proves unhelpful to the jury.\(^\text{66}\) However, industry-specific customs provide a benchmark that, while not determinative, provides a point of departure for credibility determinations.

Consider a hypothetical case in which Allen, a tax lawyer, testifies in a malpractice trial of Baker, another tax lawyer. Allen testifies that Baker failed to exercise reasonable professional judgment by giving his client erroneous advice about the impact of a new tax law. Under Rule 702, Allen's testimony about how tax lawyers learn the law and advise their clients assists the jury.

---

Tabatchnik v G. D. Searle & Co, 67 FRD 49, 55 (D NJ 1975) (FRE 704 does not "allow[] a bare conclusion which lacks supporting data and rationale leading to that conclusion. The sole justification and purpose of expert testimony is to assist the trier of fact to find a solid path through an unfamiliar and esoteric field.").

\(^\text{62}\) See FRE 704 Advisory Committee Notes ("[T]he question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed.").

\(^\text{63}\) See, for example, United States v Scop, 846 F2d 135, 140 (2d Cir 1988) (holding that securities expert's testimony describing defendant's "manipulation" and "fraud" consisted of impermissible legal conclusions).

\(^\text{64}\) Chadbourn, ed, 7 Wigmore § 1952 at 103 (cited in note 14).

\(^\text{65}\) Marx & Co v Diner's Club, Inc, 550 F2d 505, 509-10 (2d Cir 1977) ("It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.").

\(^\text{66}\) See Minasian v Standard Chartered Bank, PLC, 109 F3d 1212, 1216 (7th Cir 1997) (rejecting expert's conclusion that transaction was "not commercially reasonable" as "legal analysis in the guise of banking expertise," especially when based on "economically ludicrous" assumptions).
Allen also identifies for the jury Baker’s deviation from the professional standard. Because Allen and Baker are both tax lawyers, the jury can evaluate the competing claims, believe or disbelieve Allen’s testimony, and determine whether Baker met professional standards.  

When no custom or professional standard exists to guide the standard of care, expert testimony may make conclusions of law and mislead a jury. In one case, an expert testified that a deaf plaintiff was denied “as effective” communication under the Americans With Disabilities Act, because the police officer taking the plaintiff’s statement did not use a deaf interpreter. However, regulations required that the meaning of “as effective” be determined “contextually,” rather than “on an absolute scale.” Because the expert made no effort to identify for the jury the relevant contextual facts, the Court of Appeals held that his testimony constituted an impermissible legal conclusion. Especially where no industry custom exists, relevant context is necessary to support an expert’s opinion as to an ultimate issue.

Judges screen scientific and non-scientific expert testimony based on whether the testimony contributes to an issue of significance in the case. Principles such as reliability, fit, and the prohibition on legal conclusions eliminate testimony that adversely affects the jury’s ability to apply the relevant facts to the law. In the case of non-scientific testimony, context is especially important in the expert’s opinion to prevent confusing the jury with quasi-legal standards that are not relevant to the ultimate issue.

II. EXPERT TESTIMONY IN SEXUAL HARASSMENT CASES

Although expert testimony is not required to sustain a hostile workplace environment sexual harassment claim, parties frequently use expert witnesses to strengthen the merits of their cases. Such expert opinion includes psychological and medical...
testimony about causation and emotional distress damages, and cultural and behavioral testimony explaining a complainant's failure to report sexual harassment. Lower courts have favored including expert testimony in sexual harassment cases. The Supreme Court has evaluated expert testimony in only one sex discrimination case, when a plurality found superfluous an expert's conclusions about sexual stereotyping. Although the Court's analysis focused on assistance to the trier of fact rather than reliability, the dissent suggested that the expert testimony lacked reliability.

Lower courts have expressed similar concerns with expert testimony about harassment policies and investigative procedures. Courts have linked the adequacy of harassment policies to an employer's liability and, in some cases, to a victim's duty to complain. Although initially skeptical toward expert testimony about harassment policies, trial courts increasingly permitted such testimony, and these presentations are now commonplace. As several courts have observed, the fundamental problem with this testimony is that it often conflates the formal characteristics of an employer's harassment policy with the employer's standard of care in preventing harassment.

A. Employer Responses to Sexual Harassment

Federal courts permit experts to testify about a number of issues concerning the effectiveness of an employer's response to

---

73 See, for example, Jensen v Eveleth Taconite Co, 130 F3d 1287, 1298 (8th Cir 1997) (finding the testimony of plaintiff's expert regarding causation to be "thorough and meticulously presented").
74 See, for example, Dang Vang v Vang Xiong X. Toyed, 944 F2d 476, 481–82 (9th Cir 1991) (expert testimony permitted in § 1983 sexual harassment case involving Hmong refugees raped by a state official, explaining, inter alia, victims' continuing contact with the official).
75 Jensen, 130 F3d at 1298 (stating that "[t]he rule clearly is one of admissibility rather than exclusion," and criticizing "categorical exclusions" of expert testimony based on subject matter) (citation omitted).
76 Hopkins v Price Waterhouse, 490 US 228, 256 (1989) (plurality opinion).
77 Id ("[W]e are tempted to say that [the witness's] expert testimony was merely icing on [plaintiff's] cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'").
78 Id at 293 n 5 (Kennedy dissenting) ("[The expert] purported to discern stereotyping in comments that were gender neutral . . . without any knowledge of the comments' basis in reality and without having met the speaker or subject.").
79 See Part II B.
80 See notes 119–25 and accompanying text.
81 See notes 99–107 and accompanying text.
82 See notes 116–17 and accompanying text.
83 See notes 126–42 and accompanying text.
sexual harassment. At least one state court has also addressed the admissibility of expert testimony about harassment policies and investigations. See Coates v Wal-Mart Stores, Inc, 976 P2d 999, 1008 (NM 1999) (finding an expert's testimony regarding the minimum standards for an effective sexual harassment corporate policy to be both relevant to refute the employer's defense and helpful to "the jury in understanding the issue"). An analysis of state court decisions on this subject is outside the scope of this Comment. Second, a

---

84 At least one state court has also addressed the admissibility of expert testimony about harassment policies and investigations. See Coates v Wal-Mart Stores, Inc, 976 P2d 999, 1008 (NM 1999) (finding an expert's testimony "regarding the minimum standards for an effective sexual harassment corporate policy" to be both relevant to refute the employer's defense and helpful to "the jury in understanding the issue"). An analysis of state court decisions on this subject is outside the scope of this Comment.

85 See, for example, Robinson v Jacksonville Shipyards, Inc, 760 F Supp 1486, 1506-07 (M D Fla 1991) (common reactions to sexual harassment, including coping mechanisms); Moffett v Glick, 621 F Supp 244, 262 (N D Ind 1985) (stress effects and victims' perceptions of employer non-response); Broderick v Ruder, 685 F Supp 1269, 1273 (D DC 1988) (stress effects).


87 Jonasson v Lutheran Child & Family Services, 1995 WL 579610, *2 (N D Ill) (permitting expert to testify about "what she considers to be an appropriate management structure to properly respond to all issues of sexual harassment"); Robinson, 760 F Supp at 1519 (permitting expert to testify about "the elements of a comprehensive, effective sexual harassment policy"); see also Perkins v General Motors Corp, 129 FRD 655, 667 (W D Mo 1990) (quoting another court's qualification of expert regarding "the appropriate response that employers should make to harassment on the job").

88 See, for example, Harper v Southeast Alabama Medical Center, 998 F Supp 1289, 1297 (M D Ala 1998) (expert testifying that a policy must be specifically directed at sexual harassment and state that employees using grievance procedure would be protected); Robinson, 760 F Supp at 1519 (expert testifying that a policy must describe behaviors constituting sexual harassment, note that both coworkers and supervisors can be harassers, and "promise and provide confidentiality and protection from retaliation").

