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# THE “QUIET REVOLUTION” IN EMPLOYMENT LAW & ITS IMPLICATIONS FOR COLLEGES AND UNIVERSITIES<sup>†</sup>

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## INTRODUCTION

Since the initial passage of the Civil Rights Act of 1964, courts and Congress have consistently expanded the reach of liability for workplace harassment and other discrimination. Until recently, however, most employment discrimination laws—and the court decisions interpreting them—remained simply prohibitive, outlawing discrimination without specifying how to eliminate it.

Over the last eight years, a “quiet revolution” has been taking place in the law of employment discrimination. Federal courts have been providing increasingly explicit guidelines for how employers may avoid or minimize exposure to costly

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lawsuits and damages. In simplest terms, federal courts seem to have adopted an incentive approach that rewards employers for implementing effective compliance programs and penalizes those that decline to do so. This judicial “revolution” has garnered little attention in most part because it has been patched together from an extensive array of case law rather than enacted amid much fanfare and commentary like its legislative counterparts.

The revolution started in 1998 with the Supreme Court’s twin decisions in *Burlington Industries, Inc. v. Ellerth*<sup>1</sup> and *Faragher v. City of Boca Raton*.<sup>2</sup> In these cases, the Court first recognized the existence of a limited affirmative defense available in sexual harassment cases, referred to in this article as the “effective compliance” defense. According to the Court in *Faragher* and *Ellerth*, this defense allowed an employer to protect itself from vicarious liability for sexual harassment in a discrete class of cases.<sup>3</sup> As later amplified by the Court, this defense also allowed an employer to avoid punitive damages where the employer had adopted and implemented effective policies and procedures to address complaints of workplace harassment and discrimination.<sup>4</sup>

This article explores the evolution of the original “effective compliance” defense from a limited shield to a powerful affirmative duty that employers now ignore at their peril. Since 1998, this defense has been quietly and painstakingly expanded by the lower courts. A review of the developing case law not only illustrates the often-overlooked elements and benefits of an effective compliance program but also dramatizes the increasingly serious risk of declining to comply. Further, state law trends that codify the requirements of an effective anti-harassment and discrimination program suggest that employers who fail to implement effective compliance programs may soon find themselves not only deprived of defenses but also facing enhanced federal or common law liability. Judging from recent cases and legislative initiatives, there is little doubt that effective compliance programs are no longer discretionary, but rather now constitute essential “best practices” in civil rights compliance.

Colleges and universities have much to gain from the effective compliance defense. Given the large number of individuals they generally employ and the personal nature of the relationships on campus, educational institutions often face harassment and discrimination lawsuits. At a time when many can ill-afford costly litigation, colleges and universities can derive significant risk management benefits from developing internal compliance mechanisms that may forestall lawsuits and external agency investigations.

Colleges and universities are also uniquely suited to take advantage of the effective compliance defense. Unlike their counterparts in the corporate world, colleges and universities have ready access to the educational resources necessary to teach employees about their responsibilities under the law. They also serve constituencies that are primed to learn. Perceptive educators view the obligation to

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1. 524 U.S. 742 (1998).
  2. 524 U.S. 775 (1998).
  3. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806–07.
  4. *See Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999).

comply as an important “teachable moment” on campus and identify the eradication of discrimination as fundamental to their educational mission. Other educational institutions, however, have failed to take advantage of this opportunity, adopting high-minded policies but declining to use available educational resources to implement effective training procedures.

Such lapses are particularly unfortunate because the ultimate benefit of effective compliance is one that is critical to every college and university’s educational mission—the eradication of improper and disrespectful conduct. Discrimination and harassment are odious; they corrupt the workplace, strain campus communities, demoralize good employees, and generate negative publicity. Elimination of harassment and discrimination is crucial to any institution’s mission of providing a safe and nurturing environment where people can learn and work. In discussing the effective compliance defense, courts have made it clear—and educators should never forget—that addressing discrimination is not only a legal imperative, but a moral one as well.

## I. THE GENESIS OF THE “EFFECTIVE COMPLIANCE” DEFENSE

### A. The Proliferation of Employment Litigation: A Crisis in the Courts

The Supreme Court articulated the effective compliance defense at a time when it was besieged with employment discrimination cases. During 1970, only 350 employment discrimination cases were filed throughout the federal court system.<sup>5</sup> During the next twenty years, however, the number of employment discrimination cases expanded by over 2,000%—an astonishing figure compared with a relatively meager 125% increase in the number of civil filings overall.<sup>6</sup>

An already-crowded docket grew even more congested after Congress passed the Americans with Disabilities Act (ADA)<sup>7</sup> in 1990, the Civil Rights Act of 1991,<sup>8</sup> and the Family and Medical Leave Act of 1993 (FMLA).<sup>9</sup> Around the same time as the passage of these milestone laws, the 1991 confirmation hearings for Justice Clarence Thomas focused nationwide attention on the issue of sexual harassment. These events had a cumulative and near-instantaneous impact on the amount of employment discrimination litigation. The number of sexual harassment charges filed with the Equal Employment Opportunity Commission (“EEOC”) increased from 6,883 in 1991<sup>10</sup> to 10,532 in 1992;<sup>11</sup> by 1998, filings had

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5. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

6. *Id.*

7. 42 U.S.C. §§ 12101 *et seq.* (2000 & Supp. III 2003).

8. 42 U.S.C. §§ 1981, 1981a, 1988, 2000e, 12111, 12112 (2000 & Supp. III 2003).

9. 29 U.S.C. §§ 2601 *et seq.* (2000 & Supp. III 2003).

10. UNIV. OF NEW MEXICO, UNIV. BUSINESS POLICIES AND PROCEDURES MANUAL, POLICY # 3780 — SEXUAL HARASSMENT POLICY, available at [http://www.unm.edu/~hrinfo/Civilrights/step2\\_2.htm](http://www.unm.edu/~hrinfo/Civilrights/step2_2.htm) (last visited Oct. 29, 2006).

11. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SEXUAL HARASSMENT CHARGES, EEOC & FEPAS COMBINED: FY 1992–FY 2005 (Jan. 27, 2006),

increased to more than 15,000.<sup>12</sup> But this was only a preview of the deluge waiting for the federal courts: in 1998, there were 23,299 federal employment discrimination cases filed in the courts—almost triple the number of annual filings from ten years prior.<sup>13</sup> At that point, employment discrimination cases comprised nearly 10% of the federal civil caseload.<sup>14</sup>

B. *Faragher* and *Ellerth*: Affirmative Defense to Liability

Against this backdrop, the Supreme Court decided two cases that addressed the circumstances in which an employer may be liable for its employees' sexual harassment. In *Ellerth*, a salesperson alleged that her supervisor constantly harassed her.<sup>15</sup> The Court was asked to decide whether the actions of the supervisor, who was a "midlevel manager,"<sup>16</sup> subjected the employer to vicarious liability.<sup>17</sup>

Resolving a split among the circuit courts of appeal,<sup>18</sup> the Court held that an employer could be vicariously liable for a supervisory employee's harassing conduct.<sup>19</sup> The Court found that liability should attach regardless of whether the harassing conduct merely created a "hostile work environment" or resulted in a full-fledged "tangible employment action" that directly injured an employee.<sup>20</sup> The Court defined a tangible employment action as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>21</sup>

Notwithstanding its broad liability ruling, however, the Court also held that an affirmative defense to liability would be available in certain cases in which the employee's conduct did not result in a tangible employment action.<sup>22</sup> In crafting this defense, the Court emphasized Title VII's deterrent purpose. It observed that Title VII was "designed [by Congress] to encourage the creation of anti-harassment policies and effective grievance mechanisms."<sup>23</sup> The Court reasoned that if liability depended "in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context."<sup>24</sup> Moreover, "[t]o the extent limiting employer liability

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<http://www.eeoc.gov/stats/harass.html>.

12. *Id.*

13. Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workplace and the Unfulfilled Promise That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 664 (Spring 2005).

14. Donohue & Siegelman, *supra* note 5, at 985.

15. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

16. *Id.*

17. *Id.* at 753.

18. *Id.* at 749–51.

19. *Id.* at 766.

20. *Id.* at 765.

21. *Id.* at 761.

22. *Id.* at 765.

23. *Id.* at 764.

24. *Id.* (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984)).

could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."<sup>25</sup>

Therefore, the Court held that in cases not involving a tangible employment action, the employer would have a complete affirmative defense if, and only if: "(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>26</sup>

The Supreme Court reinforced this ruling in *Faragher, Ellerth's* companion decision. Addressing the case of a lifeguard subjected to a hostile environment by fellow beach employees,<sup>27</sup> the Court again took up the challenge of crafting "manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees."<sup>28</sup> Just as in *Ellerth*, the Court once again "recogniz[ed] the employer's affirmative obligation to prevent violations and g[ave] credit here to employers who made reasonable efforts to discharge their duty."<sup>29</sup>

The Court re-emphasized the employee's own duty under Title VII to minimize damages. The Court again warned that if an employer has a "proven, effective mechanism for reporting and resolving complaints of sexual harassment available to the employee without undue risk or expense," and an employee "unreasonably fail[s] to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so."<sup>30</sup> Having said this, the Court went on to confirm its holding in *Ellerth* that, if no tangible employment action had been taken, an employer may avoid vicarious liability for the misconduct of its employees if it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer."<sup>31</sup>

### C. *Kolstad*: Bar to Punitive Damages

A year after deciding *Faragher* and *Ellerth*, the Supreme Court shifted its focus from liability to circumstances in which an employer could limit its damages for harassment. In *Kolstad v. American Dental Association*,<sup>32</sup> a jury found that a female employee of a professional association was denied a promotion because of her gender in violation of Title VII.<sup>33</sup> The case reached the Supreme Court on the question of whether the district court properly denied the jury an opportunity to

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25. *Id.* (citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995)).

