

**Sexual Harassment Law**

**\*645** BURLINGTON, FARAGHER, ONCALE, AND BEYOND: RECENT DEVELOPMENTS IN TITLE VII JURISPRUDENCE [FNal]

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INTRODUCTION

After more than ten years without issuing a ruling under Title VII, the United States Supreme Court issued three important Title VII decisions in the same term. The Faragher, Burlington and Oncale decisions clarified the plaintiff's and the employer's burdens in Title VII cases. They also refueled discussion about addressing, and more importantly, preventing illegal harassment and discrimination in the workplace. This article explains the import of the Supreme Court's decisions to colleges and universities, discusses post-Burlington-Faragher-Oncale cases in the educational context, and recommends measures that educational institutions can take to safeguard themselves from discrimination and harassment complaints and liability.

I. THE BURLINGTON-FARAGHER DECISIONS

On June 26, 1998, the United States Supreme Court ruled in two landmark sexual harassment cases, Burlington Industries, Inc. v. Ellerth, [FN1] and Faragher v. City of Boca Raton, [FN2] that employers may be "vicariously liable" for unlawful harassment committed by their supervisors, subject to an affirmative defense \*646 based on the reasonableness of the employer's and the victim's conduct. [FN3]

A. Sexual Harassment Law Before Burlington and Faragher

In order to realize fully the significance of the Court's Burlington and Faragher decisions, it is important to understand the issues that had divided the federal appellate courts.

Both before and after the Court's Burlington and Faragher decisions, actionable sexual harassment could be pursued under two distinct legal theories: quid pro quo and hostile work environment. Quid pro quo is the most obvious form of sex discrimination in that it compels a person to choose between suffering an adverse employment action or submitting to sexual demands. By comparison, hostile work environment claims are often less obvious than the "tit-for-tat" quid pro quo claims, and can involve unwelcome sexual advances or offensive workplace behavior based on sex. Whatever form it takes, however, the discrimination must create an environment that is both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. [FN4]

In Burlington, the Court explained that "[t]he principal significance of the

distinction [between quid pro quo and hostile work environment cases] is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain that the latter must be severe or pervasive." [FN5] Thus, the Court's decision in Burlington lessened the significance of this distinction and held that the factors giving rise to liability, not the claim's classification as quid pro quo or hostile work environment, will control. [FN6]

In discussing what factors would give rise to employer liability for supervisory harassment, the Court first acknowledged that prior to the Burlington and Faragher decisions, the federal appellate courts were split on whether employers were to be held to an actual or constructive "knew or should have known" standard of knowledge in hostile work environment cases. Indeed, in Faragher, the Court observed:

**\*647** While indicating the substantive contours of the hostile environments forbidden by Title VII, our cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive .... There have, for example, been myriad cases in which District Courts and Courts of Appeals have held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop.

...

Other courts have suggested that vicarious liability is proper because the supervisor acts within the scope of his authority where he makes discriminatory decisions in hiring, firing, promotions, and the like. [FN7]

The Court also noted that at least one court of appeals had held that employers were strictly liable for the harassment of their supervisors. [FN8]

The Court used Burlington and Faragher as opportunities to remedy this confusion by identifying the source of vicarious employer liability and setting forth definitively the standard by which employer liability would be assessed in the sexual harassment context.

## B. Burlington Industries, Inc. v. Ellerth

In Burlington, the plaintiff, a salesperson, quit her job after fifteen months, claiming that her supervisor's constant sexual harassment had made her job intolerable. [FN9] The plaintiff then brought sexual harassment and constructive discharge claims under Title VII. [FN10] She alleged that her supervisor had made unwelcome sexual advances and had threatened to influence her employment negatively if she did not submit to his advances. [FN11] The plaintiff admitted that her supervisor never carried out any of his threats and that, in fact, she had been promoted. [FN12] The plaintiff also admitted that she never had complained to anyone in authority about the supervisor's behavior. [FN13] Thus, the central issue for resolution was "whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat." [FN14] In a 7-2 decision authored by Justice Kennedy (with dissents by Justices Thomas and Scalia), the Court answered this question by discussing the potential liability of employers for supervisors' behavior and outlining one affirmative defense employers might offer to such liability.

**\*648** The Court first explained that "when a supervisor takes a tangible employment action against [a] subordinate," it is "beyond question" that "the mere existence of the employment relation aids in commission of the harassment" such that an employer may be held liable for the supervisor's actions. [FN15] The Court continued that an employer may also be liable for a supervisor's actions, even if the threats of a supervisor are unfulfilled, if the supervisor created a sexually hostile work environment. The basis for liability in this situation emanates also from agency principles and, in particular, the theory that the harasser's supervisory status aided him in the commission of the tort. [FN16] The Court explained the inherent difficulty of the theory:

On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particularly threatening character, and in this sense, a supervisor always is aided by the agency relation . . . . On the other hand, there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status makes little difference.