89 See, for example, Harper, 998 F Supp at 1297 (expert testifying that an employer must specify multiple, specific contacts for reporting sexual harassment, post the policy in addition to including it in employee handbook, and should conduct seminars regarding policy); Robinson, 760 F Supp at 1519 (expert testifying that a policy must provide "a number of avenues through which a complaint may be initiated" and that employer must train supervisors on how to investigate claims of sexual harassment); but see Jones v USA Petroleum Corp, 20 F Supp 2d 1379, 1386 (S D Ga 1998) (court refusing to require that an employer must "affirmatively train its employees regarding sexual harassment").

victim's subjective perspective is a necessary element of a hostile workplace environment claim.\footnote{\textit{Harris v Forklift Systems, Inc}, 510 US 17, 21–22 (1993) (requiring objectively hostile conditions and subjective perception of abusive environment to sustain hostile work environment claim).}

B. Employment Policies and Title VII Liability

In \textit{Meritor Savings Bank, FSB v Vinson},\footnote{477 US 57 (1986).} the Court held that Title VII\footnote{Civil Rights Act of 1964, §§ 701–16, Pub L No 88-352, 78 Stat 253–66 (1964), codified at 42 USC §§ 2000e–2000e-17 (1994).} permits an employee to hold an employer vicariously liable for sexual harassment by a supervisor.\footnote{\textit{Meritor}, 477 US at 73.} \textit{Meritor} stated that a sexual harassment policy would not always defeat the employer’s liability, but was “plainly relevant” in two ways.\footnote{\textit{Id} at 72.} First, an employer might not be found liable if it demonstrates the “existence of a grievance procedure and a policy against discrimination.”\footnote{\textit{Id}.} Second, an employer might also prevail when it proves that a plaintiff “fail[ed] to invoke” the employer’s grievance procedure.\footnote{\textit{Id}.}

Expert witnesses testified about the effectiveness of sexual harassment policies as early as 1985,\footnote{See \textit{Moffett v Glick}, 621 F Supp 244, 262–63 (N D Ind 1985) (expert testified about stress effects and victims’ perceptions of employer non-response).} often explaining why complainants in general, or even a particular complainant, did not report incidents of sexual harassment to the employer. The leading case on this issue is \textit{Robinson v Jacksonville Shipyards, Inc},\footnote{760 F Supp 1486 (M D Fla 1991).} in which the plaintiff was one of only a few female craftworkers employed at the defendant’s shipyards.\footnote{\textit{Id} at 1491.} The expert witness stated that typical responses by victims of sexual harassment range from denying the impact of the incident, to joking with others to “defuse the situation,” to actually making a formal complaint.\footnote{\textit{Id} at 1506.} According to the expert, making a complaint was the rarest response, and accordingly, “An effective policy for controlling sexual harassment cannot rely on ad hoc incident-by-incident reporting and investigation.”\footnote{\textit{Id}.}
The *Robinson* court relied on this expert testimony in criticizing the language of the policy, defendant's distribution of the policy, and its response to complaints. However, the court devoted a much greater portion of its opinion to recounting numerous incidents of supervisors ignoring and undermining employees' informal complaints about sexual harassment. The court recognized the importance of the factual context:

Female employees lacked confidence in the willingness and commitment of [defendant] to take steps to halt sexually harassing behavior . . . [and] adopted personal strategies for coping with the work environment. [Plaintiff], for instance, declined to complain about degrading pictures and comments because she feared that she might be subjected to retaliation and that the complaints would not be well-received.

By this reasoning, the deficient policy did not cause sexual harassment, but rather failed to minimize the incidence and severity of harassment, forcing victims to resort to coping methods instead of filing formal complaints.

Sexual harassment experts reached the same conclusion in several other cases tried during the late 1980s and early 1990s, relating the sufficiency of harassment policies to the victim's perception of and response to harassment. As in *Robinson*, expert testimony intertwined employee and employer reasonableness, so that an unreasonable harassment policy made it unlikely that a harassment victim would come forward. After *Meritor*, if an employer had a harassment policy, a plaintiff arguably had to

---

103 760 F Supp at 1510, 1518 (policy failed to name the person to whom victims of sexual harassment should report grievances, and subsequent policy did not provide an alternate contact for grievances).
104 Id (policy not incorporated into company rule book, not distributed in same manner as safety policies, many employees and supervisors were unaware of policy, and harassment policy was posted only on bulletin boards).
105 Id at 1512 (company did not require that supervisors document harassment complaints).
106 Id at 1510 (supervisors failed to investigate claims of sexual harassment by other female employees); id at 1511 (supervisors pressured one victim to "accept an apology as full settlement of her complaint"); id at 1513–15 (supervisors repeatedly ignored plaintiff's complaints about presence of pornographic pictures in workplace).
107 760 F Supp at 1512.
108 See note 85.
109 See, for example, *Shrout v Black Clawson Co*, 689 F Supp 774, 777 (S D Ohio 1988) (permitting an expert on corporate policies to testify that because of employer's inadequate sexual harassment policy, women reasonably failed to complain about sexual harassment).
defend any delay in coming forward.\textsuperscript{110} If the plaintiff did not have a specific psychological justification for delay, a critique of the policy served as an alternate method for establishing her reasonableness.

C. Separating Victim Perception from Policy Analysis

In \textit{Harris v Forklift Systems, Inc},\textsuperscript{111} the Supreme Court held that to prevail on a hostile environment claim, a plaintiff must show objectively hostile conditions and a subjective perception that the workplace was abusive.\textsuperscript{112} Since the \textit{Harris} decision, most experts analyzing employer responses to sexual harassment focus on whether a written policy meets certain textual requirements, rather than on whether a policy chilled reports of sexual harassment.\textsuperscript{113} Trial courts generally hold this testimony admissible, although some courts impose limitations on the subject matter.

1. Expert Testimony Regarding a Policy's Adequacy.

The ultimate issue in most expert testimony about employer response is whether the harassment policy and investigation are adequate.\textsuperscript{114} Under Rule 704, an expert must provide a factual basis rather than a bare conclusion to support her opinion on a policy's adequacy.\textsuperscript{115} However, this Rule does not specify how detailed the supporting facts must be, and courts evaluating expert opinions regarding sexual harassment policies rarely ask for specific supporting evidence.\textsuperscript{116}

Experts' analyses of harassment policies usually focus solely on the sufficiency of the written documents. In refusing to permit

\begin{itemize}
\item \textsuperscript{110} See Mulligan, \textit{et al}, Expert Witnesses § 23.20 at 361 (cited in note 9) ("The attitude of management would also be useful in understanding the reason why a complainant would not file or process a formal complaint.").
\item \textsuperscript{111} 510 US 17 (1993).
\item \textsuperscript{112} Id at 21-22.
\item \textsuperscript{113} See Sealy \textit{v Gruntal & Co}, 1998 WL 698257, *3 (S D NY) (noting that expert witness "in preparing her report... did not even consult deposition testimony"); Ferriso \textit{v The Conway Organization}, 1995 WL 580197, *1 (S D NY) (noting that bulk of expert's report concerned facial adequacy of harassment policy, not its application).
\item \textsuperscript{114} See, for example, Harper \textit{v Southeast Alabama Medical Center}, 998 F Supp 1289, 1297 (M D Ala 1998) (expert testified that policy was "insufficient" and its dissemination was "inadequate").
\item \textsuperscript{115} See Part I C 1.
\item \textsuperscript{116} Compare Bonner \textit{v Guccione}, 1996 WL 512158, *1 (S D NY) (requiring expert to revise report and explain opinion that employer's "written policy on sexual harassment was 'deficient in several respects'"); with Carrigan \textit{v Delaware Department of Corrections}, 957 F Supp 1376, 1383 (D Del 1997) (granting summary judgment for prison in § 1983 sexual harassment suit by inmate, where plaintiff did not rebut defense expert's opinion that training, policy, procedures and supervision were 'more than adequate').
\end{itemize}
one expert to broaden the scope of her report, a court noted that the expert was testifying exclusively about the written policy, and did not even review deposition transcripts. Experts’ emphasis on the text of the policy diminishes the policy’s relevance to the day-to-day working environment, an issue critical to the Robinson decision. Admitting testimony regarding the adequacy of a written policy does not mean that the court must also admit expert testimony regarding the reasonableness of the employer’s preventative and remedial measures.