26. *Id.* at 765.

27. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

28. *Id.* at 785–86.

29. *Id.* at 806.

30. *Id.* at 806–07.

31. *Id.* at 807.

32. 527 U.S. 526 (1999).

33. *Id.* at 531–32.

assess punitive damages, which are available under Title VII only where a defendant acts with “malice” or “reckless indifference.”<sup>34</sup> The Court was asked to weigh whether an employer’s strong commitment to training and other compliance programs should be relevant to the assessment of its intent in a particular case.<sup>35</sup>

Continuing its stated commitment to encouraging private compliance, the Supreme Court concluded that an effective compliance program could potentially bar punitive damages in a Title VII case. As a policy matter, imposing punitive damages without regard to whether an employer has engaged in substantial education or compliance efforts would “penalize[] those employers who educate themselves and their employees on Title VII’s prohibitions.”<sup>36</sup> Certainly, “[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.”<sup>37</sup> Therefore, “to avoid undermining the objectives underlying Title VII,”<sup>38</sup> and consistent with its approach in *Faragher* and *Ellerth*, the Court held that, “in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s good faith efforts to comply with Title VII.”<sup>39</sup> The Court declined to elaborate upon what might constitute a “good faith effort.”<sup>40</sup>

Having held in general terms that an effective anti-harassment and discrimination program may bar not only liability but also punitive damages, the Supreme Court in *Kolstad* left unanswered many questions about the parameters of what is now called the *Faragher/Ellerth* defense. The task was left to the lower courts to determine what might constitute reasonable care by the employer or unreasonable failure by the employee to take advantage of an employer’s anti-harassment programs.

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34. *Id.* at 532–33.

35. *Id.* at 544.

36. *Id.*

37. *Id.* at 545.

38. *Id.*

39. *Id.* (quotations omitted).

40. *Kolstad* was hailed by employers and criticized by plaintiffs’ attorneys. For example, the General Counsel of an employer’s association noted that “[*Kolstad*] creates a safe harbor for employers who use a good faith effort to comply with the law.” Jan Crawford Greenburg, *Top Court Creates Standard for Discrimination Damages*, CHICAGO TRIB., June 23, 1999, at 6. Another advocate of employee training calls the *Faragher* and *Ellerth* decisions “a gift” and *Kolstad* “another gift.” See CAROL M. MERCHASIN, MINDY H. CHAPMAN & JEFF POLISKY, *CASE DISMISSED: TAKING YOUR HARASSMENT PREVENTION TRAINING TO TRIAL* 5, 7 (2d ed. 2005). In contrast, a noted plaintiff’s attorney who specializes in employment cases called *Kolstad* “judicial legislation run amok.” See Debra S. Katz, *Judicial Legislation Run Amok: New Limits On Punitive Damages Imposed*, LEGAL TIMES, July 12, 1999, at S31. She argued that “while paying lip service to expanding the rights of the aggrieved, the Court dredged safe harbors found nowhere in either of the laws at issue . . . [the] majority is unwilling to accept Congress’ considered judgment that punitive damages are necessary to strengthen employee rights and aggressively deter employer violations.” *Id.*

## II. "BEST PRACTICES" IDENTIFIED BY THE COURTS

In the years since *Faragher*, *Ellerth*, and *Kolstad* were decided, lower courts have gone far in adding substance to the Supreme Court's very general statements regarding anti-harassment programs. They have also expanded the *Faragher/Ellerth* defense from sexual harassment cases under Title VII to other Equal Employment Opportunity ("EEO") actions, such as those arising under the ADA, the Age Discrimination in Employment Act ("ADEA"),<sup>41</sup> Title IX,<sup>42</sup> 42 U.S.C. § 1983, and state anti-harassment and anti-discrimination statutes.<sup>43</sup> In construing *Faragher*, *Ellerth*, and *Kolstad*, lower courts have consistently identified certain practices as essential to effective compliance.<sup>44</sup> Just as consistently, lower courts have disapproved insufficient or illusory procedures that fail to discourage violations of EEO laws or address violations that do occur. Although no single decision purports to define the "best practice" in compliance procedures, the following case law clarifies the factors that courts have found critical in approving or criticizing compliance programs.

The elements of an effective EEO compliance program as derived from relevant case law divide into three main categories: (1) development, implementation, and publication of comprehensive anti-harassment and discrimination policies and procedures; (2) development, implementation, and publication of effective complaint, investigation, and appeal procedures; and (3) effective training of all employees with respect to these policies and procedures. Only by fully addressing all three of these elements can a college or university gain confidence that it has implemented an effective EEO compliance program and taken full advantage of the holdings in *Faragher*, *Ellerth*, and *Kolstad*.

Most, if not all, of these elements should be familiar to school administrators. Years ago the Department of Education's Office for Civil Rights ("OCR") promulgated regulations under Title IX and the ADA requiring institutions that receive federal funds to publish policies of non-discrimination and designate employees to coordinate efforts.<sup>45</sup> These regulations also require that institutions

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41. 29 U.S.C. § 621 (2005).

42. 20 U.S.C. § 1681 (2006).

43. See, e.g., *Williams v. Admin. Review Bd.*, 376 F.3d 471, 478 (5th Cir. 2004) (applying *Faragher/Ellerth* to a hostile work environment claim brought under the whistleblowing provisions of the Energy Reorganization Act of 1974); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 (4th Cir. 2001) (allowing liability standards developed for sexual harassment to apply to all forms of harassment); *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 411-12 (6th Cir. 1999) (finding a racial harassment claim can be proven with evidence of an abusive or offensive work environment); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998) (applying the same agency principles of vicarious liability under the Civil Rights Act to acts of racial discrimination by supervisors); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (finding no difference in employer-liability standards for race and sex-based discrimination); *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 687-88 (8th Cir. 1998) (assuming, without deciding, that an ADA claim caused by a hostile work environment is to be modeled after a similar claim under Title VII).

44. This article will refer to compliance with Title VII and other laws prohibiting harassment and discrimination as "EEO compliance."

45. See Title IX, 34 C.F.R. § 106.9 (2003); Age Discrimination Act, 34 C.F.R. § 110.25

adopt and publish grievance procedures to resolve complaints.<sup>46</sup> Thus, an effective EEO program is essential not only to preserving the *Faragher/Ellerth* defense, but also to comply with statutory and regulatory requirements that have existed for some time.

#### A. Broad Policy Prohibiting Discrimination, Harassment, and Retaliation

Lower courts have expanded upon *Faragher* and *Ellerth* in clarifying that the first, essential element of a comprehensive compliance program is a strong policy statement against the offending conduct. The school must define the prohibited behavior and state unequivocally that the conduct violates its policies and will not be tolerated. This gives the campus community fair warning and also sets a standard against which future conduct can be evaluated.

Decisions subsequent to *Faragher* and *Ellerth* also clarify that such policies should encompass the full array of forms of discrimination. Although nearly all employers have now adopted some form of EEO compliance policy, a surprising number still limit their policies to sexual harassment and fail to mention other categories of discrimination, harassment, or retaliation. This is a mistake. The case law clarifies that an incomplete policy may seriously jeopardize the institution's ability to mount a defense or forestall punitive damages.

For example, in *Molnar v. Booth*,<sup>47</sup> the court found that a general policy barring discrimination on the basis of "race, color, or sex" was insufficient because it did not define "sexual harassment" or give guidance to employees on how to deal with such harassment.<sup>48</sup> In *Golson v. Green Tree Financial Servicing Corp.*,<sup>49</sup> the court criticized the employer's failure to mention pregnancy discrimination in its general policy prohibiting discrimination: "no matter how effectively the policy in the

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(1975).

46. See Title IX, 34 C.F.R. § 106.8 (2003); Age Discrimination Act, 34 C.F.R. § 110.25 (1975). See also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 305 n.15 (1998) ("The school district must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of discrimination. The district also must inform students and their parents of Title IX's antidiscrimination requirement.") (citations and internal quotation marks omitted); *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1225 n.4 (7th Cir. 1997) ("Under federal law, all education programs receiving federal financial assistance must designate at least one responsible employee to investigate complaints of sexual harassment and must adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of harassment.") (internal quotation marks omitted); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 408 (5th Cir. 1996) ("Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination."); *Frederick v. Simpson Coll.*, 160 F. Supp. 2d 1033, 1036 (S.D. Iowa 2001) ("When OCR receives a complaint, it inspects: whether the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures; whether the school investigated or otherwise responded to allegations of sexual harassment; and whether the school has taken immediate and effective corrective action responsive to the harassment.").

47. 229 F.3d 593 (7th Cir. 2000).

48. *Id.* at 601.