It is this tension which, we think, has caused so much confusion among the Courts of Appeals which have sought to apply the aided in the agency relation standard to Title VII cases. [FN17]

The Court balanced these two concerns by imposing vicarious liability on the employer in cases where the supervisor created a hostile work environment, but by providing an affirmative defense to the employer to eradicate or limit that liability. [FN18] Thus, in cases where the victim has suffered no negative tangible employment action, e.g., discharge, demotion, or undesirable reassignment, the employer may receive the benefit of an affirmative defense if it can prove by a preponderance of the evidence two necessary elements:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. [FN19]

The Court went on to explain factors to be considered in determining whether the employer used "reasonable care" or whether an employee "unreasonably failed" to take advantage of corrective measures:

**\*649** While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And although proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. [FN20]

After articulating the standard of liability and the affirmative defense, the Court affirmed the court of appeals' reversal of the lower court's judgment in the employer's favor and remanded the case to give the employer a chance to prove the affirmative defense. [FN21]

### C. Faragher v. City of Boca Raton

The Court's decision in Faragher, decided the same day as Burlington, reiterates the same standards. The plaintiff in Faragher alleged that, during her five years of employment as a lifeguard with the city of Boca Raton, she had been subjected to a sexually hostile work environment by two of her supervisors who repeatedly subjected her to "uninvited and offensive touching," [FN22] lewd remarks, and discussions of women in offensive terms. The plaintiff never officially reported any of these incidents. [FN23] Although the city argued that it had a sexual harassment policy, the policy was not widely disseminated and neither the harassing supervisors nor the victim were aware of the policy. [FN24]

In a 7-2 decision by Justice Souter (again with dissents by Justices Thomas and Scalia), the Supreme Court ruled that the District Court had been correct in holding the city vicariously liable for sexual harassment committed by its supervisors. [FN25] In doing so, the Court employed the same test and affirmative defense it announced in Burlington. It concluded that the city could not assert the affirmative defense to liability successfully because, even though the city may have had a

sexual harassment policy, it was not widely disseminated and, consequently, most of the lifeguards were not aware of its existence. [FN26] Thus, the Supreme Court reinstated the district court's award of \$1 to the plaintiff on her Title VII claim against the City, \$10,000 in compensatory \*650 damages against the supervisors, jointly and severally, and \$500 in punitive damages against one of the supervisors.

#### D. What Burlington and Faragher Mean

Burlington and Faragher make clear that employers may be held liable for unlawful harassment committed by their supervisors. The claim that a supervisor is acting outside the scope of his or her employment when committing such acts will not provide protection from liability. Thus, employers must now, more than ever, take affirmative steps to prevent harassment and to limit their potential liability. Moreover, in cases like Burlington where the victim suffered no negative employment consequences, an employer may be able to establish an affirmative defense to charges that a supervisor harassed a subordinate employee. As a result, the more reasonable an employer's conduct, the more likely it is that an employer will be able to assert the affirmative defense successfully.

Based upon the Faragher-Burlington affirmative defense, an employer can avoid liability in cases where no adverse employment action was taken by showing two things. First, an employer would have to show that it had exercised reasonable care to prevent and to correct promptly any sexually harassing behavior. Second, the employer would have to prove that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities given by the employer or had failed to avoid the harm otherwise.

The impact of the Supreme Court's decisions in Faragher and Burlington is not limited to sexual harassment cases. The same rules apply to all Title VII cases, including racial harassment cases. In Deffenbaugh-Williams v. Wal-Mart Stores, Inc., [FN27] the Fifth Circuit employed vicarious liability principles to uphold a \$75,000 punitive damage award against Wal-Mart in a Title VII and Section 1981 race discrimination case. This followed a jury's finding that the plaintiff's immediate supervisor acted with malice or reckless indifference when he allegedly discharged her for engaging in an interracial relationship. [FN28] Citing Burlington, the Fifth Circuit wrote that the Supreme Court's intent in adopting a vicarious liability standard:

apparently was not to state a standard solely for sexual harassment claims, but rather "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees ...." [FN29]

The Fifth Circuit's application of Burlington and Faragher to race discrimination claims was a foreseeable extension of the Court's rationale, and it is \*651 likely that that same rationale would apply equally in all cases of harassment made illegal by Title VII. [FN30]

#### E. Higher Education Case Law in the Wake of the Burlington-Faragher Decisions

In the wake of the Burlington-Faragher decisions, employers, attorneys and courts alike have endeavored to determine correctly the decisions' import. As one might expect, several cases have arisen in the context of educational institutions. Each is instructive.

The decisions in Fall v. Indiana University (South Bend) [FN31] are frightening decisions for any college administrator or attorney to read. In the first Fall decision, the United States District Court for the Northern District of Indiana denied the University's motion for summary judgment on the plaintiff's hostile work environment claim against the University and Indiana University at South Bend's ("IUSB") then-chancellor, Dan Cohen. The Court's decision explained that plaintiff Lynn Fall had been hired by IUSB to serve as a student interest liaison with the

community of Plymouth, Indiana. Through her position, she met Chancellor Cohen. [FN32]

According to the court, which accepted the plaintiff's version of the facts for the purpose of the summary judgment motion, Fall claimed that during a meeting in Cohen's office, Cohen closed the door, admitted that his e-mail scheduling the meeting had been a ruse, put his arms around her, groped her breasts, and forced his tongue into her mouth. [FN33] Fall alleged that she vomited after the encounter and claimed she felt "paralyzed." [FN34] Fall did not complain to anyone in authority immediately following the incident but she did avoid Cohen. [FN35] At a reception a few months later, Cohen told Fall that some "cuts" would have to be made and she took this to mean that her job would be eliminated. [FN36] Fall then reported the incident in Cohen's office to her immediate supervisor (three months after it allegedly had occurred). [FN37] As a result, at least in part, of the ensuing investigation, Cohen resigned [FN38] as Chancellor of IUSB to take a one-year sabbatical leave.