Courts vary widely in their efforts to limit the scope of expert testimony on employer reasonableness. Several court decisions predating Robinson rejected this type of expert testimony, finding that it would usurp either the judge’s or jury’s role. In Perkins v General Motors Corp, the district court refused to qualify an expert to testify about an employer’s sexual harassment policy, admonishing that “no witness would be permitted to testify about the law on sexual harassment.” In Lipsett v University of Puerto Rico, the district court concluded that expert testimony concerning sexual harassment usurps the jury’s province, and therefore excluded the testimony. The Lipsett court held that expert testimony did not assist the jury on the ultimate issue of whether the employer had a hostile work environment.


\[118\] Compare Ferriso, 1995 WL 580197 at *2 (permitting expert testimony on adequacy and effect of employer’s harassment policies on employee, but not on “the typicality of [employee’s] reactions to the alleged harassment”), with Robinson v Jacksonville Shipyards, Inc, 760 F Supp 1486, 1512 (M D Fla 1991) (plaintiff “declined to complain about degrading pictures and comments... because she feared that she might be subjected to retaliation and that the complaints would not be well-received”); see also Mulligan, et al, Expert Witnesses, § 23.20 at 361 (cited in note 9) (“The expert should point to specific policies or acts by management that fail to properly deal with sexual harassment.”).

\[119\] Lipsett v University of Puerto Rico, 740 F Supp 921 (D PR 1990); Perkins v General Motors Corp, 129 FRD 655, 667 (W D Mo 1990) (same expert witness who later testified in Robinson).

\[120\] 129 FRD 655 (W D Mo 1990).

\[121\] Id at 667.

\[122\] Id (expert attempted to testify on issues such as the definition of sexual harassment and specific steps that the employer could have taken to “create an environment free from sexual harassment”).

\[123\] 740 F Supp 921 (D PR 1990).

\[124\] Id at 925.

\[125\] Id (“[W]e conclude that the proposed experts’ testimony in this case would not bring to the jury anything more than the lawyers can offer in argument.”) (citation and internal quotation marks omitted).
District courts have recently proposed different limits on the admissibility of expert testimony regarding harassment policies and investigations. In *EEOC v Indiana Bell Telephone Co, Inc*,, the Equal Employment Opportunity Commission proffered testimony by an "employment law educator" on numerous subjects related to the adequacy of the defendant's sexual harassment policy. The district court excluded all of this testimony for several reasons. First, the expert intended to testify about "standard employer practices and procedures regarding sexual harassment," but the court found these practices to be neither standardized nor published in the defendant's industry. Second, the court found the expert's proposed discussion of industry standards for harassment policies to be inconsistent with determining the employer's liability under Title VII. Third, the court criticized the generality of the expert's observations and conclusions, and her overall unhelpfulness to the jury.

Other district courts have come to similar conclusions in trying to limit the scope of expert testimony on this subject. In *Huffman v City of Prairie Village*, both parties attempted to introduce expert testimony about the employer's harassment policy, and exclude each other's expert testimony. The district court, noting the conflict between *Robinson* and *Lipsett* on the admissibility of this type of testimony, refused to exclude either party's expert. Nevertheless, the court declared that it was "not

---

126 79 FEP Cases (BNA) 570 (S D Ind 1997).
127 Id at 573.
128 Id:

[Expert] will testify as to standard employer practices and procedures regarding sexual harassment and the "comparative adequacy" of Ameritech's policies and procedures; Ameritech's efforts to educate and train managers about its sexual harassment policies and procedures; whether Ameritech's responses to complaints of sexual harassment were consistent with standard practices regarding investigation, thoroughness, commitment, recording, tracking, monitoring, follow-up and training; and whether DF [sic] complied with its own procedures.

129 Id.
130 79 FEP Cases at 574 ("No industry groups have adopted her standards, nor have they even been widely-published.").
131 Id ("Courts considering Title VII cases have not routinely allowed a reasonableness determination based on [ ] industry standards.").
132 Id at 574-75 (because the expert's opinions were based on observing "the aggregate of conduct," they had "too little connection with the facts of this case to be useful to the jury, or to overcome the potential prejudicial effect").
133 980 F Supp 1192 (D Kan 1997).
134 Id at 1207.
135 Id at 1208.
136 Id at 1209.
enthusiastic about any of the proposed expert testimony, and might later exclude evidence that did not comport with the facts.

In Jonasson v Lutheran Child & Family Services, another case involving a defendant's sexual harassment policy, the court limited plaintiff's expert testimony to generally appropriate responses by management to prevent and deter harassment. Like the court in Indiana Bell, the Jonasson court noted that "the test is not whether the employer could have done more to remedy the adverse effects." This limitation is consistent with Rule 704 and cases involving standards of care.

Since the Robinson decision, lower courts have been increasingly willing to admit expert testimony regarding employer harassment policies and investigations. Yet in light of Harris v Forklift Systems, the need for such testimony is increasingly suspect. As a few courts have held, employers should not be held liable for failing to have "the best" policy, but only for failing to have a reasonable policy. This argument has added force in light of recent developments in the standard for employer liability under Title VII.

III. THE EMPLOYER'S AFFIRMATIVE DEFENSE TO LIABILITY

In the companion decisions of Burlington Industries, Inc v Ellerth, and Faragher v City of Boca Raton, the Supreme Court held that in a hostile work environment suit, an employer may have an affirmative defense to vicarious liability by having a sexual harassment policy. To prevail on the affirmative defense, an employer must prove by a preponderance of the evidence that: (1) it exercised "reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the employee unreasonably failed to take advantage of any preventive or corrective opportunities." The affirmative defense is not avail-

137 980 F Supp at 1209.
138 Id.
139 1995 WL 579510 (N D Ill).
140 Id at *2.
141 Compare id with Indiana Bell, 79 FEP Cases at 574 ("The proper inquiry, however, is not what is best, but what is reasonable under the circumstances.").
142 See Part I C 2.
143 Indiana Bell, 79 FEP Cases at 574; see also Jonasson, 1995 WL 579510 at *2.
144 118 S Ct 2257 (1998).
145 118 S Ct 2275 (1998).
146 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
147 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
able, however, if the harassment leads to the employee's "dis
discharge, demotion, or undesirable reassignment."\textsuperscript{148}

Elaborating on the employer's "reasonable care" requirement, the Court stated that larger employers with "many departments"
and "far-flung locations" must have a formal harassment policy.\textsuperscript{149}
The Court further noted that an employer's policy and implement-
tation of it must be reasonably calculated to prevent and correct
sexual harassment.\textsuperscript{150} However, these standards are not the novel
part of \textit{Ellerth} and \textit{Faragher}, since lower court decisions as early as
1983 held employers' harassment policies to a similar stan-
dard.\textsuperscript{161} The key innovations in \textit{Ellerth} and \textit{Faragher} result from
(1) the focus on specific examples that evince employer reason-
ableness, and (2) consideration of employer and employee reason-
ableness separately.

A. Factual Inquiry in Determining Employer Reasonableness

In determining whether an employer has acted reasonably,
the \textit{Faragher} Court focused on actions such as creating a policy,
disseminating a policy, keeping track of supervisors' conduct, and
informing employees that they may bypass harassing supervisors
when registering complaints.\textsuperscript{162} Lower courts have applied these
findings in determining whether an employer is entitled to pre-
vail on its affirmative defense.\textsuperscript{163} To a number of these courts, a
sexual harassment policy is adequate if it satisfies the require-
ments set forth in \textit{Faragher}.\textsuperscript{164}

1. \textit{Threshold Questions.}

The \textit{Faragher} decision identified three important character-
istics — a policy's existence, its dissemination, and its reporting

\textsuperscript{148} \textit{Ellerth}, 118 S Ct at 2270; \textit{Faragher}, 118 S Ct at 2293.

\textsuperscript{149} \textit{Faragher}, 118 S Ct at 2293 (distinguishing small workforces which might inform-
mally prevent and correct harassment, from organizations with "many departments in far-
flung locations," which must "communicat[e] some formal policy against harassment").

\textsuperscript{150} Id.

\textsuperscript{161} See, for example, \textit{Katz v Dole}, 709 F2d 251, 256 (4th Cir 1983) (holding that an
employer may "point[ ] to prompt remedial action reasonably calculated to end the har-
assment").

\textsuperscript{162} \textit{Faragher v City of Boca Raton}, 118 S Ct 2275, 2293 (1998).

\textsuperscript{163} See notes 162, 185, 200–01. See also Equal Employment Opportunity Commission,
\textit{Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Super-
visors} (outlining six elements of an effective complaint procedure, including (1) prohibition
against harassment, (2) protection against retaliation, (3) effective complaint process, (4)
confidentiality, (5) effective investigative process, and (6) assurance of immediate and
appropriate corrective action), available online at <http://www.eeoc.gov/docs/
harassment.html> (visited Oct 1, 1999).

\textsuperscript{164} See notes 161–62.
procedures — that help determine whether an employer may prevail on its affirmative defense in a sexual harassment lawsuit.\textsuperscript{155} Several lower courts evaluating these elements determined without the use of expert testimony whether or not the employer satisfied these requirements.\textsuperscript{166}

The first question courts ask is whether the employer has a sexual harassment policy. At least one expert has characterized an employer's harassment policy as nonexistent,\textsuperscript{157} but courts have not adopted this analysis when applying Ellerth and Faragher.\textsuperscript{158} If the employer has a written policy that discusses sexual harassment, courts generally accept the policy's existence without delving into details.