49. 26 F. App'x 209 (4th Cir. 2002).

handbook was disseminated, [the employer] failed to notify its employees that discrimination on the basis of pregnancy violates Title VII.”<sup>50</sup> On this basis, the court found that the employer’s conduct constituted “reckless indifference” and justified an award of punitive damages.<sup>51</sup> Similarly, in *EEOC v. Preferred Management Corp.*,<sup>52</sup> the court affirmed an award of punitive damages, noting that the employer’s anti-harassment policy failed to include religious discrimination, its managers had received no training on the issue, and it had no procedure for handling complaints of religious discrimination.<sup>53</sup>

The EEOC’s *Enforcement Guidance*<sup>54</sup> underscores the importance of a comprehensive EEO policy that addresses more than just sexual harassment. At a minimum, the EEOC recommends that a policy include: (1) a clear definition of the prohibited conduct; (2) a clear statement prohibiting retaliation for making a complaint or for providing information regarding a complaint; (3) a complaint process with accessible avenues for complaints; (4) an assurance of confidentiality, to the extent possible; (5) a complaint process that is prompt, thorough and provides an impartial investigation; and (6) assurance that immediate and effective corrective action will be taken if it is determined that discrimination occurred.<sup>55</sup> Courts have confirmed the importance of these elements as well.<sup>56</sup>

The EEOC’s *Enforcement Guidance* also specifies that an effective policy “should make clear that [the employer] will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints” and warns that a “policy and complaint procedure will not be effective without such an assurance.”<sup>57</sup> Courts have consistently ruled in favor of employers that adopt such a provision and punished those that do not. For example, in *Garone v. United Parcel Service, Inc.*,<sup>58</sup> the court granted the employer’s *Faragher/Ellerth* defense, in part because it was “undisputed that [the employer] maintained and published to its employees policies that not only prohibited sexual

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50. *Id.* at 214.

51. *Id.* at 213–14.

52. 226 F. Supp. 2d 957 (S.D. Ind. 2002).

53. *Id.* at 963.

54. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC NOTICE NO. 915.002 (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> [hereinafter EEOC’S ENFORCEMENT GUIDANCE].

55. *Id.*

56. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349–50 (6th Cir. 2005) (concluding that while no one definitive formula for a sexual harassment policy is necessary, “an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint and (4) and provide for training regarding the policy.”); *Montero v. Agco Corp.*, 192 F.3d 856, 862 (9th Cir. 1999) (finding an employer’s sexual harassment policy was adequate where it “(1) provide[d] a definition of sexual harassment, (2) identifie[d] who[] employees should contact if they are subjected to sexual harassment, (3) describe[d] the disciplinary measures that the company may use in a harassment case, and (4) provide[d] a statement that retaliation will not be tolerated.”).

57. EEOC’S ENFORCEMENT GUIDANCE, *supra* note 54.

58. 436 F. Supp. 2d 448 (E.D.N.Y. 2006).

harassment, but protected individuals from retaliation for reporting harassment and pledged to investigate and take action upon both anonymous and attributed complaints.”<sup>59</sup> Conversely, in *Reed v. Cracker Barrel Old Country Store*,<sup>60</sup> the court found a policy inadequate because it contained no mention of retaliation for “reporting or objecting to sexual harassment,” the employer’s managers had not received any training on retaliation, and that no “specific efforts were used to prevent or to address complaints of retaliation.”<sup>61</sup>

From the standpoint of effective management, an improperly limited policy sends the wrong message to employees, suggesting that the institution takes some categories of discrimination or harassment less seriously than others. This undermines respect within the workplace. To be effective, a policy should include a clear, broad prohibition against *all* forms of discrimination, harassment, and retaliation.

### B. Effective Publication of Policies and Procedures

Lower courts building upon *Faragher* and *Ellerth* have also emphasized that an institution must not only adopt but also distribute and publicize its anti-discrimination policies to everyone within the institution or campus community. The Supreme Court focused upon this omission in *Faragher*. Although the defendant in *Faragher* had adopted a policy against sexual harassment, it had “entirely failed to disseminate its policy against sexual harassment among the beach employees and . . . its officials made no attempt to keep track of the conduct of supervisors.”<sup>62</sup> In addition, the policy did not allow the plaintiff to bypass her immediate supervisors even though she sought to complain about those supervisors personally.<sup>63</sup> Under these circumstances, the Court held as a matter of law that the employer had failed to exercise reasonable care.<sup>64</sup>

The Supreme Court’s words should resonate with any university administrator overseeing a large campus or one with multiple locations. The *Faragher* decision warned that the defendant “could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.”<sup>65</sup>

Numerous lower courts have since agreed that effective distribution of a formally adopted policy is essential to showing reasonable care in maintaining an effective compliance program.<sup>66</sup> The Fourth Circuit Court of Appeals has held that

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59. *Id.* at 472.

60. 171 F. Supp. 2d 741 (M.D. Tenn. 2001).

61. *Id.* at 749–50.

62. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

63. *Id.*

64. *Id.* at 809.

65. *Id.* at 808–09.

66. *See, e.g., Hertzberg v. SRAM Corp.*, 261 F.3d 651, 664 (7th Cir. 2001) (finding a jury could conclude that employer did not make a good faith effort to implement anti-harassment policy based on evidence in the record that employer did not provide employees with ready

distribution of an anti-harassment policy is “compelling proof” that an employer exercised reasonable care in preventing and correcting harassment,<sup>67</sup> which may be rebutted only by showing “that the employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional.”<sup>68</sup> Although no other circuit has adopted this “compelling proof” standard, the importance of distributing an effective EEO policy cannot be overstated.

Courts have approved many methods that an employer may use to effectively publish its anti-harassment policies. These include training employees, putting up posters in the workplace,<sup>69</sup> referencing the policy in a union contract,<sup>70</sup> or explaining the policy in a newsletter<sup>71</sup> or the institution’s internal, monthly magazine.<sup>72</sup> One employer even reproduced its anti-harassment policy on the back of its employees’ pay stubs.<sup>73</sup> At the very least, each college and university will want to include the relevant policy in its employee handbook and post the policy on the institutional website.<sup>74</sup> In addition, the institution should distribute any modifications of its policy to all of its employees and also distribute the policy to new employees. A common, court-approved mechanism is to re-distribute such materials on a yearly basis and obtain signatures memorializing each employee’s receipt of the policy.<sup>75</sup> Many colleges and universities also send an annual e-mail

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access to anti-harassment policy); *Romano v. U-Haul Int’l*, 233 F.3d 655, 670 (1st Cir. 2000) (“[A] written statement, without more, is insufficient to insulate an employer from punitive damages liability.”); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (ruling against an affirmative defense because employer did not distribute harassment policy to employees).

67. See, e.g., *White v. BFI Waste Serv., LLC*, 375 F.3d 288, 299 (4th Cir. 2004); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001).

68. *Barrett*, 240 F.3d at 266 (internal quotation marks omitted).

69. See, e.g., *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1304 (M.D. Ala. 2006) (concluding employer effectively published anti-harassment policy by posting it in a “crew room” where plaintiff was present on a regular basis); *Simmons v. Mobile Infirmary Med. Ctr.*, 391 F. Supp. 2d 1124, 1134 (S.D. Ala. 2005) (finding an anti-harassment policy was effectively distributed when reviewed in training and placed on bulletin boards).

70. Cf. *Austin v. Norfolk S. Corp.*, 158 F. App’x 374 (3d Cir. 2005). In reversing the denial of judgment as a matter of law for the employer, the court found it laudatory that the employer “even went so far as to contact [the plaintiff’s] local union representative and ask him to address the subject of [harassing conduct] with the union’s members.” *Id.* at 378.

71. See, e.g., *Andrews v. Lockheed Martin Energy Sys., Inc.*, No. 3:06-CU-42, 2006 WL 2711818, at \*9 (E.D. Tenn. Sept. 21, 2006) (publishing anti-harassment policies in newsletters, handbooks, and “other publications” is evidence that employer implemented policies to create a workplace free from discrimination); *Montero v. Agco Corp.*, 192 F.3d 856, 862 (holding that the employee’s receipt of a copy of the policy in a handbook, a separate memorandum explaining the policy, and two additional pamphlets regarding the policy during her employment demonstrated reasonable care by employer to prevent sexual harassment).

72. See, e.g., *Swingle v. Henderson*, 142 F. Supp. 2d 625, 634–37 (D.N.J. 2001).

73. *Bryant v. Sch. Bd. of Miami Dade County*, 142 F. App’x 382, 385 (11th Cir. 2005).

74. See, e.g., *Taylor*, 418 F. Supp. 2d at 1304 (posting employer’s anti-harassment policy on company’s intranet satisfied the publishing requirement).

75. See, e.g., *Harper v. City of Jackson Mun. School Dist.*, 414 F. Supp. 2d 595, 605 (S.D. Miss. 2005) (requiring employees to sign an annual employment contract that explicitly made

to all employees reminding them of the harassment policy and providing a link to the policy on the institution's website. No signature is necessary if the e-mail records are retained because most systems will show whether employees received the e-mail.