\*652 In reviewing the motion for summary judgment, the court acknowledged that the Faragher-Burlington framework applied because Fall had suffered no tangible adverse employment action but noted that "we need not address this new pronouncement of employer liability if the sexually objectionable environment created by a supervisor does not rise to a level actionable under Title VII." [FN39] Thus, the court began by interpreting Faragher's admonition that the standard for judging hostility be "sufficiently demanding to ensure that Title VII does not become a 'general civility code'" to mean that "only extreme conduct can be said to discriminatorily alter the terms and conditions of employment." [FN40] Accordingly, it held that Fall had to meet a two-prong test: (1) that the conduct was subjectively hostile to her; and (2) that the conduct would have been objectively hostile to a reasonable person. [FN41] Using these standards, the court held that Fall met the subjective prong because she alleged that she vomited and felt "paralyzed" after the incident. [FN42] The court held that Fall also satisfied the objective prong because Cohen planned the meeting which took place in the confines of his office and because the physical contact was "severe." [FN43] The court emphasized, "Cohen's alleged actions, as deplorable as they would be in any setting, are objectively more sinister and abusive given that they occurred in the isolation of the Chancellor's office." [FN44]

After concluding that both prongs of the subjective/objective test had been met, the court next considered the University's affirmative defense. The affirmative defense requires an employer to show both that it exercised reasonable care to prevent and to correct the harassing behavior and that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided. The court held that the University met the corrective part of the affirmative defense -- that is, it exercised reasonable care to promptly correct sexually harassing behavior by a supervisor -- by having an anti-sexual harassment policy in place and by immediately investigating Fall's complaint. [FN45] Indeed, the court acknowledged that "once the Plaintiff registered her complaints to the appropriate officials, the University immediately \*653 launched an expansive investigation into the matter, which resulted in Cohen's resigning his position as Chancellor." [FN46]

The court also held, however, that the University did not act reasonably to prevent the harassment. On this point, the facts in Fall are quite instructive. In response to Fall's complaint against Cohen, Fall testified that her supervisor, Jacqueline Carl, told her that "it wasn't the first time." [FN47] She also testified that the Vice-Chancellor for Academic Affairs responded "Oh, no, not again," referring to his knowledge of a previous sexual harassment complaint against Cohen in which a female employee alleged that she went into Cohen's office and that he closed the door and tried to kiss her. [FN48] Because of this knowledge by the University, albeit actual or constructive, the court denied summary judgment because "Burlington and Faragher place the burden of showing reasonable care in preventing sexual harassment on the University." [FN49] Although this does not imply that employers must discharge employees who are the focus of sexual harassment complaints, it stresses the importance of investigating and responding adequately to all complaints. [FN50] One may no longer opt to take no action either at the "request" of an alleged victim or on the theory that "every dog gets one bite."

[FN51] Indeed, employers must take action even if no employee has complained about alleged harassment but the employer has knowledge that it is occurring. [FN52] More importantly, employers must respond even if the complaining employee asks that nothing be done. [FN53]

\*654 The court also stated that the University did not meet the second part of the affirmative defense, i.e., the University did not show that Fall unreasonably failed to take advantage of the University's preventive and corrective opportunities offered to remedy the harassment. Specifically, the court concluded that Fall's three-month delay in reporting the incident was not unreasonable and, therefore, the University was not able to assert the affirmative defense created by the Supreme Court in Faragher and Burlington. [FN54]

Following the court's denial of Cohen's and the University's motions for summary judgment, the case proceeded to trial. The jury found for Fall and against the University on her Title VII claim but awarded no damages against the University. The jury also found for Fall and against Cohen on her Section 1983 and state law assault and battery claims and awarded \$5,157 in compensatory damages and \$800,000 in punitive damages against Cohen. [FN55]

Both Fall and Cohen filed post-trial motions. Fall contended that the verdict was inconsistent because the jury did not impose compensatory damages against the University, even though it found the University liable. The court denied Fall's motion and explained that the jury could properly award no damages against the University because the jury instruction, to which Fall did not object, directed the jury to award damages in proportion to each party's responsibility. Cohen contended that a new trial was appropriate because, inter alia, the verdict was against the weight of the evidence and the punitive damages award was not supported by sufficient evidence. The court disagreed and denied Cohen's motion but did recommend to remittitur of the punitive damage award from \$800,000 to \$50,000. [FN56]

Fall demonstrates the "do's" and "don'ts" of responding to complaints of harassment. But, more importantly, it is a reminder to employers that "the primary objective of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place." [FN57]

In Gunnell v. Utah Valley State College, [FN58] a college secretary brought claims for sexual harassment and retaliation under Title VII and for denial of medical leave under the Family and Medical Leave Act. [FN59] Specifically, Gunnell \*655 claimed that her direct supervisor and the Chief of Campus Police (for whom she also worked) subjected her to comments, jokes and pictures of a sexual nature and unwelcome physical contact such as hugs. Gunnell complained to the College's Personnel Director and the College, which investigated the allegations, reviewed the sexual harassment policy with the alleged harassers' departments, and instructed that there could be no retaliation against Gunnell for her complaints.

Immediately after Gunnell complained, the sexual harassment ceased. Gunnell, however, complained that she was given inferior equipment and fewer job duties and that other employees were "setting her up" by shifting blame to her for errors she did not commit. [FN60] The situation came to a head when one of Gunnell's supervisors put her on probation for refusing to cooperate with co-workers. Gunnell left the office declaring "I'm through. This is it." [FN61] Later, however, she called in and said she was taking a medical leave. Shortly thereafter, Gunnell was discharged for insubordination.