One court concluded that the method for disseminating a harassment policy, the second element discussed in Faragher, signifies how seriously the employer wants to deter sexual harassment.\textsuperscript{169} At least one expert has testified about the proper means of disseminating a harassment policy.\textsuperscript{160} Recent cases considering the affirmative defense adopt a pragmatic perspective that should preclude such expert testimony. Rather than speculating how employers can distribute a policy, courts now focus on whether an employee knows that a harassment policy exists and how to invoke its grievance procedures.\textsuperscript{161} Several courts have addressed this issue at the summary judgment stage,\textsuperscript{162} suggest-

\textsuperscript{155} Faragher v City of Boca Raton, 118 S Ct 2275, 2293 (1998).
\textsuperscript{156} See, for example, Coates v Sundor Brands, Inc, 164 F3d 1361, 1364 (11th Cir 1999); Jones v USA Petroleum Corp, 20 F Supp 2d 1379, 1385–86 (S D Ga 1998); Montero v AGCO Corp, 19 F Supp 2d 1143, 1146 (E D Cal 1998).
\textsuperscript{157} See Shrout v Black Clawson Co, 689 F Supp 774, 777 (S D Ohio 1988) (expert stated that "open-door" policy was too broad to qualify as sexual harassment policy).
\textsuperscript{158} Coates, 164 F3d at 1384 (defendant's "own promulgated sexual harassment policy clearly specified the steps a victimized employee should take to alert the employer of harassment"); Montero, 19 F Supp 2d 1143, 1146 (E D Cal 1998) (employer "had an anti-harassment policy with a complaint procedure").
\textsuperscript{160} Harper v Southeast Alabama Medical Center, 998 F Supp 1289, 1297 (M D Ala 1998) (expert opined that "any statement addressing sexual harassment should be posted and widely publicized and distributed among employees periodically").
\textsuperscript{161} Jones, 20 F Supp 2d at 1386 (granting summary judgment for employer and rejecting argument that it was required to post its harassment policy or give employees a copy to keep); but see Robinson v Truman College, 1999 US Dist LEXIS 545, *21 (N D Ill) (granting summary judgment for employer in part because "it has had in place, since 1992, a written sexual harassment policy that is distributed to every full and part-time employee"); Maddin v GTE of Florida, Inc, 33 F Supp 2d 1027, 1032 (M D Fla 1999) (granting summary judgment for employer in part because the employer "posted the policy on employee bulletin boards on every floor of the building in which [plaintiff] worked").
\textsuperscript{162} Jones, 20 F Supp 2d 1386; Robinson v Truman College, 1999 US Dist LEXIS 545 at *21.
ing that an employer's method of distribution normally does not raise issues of credibility for the jury.

Despite the low threshold that most courts have set for proper dissemination of a harassment policy, employees may not always be aware of the harassment policy. This is especially true if a policy is merely an insert in an employee handbook.\textsuperscript{163} One can also imagine borderline scenarios, such as an employer distributing its harassment policy in a tiny typeface. Although an expert might testify that a 3-point font is too small for most people to read, the proper question is whether the jury needs the expert's specialized knowledge to determine whether the policy has been properly disseminated.\textsuperscript{164} In this context, specialized knowledge will almost always be unnecessary. Under \textit{Faragher}, employers must "communicat[e] some formal policy against harassment," but need not use a specific form of communication.\textsuperscript{165} Absent an employee unable to understand the terms of a harassment policy, courts can resolve the adequacy of the employer's communication without expert testimony.\textsuperscript{166}

The third threshold question is whether a harassment policy permits an employee to bypass her supervisor when reporting an incident of sexual harassment.\textsuperscript{167} Again, no expert is needed because the presence or absence of a bypass procedure will be obvious on its face.\textsuperscript{168} Several recent cases focusing on burdens placed on complainants by an overly complex reporting structure illustrate why expert testimony on this subject does not assist the trier of fact. In \textit{Williamson v City of Houston},\textsuperscript{169} the plaintiff followed the employer's policy by reporting harassment to an appropriate supervisor, but the harassment did not stop.\textsuperscript{170} In the subsequent Title VII action, the employer argued that upon receiving an unsatisfactory response from her supervisor, the plaintiff

\textsuperscript{163} See, for example, \textit{Harper}, 998 F Supp at 1297 (expert stating that "it is inadequate to merely include sexual harassment policy in an employee handbook"); but see \textit{Butta-Brinkman v FCA International, Ltd}, 950 F Supp 230, 232 (N D Ill 1996) (finding that plaintiff was aware of defendant's sexual harassment policy, which was "clearly articulated in [defendant's] employee handbook").
\textsuperscript{164} See notes 14–16 and accompanying text.
\textsuperscript{165} \textit{Faragher}, 118 S Ct at 2293.
\textsuperscript{166} \textit{Jones}, 20 F Supp 2d at 1385 ("[N]either [employee] claims that they were prevented from reading and understanding what they signed.").
\textsuperscript{167} \textit{Faragher}, 118 S Ct 2275, 2293 (1998) (requiring "assurance" of bypass in reporting complaints).
\textsuperscript{168} Id (record clearly reflected assurance that employees could bypass supervisors in reporting sexual harassment); \textit{Jones}, 20 F Supp 2d at 1386 (defendant's harassment policy supplied "an alternative channel for bypassing errant supervisors").
\textsuperscript{169} 148 F3d 462 (5th Cir 1998).
\textsuperscript{170} Id at 463–64.
should have contacted another named entity for receiving complaints, the city's affirmative action office. The Fifth Circuit rejected this defense, noting that the employer was attempting to use its policy "to insulate itself from liability." Clearly the problem in Williamson was the supervisor's failure to take plaintiff's complaint seriously, as was the case in Robinson v Jacksonville Shipyards, Inc.

The Tenth Circuit reached a similar conclusion in Wilson v Tulsa Junior College, when it found that a college's harassment policy "did not provide an avenue for processing [after-hours] complaints." In this case, the only office responsible for receiving harassment complaints was closed during the evening and on weekends. Late one night, plaintiff reported an incident of sexual harassment to the campus police, but the police failed to inform the university's civil rights office of the complaint. Although the Tenth Circuit found the college liable for its supervisor's harassment of the plaintiff, two of three judges did not find the employer's policy inadequate.

Despite criticizing the employers' reporting policies, the above cases do not establish specific requirements for procedures to bypass a complainant's supervisor. Clearly both the Fifth and Tenth Circuits will not tolerate harassment policies that force plaintiffs to jump from office to office in order to lodge internal complaints. In both cases, however, the courts held the employers liable because supervisors with actual knowledge failed to respond to complaints. As in Faragher, a harassment policy's operation, not its text, determines the employer's liability.

\[\text{Id at 463, 466.}\]
\[\text{Id at 487.}\]
\[\text{760 F Supp at 1512 (criticizing employer's failure to document or otherwise record complaints of sexual harassment).}\]
\[\text{164 F3d 534 (10th Cir 1998).}\]
\[\text{Id at 542.}\]
\[\text{Id at 541.}\]
\[\text{Id at 542.}\]
\[\text{164 F3d at 543.}\]
\[\text{Id at 544 (Briscoe concurring) ("we need not address whether [defendant's] sexual harassment policy was effective"); id (Ebel dissenting) (finding defendant's policy and procedures adequate).}\]
\[\text{Williamson, 148 F3d at 467; Wilson, 164 F3d at 542.}\]
\[\text{Compare Faragher, 118 S Ct 2275, 2293 (1998) (finding plaintiff and her colleagues to be "completely isolated from the City's higher management") (citation and internal quotation marks omitted), with Williamson, 148 F3d at 467 (plaintiff's report of sexual harassment to one named authority constituted notice to the entire organization, despite policy requesting victims under some circumstances to report harassment to two authorities), and Wilson, 164 F3d at 528, 542 (10th Cir 1998) (employer failed to provide adequate}\]
pert's assertion that "there should be a number of individuals and offices specifically identified by name as places where a complaint concerning sexual harassment could be made" would not change the fact-finder's analysis one iota. Such a generic statement, besides being trite and meaningless, is part of the everyday life experiences of most jurors, so experts testifying to that effect would be merely a wasted exercise.