In the years since *Faragher* and *Ellerth*, lower courts have clarified that, although no one mechanism is required, some effective dissemination of anti-harassment and discrimination policies is essential. An employer must now make efforts to "implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate."<sup>76</sup>

### C. Complaint, Investigation, and Appeal Procedures

The emerging case law also clarifies that adopting and publicizing an anti-harassment policy is not enough; the institution must also have an effective strategy for implementing and enforcing that policy or else risk forfeiting the affirmative defense.<sup>77</sup> As one court applying *Faragher* and *Ellerth* stressed, "[e]very court to have addressed this issue thus far has concluded that [simply adopting] a written or formal anti-discrimination policy is . . . not sufficient in and of itself to insulate an employer from a punitive damages award."<sup>78</sup> Otherwise, "employers would have an incentive to adopt formal policies . . . but they would have no incentive to enforce those policies."<sup>79</sup>

To be truly effective, an EEO compliance program must include specific and workable complaint, investigation, and appeal procedures.<sup>80</sup> Courts have stressed that a compliance program should be explicit in delineating how to make a complaint, to whom one complains, and the process for investigation and resolution of complaints.<sup>81</sup> An effective compliance program must also include an

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employment subject to school district's anti-harassment policy); *Talamantes v. Berkeley County Sch. Dist.*, 340 F. Supp. 2d 684, 697 (D. S.C. 2004) (distributing anti-harassment policy to school employees when hired and at annual training); *McDaniel v. Merlin Corp.*, No. Civ. A.1:01CV2992JEC, 2003 WL 21685622, at \*10 (N.D. Ga. June 26, 2003) (satisfying publication requirements of *Faragher/Ellerth* defense by showing that employees signed acknowledgement form accepting responsibility for reviewing handbook that contained anti-harassment policy and procedures).

76. *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000).

77. *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172, 176 (4th Cir. 1998).

78. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001).

79. *Id.* (citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 517 (9th Cir. 2000) ("[The] purpose of Title VII . . . would be undermined if [anti-discrimination] policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages.")).

80. EEOC ENFORCEMENT GUIDANCE, *supra* note 54. *See also Gentry v. Export Packaging Co.*, 238 F.3d 842, 847 (7th Cir. 2001) ("[A] sexual harassment policy must provide for 'effective grievance mechanisms' and therefore the mere creation of a sexual harassment policy will not shield a company from its responsibility to actively prevent sexual harassment in the workplace.").

81. *See, e.g., Madison v. IBP, Inc.*, 257 F.3d 780, 795 (8th Cir. 2001), *overruled on other grounds by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (discussing corporate policy prohibiting racial and sexual discrimination and harassment, maintaining affirmative action plan, and conducting annual two-hour training session for plant managers, which were held

“assurance that the harassing supervisors could be bypassed in registering complaints.”<sup>82</sup> This standard “best practice” requires that if the complaining employee is lodging a complaint against her own supervisor, or should she feel for any reason that she cannot complain to the designated person, she may complain to another identified, alternative supervisory employee.

The decision in *Stuart v. General Motors Corp.*<sup>83</sup> provides a good example of effective complaint and investigation procedures. In *Stuart*, the court noted that, upon receipt of a complaint, the employer had (1) immediately removed harassing material from the employee’s workplace, (2) completed a thorough investigation within nine days after the complaint, (3) spent a week interviewing thirty people as to their knowledge of the harassment, (4) reiterated its sexual harassment policy by sending a letter to all its employees explaining its policy along with a copy of its employee handbook, and (5) offered the aggrieved employee a transfer to a different department.<sup>84</sup> Under these circumstances, the court concluded, no rational jury could have found the employer’s EEO compliance program inadequate.<sup>85</sup> This level of commitment is appropriate to promote compliance and also protect the institution’s *Faragher/Ellerth* defense.

#### D. Employee and Supervisor Training

Finally, the importance of training has been strongly affirmed by courts interpreting *Faragher*, *Ellerth*, and *Kolstad*. Lower courts appear to be placing increasingly heavy emphasis upon an employer’s attempts to train employees—at both the staff and supervisory levels—about the operation of the employer’s anti-discrimination policies.

In *Bryant v. Aiken Regional Medical Centers, Inc.*,<sup>86</sup> the employer’s “extensively implemented organization-wide” EEO policy included “formal training classes and group exercises for hospital employees.”<sup>87</sup> In conjunction with the employer’s grievance policy, this was sufficient evidence of “widespread

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insufficient when such policies were not carried out at the worksite at issue); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (stating that the jury properly rejected *Faragher/Ellerth* defense where employer did not investigate or take action on employee’s complaint); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (deciding that the existence of a complaint procedure was insufficient where the employees testified that they feared retaliation if the procedures were used); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999) (finding that simply encouraging employees to contact higher management with grievances insufficient to show good faith effort required to avoid punitive damages); *but see Daniel v. Spectrum Stores, Inc.*, 381 F. Supp. 2d 1368, 1375 (M.D. Ga. 2005) (finding that employer satisfied first prong of *Faragher/Ellerth* defense where its anti-harassment policy contained adequate complaint procedures and employer also maintained an “Alertline,” where employees could report harassment anonymously).

82. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

83. 217 F.3d 621 (8th Cir. 2000).

84. *Id.* at 633.

85. *Id.* at 633–34.

86. 333 F.3d 536 (4th Cir. 2003). See discussion *infra* Part III.B for details on this case.

87. *Id.* at 548–49.

anti-discrimination efforts” to justify reversal of the punitive damages award.<sup>88</sup> Similarly, in another case the employer regularly conducted training sessions and distributed to each employee an anti-harassment policy that included “multiple mechanisms for detecting and correcting harassment.”<sup>89</sup> The court held that these efforts established that the employer had exercised reasonable care sufficient to obtain summary judgment on an employee’s claim of sexual harassment.<sup>90</sup> Another sound practice, which has been repeatedly approved by courts, is to train all employees when they begin work and before incidents arise.<sup>91</sup>

Conversely, courts have not hesitated to penalize employers where training efforts were nonexistent.<sup>92</sup> Inadequate training is also a serious risk.<sup>93</sup> For example, one court rejected an employer’s attempts to avoid punitive damages where the employer only provided limited training in “equal opportunity.”<sup>94</sup> Another court upheld an award of punitive damages where the employer had not provided its employees with any EEO training and had merely placed an EEOC “Sexual Harassment” poster in one area of its facility.<sup>95</sup>

Many courts have stressed that appropriate training involves not only the general training of employees but also the more comprehensive training of supervisors and managers who play many different roles in the compliance process.<sup>96</sup> For example, in *Soto v. John Morrell & Co.*,<sup>97</sup> the district court identified training for company supervisors as an important element of an effective policy and noted that the absence of such training raised a jury question of the effectiveness of that employer’s policy.<sup>98</sup>

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88. *Id.* at 549.

89. *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999).

90. *Id.* at 812.

91. *See Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (stating that punitive damages were unavailable where employer trained all employees, including new employees).

92. *See, e.g., Gordon v. Southern Bells, Inc.*, 67 F. Supp. 2d 966, 982–83 (S.D. Ind. 1999); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747–48. These two cases permitted assessment of punitive damages because of employer’s failure to train.

93. *Baty v. Willamette Industries*, 172 F.3d 1232, 1238–39 (10th Cir. 1999) (affirming an award of damages against employer that only conducted two, 45-minute prevention sessions for selected employees, and only after the plaintiff’s complaint was received). *See discussion infra* Part IV.A.1 for details on this case.

94. *Zimmermann v. Assoc. First Capital Corp.*, 251 F.3d 376, 385–86 (2d Cir. 2001).

95. *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 461 (4th Cir. 2002).

96. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (“Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim’s employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (finding that Wal-Mart’s failure to train supervisors precluded defense to punitive damages).

97. 285 F. Supp. 2d 1146 (N.D. Iowa 2003).

98. *Id.* at 1164–66. *See also Romano v. U-Haul Int’l*, 233 F.3d 655, 670 (1st Cir. 2000) (upholding award of punitive damages where employer did not train supervisors to recognize harassment).

The importance of training supervisors cannot be overemphasized. Supervisors need to know how to refrain from harassment, prevent it among the employees they manage, and respond to complaints that are brought to them. Supervisors must also be trained to recognize retaliation and intervene immediately if retaliation occurs. Courts have correctly observed that, because supervisory employees are on the front line of preventing and responding to harassment and discrimination, supervisors need to be especially well-educated in the institution's policy and enforcement procedures.

### III. BENEFITS OF AN EFFECTIVE COMPLIANCE PROGRAM

The developing case law has not only identified the critical elements of an effective compliance program but has also consistently stressed the risk management benefits to adopting and implementing an effective compliance program. Those benefits include: (1) an affirmative defense to liability in the majority of cases, including cases involving claims other than sexual harassment; and (2) an opportunity to bar an award of punitive damages even in cases involving significant liability. Although an institution's ultimate goal should be to prevent misconduct, these risk management benefits offer an additional, powerful incentive for colleges and universities to adopt and implement an effective compliance program.

#### A. Affirmative Defense to Liability

The most obvious, litigation-related benefit of a comprehensive compliance program is the prospect of mounting a successful *Faragher/Ellerth* defense. This defense promises to be a complete bar to many hostile environment claims. Courts have been quick to rule in favor of employers that have instituted strong compliance programs. Indeed, numerous courts have entered summary judgment in favor of an employer purely on the basis of a *Faragher/Ellerth* defense, thus allowing employers to avert the risk of trial.<sup>99</sup>

For example, in *Swingle v. Henderson*,<sup>100</sup> summary judgment was granted in favor of the employer in a hostile environment case on the basis of a *Faragher/Ellerth* defense.<sup>101</sup> The employer in *Swingle* had: (1) provided training upon orientation; (2) posted notices instructing employees about how and where to complain; (3) reminded employees on a weekly basis about the policy; and (4) made sexual harassment the cover story on the company's internal magazine.<sup>102</sup> Likewise, in *Newsome v. Administrative Office of the Courts of New Jersey*,<sup>103</sup>

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99. See, e.g., *Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001); *Cooke v. County of Suffolk*, 16 F. App'x 35, 37 (2d Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811–814 (7th Cir. 1999); *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971–72 (5th Cir. 1999); *Dudik v. Mesquite Rodeo*, No. 03-178, 2004 WL 524947, at \*6 (N.D. Tex. March 12, 2004); *Schoiber v. Emro Mktg. Co.*, No. 95-5726, 1999 WL 825275 (N.D. Ill. Sept. 21, 1999).