The college raised several arguments on summary judgment, including that the harassment stopped as soon as Gunnell complained. The district court granted summary judgment to the college on Gunnell's sexual harassment claim. [FN62] On appeal, the Tenth Circuit remanded to the trial court for it to re-evaluate the case based upon the Supreme Court's decisions in Faragher and Burlington. The Tenth Circuit explained:

Under Faragher and Burlington Industries, an employer whose supervisory personnel has harassed subordinates will be liable for the harassment that occurred even though the employer ultimately stopped further harassment. If the employee has

not been subjected to any tangible employment action, however, the employer may assert an affirmative defense to any liability by showing both that it had reasonable mechanisms in place to prevent and to cure any discriminatory practices and that the plaintiff employee unreasonably failed to take advantage of such opportunities. Before the district court, [the college] argued generally that it acted promptly to correct any inappropriate behavior. However, given that Faragher and Burlington Industries have now set forth a specific defense to employer liability for sexual harassment by a supervisor, we \*656 reverse summary judgment on this claim and remand to allow the district court to evaluate Gunnell's claim in light of these recent Supreme Court cases. For example, under Faragher and Burlington Industries, the district court should consider whether there was a hostile work environment based on sexual harassment of Gunnell that existed within the limitations period; whether [her direct supervisor] or others who caused such hostile work environment were [actually] Gunnell's supervisors; whether [the college] had a reasonable policy in place to prevent and correct promptly such sexually harassing behavior; and whether Gunnell unreasonably failed to take advantage of such policies or to avoid harm or otherwise. [FN63]

In short, the Gunnell court's language implies that having a policy in place which is not effective to stop reported harassment may cause an employer to fail the first prong of the affirmative defense. This legal ruling complies with common sense: if your policy is not effective, it will not protect you.

Several post-Faragher-Burlington cases similarly demonstrate the manner in which schools have successfully--and not so successfully--availed themselves of the affirmative defense. Starting with the first prong, *Wilson v. Tulsa Junior College* [FN64] confirms that simply having a policy is not enough to satisfy the affirmative defense. In *Wilson*, the Tenth Circuit affirmed a verdict for the plaintiff in a sex-based hostile environment claim. Citing *Burlington* and *Faragher*, the court held that the employer's policy was unreasonable because it did not provide a way to make a complaint to the personnel director during evenings or weekends when many personnel worked and did not direct supervisors on how to deal with complaints. [FN65] *Wilson* demonstrates that courts require employers to use common sense in drafting and applying their harassment policies. It also stresses that, no matter how effectively drafted the policy is, the employer will receive no protection if its supervisors are not trained on how to apply it.

In *Glickstein v. Neshaminy School District*, [FN66] the district court denied the employer's motion for summary judgment because the plaintiff presented sufficient evidence that the school district failed the first prong of the affirmative defense by not taking prompt remedial action. Specifically, the plaintiff presented evidence that the person to whom she had to complain was a friend of the harasser, who only gave him a verbal reprimand, which made the harassment more frequent and severe. When the plaintiff tried to circumvent this investigator, school administration took no further action and the harassment persisted. *Glickstein* again emphasizes that a written policy designed to prevent harassment is no longer enough: the policy, in practice, must work to correct harassment. Policies must provide multiple avenues of complaint so that the complaining employee can circumvent the alleged harasser and report to a neutral third party with authority to take action. Further, \*657 supervisors must be aware of the duty to report complaints of sexual and other illegal harassment. They cannot simply "sit" on complaints claiming that they are not the proper person to whom such allegations should be reported.

Post-Faragher-Burlington cases also emphasize the plaintiff's duty to act under the second prong of the affirmative defense. For example, in *Scrivner v. Socorro Independent School District*, [FN67] the Fifth Circuit affirmed the district court's dismissal of a teacher's hostile work environment claim because the school successfully invoked the affirmative defense. It met the first prong of the affirmative defense - taking prompt remedial action - by launching a full investigation, which included interviewing the entire faculty. The school satisfied the second prong because, during its investigation of the alleged hostile work environment, the plaintiff denied that any harassment took place and, thus, unreasonably failed to prevent or correct the alleged harm. [FN68] *Scrivner* demonstrates that the affirmative defense imposes duties on both the employer and

the employee in harassment cases.

Similarly, in *Robinson v. Truman College*, [FN69] the district court granted summary judgment to the employer, based on *Burlington*, because the employee failed to overcome the second prong of the affirmative defense. She unreasonably failed to report the behavior by lodging her first complaint after she was terminated. [FN70]

These cases confirm that courts undertake a fact-intensive review in determining whether the employer has successfully satisfied the *Faragher-Burlington* affirmative defense. It is not enough to have a sexual harassment policy. The policy must be written and disseminated to all employees. It must provide for alternative avenues of complaint, in addition to an employee's direct supervisor. Finally, it must be enforced through supervisory training and effective investigation of employee complaints.

Similar scrutiny is imposed upon the employee's actions. An employee cannot sit on his or her complaint by refusing to cooperate in an investigation or by claiming that everything is fine and nothing should be done. The employee must take advantage of the recourse afforded by the employer's no harassment policy. In this way, the affirmative defense encourages both employer and employee to be more responsible. The more clear and effective \*658 the policy, the easier it is for the employer and employee to utilize it successfully and to resolve any complaints.

While *Faragher* and *Burlington* demonstrate the necessity for, and the need for proper enforcement of, a well-drafted zero tolerance harassment policy, a third Supreme Court opinion, *Oncale v. Sundowner Offshore Services, Inc.*, [FN71] demonstrates the increasing breadth of the discrimination laws.