2. Investigative Questions.

The other major category of inquiry under Faragher concerns whether an employer adequately investigated claims of sexual harassment. Because a number of different parties are involved the application of a sexual harassment policy may vary more from case to case than its mere existence, dissemination, and bypass procedure. Judges and juries should and do evaluate the adequacy of investigations without relying on expert witnesses. Allowing expert witnesses to evaluate an employer's investigation would be inconsistent with Rule 702's helpfulness requirement.

The first problem with expert testimony regarding investigations is that such testimony is generally irrelevant. The authors of a leading book on workplace sexual harassment propose fourteen guidelines that would apply to all investigations, but no court has adopted these or any other categorical recommendations. In Harper v Southeast Alabama Medical Center, the plaintiff's expert stated that "it was inadequate not to interview other individuals" who, according to the plaintiff, had witnessed alternate channel when campus police officer to whom victim reported sexual harassment did not formally notify victim's supervisor of incident).

See Dunning v Ezell, 1998 US Dist LEXIS 18129, *14 (S D Ala) (finding that employer's internal investigation and remedial action constituted reasonable action as a matter of law); see also Ponticelli v Zurich American Insurance Group, 16 F Supp 2d 414, 431 (S D NY 1998) (adequacy of defendant's investigation is "a factual dispute").

Harper v Southeast Alabama Medical Center, 998 F Supp 1289, 1297 (M D Ala 1998); Huffman v City of Prairie Village, 980 F Supp 1192, 1207 (D Kan 1997); but see Malik v Carrier Corp, 986 F Supp 86, 96 (D Conn 1997) (rejecting the necessity of expert testimony to show "the manner in which investigations of claims of sexual harassment must be conducted").

incidents of harassment. Certainly it is appropriate to question the defendant’s decision, which was possibly incorrect. But the question for the jury is whether the defendant’s investigation failed to evince reasonable care in correcting sexual harassment. Under this standard, the trier of fact must evaluate the defendant’s reasons for narrowing the scope of an investigation and determine whether these reasons are sufficient for the employer to avoid vicarious liability. How the employer could have conducted a better investigation — in the absence of countervailing reasons — amounts to a tautology and is simply not relevant.

Expert testimony about employer investigations also ignores a second issue, the employer’s incentive to conduct a thorough, speedy investigation. Plaintiffs recognize the importance of facts gathered during an internal investigation, and frequently request disclosure of investigation notes despite the colorable claim that such notes are protected by the attorney-client privilege. For many employers, the purpose of a thorough investigation is to prevent the possibility of litigation. It only makes sense for an employer to conduct a sham investigation if the employer is concerned about neither lost productivity nor Title VII liability.

Even when an employer’s incentive to conduct a thorough investigation proves insufficient, courts are able to identify inadequate investigations based on the employer’s diligence in pursuing the claim. For example, in Southard v Texas Board of Criminal Justice, the Fifth Circuit rejected an expert’s testimony that a state agency’s investigation procedure was “fatally

---

189 Id at 1297 & n 17 (defendant’s human resources director stated that he did not consider the other persons to be “witnesses”).
190 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
191 In Harper, the district court held that employer was not liable for harassment, but did not address the adequacy of the investigation. 998 F Supp at 1301–02.
192 See, for example, EEOC v Indiana Bell Telephone Co, Inc, 79 FEP Cases (BNA) 570, 574 (S D Ind 1997) (“The proper inquiry, however, is not what is best, but what is reasonable under the circumstances.”).
193 Harding v Dana Transportation, 914 F Supp 1084, 1103 (D NJ 1996) (employer must disclose facts communicated to an attorney engaged as an investigator); see also Johnson v Rauland-Borg Corp, 961 F Supp 208, 211 (N D Ill 1997) (employer must also disclose legal advice tendered during investigation). Some courts find that a plaintiff has a compelling need for notes written during an internal investigation, to impeach witnesses and reveal bias. Peterson v Wallace Computer Services, Inc, 984 F Supp 821, 826 (D Vt 1997).
195 114 F3d 539 (5th Cir 1997).
flawed." The court noted that another department conducted the investigation, that information could be given informally, and that the employer encouraged and protected witnesses. Although the expert in Robinson v Jacksonville Shipyards, Inc, did not testify about proper investigative procedures, the court concluded that the employer's investigation into sexual harassment was seriously deficient. These and other cases reject a checklist approach to the adequacy of an investigation, and highlight instead evidence of the employer's zeal to investigate and resolve claims of sexual harassment, as well as fact-specific issues such as timeliness. Refusing to admit expert testimony on these subjects focuses parties and courts on the essential factual questions without the gloss of conclusory testimony by experts.

B. Separating Employer From Employee Reasonableness

Expert testimony concerning employer reasonableness initially gained explanatory force by providing evidence that victims of sexual harassment rarely come forward. However, in establishing an affirmative defense to vicarious liability, the Supreme Court has divided employer and employee reasonableness into two separate tests. Proof that an employer has exercised reasonable care in preventing and correcting sexual harassment is insufficient to prevail on the affirmative defense. A defendant

---

196 Id at 553 n 28.
197 Id at 553.
199 Id at 1519 (defendant failed to investigate plaintiff's complaints about hostile work environment caused in part by nude pictures posted in the workplace).

[Plaintiff's] criticisms of the pace or thoroughness of the investigation are irrelevant because there is no dispute that [defendant] was not ignoring her allegations and was taking action reasonably calculated to stop the harassment. Although she complains that defendant 'acted unreasonably by investigating for more than a month without making any conclusions or recommendations,' [plaintiff] offers no evidence to show that [defendant's] efforts were a sham or a token gesture.

Id at *15 (citation omitted).

201 Montero v AGCO Corp, 19 F Supp 2d 1143, 1146 (E D Cal 1998) ("Moreover, [defendant] immediately investigated plaintiff's complaints and acted to correct the same.").
202 Robinson v Jacksonville Shipyards, Inc, 760 F Supp 1486, 1519 (M D Fla 1991) ("[F]ormal complaint is the most rare because the victim of harassment fears an escalation of the problem, retaliation from the harasser, and embarrassment in the process of reporting.").
203 See note 147 and accompanying text.
must show independently that the plaintiff's delay in bringing a grievance was unreasonable.\textsuperscript{204}

To the extent that a plaintiff's failure to take advantage of a grievance procedure results from psychological or other distress, expert testimony may be admissible in some circumstances.\textsuperscript{205} There are also broader questions concerning the helpfulness or admissibility of expert testimony in demonstrating a plaintiff's reasonableness in hostile workplace environment cases.\textsuperscript{206} However, neither of these issues is connected with an employer's duty to take reasonable care. Courts should hold that cultural or psychological expert testimony is admissible only with respect to an employee's failure to take advantage of a harassment policy, and not to the reasonableness of the employer's policy and grievance procedure.

The \textit{Ellerth} and \textit{Faragher} decisions represent an evolutionary, rather than revolutionary, change in the law of employer liability for sexual harassment. Although harassment policies had been relevant to employer liability for more than ten years,\textsuperscript{207} the Supreme Court distinguished employer from employee reasonableness and identified salient facts evincing an employer's rea-

\textsuperscript{204} Courts appear to be divided on how closely they will scrutinize the plaintiffs' reasons for delay. Compare Vandermeer \textit{v} Douglas County, 15 F Supp 2d 970, 981 (D Nev 1998) (plaintiff's delay in delaying harassment complaint held reasonable as a matter of law, because plaintiff believed supervisor's superiors already knew about harassment and plaintiff had been warned not to publicly accuse supervisor of anything), and Corcoran \textit{v} Shoney's Colonial, Inc, 24 F Supp 2d 601, 606 (W D Va 1998) (delay of eight months not unreasonable where "isolated remarks were made and [ ] for a long period nothing further occurred"), with Jones \textit{v} USA Petroleum Corp, 20 F Supp 2d 1379, 1386 (S D Ga 1998) (failure to report sexual harassment unreasonable where plaintiffs merely made "conclusory assertions that [they] felt they would get into trouble if they reported [supervisor's] behavior").

\textsuperscript{205} See \textit{Dang Vang} \textit{v} Vang Xiong X. Toyed, 944 F2d 476, 481–82 (9th Cir 1991) (admitting cultural testimony to explain behavior of sexual assault victims who had continuing contact with the official who raped them); see also Vansonius and Gould, 50 Baylor L Rev at 308 (cited in note 72) (describing a plaintiff's use of "sociologists, psychologists, or anthropologists" to explain that "delay in reporting the alleged harassment is consistent with his or her culture's norms").