100. 142 F. Supp. 2d 625 (D.N.J. 2001).

101. *Id.* at 634–637.

102. *Id.*

103. 103 F. Supp. 2d 807 (D.N.J. 2000).

summary judgment was granted on the basis of the *Faragher/Ellerth* defense where the employer had disseminated a strong policy to all employees, regularly conducted harassment awareness sessions and, most significantly, acted immediately and effectively to stop the offensive conduct once the plaintiff complained.<sup>104</sup>

In addition, courts have not hesitated to grant summary judgment on the basis of this defense where the plaintiff unreasonably failed to make use of an internal complaint process bolstered by a strong anti-harassment policy. For example, summary judgment in one case was granted in favor of the employer because the plaintiff failed to take advantage of a procedure for facilitating employee complaints and did not complain of the alleged harassment until after he resigned following fifteen alleged incidents.<sup>105</sup> Courts have also rejected many plaintiffs' attempts to explain away unreasonable delays. For instance, an employee's subjective fears of retaliation do not justify his or her failure to complain.<sup>106</sup> Nor are a plaintiff's unsupported concerns about coworker reaction legitimate reasons to refrain from filing an internal complaint.<sup>107</sup>

#### B. Elimination of Punitive Damages

Trial courts have also enthusiastically embraced the *Kolstad* holding that an effective EEO compliance program may shield an employer from the additional imposition of punitive damages. A leading case, *Bryant v. Aiken Regional Medical Centers, Inc.*,<sup>108</sup> demonstrates the extent of most courts' willingness to look favorably upon an employer's sincere, good faith attempts to address discrimination and harassment problems.

In *Bryant*, a surgical technician prevailed at trial in establishing race discrimination and retaliation under Title VII and 42 U.S.C. § 1981. The jury awarded the plaintiff \$40,000 in compensatory damages, \$50,000 in emotional distress damages, and \$210,000 in punitive damages.<sup>109</sup> On appeal, the Fourth Circuit Court of Appeals upheld the award of \$90,000 in actual damages but struck down the larger punitive damage award.<sup>110</sup> The court relied upon the employer's

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104. *Id.* at 819–820. *See also* Hooker v. Wentz, 77 F. Supp. 2d 753, 757 (S.D. W. Va. 1999) (granting summary judgment in favor of employer where policy widely disseminated, managers trained, and action taken promptly upon receipt of plaintiff's internal complaint).

105. Casiano v. AT&T Corp., 213 F.3d 278, 286–87 (5th Cir. 2000).

106. *See* Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1290–91 (11th Cir. 2003) (stating that plaintiff's unsupported concerns about retaliation did not justify failure to complain); Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001) (affirming dismissal of claim because employee's failure to report the harassment to a supervisor allowed employer to raise a *Faragher/Ellerth* affirmative defense); Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001) (affirming judgment against employee who failed to take advantage of employer's anti-harassment policy).

107. Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000).

108. 333 F.3d 536 (4th Cir. 2003).

109. *Id.* at 543.

110. *Id.* at 540.

training and prevention efforts, citing the employer's strong policy, ongoing attempts to publicize its policy and train its employees, and voluntary monitoring of departmental demographics in an attempt to "keep the employee base reflective of the pool of potential employees in the area."<sup>111</sup> The employer's "widespread anti-discrimination efforts, the existence of which [the plaintiff did] not dispute, preclude[d] the award of punitive damages in this case."<sup>112</sup>

Similarly, other courts have denied plaintiffs the opportunity to seek or retain punitive damages because of comprehensive and ongoing compliance attempts by the employer.<sup>113</sup> In *Woodward v. Ameritech Mobile Communications*,<sup>114</sup> the court granted summary judgment on behalf of the employer with respect to the availability of punitive damages.<sup>115</sup> The court emphasized the employer's strong anti-harassment policy, which included (1) two different complaint mechanisms; (2) two-day training sessions for all employees; and (3) requirement that all employees, including the plaintiff, sign a form indicating their receipt and review of the policy.<sup>116</sup> Under these circumstances, there was no triable issue as to whether the employer made a good faith effort to comply with Title VII, and thus punitive damages were unavailable as a matter of law.<sup>117</sup>

It is fair to say that courts have enthusiastically embraced the Supreme Court's holdings in *Faragher*, *Ellerth*, and *Kolstad* in a significant number of hostile environment cases. The courts could not have signaled any more strongly that comprehensive attempts to address EEO issues may significantly benefit an employer in litigation.

#### IV. THE RECOGNIZED LEGAL RISKS OF NON-COMPLIANCE

Perhaps even more significant than the decisions that reward employers for strong compliance programs are those decisions that penalize employers for failing to implement a strong compliance initiative. The danger is not simply that a college or university will be forced to go to trial rather than prevail on summary judgment. The more serious danger is that courts or juries will draw a strong, adverse inference from an institution's unwillingness to adopt what are increasingly considered standard practices in EEO compliance. Not only do the school and its individual employees risk findings of liability, but they also risk the

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111. *Id.* at 548-49.

112. *Id.* at 549.

113. *See, e.g., Green v. Admin. of Tulane Educ. Fund*, 284 F.3d 642, 654 (5th Cir. 2002) (stating that employer was entitled to judgment as a matter of law on punitive damages claim where employer acted in good faith by placing complainant on paid leave, holding meetings, and restating employee's job duties).

114. No. 98-0744, 2000 WL 680415 (S.D. Ind. March 20, 2000).

115. *Id.* at \*16.

116. *Id.* at \*14.

117. *Id.* at \*16. *See also Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (disallowing punitive damages where employer publicized anti-harassment policy, trained all new employees, maintained effective grievance procedure, and promptly investigated plaintiff's complaints); *Fuller v. Caterpillar, Inc.*, 124 F. Supp. 2d 610, 618 (N.D. Ill. 2000) (disallowing punitive damages where employer extensively publicized policy and trained all employees).

imposition of significant, potentially uninsurable punitive damages. Recent case law demonstrates that this risk is not abstract but very real, very serious, and only becoming more so.

#### A. Forfeiture of the Institution's Affirmative Defense

The Supreme Court warned in *Ellerth* that an employer would have a defense to liability only if the employer could demonstrate the exercise of "reasonable care to prevent and correct promptly any sexually harassing behavior."<sup>118</sup> This has proven all too true. While many courts have rewarded employers for serious attempts to comply with the EEO laws, many other decisions find the affirmative defense entirely inapplicable (or deny summary judgment on this basis) where a compliance program is arguably insufficient.

A useful, cautionary example is the decision in *Miller v. Woodharbor Molding & Millworks, Inc.*,<sup>119</sup> in which the employer sought to assert the defense because it had adopted an anti-harassment policy.<sup>120</sup> The court, however, observed that the plaintiff's supervisors were unfamiliar with the policy, had never received training on how to implement the policy, and had never been informed about the employer's procedures for reporting sexual harassment.<sup>121</sup> The court noted that the policy itself was incomplete in that it failed to prohibit retaliation and that it did not provide a formal complaint procedure.<sup>122</sup> Mere encouragement to complain was not enough because the employer did not even identify to whom a complaint should be made.<sup>123</sup> The court thus concluded that the *Faragher/Ellerth* defense was unavailable.<sup>124</sup>

*Miller* is not the only decision to have laid particular emphasis upon inadequate training in determining that the *Faragher/Ellerth* defense has been forfeited. For instance, in *Baty v. Willamette Industries, Inc.*,<sup>125</sup> a jury awarded more than \$1 million in damages in a sexual harassment and retaliation case.<sup>126</sup> On appeal, the employer argued that it was entitled to a *Faragher/Ellerth* defense because it responded promptly to the complaint and, after the complaint was received, conducted two forty five-minute sexual harassment prevention sessions that included discussion and a video.<sup>127</sup> However, the court found that the employer's investigation concluding that no harassment had occurred was a sham, given the pervasiveness of harassment in the workplace and the fact that "management

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118. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

119. 80 F. Supp. 2d 1026 (N.D. Iowa 2000).

120. *Id.* at 1030.

121. *Id.* at 1030–31.

122. *Id.* at 1031.

123. *Id.*

124. *Id.* at 1032. *See also* *Gordon v. Southern Bells, Inc.*, 67 F. Supp. 2d 966, 982–83 (stating that employer forfeited defense because it failed to distribute policy or conduct any training); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735, 747–48 (stating that employer forfeited defense because it failed to train managers or distribute policy).

125. 985 F. Supp. 987 (D. Kan. 1997).

126. *Id.* at 991–998 (reducing the award to \$300,000 pursuant to the Title VII statutory cap).