## II. The *Oncale* Decision

In *Oncale v. Sundowner Offshore Services, Inc.*, the United States Supreme Court unanimously ruled that Title VII's prohibition against sexual harassment applies to harassment by a member of one sex against a member of the same sex, thereby resolving what the Court termed a "bewildering variety of stances" taken by federal circuit and district courts on the issue. [FN72] Although it is sometimes overlooked, it is, perhaps, more important that the Court also gave needed direction on the sufficiency and type of evidence needed to support a hostile work environment claim under Title VII.

### A. *Oncale v. Sundowner Offshore Services, Inc.*

In *Oncale*, the plaintiff brought a sexual harassment suit under Title VII alleging (among other things) acts of sexual battery and threats of homosexual rape by two male supervisors and a male co-worker. The Court of Appeals for the Fifth Circuit affirmed summary judgment against *Oncale* under its earlier holding that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." [FN73]

In an opinion authored by Justice Scalia, the Supreme Court reversed, holding that same-sex harassment claims are cognizable under law if they meet the standards of proof applicable to sexual harassment claims generally. In so ruling, the Court relied on a literal reading of Title VII's prohibition that:

[I]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex .... [FN74]

Building on its earlier holding in *Castaneda v. Partida* [FN75] that discrimination by people of one race against people of the same race may be actionable under Title VII, the Court ruled that same-sex discrimination falls within Title VII's purview and explicitly rejected the requirement that, to be unlawful, the alleged harasser



must be a homosexual or be motivated by sexual desire.

\*659 The Court also clarified that hostile work environment claims are not about the gender of the alleged harasser, but rather are about behavior - because of sex - that is so severe or pervasive that it would alter the conditions not only of the alleged victim's employment, but also of a reasonable person's employment. [\[FN76\]](#)

Finally, the Court also rejected the argument that recognition of same-sex harassment claims would impose an unworkable burden on employers and would "transform Title VII into a general civility code for the American workplace." [\[FN77\]](#) The Court observed that "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and jurists to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." [\[FN78\]](#)

## B. What Oncale Means

Oncale was a foreseeable clarification of Title VII jurisprudence that confirms that unlawful discrimination is any discrimination because of sex. The Court's decision should have no effect on the policies and internal mechanisms that have been and continue to be advisable to prevent workplace discrimination and harassment and to address potential problems when they arise. It does, however, require employers to recognize the viability of same-sex discrimination and harassment claims to ensure that their policies articulate this "zero tolerance" approach to all forms of harassment and discrimination in the workplace.

## C. Higher Education Case Law In The Wake Of The Oncale Decision

In Oncale, the Supreme Court explained that Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] ... because of ... sex." [\[FN79\]](#) Furthermore, the Court explained that it has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." [\[FN80\]](#) Instead, the sufficiency and type of evidence needed in sex discrimination cases is the focus. Accordingly, a same-sex discrimination plaintiff may raise an inference of discrimination when, for instance, "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women \*660 in the workplace." [\[FN81\]](#) A same-sex harassment plaintiff may also "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." [\[FN82\]](#)

The lower courts have applied the Court's reasoning in cases arising in higher education. Each case illustrates Oncale's impact.

In Chrouser v. DePaul University [\[FN83\]](#) the United States District Court for the Northern District of Illinois granted summary judgment to DePaul on sexual harassment claims brought by an assistant professor. Assistant Professor Kelley Chrouser alleged that her department chair and another colleague, both lesbians, sexually harassed her by staring at her breasts, backing her up against a wall, making sexually explicit comments to her, and telling her that she was "all tarted up." [\[FN84\]](#)

Based on Oncale, the court stated that "Chrouser's burden is to demonstrate that her workplace was 'hellish,' not merely tinged with offensive sexual connotations and vulgarity." [\[FN85\]](#) Thus, although the court found that some of the "more graphic and vulgar remarks were certainly offensive utterances ... the law of sexual harassment is 'not designed to purge the workplace of vulgarity.'" [\[FN86\]](#) The court granted summary judgment on the sexual harassment claims noting that "[t]he circumstances of Chrouser's employment are too far removed from the hellish and intolerable end of the spectrum, and too close to the merely unpleasant workplace." [\[FN87\]](#) Under Oncale's rationale, the actions alleged in Chrouser, including backing

the employee up against a wall and staring at her breasts, would be no more actionable in a male-female situation than in a same sex one (a conclusion which, while understandable in "legal theory," is hard to square with the reality of such a male-female situation). In other words, Oncale does not change the evaluation of the sufficiency of a plaintiff's evidence of harassment, it simply confirms that discrimination because of sex is not limited to discrimination by members of the opposite sex. [FN88]

Lower courts have also predictably expanded Oncale's prohibition to protected categories other than sex. [FN89] In Oncale, the Supreme Court noted that:

**\*661** [I]n the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race. "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings as one definable group will not discriminate against other members of that group." [FN90]

Thus, Oncale's instruction is clear: discrimination that is "because of" a person's membership in a protected category may be actionable. For example, in *Curley v. St. John's University*, [FN91] the court cited Oncale and permitted the plaintiff's age discrimination claim to proceed even though the majority of decision-makers were over forty. The court held that, through Oncale, the Supreme Court has "emphasized the plausibility of various forms of intragroup discrimination ...." [FN92]

In *Green v. Administrators of Tulane Educational Fund*, [FN93] the court, citing Oncale, denied Tulane's motion for summary judgement and explained that even where there is no allegation of unwanted physical contact, nor any request for sex, if the harassment would not have occurred but for the sex of the victim, it meets the Title VII statutory requirement of being "because of ... sex." [FN94] The court also cited Faragher, saying where there is no adverse employment decision, an environment is not actionable unless it is one that a reasonable person would find hostile or abusive. The court found material issues of fact about whether the alleged demotion and threats to terminate constituted hostile or abusive behavior under the Faragher standard.