\textsuperscript{206} See note 13. Because this Comment focuses on employer reasonableness, it does not address whether the "reasonable person" standard should permit greater use of expert testimony in establishing the plaintiff's prima facie case. For an argument that courts should permit greater expert testimony in support of plaintiffs' claims, see Note, \textit{Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials}, 61 Stan L Rev 357, 384 (1999) ("E]xpert testimony provides the necessary tools for helping lay decisionmakers to understand why a plaintiff may have initially tried to deny, ignore, or cope with the sexually harassing conduct before she expressly or forcefully confronted it.") (citation and internal quotation marks omitted); see also Comment, \textit{Sexual Harassment and Expertise: The Admissibility of Expert Testimony in Cases Utilizing the Reasonable Woman Standard}, 35 Santa Clara L Rev 651, 675–76 (1995).

\textsuperscript{207} See notes 95–97 and accompanying text.
sonableness. Because facts concerning an employer's responsiveness are rarely outside a jury's common understanding, courts should not permit a party to utilize expert testimony for the purpose of supporting or attacking an employer's affirmative defense under Ellerth and Faragher.

IV. PRINCIPLES FOR NARROWING THE SCOPE OF EXPERT TESTIMONY CONCERNING HARASSMENT POLICIES

Limiting the scope of admissible expert testimony regarding employer reasonableness will ensure that expert testimony assists rather than confuses the jury.206 The civil jury, rather than the expert analyst, is the best representative of community sentiment in complex liability cases. Even if jurors do not defer to expert opinions, the experts' concepts of "adequacy" and "inadequacy" improperly frame the debate over liability and are misleading.209 Useful expert testimony must focus the jury and the parties on the employer's willingness to alter its day-to-day behavior to deter sexual harassment,210 rather than substitute for the jury's judgment.

A. Assistance or Confusion?

Because an employer's post-Ellerth affirmative defense relies primarily on facts evincing reasonableness, eliminating the use of expert testimony on this issue preserves the jury's role as the finder of ultimate fact. The jury, rather than the expert, represents the common sense of the community.211 Furthermore, the jury functions to change norms, not merely to reflect the status quo.212 In the hard cases concerning the scope of employer liability under Title VII, jurors should be permitted to arrive at moral arguments honestly, without encountering a "mystifying cloud of words"213 from an expert.

206 See Part I C 2.
209 See Part IV A.
210 See Part IV B.
211 See notes 215–17 and accompanying text; see also EEOC v Indiana Bell Telephone Co, 79 FEP Cases (BNA) 570, 574 (S D Ind 1997) (defendant's conduct "is subject to a reasonableness determination and hindsight evaluation by a panel of impartial jurors").
212 See notes 237–38 and accompanying text.
213 Benjamin Cardozo, What Medicine Can Do For Law, in Law and Literature and Other Essays and Addresses 100 (Harcourt, Brace 1931).

To understand the relationship between the expert witness and the jury, it is important first to understand the civil jury's function as an embodiment of "common sense." Although Justice Holmes once envisioned a growing sphere of matters in which judges, rather than juries, would better "represent the common sense of the community," the jury's importance has persisted, especially in determining what constitutes sexual harassment.

The prominence of juries in federal anti-discrimination law suggests that Congress does not intend to cede liability and damages decisions to panels of experts. The 1991 Amendments to the Civil Rights Act of 1964 specifically created a right to a jury trial for victims of sexual harassment. Legislators effected this change in the law despite opposition from those who feared that an expansion of Title VII's remedial scheme would "cause juries to award damages vastly disproportionate to the offenses [sic] committed by the defendant."

The liability issues at stake in sexual harassment trials are conducive to jury decision-making. As an initial matter, few sexual harassment cases proceed to trial, and even fewer to a jury trial. Therefore the issues presented in a jury trial may fall

---

214 Oliver Wendell Holmes, Jr., The Common Law 124 (Little, Brown, 1923). The case of Lorenzo v Wirth, 49 NE 1010 (Mass 1898), pointedly illustrates the contrast on this issue between Holmes and his critics. Justice Holmes, writing for the majority, found the defendant not liable as a matter of law for plaintiff's injuries, which she sustained when she walked on a paved surface outside her building and stepped into a coal hole. Id at 1011 ("A heap of coal on a sidewalk in Boston is an indication, according to common experience, that there may very possibly be a coal hole to receive it."). A dissenting Justice argued that the case was sufficiently complex to submit to the jury. Id at 1012 (Knowlton dissenting) ("I think that the jury might well have found that a coal hole on a public sidewalk... was left open on a dark evening... with nothing to indicate to pedestrians that there was an opening there, and [ ] nobody to guard the hole or to warn them of danger.").

215 See Harris v Forklift Systems, Inc, 510 US 17, 24 (1993) (Scalia concurring) ("[T]oday's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."); see also note 241.

216 "If a complaining party seeks compensatory or punitive damages under this section... any party may demand a trial by jury." 42 USC § 1981a(c) (1994).


218 See generally Ramon Coronado, Man Gets $1 Million in Harass Lawsuit: Nurse’s Employer to Pay in Same-Sex Settlement, Sacramento Bee B1 (June 19, 1998) (an employment lawyer stated that "[o]nly about 2 percent of sexual harassment cases make it to trial, and those that do rarely reach a jury"); John Accola, Most Disputes Never Reach Court, Rocky Mountain News 8B (Mar 30, 1999) (reporting that an employment lawyer litigated only 2 of approximately 300 sexual harassment disputes before a jury); John Accola, Deals in the Dark: Colorado Employers Rapidly Settling Lawsuits in Secret, Rocky Mountain News 1G (Mar 28, 1999) (reporting that of 108 sexual harassment suits filed in
Closer to the boundary of whether an employer has acted reasonably. Important facts may support neither or both parties. Courts should be wary of attempts to use expert testimony to limit the jury’s exercise of common sense in fixing liability in difficult cases. The Supreme Court’s skepticism about sexual stereotyping testimony in *Price Waterhouse v Hopkins* is particularly appropriate here. As the Court said, “It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’”


Experts should be allowed to testify on underlying facts, but never about reasonableness. Otherwise the jury would be tempted to substitute the expert’s advice for their own judgment, preventing the jury from exercising its role as representative of the community. Even if the average juror knows little about the functioning of a sexual harassment policy and grievance procedure, it is doubtful that conclusory expert opinions about a policy’s adequacy satisfy Rule 702’s assistance requirement. Some experts know nothing about the parties, but only testify about the language of the employer’s policy. Such testimony is hardly distinguishable from “tell[ing] the jury what result to reach.” When expert opinion does not examine the facts of whether an employee knew about an employer’s harassment policy, and how promptly and thoroughly the employer conducted an investigation, a conclusion as to “reasonableness” or “adequacy” is simply not relevant to liability. An expert who wants to provide real assistance to the jury must address facts of policy dissemination and complaint investigation.

Experts in many fields can assist a jury by testifying about facts other than scientific cause, such as *modus operandi* or custom. The Sixth Circuit provides the useful example of a beekeeper testifying from experience that bumblebees always take

---

*one federal district court in 1997, 93 were settled, dismissed, or resolved prior to trial, and only one had gone to trial.*

219 490 US 228 (1989) (plurality opinion); see notes 76–78 and accompanying text.

220 490 US at 256.

221 See notes 14–16 and accompanying text.

222 See note 113.

223 FRE 704 Advisory Committee Notes; see also part I C 2.

224 EEOC v Indiana Bell Telephone Co, 79 FEP Cases (BNA) 570, 574 (S D Ind 1997) (“Reasonableness will vary with the set of circumstances facing the employer. Nothing in [the expert’s] testimony connects her prior experience or knowledge to the facts and circumstances facing [defendant].”).
off in the direction of the wind.\textsuperscript{225} The government uses a variant of this testimony in drug prosecutions, when experts testify that traffickers do not use "unknowing transporters."\textsuperscript{226} Expert witnesses in sexual harassment cases might evaluate employer trends. An expert should be permitted to state what percentage of Fortune 500 companies have a written sexual harassment policy, describe how these companies disseminate information to employees, and compare and contrast different methods of investigating harassment allegations. Such testimony may be reliable and in certain circumstances fit the facts of the case,\textsuperscript{227} but it does not qualify the expert to assess whether an employer's attempt to prevent and correct harassment was reasonable. Concluding from an industry trend that a specific employer was reasonable would be like asking a beekeeper not why bumblebees take off into the wind, but why one particular bee flies slower than another.