127. *Baty v. Willamette Indus. Inc.*, 172 F.3d 1232, 1245–46 (10th Cir. 1999).

condoned and even encouraged the creation of a hostile work environment for plaintiff.”<sup>128</sup> Moreover, one of the principal harassers testified at trial that even after the training sessions, he did not understand what constituted sexual harassment. Accordingly, the Tenth Circuit Court of Appeals rejected the *Faragher/Ellerth* defense, finding that the “jury could reasonably have concluded that the small amount of training given the employees was inadequate in light of the severity of the problem.”<sup>129</sup>

A significant line of decisions also rejects the *Faragher/Ellerth* defense where a policy appears adequate as drafted but, when tested, utterly fails to address serious complaints. For instance, in *Smith v. First Union National Bank*,<sup>130</sup> a female employee complained of sexual harassment by her supervisor.<sup>131</sup> While the company had a serviceable policy against harassment, the ensuing investigation focused solely on the supervisor’s management style and the supervisor was never even asked about the accuser’s specific allegations.<sup>132</sup> These facts raised a jury question as to the adequacy of the employer’s compliance efforts.<sup>133</sup> The court noted that this employer’s compliance program, while technically accurate, was ineffective in promptly addressing and eliminating the challenged conduct, thus calling into question the availability of the *Faragher/Ellerth* defense.<sup>134</sup> Such cases underscore the need to adopt not only a formal policy but also workable and effective compliance procedures, which then must be applied rigorously and fairly even in the most sensitive cases.<sup>135</sup>

#### B. Increased Risk of Individual Liability

Failure to take sufficient measures to prevent harassment and discrimination not only deprives the educational institution of an affirmative defense but also places faculty and supervisors at increased risk of personal liability. Although individuals cannot be sued personally under Title VII, individuals remain highly vulnerable to suit by common law or state statutory claims. Failure to promote a compliant

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128. *Id.* at 1242.

129. *Id.* See also *Miller v. D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 803 (D. Or. 1998) (finding the affirmative defense unavailable because of lack of training).

130. 202 F.3d 234 (4th Cir. 2000).

131. *Id.* at 239–40.

132. *Id.* at 245–46.

133. *Id.* See also *O’Rourke v. City of Providence*, 235 F.3d 713, 736–38 (1st Cir. 2001) (finding that plaintiff’s internal complaints about hostile environment having largely been ignored, no *Faragher/Ellerth* defense was available and plaintiff recovered \$275,000, plus significant attorneys’ fees and costs, after jury trial); *White v. New Hampshire Dep’t of Corr.*, 221 F.3d 254, 261–62 (1st Cir. 2000) (finding that insufficient, untimely investigation blocked the affirmative defense and supported large jury verdict on behalf of female employee alleging hostile work environment); *Hafford v. Seidner*, 183 F.3d 506, 513–14 (6th Cir. 1999) (finding that plaintiff raised a jury question of harassment where employer’s alleged response to complaints about racial harassment was not to investigate but to reprimand complainant).

134. *Smith v. First Union Nat’l Bank*, 202 F.3d at 245–46.

135. See *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288–89 (rejecting plaintiff’s challenge to adequacy of investigation of her complaint, inasmuch as the investigation resulted in termination of the employee against whom she complained).

workplace only increases this risk.

In a number of cases, faculty and supervisors have been held individually liable for harassing or discriminatory conduct on various theories and ordered to pay significant damages. For example, in *Pociute v. West Chester University*,<sup>136</sup> a student alleged that the head of the chemistry department tried to touch and kiss her in his office with the door closed and offered to trade sex for better grades.<sup>137</sup> Fearing that no one would believe her story, the student concealed a tiny video camera in her notebook and returned to the professor's office. At trial, the student played a video showing the professor's hand moving towards her breast.<sup>138</sup> Although the jury eventually absolved the university of liability, it awarded the student \$120,000 in her suit against the professor.<sup>139</sup>

Similarly, a graduate teaching assistant at the Harvard University Extension School alleged that a professor harassed her by sending her emails of a personal and sexual nature.<sup>140</sup> The student filed a charge against both the university and the professor with the Massachusetts Commission Against Discrimination (MCAD), alleging violations of the state's human rights law. Although the complainant later dismissed her charge against the university, the MCAD held the professor individually liable for sexual harassment and ordered that he pay \$25,000 in emotional distress damages.<sup>141</sup>

In some situations, both the institution and individual employees face potential liability under statutes other than the federal civil rights laws. In another MCAD case, the only female carpenter at Smith College contended that she was subjected to a hostile work environment because of her gender and sexual orientation.<sup>142</sup> She alleged that her supervisor did nothing to stop the harassment and gave her the least desirable work assignments.<sup>143</sup> One of her co-workers further alleged that the supervisor retaliated against him when he complained on behalf of the complainant.<sup>144</sup> The college and a number of other defendants settled, leaving the

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136. *Pociute v. West Chester Univ.*, 117 F. App'x 832 (E.D. Pa. 2004) (affirming district court's judgment in favor of the plaintiff under Title IX of the Civil Rights Act of 1964, as amended, 20 U.S.C. § 1681 and the Pennsylvania Human Relations Act. 43 PA. CONS. STAT. § 951).

137. *Id.* at 833. See also Jim Smith, *Jury Finds West Chester Prof Liable for Harassing Student*, PHILADELPHIA DAILY NEWS, Nov. 21, 2003, at 8; Sharon Walsh, *Videotape Persuades Jury to Find Professor Liable for Sexual Harassment*, CHRON. HIGHER EDUC., Dec. 5, 2003, at A8.

138. Walsh, *supra* note 137.

139. Smith, *supra* note 137.

140. John O. Cunningham, *Professor Personally Liable for Harassment*, MASSACHUSETTS LAWYERS WEEKLY, June 11, 2001, available at <http://www.masslaw.com/signup/archives.cfm?page=/archives/ma/01/611012.htm>. See also MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ANNUAL REPORT 2001: DECISIONS, available at <http://www.mass.gov/mcad/decisions5.html>.

141. See sources cited *supra* note 140.

142. Mass. Comm'n Against Discrimination v. Faust, Docket Nos. 91-SEM-3095, 91-SEM-3097 (April 29, 2004) (unpublished opinion, on file with author).

143. *Id.* at 3, 10–11.

144. *Id.* at 12–13.

supervisor as the only defendant before the MCAD.<sup>145</sup> The MCAD ordered that the supervisor pay the complainant \$100,000 and her co-worker \$50,000 in emotional distress damages.<sup>146</sup>

42 U.S.C. § 1983 provides yet another means by which a plaintiff may bypass the civil rights laws and seek to hold faculty and staff at public colleges and universities individually liable for harassment.<sup>147</sup> In *Delgado v. Stegall*,<sup>148</sup> a student alleged that she had been sexually harassed by her professor.<sup>149</sup> She filed suit against the university under Title IX and against the professor under § 1983.<sup>150</sup> The district court ruled that the university could not be held liable under Title IX because it had no actual knowledge of the harassment, and because Title IX provided the exclusive remedy for students alleging sexual harassment, the court also found that the student was barred from suing her professor.<sup>151</sup> The Seventh Circuit Court of Appeals reversed in part, holding that the student could still pursue her claim against the professor under § 1983 even though the university had been dismissed.<sup>152</sup> The court reasoned that “[t]he legislators who enacted Title IX would be startled to discover that by doing so they had killed all federal remedies for sex discrimination by teachers of which the school lacked actual knowledge.”<sup>153</sup>

In sum, colleges and universities—and their faculty and staff—need to be aware of the possibility of individual liability for supervisory employees of the institution. Effective training and prevention efforts can help moderate questionable conduct and minimize liability, protecting not only the institution’s welfare but also its employees’ personal interests. Conversely, failure to train or implement a comprehensive compliance program not only risks liability to the school through loss of the *Faragher/Ellerth* defense but also creates the potential for serious personal liability on the part of individuals.

### C. Assessment of Punitive Damages

Exposure to liability—both institutional and personal—is not the only risk. Now that compliance programs are so common that courts and juries expect them to be implemented, employers also run a serious risk of being seen as “reckless” or “indifferent,” and thus incurring punitive damages, if EEO compliance programs are absent or inadequate. Even public institutions are more at risk of significant punitive damages than may be commonly acknowledged, and many institutions potentially face the nightmare that an assessment of punitive damages proves.

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145. *Id.* at 2.

146. *Id.* at 28.

147. 42 U.S.C. § 1983 (2000).

148. 367 F.3d 668 (7th Cir. 2004).

149. *Id.* at 670.

150. *Id.*

151. *Id.*

152. *Id.* at 674–75.

153. *Id.*

### 1. Inadequate Compliance as a Basis for Punitive Damages

Perhaps the most noteworthy imposition of punitive damages is found in *EEOC v. Board of Regents of the University of Wisconsin System*.<sup>154</sup> After the university laid off four employees between the ages of forty-six to fifty-six, the terminated employees sued under the Age Discrimination in Employment Act (ADEA).<sup>155</sup> A jury found that the employer had discriminated willfully and it awarded both compensatory and “liquidated” damages, which is the form of punitive damages available under the ADEA.<sup>156</sup>

On appeal, the Seventh Circuit Court of Appeals excoriated the university for failing to train its decision-makers in the basics of the age discrimination laws. The two primary decision-makers had not “been given any employment law training and neither man seemed to know the age at which the protections of the Act arose.”<sup>157</sup> The campus layoff expert did not “look at the terminations to see if age discrimination might have been involved.”<sup>158</sup> Indeed, neither the Dean nor the Associate Dean who reviewed the terminations even knew “that the floor age of protection under the ADEA was 40.”<sup>159</sup> The court of appeals therefore affirmed the liquidated damage award, stressing that “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake from which a jury can infer reckless indifference.”<sup>160</sup>

The Seventh Circuit’s decision, though rhetorically dramatic, is not an aberration. Numerous courts have affirmed punitive damage awards because of perceived deficiencies in compliance programs, citing defects ranging from inadequate policies to insufficient training. For example, one punitive damage award was upheld because the employer lacked a separate policy on discrimination and limited its training of hiring personnel to “a ten-minute video” and handouts giving examples of permissible and prohibited questions.<sup>161</sup> The court concluded that the “jury could have found this level of training and information to be insufficient and therefore reprehensible.”<sup>162</sup> In another case, the employer’s failure even to mention pregnancy discrimination in its policy or to train managers and supervisors on the issue was held to justify an award of punitive damages.<sup>163</sup> In

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154. 288 F.3d 296 (7th Cir. 2002).