The above cases make clear that the lower courts have interpreted Oncale to prohibit all discrimination "because of" sex. Other courts have extended Oncale's rationale to apply to other forms of discrimination so long as the alleged discriminatory acts are "because of" the victim's membership in a protected category. Once it is determined that the discrimination is actionable, the employer may attempt to defend itself using the Faragher- Burlington affirmative defense. Employers must be sensitive to the significant movement in the discrimination laws and revise and enforce their policies accordingly.

### **\*662 III. WHAT SHOULD LEARNING INSTITUTIONS DO DIFFERENTLY IN LIGHT OF THE BURLINGTON-FARAGHER-ONCALE DECISIONS?**

Burlington, Faragher and Oncale provided some much needed guidance on illegal workplace harassment and the respective duties of employers and employees in combating it.

One practical ramification of this trilogy of cases is that employers should revisit their existing zero-tolerance harassment policies to ensure that they forbid all forms of unlawful discrimination and harassment, including same sex harassment and other harassment by members of protected groups against one another. Policies should also establish effective complaint and investigatory processes that afford victims the opportunity to report the unlawful conduct to someone other than their supervisor or professor, such as an affirmative action or EEO officer.

These cases also make clear that having a good policy on paper is not enough. The employer must establish a system to disseminate the policy. The policy must be widely disseminated and discussed with faculty, students and employees. All supervisors, including department chairs and professors, must be educated thoroughly on all aspects of the policy, emphasizing their special obligation not to engage in

discrimination or harassment and to deal with, rather than to ignore, potential discrimination and harassment.

When complaints are made, employers must respond to them by promptly interviewing the accuser, the accused, and witnesses, gathering any documentary or other evidence, and documenting the investigatory process. [FN95] All investigations should be concluded with a written report that thoroughly and fairly summarizes the factual findings and the bases for them in a way that avoids making unnecessary "admissions" that can later be mischaracterized in the course of any litigation. If a policy violation is found, the employer needs to evaluate the seriousness of the offense and the violator's past record. In that context, the employer should take and document appropriate corrective action that is reasonably calculated to prevent any further harassment or discrimination. What is reasonable will vary depending on factors such as the action taken against others for similar offenses, the victim's input, the actor's prior pertinent history, and any other relevant circumstances. Employers should also communicate results on a "need to know" basis in confidence and give closure to the matter with those involved (including the person who made the complaint), while keeping in mind that unnecessary or improper disclosure may create a claim for defamation. Finally, employers should follow-up by checking both with the victim to make sure that the problem has been resolved and that no retaliation has occurred and also with the perpetrator to make sure that all mandatory steps are followed, that the conduct has not been repeated, and that follow-up is documented.

\*663 Following these steps should maximize the chances that an employer will be able to successfully avail itself of the Faragher-Burlington affirmative defense when the employee has suffered no adverse employment action.

#### CONCLUSION

To educational institutions that currently have effective policies against all discrimination and harassment in place, Faragher, Burlington, and Oncale simply mean: keep doing what you are doing. Those who do not have such policies in place should seize the opportunity to implement a policy that assimilates the Court's recent holdings and articulates a "zero tolerance" approach to all discrimination and harassment in the workplace. Although these decisions require employers to recognize the parameters of supervisory liability and the viability of same-sex discrimination and harassment claims, the Court's decisions should have no adverse effect on the policies and internal mechanisms that have been and continue to be advisable to prevent workplace discrimination and harassment and to address potential problems when they arise.

In sum, Faragher, Burlington and Oncale reinforce that employers and employees both have obligations to prevent and to remedy all harassment in the workplace that is "because of" an individual's membership in a protected group. These cases promise a reward for employers, in the form of an affirmative defense, who take adequate preventive measures to ward off harassment and who take adequate corrective ones to remedy it when it unfortunately occurs. Colleges and universities would be well advised to take advantage of the Court's promised reward.

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[FN1]. 524 U.S. 742 (1998).

[FN2]. 524 U.S. 775 (1998).

[FN3]. "Vicarious liability" means that an employer may be liable not only for its own negligence, but for the negligence of one of its employees. Under the common law, an employer may be "vicariously" liable for the torts of its servants or employees committed while acting in the scope of their employment. See Restatement (Second) of Agency § 219(1) (1958). An employer also may be liable for employee actions committed outside the scope of employment when, for example, the employer itself was reckless or negligent, see id. at § 219(2)(b), or when the employee purported to act or to speak on behalf of the employer and there was reliance on the employee's apparent authority, or when the employee was aided in accomplishing the tort by the existence of the agency relationship. See id. at § 219(2)(d).

[FN4]. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

[FN5]. 524 U.S. at 752.

[FN6]. See id. "When we assume discrimination can be proved, however, the factors we discuss below, and not the categories quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability." Id. at 754.

[FN7]. 524 U.S. at 788-89, 791.

[FN8]. See id. at 792 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69-70 (1986)).

[FN9]. 524 U.S. 742, 742 (1998).

[FN10]. See id. at 749.

[FN11]. See id.

[FN12]. See id. at 748-749.

[FN13]. See id. at 748.

[FN14]. Burlington, 524 U.S. at 754.

[FN15]. Id. at 760.

[FN16]. See id. at 758-763.

[FN17]. Id. at 763 (internal citations omitted).

[FN18]. Cases of harassment by a co-worker are judged under a negligence standard and the affirmative defense is not available to employers in those cases. Faraqher, 524 U.S. at 799.