An expert testifying about employer reasonableness, even when she discusses how a harassment policy and grievance system work, must of course explain how these facts bear on an employer's liability.\textsuperscript{228} Not only must an expert tell the jury something it does not already know,\textsuperscript{229} but the basis for the testimony must also "fit" the circumstances in the individual case.\textsuperscript{230} As the Supreme Court stated in \textit{Daubert}, "validity for one purpose is not necessarily [ ] validity for other, unrelated purposes."\textsuperscript{231} Consider, for example, a survey of how employers conduct investigations. If an expert intends to testify that only 5 percent of Fortune 500 employers require the victim to submit a written complaint, this information is potentially useful. But if the parties to the lawsuit agree that the employer began an internal investigation immediately after the victim submitted a written complaint, there is no nexus between this facet of the grievance procedure and the employer's response. This testimony would not fit the facts of the case, and should be excluded.

\textsuperscript{225} See note 46.

\textsuperscript{226} \textit{United States v Cordoba}, 104 F3d 225, 229 (9th Cir 1997).

\textsuperscript{227} But see \textit{Indiana Bell}, 79 FEP Cases at 574–75 (excluding expert testimony that purported to summarize "best practices" in implementing sexual harassment policies).

\textsuperscript{228} See notes 48–51 and accompanying text.

\textsuperscript{229} See Learned Hand, \textit{Historical and Practical Considerations Regarding Expert Testimony}, 15 Harv L Rev 40, 54 (1901) (expert testimony is "foreign in kind" from the experience of a jury).

\textsuperscript{230} See \textit{United States v Downing}, 753 F2d 1224, 1242 (3d Cir 1985) (finding possible lack of fit when expert's experimental methodology did not duplicate circumstances for which testimony was offered).

\textsuperscript{231} 509 US at 591.
Permitting expert testimony generally about what employer responses are reasonable runs the further risk of confusing the jury regarding the underlying issue of an employer's liability. One justification for the Daubert factors is the potential for juries to be swayed by expert opinion in the guise of science. Some scholars argue that juries automatically discount the value of non-scientific or non-technical expert testimony, and suggest that the Daubert test should not be applied rigorously to non-scientific testimony. However, other research on jury behavior has suggested that jurors often do not draw credibility distinctions between scientific and non-scientific expert testimony. If the latter study more accurately describes the average jury, juries may overestimate the value of expert testimony concerning employer reasonableness. Limiting expert testimony to the facts surrounding an employer's harassment policy and procedures — rather than allowing general opinions as to "reasonableness" — will prevent the jury from deferring to experts on the community's standard for employer liability.


Expert testimony regarding employer reasonableness also undermines the legitimacy of juries to punish employer behavior that transgresses community norms. One important feature of the civil jury is its role as a "catalyst of change," particularly on questions involving complex value judgments. This is not to

---

232 Id at 595 (citing risk of 'prejudice, confusion of the issues, or misleading the jury') (citation omitted).

233 See, for example, Neil Vidmar, The Performance of the American Jury: An Empirical Perspective, 40 Ariz L Rev 849, 863–64 (summarizing research suggesting that jurors are not unduly influenced by expert testimony). One study found that in four complex trials, one of which was a sexual harassment case, jurors were not impressed with the experts, and dismissed them as "hired guns." Special Committee on Jury Comprehension, Jury Comprehension in Complex Cases 29–31 (ABA 1990).

234 Professor Vidmar and others filed a brief amici curiae in the United States Supreme Court on behalf of the respondents in Kumho Tire Co v Carmichael. The amici took no position on the applicability of Daubert to non-scientific testimony, but argued that the empirical evidence belied that claim that juries defer to experts. See Brief of Neil Vidmar, et al, as Amici Curiae in Support of Respondents at 3, Kumho Tire Co v Carmichael, 119 S Ct 1167 (1999), available at 1998 WL 734434 ("We enter this case to assist the Court with a candid presentation of what social science evidence tells us about how juries respond to expert evidence.").

235 Daniel W. Shuman, Anthony Champagne, and Elizabeth Whitaker, Juror Assessments of the Believability of Expert Witnesses: A Literature Review, 36 Jurimetrics J 371, 382 (1996) (questioning the assumption that juries treat "hard" and "soft" scientific testimony differently, especially when "[t]he typical juror forms impressions of experts stereotypically . . . based on the personal characteristics of the experts").

236 Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va L Rev 1055, 1071 (1964). For a critique of Kalven's view of the jury's ability to "define[e] liability and evaluat[e]"
deny that experts, scientific or otherwise, can also be catalysts for change. But expert testimony focusing entirely on the language in policies and procedures undermines the civil jury's legitimacy, by encouraging employers to manipulate the incentive structure outlined in *Faragher*. Vicarious employer liability will not work if the employer can prevail too easily on its affirmative defense. For example, an employer might fail to respond to complaints of sexual harassment if it could encourage a jury to defer to a defense expert and thus win the lawsuit. A strongly-worded but never-enforced sexual harassment policy might also defeat liability if plaintiffs do not hire an expert witness to counter the employer's expert.

Generalized expert testimony about employer reasonableness may inhibit honest resolution of lay persons' disagreements. Jurors likely will disagree about whether an employer must do more (or less) to prevent sexual harassment. The appropriate question is not whether the employer's system for preventing and correcting harassment caused the plaintiff's harm, but rather whether it did what was necessary to avoid the harm. When an employer's harassment procedures fall on the borderline of reasonableness, jury verdicts may indeed be inconsistent. But at bottom, a jury's verdict on an employer's liability for sexual harassment is

---

618 THE UNIVERSITY OF CHICAGO LEGAL FORUM [1999:


*Faragher v City of Boca Raton*, 118 S Ct 2275, 2292 (1998) ("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.").

See *Butta-Brinkman v FCA International, Ltd*, 950 F Supp 230, 233 (N D Ill 1996) (granting summary judgment for defendant whose employee relations expert testified that defendant "has a clear specific policy against sexual harassment" and employees "have every reason to expect a prompt, thorough investigation, and prompt, effective remedial action when they bring forward a complaint of harassment") (internal quotation marks omitted); see also *Carrigan v Delaware Dept of Corrections*, 957 F Supp 1376, 1383 (D Del 1997) (granting summary judgment for prison in § 1983 sexual harassment suit by inmate, where plaintiff did not rebut defense expert's opinion that training, policy, procedures and supervision were 'more than adequate').

*Faragher*, 118 S Ct at 2293 (employer satisfies first element of affirmative defense by "exerc[ing] reasonable care to prevent and correct promptly any sexually harassing behavior").

See Guido Calabresi and Philip Bobbitt, Tragic Choices 63 (Norton 1978):

"If a series of juries is viewed as representative, then the pattern of decisions which emerges from that series can also be taken to reflect the values of the community. Similarly, the lack of a pattern may be viewed as reflecting values so sensitive to the nuances of slightly varying facts, or in such flux, as to disrupt any discernible pattern."
LIMITING EXPERT TESTIMONY

in many respects a moral judgment. From this perspective, an expert may confuse the jury into thinking that this moral question is instead technical. Limiting expert testimony to facts about harassment policies thus allows juries to decide where a particular employer fits on the continuum of responses to sexual harassment. Testimony on trends may better inform juries as to when an employer is clearly behind the curve in implementing its sexual harassment policy, but will not tell juries that a certain policy amounts to automatic liability or an automatic defense.

The wide range of admissible expert testimony regarding employer responses to sexual harassment also prevents the shaping of norms in the outside world. When experts recast the issue of an employer's reasonableness as the "adequacy" of a harassment policy, they may mislead the jury into thinking that its liability decision is not an evaluative judgment. Conduct that employers or even jurors perceive to have been acceptable in the past may now be questionable or unacceptable. Juries are the ideal instrument for deciding where to place the line: although experts write and think about these issues frequently, deferring to them concerning the effectiveness of harassment policies assumes erroneously that experts have a moral sense superior to that of lay jurors. For a dialogue concerning the limits of liability to be successful, lay opinions on fault rather than expert opinions on "adequacy" must be controlling.