155. *Id.* at 299.

156. *Id.* While liquidated damages were not specifically mentioned in the court’s decision, they are the only form of penalty available under the ADEA and were referred to in the EEOC’s press release. See Press Release, The U.S. Equal Employment Opportunity Commission, EEOC Wins Age Discrimination Suit Against University of Wisconsin Press (May 10, 2001) available at <http://www.eeoc.gov/press/5-10-01-a.html>.

157. *EEOC v. Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d at 304.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Wagner v. Dillard Dept. Stores*, No. 1:98CV499, 2000 WL 1229648, at \*9 (M.D.N.C. July 20, 2000), *aff’d in relevant part, vacated in part, reversed in part*, 17 F. App’x 141 (4th Cir. 2001).

162. *Wagner*, at \*9.

163. *Golson v. Green Tree Fin. Servicing Corp.*, 26 F. App’x 209, 214 (4th Cir. 2002).

still another case, a court concluded that an employer could be held liable for punitive damages where it failed to educate its supervisors about the requirements of the ADA.<sup>164</sup>

In short, “every court to have addressed this issue thus far has concluded that” simply adopting an anti-harassment policy is not enough to avoid punitive damages.<sup>165</sup> It is abundantly clear that colleges and universities must both adopt and implement effective anti-discrimination policies to avoid this risk.<sup>166</sup>

## 2. Seriousness of the Risk of Punitive Damages

Although the specter of punitive damages alone should present enough motivation to implement an effective compliance program, institutions must also be aware of even greater challenges posed by the following circumstances: (1) the prospect that a plaintiff may circumvent the damage caps set forth in Title VII; (2) the high permissible ratio of punitive to compensatory damages; and (3) the potential unavailability of insurance for punitive damages.

### a. Circumvention of the Title VII Damage Caps

One of the greatest risks that institutions face in employment suits is circumvention of the damage caps set forth in Title VII. The Civil Rights Act of 1991 established the following caps on the compensatory and punitive damage awards in employment discrimination cases depending on the size of the employer:

<u>Number of Employees</u>	<u>Damage Caps</u>
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
501+	\$300,000 <sup>167</sup>

If a jury awards damages under Title VII in excess of the statutory cap, the trial

164. EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1249 (10th Cir. 1999).

165. Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001).

166. See, e.g., MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 932 (8th Cir. 2004) (“The company’s lax anti-discrimination policies were insufficient to keep the issue of punitive damages from the jury.”); Anderson v. G.D.C., Inc., 281 F.3d 452, 461 (4th Cir. 2002) (stating that jury could find sufficient evidence to support new trial on punitive damages where employer never adopted an anti-discrimination policy or provided training; placement of EEOC poster regarding discrimination “simply does not constitute a good faith effort to forestall potential discrimination or to remedy any that might occur”); Zimmermann v. Assocs. First Capital Corp., 251 F.3d 376, 385–86 (2nd Cir. 2001) (allowing punitive damages where employer provided only limited training in “equal opportunity”); Romano v. U-Haul, Int’l, 233 F.3d 655 (1st Cir. 2000) (affirming award of punitive damage because employer failed to train supervisors on prevention of discrimination); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000) (allowing punitive damages because employer did not make good faith effort to educate employees); but see Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000) (vacating the trial court’s award of punitive damages and remanding the case for a determination of whether the plaintiff was entitled to punitive damages).

167. See 42 U.S.C. § 1981a(b)(3).

court must reduce the award to the cap amount pursuant to the statute.<sup>168</sup>

Well-informed counsel, however, have found effective ways to circumvent these caps. A common method is to file suit under both Title VII and a state or local jurisdiction's non-discrimination statute.<sup>169</sup> Federal courts agree that if a jury awards damages under both Title VII and a local non-discrimination statute, the court may allocate the award "so as to *maximize* the plaintiff's recovery while adhering to the Title VII cap."<sup>170</sup>

For example, in *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.*,<sup>171</sup> the plaintiff filed suit under both Title VII and a Puerto Rican statute alleging that her employment was terminated because of her age and gender.<sup>172</sup> The jury awarded plaintiff \$250,000 in damages for emotional distress and \$105,000 in backpay, without specifying whether those damages were awarded under Title VII or the local statute.<sup>173</sup> In addition, the jury awarded \$250,000 in punitive damages under Title VII.<sup>174</sup> The defendant argued that Title VII limited plaintiff's total recovery to \$200,000, the maximum award under the damage cap against an employer of its size.<sup>175</sup> The trial court disagreed.<sup>176</sup> To comply with the Title VII cap, the trial court allocated \$249,999 of the emotional distress award to the Puerto Rican law claims and \$1 of the emotional distress award to the Title VII claim.<sup>177</sup> It then awarded plaintiff \$199,999 in punitive damages under Title VII.<sup>178</sup> Altogether, because the Puerto Rican law mandated doubling of the emotional distress award, the final judgment in favor of plaintiff totaled \$804,998.<sup>179</sup>

The court of appeals held that the trial court acted properly. The court noted that all courts having "addressed the problem of allocating damages where the jury provides one damage award for parallel state and federal discrimination claims but the award exceeds the applicable federal cap" have "consider[ed] the unspecified

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168. *Id.*

169. Note that this strategy is not effective in the few states whose non-discrimination statutes impose the same damages caps as Title VII. See, for example, ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(8)(e)(iv).

170. *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 66 (1st Cir. 2005) (emphasis added). See also *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669, 679–80 (6th Cir. 2003) (reversing reduction in damages by district court, stating that "where the jury was instructed in such a fashion sufficient to support punitive damage awards under both the federal as well as the state statute, Plaintiff should be entitled to the balance of the award in excess of the federal \$300,000 cap under state law."); *Martini v. Fed. Nat. Mort. Ass'n*, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999) (reinstating \$3 million punitive damage award, stating that, "[t]o be sure, only \$300,000 of that amount may be awarded under Title VII. But we see no reason why Martini should not be entitled to the balance under the D.C. Human Rights Act, since the local law contains the same standards of liability as Title VII but imposes no cap on damages.").

171. 399 F.3d 52 (1st Cir. 2005).

172. *Id.* at 55–56.

173. *Id.* at 55.

174. *Id.*

175. *Id.* at 56.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

award as fungible between the state and federal claims and allocating the award so as to *maximize* the plaintiff's recovery while adhering to the Title VII cap.<sup>180</sup> The First Circuit Court of Appeals joined other circuits in allowing individual plaintiffs to recover multi-million dollar awards in lawsuits brought under both federal and state or local non-discrimination statutes.<sup>181</sup>

Moreover, nothing precludes a plaintiff from filing exclusively in state court under a state's non-discrimination statutes, thereby avoiding Title VII's damage caps altogether.<sup>182</sup> Even when a state does not provide a strong anti-discrimination statute, plaintiffs can still add state tort claims to federal non-discrimination claims in order to circumvent the federal caps.

For example, the plaintiff in *Chavez v. Thomas & Betts Corp.*<sup>183</sup> alleged sexual harassment by a supervisor.<sup>184</sup> She filed suit under Title VII and the New Mexico Human Rights Act against her employer and added tort claims of negligent supervision and negligent retention of her supervisor.<sup>185</sup> In addition, she filed assault and battery claims against her supervisor for unwanted touching.<sup>186</sup> The jury awarded plaintiff a total of \$145,625 in compensatory damages and \$354,375 in punitive damages against her employer, and \$20,750 in compensatory damages and \$3,250 in punitive damages against her supervisor.<sup>187</sup> The Tenth Circuit Court of Appeals affirmed the damage award for a total recovery of \$524,000 plus more than \$164,000 in attorneys' fees.<sup>188</sup>

Yet another technique for circumventing damage caps set forth in Title VII is to file suit under 42 U.S.C. § 1981 in cases involving racial discrimination or harassment.<sup>189</sup> Although as a technical matter § 1981 addresses discrimination in the formation of contracts, it provides the same rights and remedies as Title VII in

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180. *Id.* at 66 (emphasis added). The First Circuit cited the following cases in support of its position: *Hall v. Consolidate Freightways, Corp.*, 337 F.3d 669, 678–79 (6th Cir. 2003) (regarding racial harassment and retaliation claims brought under Title VII and Ohio civil rights laws); *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570–71 (3d Cir. 2002) (regarding disability discrimination alleged in violation of the ADA and Pennsylvania Human Rights Act); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 509–10 (9th Cir. 2001) (regarding gender discrimination and retaliation claims brought under Title VII and Washington Law Against Discrimination); *Martini v. Fed. Nat. Mort. Ass'n*, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999) (regarding sexual harassment and retaliation claims brought under Title VII and District of Columbia Human Rights Act); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997) (regarding sexual harassment suit brought under Title VII and Missouri Human Rights Act).