[FN19]. Burlington, 524 U.S. at 765 (internal citation omitted) (emphasis added).

[FN20]. Id. at 765.

[FN21]. See id. at 766.

[FN22]. Faraqher v. City of Boca Raton, 524 U.S. 775, 780 (1998).

[FN23]. See id. at 782.

[FN24]. See id. at 781-82.

[FN25]. See id. at 802.

[FN26]. See id. at 808.

[FN27]. 156 F.3d 581 (5th Cir. 1998), reh'g en banc granted and opinion vacated by 169 F.3d 215 (5th Cir. 1998), opinion reinstated on reh'g by 182 F.3d 333 (5th Cir. 1999), remanded by 188 F.3d 278 (5th Cir. 1999).

[FN28]. 156 F.3d at 586.

[FN29]. Id. at 593 (quoting Burlington, 524 U.S. at 764).

[FN30]. Title VII prohibits discrimination on the basis of one's sex, race, national origin, religion and ancestry. 42 U.S.C. § 2000(e) (1994).

[FN31]. 12 F. Supp. 2d 870 (N.D. Ind. 1998); 33 F. Supp. 2d 729 (N.D. Ind. 1998).

[FN32]. 12 F. Supp. 2d at 873.

[FN33]. In the eventual trial, Cohen testified "that nothing untoward happened during that meeting." 33 F. Supp. 2d at 733.

[FN34]. 12 F. Supp. 2d at 873.

[FN35]. See *id.*

[FN36]. See *id.* at 874.

[FN37]. See *id.*

[FN38]. See 12 F. Supp. 2d at 874. Following Cohen's resignation, he continued to teach classes at the University's South Bend campus as a professor at a salary of about \$90,000 annually. See Marti Goodlad Heline, Cohen's Lawyer Busy with Arbitration Hearing, Motion For Retrial, SOUTH BEND TRIB., Oct. 11, 1998. He also was granted a one-year sabbatical, according to the University's Affirmative Action Director, Shirley Boardman. See 12 F. Supp. 2d at 874. At trial, Fall testified "repeatedly" that "most of the anger and distress for which she sought compensation was directed at IU's failure (in her mind) to terminate Cohen's employment." 33 F. Supp. 2d at 735. The court ruled, however, that IU had acted with "reasonable care to promptly correct Cohen's sexual harassing behavior." *Id.*

[FN39]. 12 F. Supp. 2d at 876.

[FN40]. Id. at 877 (quoting Faragher, 524 U.S. 775, 788 (1998)).

[FN41]. See 12 F. Supp. 2d at 876-77.

[FN42]. 12 F. Supp. 2d at 878.

[FN43]. Id. at 879.

[FN44]. *Id.*

[FN45]. According to the plaintiff, the University never notified Fall of the results of the investigation or of Cohen's resignation as Chancellor. 12 F. Supp. 2d at 874. Despite this, the court ultimately found that the University met the first prong of the affirmative defense. As a matter of practice, however, it is advisable to report the results of any investigation to the complaining employee.

[FN46]. 12 F. Supp. 2d at 881. In fact, the University got good marks from the court for its prompt investigation of over thirty witnesses and for advising that the University's system President "to take 'quick, appropriate and definitive action' against Cohen." Id. at 874.

[FN47]. Id. at 882.

[FN48]. Id. at 882. The University took no corrective action with respect to this complaint "apparently because the victim did not want any further action taken." Id.

[FN49]. Id. at 883.

[FN50]. See Johns v. Harborage I, Ltd., 585 N.W.2d 853 (Minn. App. 1998) (affirming trial court's finding that restaurant should have taken steps to prevent a male employee from harassing female co-worker where male employee had a history of exposing himself and groping female waitresses; although restaurant conducted prompt investigation of employee's complaint, court held that Title VII liability can be imputed when employer should have known that an employee may become victim of sexual harassment but took no steps to prevent it.).

[FN51]. See Jones v. Clinton, 990 F. Supp. 657, 667, 675 (E.D. Ark. 1998).

[FN52]. The court in Fall explained that "[t]he Investigative Report reveals that prior to Cohen's harassment of the Plaintiff, a substantial number of female employees at IUSB were actual victims of alleged similar harassment by Cohen, or were at least aware of similar harassment, even though these incidents were not formally reported. This leads to an inference that Cohen's sexual harassment of women was so pervasive and well-known on the IUSB campus that the University, in the exercise of reasonable care, should have discovered it; or perhaps more ominously, that University personnel with the authority to do something about the harassment actually knew of Cohen's misbehavior, but refused to act." 12 F. Supp. 2d at 883.

[FN53]. The court in Fall rejected the University's argument that a five-year-old complaint by another employee against Cohen was insufficient to provide it with actual notice of Cohen's history of sexual harassment because the University, at the alleged victim's request, took no corrective action. In other words, the employee's request did not free the University of its duty to investigate. 12 F. Supp. 2d at 882-83.

[FN54]. But see Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999) (holding that employer satisfied affirmative defense where plaintiff's initial complaint of sexual harassment was investigated immediately and plaintiff confirmed through subsequent conversations that the situation was resolved even though she would allege in later proceedings that the harassment continued).

[FN55]. See 33 F. Supp. 2d at 733.

[FN56]. See id. at 748.

[FN57]. Fall, 12 F. Supp. 2d at 881.

[FN58]. 152 F.3d 1253 (10th Cir. 1998).