There is reason for concern about the over-reliance on community norms, especially when a hostile jury might ignore the legitimate claims of an employee or unfairly hold individual employers liable. However, using experts to suppress these debates does not achieve more impartial justice. Instead, such practices may cloak evaluative judgments about an employer's duty to prevent harassment. If post-Robinson expert testimony on employer responses to harassment leads to juror deference in determining

---

241 See, for example, Gallagher v Delaney, 139 F2d 338, 342 (2d Cir 1998) ("A jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment.").

242 See, for example, EEOC v Indiana Bell Telephone Co, 79 FEP Cases (BNA) 570, 574 (S D Ind 1997) (defendant's conduct "is subject to a reasonableness determination and hindsight evaluation by a panel of impartial jurors").

243 See notes 237-38 and accompanying text; see also Dan M. Kahan, Ignorance Of Law Is An Excuse — But Only For The Virtuous, 96 Mich L Rev 127, 154 (1997) (arguing that doctrines in criminal law such as the mistake of fact defense actually prevent legitimate discussion of issues on the moral boundary).
Title VII liability, then this testimony can be characterized by Justice Cardozo's phrase, "a mystifying cloud of words."[244]

B. Illusory Benefits to Litigants

Expert testimony about employer reasonableness fails to encourage out-of-court settlements of sexual harassment complaints. The Court in Faragher v City of Boca Raton referred to employers' affirmative defense as an "incentive" to discharge their duty to prevent sexual harassment of employees. Expert testimony, however, upsets the incentive structure in two ways. First, if employers can use expert testimony to declare policies and investigations "reasonable" in order to prevail on summary judgment or before a jury, they will have fewer incentives to reshape their day-to-day practices in order to reduce incidents of sexual harassment.[247]

Second, and conversely, even if the facts of an employer's investigation suggest that the employer took significant action to prevent and correct harassment, expert testimony may undervalue the peculiarities of the investigation relative to the written words of the sexual harassment policy. An expert for the plaintiff could criticize the defendant's policy based on a superficial analysis of its terms, and persuade the jury to ignore the facts and find the defendant liable. Although this criticism is not unique to sexual harassment cases, the non-scientific nature of such testimony makes judicial screening more important. If the employer wins or loses without regard to its policy, it will not bother to improve its written policy. Similarly, if it wins or loses regardless of its actions, it will not bother to better implement its policy.[250]

Employers would have a more powerful incentive to improve their harassment policies and modify their employees' behavior if they could prove reasonableness solely through the facts of policy dissemination and investigation. Juries' decisions could begin to mark out an area within which employer behavior is deemed adequate to avoid liability. Most employers will have the incen-

---

[244] Cardozo, What Medicine Can Do For Law at 100 (cited in note 213).
[246] Id at 2292.
[248] See Part II C.
[249] See notes 41–45 and accompanying text.
tive to alter their day-to-day practices to the most stringent end of this range of reasonable behavior and avail themselves of the powerful affirmative defense. Even though the cost of precautions will increase, the employer will have a net gain because it will not be held liable if it prevails on the affirmative defense. Thus, modifying employment policies and conducting thorough investigations of sexual harassment will be cheaper than guessing wrong and being held liable for sexual harassment.

Proponents of expert testimony in sexual harassment cases frequently argue that plaintiffs need this testimony. Nevertheless, recent changes in the law will increasingly encourage employers to use expert testimony to defend their harassment policies and procedures. Under Faragher and Burlington Industries, Inc v Ellerth, the employer rather than the employee bears the burden of proof that its policies and procedures adequately prevented and corrected sexual harassment. Furthermore, even if an employer is found liable, it may still use the affirmative defense to reduce the amount of damages a plaintiff is awarded. Thus, it is likely that employers, not victims of sexual harassment, will benefit most from liberal admissibility of expert testimony on this subject. The overall purpose of Title VII to protect employees, coupled with the possibly misleading nature of expert testimony, means that expert testimony on behalf of the defendant should be viewed more skeptically then ever.

A related argument in favor of expert testimony is that in an adversary system of civil litigation, courts should not preclude parties from utilizing expert witnesses, regardless of distribu-

---

251 Id at 196 (arguing that the probability that even a careful defendant will cause an accident causes it to incur greater expenses to take care).
252 See, for example, Mulligan, et al, Expert Witnesses § 23.1 at 320 (cited in note 9) (arguing that experts are needed to “document to the trier of fact the importance of the various kinds of harassment in causing the injuries alleged”); see also Comment, 35 Santa Clara L Rev at 675–76 (cited in note 206).
254 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293. This analysis assumes that the plaintiff can satisfy the prima facie case for a hostile environment. See Meritor Savings Bank, FSB v Vinson, 477 US 57, 67 (1986) (adopting “severe or pervasive” standard for hostile work environment claims). Of course if a plaintiff cannot meet this burden, the defendant need not raise the affirmative defense.
255 Ellerth, 118 S Ct at 2270; Faragher, 118 S Ct at 2293.
256 For an argument that jurors are perhaps as capable as judges in screening out poor expert testimony, see Vidmar, 40 Ariz L Rev at 863–66 (cited in note 233); see also Daubert v Merrill Dow Pharmaceuticals, Inc, 509 US 579, 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). For a contrasting view, see L. Timothy Perrin, Expert Witness Testimony: Back to the Future, 29 U Richmond L Rev 1389, 1455 (1995) (arguing that the adversary system fails to effec-
tional and normative effects. This argument is erroneous for several reasons. First, the trial court—not the parties—decides whether an expert witness can assist the trier of fact. Second, the "battle of the experts" phenomenon degrades juror perceptions of the validity of the expert opinion. This argument has greater force when non-scientific testimony is at issue, and the trial court's balancing of probative value against prejudice has fewer guideposts. Third, greater use of experts to assess employer reasonableness will lead defendants to incur greater expert costs in litigation.

Some plaintiffs and some defendants may win individual cases on the basis of expert testimony, but making such testimony outcome-determinative does not further the remedial and conciliatory purposes of Title VII. When Congress amended Title VII in 1991, it clearly intended to maintain the pre-litigation goals of mediation and internal dispute resolution, even while moving to a system of fee-shifting and recovery of expert costs. It would be ironic if allowing the increased use of experts on employer reasonableness undermines the first goal in pursuit of the second.

CONCLUSION

This Comment advocates a judge-based solution to the problem of increasingly diffuse and intangible expert testimony critiquing employer reasonableness. For employers, whether or not courts exclude this expert testimony will not determine the success of their affirmative defense. The employer must still prove that the plaintiff behaved "unreasonably" by failing to take advantage of a grievance procedure. Further, no affirmative defense...
is available if the allegedly harassing environment led to a tangible employment action.\textsuperscript{262}

Limiting expert testimony to industry trends and descriptive information that jurors do not normally possess will have the positive effect of giving employers incentive to focus on the day-to-day facts of how they implement policies and investigate complaints of harassment. As demonstrated by the lower court decisions following \textit{Ellerth} and \textit{Faragher}, these threshold facts often determine whether courts will hold an employer vicariously liable for a supervisor's harassment of a subordinate.

For employees, refusing to admit expert testimony on employer reasonableness appears to eliminate a useful litigation strategy. However, recent examples of expert testimony on harassment policies indicate too much reliance on abstract notions of adequate and inadequate policies. Furthermore, \textit{Ellerth} and \textit{Faragher} have changed the structure of sexual harassment cases to make this type of expert testimony less probative. Not only does the employer bear the burden of proving that its grievance procedure and investigation were reasonably calculated to end harassment, the plaintiff's failure to invoke the grievance procedure need only be reasonable in order to defeat the affirmative defense.\textsuperscript{263}

In limited circumstances, expert testimony may nonetheless assist jurors in determining employer liability for sexual harassment. Descriptive testimony would be useful to fill in gaps in the layperson's knowledge. For example, an expert might define the purpose or use of a sexual harassment policy. The expert might also compare and contrast different methods of investigating sexual harassment policies. But when an expert suggests that one method is clearly adequate or inadequate, the judge should rule this conclusion impermissible because it is neither reliable nor sufficiently grounded in the facts of the case.

Under this approach, district courts should exercise their gatekeeping function more vigorously regarding expert testimony on employer reasonableness. Both parties would be forced to try issues of employer reasonableness on the facts. Not only does a stronger judicial role in screening this expert testimony help jurors make better normative judgments, it also helps employers understand that they cannot discharge their liability for supervisor harassment merely by hiring an expert.

\textsuperscript{262} See note 148 and accompanying text.

\textsuperscript{263} \textit{Ellerth}, 118 S Ct at 2270; \textit{Faragher}, 118 S Ct at 2293.