[FN59]. Although the plaintiff in this case clearly was an "employee," colleges and universities should also consider the question of: Who is an "employee" for Title VII purposes? In O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), the Court of Appeals for the Second Circuit held that a college student who was working as an

unpaid intern at a state hospital had no claim under Title VII because she was not an "employee" under the Act. Specifically, the court held that "[w]here no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist ...." Id. at 115-16. See also Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) ("Compensation by the putative employer to the putative employee in exchange for [her] services ... is an essential condition to the existence of an employer-employee relationship"). Compare Haavistola v. Community Fire Co., 6 F.3d 211 (4th Cir. 1993) (finding an issue of fact as to whether a volunteer at a fire company is an employee because she received state-funded disability pension, group life insurance and survivors' benefits for dependents).

[FN60]. See Mora v. University of Miami, 15 F. Supp. 2d 1324, 1335 (S.D. Fla. 1998) aff'd mem., 189 F.3d 485 (11th Cir. 1999) (citing Faragher and Oncale and noting that "although Title VII mentions specific employment decisions with immediate consequences, the scope of the prohibition 'is not limited to "economic" or "tangible" discrimination."').

[FN61]. 152 F.3d at 1258.

[FN62]. See id. at 1254.

[FN63]. Id. at 1261 (emphasis added).

[FN64]. 164 F.3d 534 (10th Cir. 1998).

[FN65]. See id. at 542.

[FN66]. No. 96-6236, 1999 WL 58578 (E.D. Pa. Jan. 26, 1999).

[FN67]. 169 F.3d 969 (5th Cir. 1999).

[FN68]. See id. at 972.

[FN69]. No. 97-C896, 1999 WL 33887 (N.D. Ill. Jan. 19, 1999).

[FN70]. See also Masson v. School Bd. of Dade County, 36 F. Supp. 2d 1354 (S.D. Fla. 1999) (granting summary judgment where plaintiff unreasonably failed to take advantage of the school board policy which allowed her to make a complaint); Walton v. Younce, No. 5:97-CV-367-BR2, 1999 WL 1427824 (E.D.N.C. Jan. 27, 1999), aff'd mem., 203 F.3d 821 (4th Cir. 2000) (granting judgment to East Carolina University ("ECU"), one of the defendants, because the plaintiff failed the second prong by unreasonably failing to avoid harm by utilizing the preventive measures built into ECU's program when she did not mention that her supervisor had harassed her until the designated contact person learned of the harassment from another source and contacted her).

[FN71]. 523 U.S. 75 (1998).



[FN72]. Id. at 79.

[FN73]. 83 F.3d 118, 120 (5th Cir. 1996).

[FN74]. 523 U.S. at 78 (emphasis added).

[FN75]. 430 U.S. 482, 499 (1977).

[FN76]. See 523 U.S. at 81-82.

[FN77]. Id. at 80.

[FN78]. Id. at 82. The Supreme Court remanded the case to the district court for a jury trial of Oncale's claims. A week before the scheduled trial date, the parties settled the suit for an undisclosed amount. See Parties Settle Same-Sex Harassment Suit Just Short of Trial Before Federal Jury, Daily Lab. Rep. (BNA), Oct. 29, 1998.

[FN79]. 523 U.S. at 81 (emphasis added).

[FN80]. Id. at 80.

[FN81]. Id.

[FN82]. Id. at 80-81.

[FN83]. No. 95 C 7363, 1998 WL 299426 (N.D. Ill. May 20, 1998).

[FN84]. Id. at \*2.

[FN85]. Id. at \*3.

[FN86]. Id. (internal citations omitted).

[FN87]. Id. at \*4.

[FN88]. In Lapsley v. Columbia Univ.-College of Physicians & Surgeons, 999 F. Supp. 506 (S.D.N.Y. 1998), the court cited Oncale and held that the employee failed to establish racial discrimination where the evidence showed that she was berated in front of fellow workers because "[o]pen criticism of [the plaintiff] ... does not suffice to establish a racially hostile work environment." Id. at 521.

[FN89]. The Burlington, Faragher and Oncale decisions have impacted not only the jurisprudence of Title VII, but also of Title IX. For example, in Gallant v. California State University, 997 F. Supp. 1231 (N.D. Cal. 1998), the District Court for the Northern District of California granted summary judgment in the university's

favor in a student's Title IX suit where the student, a gay woman, alleged that the then-Dean of the Center for Science, Technology and Information Resources at a satellite campus made sexually inappropriate comments to her. In granting summary judgment for the university, the court noted that the student produced "no evidence that Dr. May's conduct, although arguably objectionable and unprofessional, was in any way connected with plaintiff's sex. Plaintiff has introduced no evidence, nor does the record suggest, that Dr. May would not have acted in exactly the same way to a student or prospective student who happened to be male. Dr. May spoke to her of his sexual desires and liaisons with both men and women. Despite the sexual nature of the speech, it did not expose plaintiff to the 'disadvantageous terms or conditions ... to which members of the other sex are not exposed' that the Supreme Court requires a plaintiff to prove." Id. at 1235 (quoting Oncale, 523 U.S. at 80).

[FN90]. 523 U.S. at 78 (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).

[FN91]. 19 F. Supp. 2d 181 (S.D.N.Y. 1998).

[FN92]. Id. at 192.

[FN93]. No. 97-1869, 1999 WL 203262 (E.D. La. Apr. 8, 1999).

[FN94]. Id. at \*8.

[FN95]. One good resource is a pamphlet published by the National Association of College and University Attorneys. See ELSA KIRCHNER COLE & THOMAS HUSTOLES, NATIONAL ASS'N OF COLLEGE AND UNIV. ATTORNEYS, HOW TO CONDUCT A SEXUAL HARASSMENT INVESTIGATION (1997).

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