181. *See, e.g., Gagliardo*, 311 F.3d at 568 (affirming a \$2.3 million recovery); *Martini*, 178 F.3d at 1349–50 (affirming a \$3 million recovery).

182. *See, e.g., McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269 (N.Y. App. Div. 1998) (allowing \$1.5 million punitive damage award in harassment and retaliation case brought under New York State law).

183. 396 F.3d 1088 (10th Cir. 2005).

184. *Id.* at 1093.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1102–1105.

189. 42 U.S.C. § 1982 (2000).

the employment context without being subject to the damage caps.<sup>190</sup> For example, in *Swinton v. Potomac Corp.*,<sup>191</sup> the plaintiff filed suit in state court alleging racial harassment in violation of § 1981 and the Washington Law Against Discrimination.<sup>192</sup> After the case was removed to federal court, a jury returned awards of \$5,612 in backpay, \$30,000 for emotional distress, and \$1 million in punitive damages.<sup>193</sup> The Ninth Circuit Court of Appeals upheld both the compensatory and punitive damage awards on appeal.<sup>194</sup>

Likewise, as the Eighth Circuit Court of Appeals noted in another case, “we have applied similar standards to claims for intentional discrimination under both Title VII and § 1981. . . . The two statutes have substantially identical legal theories of recovery and the standard for punitive damages is the same under each.”<sup>195</sup> The obvious difference, that § 1981 does not cap punitive damages, adds urgency to the need to address harassment and discrimination before misconduct matures into litigation.

*b. High Ratios of Punitive to Compensatory Damages*

Colleges and universities must also be wary of punitive damage awards that are significant multiples of a compensatory damages award. Although the Supreme Court has held that punitive damages 500 times greater than the economic harm suffered were grossly excessive,<sup>196</sup> federal courts of appeal often allow punitive damage awards twenty to seventy times greater than compensatory damage awards. This can have catastrophic results for any employer, let alone colleges and universities, which typically operate on tight budgets and cannot allocate excess profits to pay for large jury verdicts.

For example, in *Jeffries v. Wal-Mart Stores, Inc.*,<sup>197</sup> a jury awarded an employee \$8,500 in compensatory damages and \$425,000 in punitive damages for race discrimination and retaliation under both federal and state statutes.<sup>198</sup> On appeal, WalMart argued that a 50:1 ratio of punitive to compensatory damages violated its constitutional right to due process.<sup>199</sup> The Sixth Circuit Court of Appeals upheld the verdict, however, reasoning that the Supreme Court had not established any bright-line mathematical formula and that a 50:1 ratio was reasonable given WalMart’s egregious conduct.<sup>200</sup> Similarly, in another case, a jury awarded the plaintiff only \$35,612 in back pay and emotional distress

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190. See *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067 (8th Cir. 1997) (“[T]he Title VII statutory cap does not apply to limit the recovery under 42 U.S.C. § 1981.”).

191. 270 F.3d 794 (9th Cir. 2001).

192. *Id.* at 801.

193. *Id.* at 798.

194. *Id.* at 820.

195. *Madison v. IBP, Inc.*, 330 F.3d 1051, 1061–62 (citations omitted).

196. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

197. 15 F. App’x 252 (6th Cir. 2001).

198. *Id.* at 255.

199. *Id.* at 266.

200. *Id.*

damages but fined the employer \$1 million in punitive damages.<sup>201</sup> On appeal, the Ninth Circuit Court of Appeals noted that a 28:1 ratio of punitive to compensatory damages is not inconsistent with rulings in other circuits.<sup>202</sup>

The lesson of these decisions is that courts have been deferential to juries in the ratios allowed to stand in discrimination cases. An institution squandering its opportunity under *Kolstad* may face extremely significant punitive damages in a difficult case.

### c. *Uninsurable Punitive Damages*

Large punitive damage awards should be of particular concern to colleges and universities located in states in which directly-assessed punitive damages are not insurable. All states except New York and Utah allow insurance for vicariously assessed punitive damages.<sup>203</sup> However, sixteen states prohibit insurance of directly assessed punitive damages on public policy grounds.<sup>204</sup>

This exception is likely to become significant in any harassment case involving inadequate training or compliance. If a jury finds malice or indifference in such circumstances, any resulting punitive damages would likely be assessed directly against the employer. Colleges and universities in those states should therefore be especially cautious about the need to ensure compliance, so as to eliminate the risk of potentially huge exposure that cannot be limited through the purchase of insurance.

### d. *Limited Protection from the Eleventh Amendment*

It is also important to recognize that even public universities, ostensibly immune from some damages actions, still face a risk of damages for failure to establish effective compliance programs. Several recent Supreme Court decisions

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201. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001).

202. *Id.* at 819–20. *See also Mathias v. Accord Econ. Lodging*, 347 F.3d 672 (7th Cir. 2003) (upholding a punitive damage award of 38 times compensatory damages in a consumer fraud case); *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (upholding punitive damages award 19 times of compensatory damages in sex discrimination case); *EEOC v. W & O, Inc.*, 213 F.3d 600, 616 (11th Cir. 2000) (upholding punitive damages of 26 and 16 times compensatory damages in pregnancy discrimination case); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262 (10th Cir. 2000) (upholding a punitive damage award 58 times compensatory damages in a sexual harassment case).

203. In Utah, Utah Code Ann. § 31A-20-101 prohibits an insurer from insuring against punitive damages. In New York, *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1070 (N.Y. 1994) held that public policy prohibits insurance of vicarious punitive damages.

204. The sixteen states are California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, and Utah. For an excellent summary of the law in this area with cases for each state and a summary chart see McCullough, Campbell & Lane, LLP, *The Insurability of Punitive Damages* (2004), [http://www.mcandl.com/puni\\_frame.html](http://www.mcandl.com/puni_frame.html). *See also* Stephanie L. Grassia, *The Insurability of Punitive Damages in Washington: Should Insureds Who Engage in Intentional Misconduct Reap The Benefit of Their "Bargains?"*, 26 SEATTLE U. L. REV. 627 (2003) (including a state by state comparison).

have held public institutions immune under the Eleventh Amendment<sup>205</sup> from age and disability discrimination damages suits. In *Kimel v. Florida Board of Regents*,<sup>206</sup> the Court held that the Eleventh Amendment provides state universities with immunity from suits for money damages under the ADEA.<sup>207</sup> The following year, the Court held in *Board of Trustees of the University of Alabama v. Garrett*<sup>208</sup> that public universities could not be sued in private actions for money damages under Title I of the ADA.<sup>209</sup> But public institutions should not develop a complacent attitude toward compliance programs. Although these decisions appear to provide significant protection to public institutions from private damages suits alleging discrimination, the shield that is actually available is relatively limited.

First, the Supreme Court's decisions do not presently provide immunity from federal suits alleging discrimination or harassment on the basis of race or gender—the two most common types of charges received by the EEOC.<sup>210</sup> Nor do these decisions protect institutions from suits brought under state anti-discrimination statutes. In *Kimel*, the Supreme Court warned that “[o]ur decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers . . . . State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”<sup>211</sup> Most states have statutes that prohibit discrimination, and some of those statutes are more favorable to employees than comparable federal laws.<sup>212</sup>

Moreover, even when individuals are precluded by the Eleventh Amendment from bringing suit against a state entity, the EEOC may still sue on their behalf. For example, in *University of Wisconsin*, the Seventh Circuit Court of Appeals rejected the University's claim that the Eleventh Amendment barred the EEOC from bringing ADEA lawsuits on behalf of terminated employees.<sup>213</sup> In such circumstances, the court observed, Eleventh Amendment immunity may be a

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205. The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” See U.S. CONST. amend. XI.

206. 528 U.S. 62 (2000).

207. *Id.* at 91.

208. 531 U.S. 356 (2001).

209. *Id.* at 360.

210. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS: FY 1992 THROUGH FY 2005 (Jan. 27, 2006), <http://www.eeoc.gov/stats/charges.html>.

211. *Kimel*, 528 U.S. at 91 (listing age discrimination statutes from more than 40 states).

212. For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court held that an individual is not considered disabled under the ADA if he can function normally through the use of mitigating measures or corrective devices. In contrast, the Supreme Judicial Court of Massachusetts has elected not to follow the analysis in *Sutton* and has since held that an individual who could achieve normal hearing through the use of hearing aids may still be considered “disabled” within the meaning of the Massachusetts disability statute. *Dahill v. Police Dept. of Boston*, 748 N.E.2d 956 (Mass. 2001).

213. *EEOC v. Bd. of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 299–301.

mixed blessing. Because the EEOC rarely brings suit, states tend to experience fewer claims. However, once the agency decides to bring a case, it brings the resources of the federal government, rather than those of an individual plaintiff, to bear on the matter.<sup>214</sup>

Moreover, emerging case law suggests that plaintiffs who are barred by the Eleventh Amendment from filing suit under the ADA may still file suit for money damages under Section 504 of the Rehabilitation Act of 1973, which prohibits disability discrimination at educational institutions that receive federal funds and which offers remedies virtually identical to the ADA.<sup>215</sup> In *Garrett*, the plaintiffs argued that they could still sue under § 504 even if their claims under the ADA were barred.<sup>216</sup> The Eleventh Circuit Court of Appeals agreed, holding that federal law “unambiguously conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under § 504 of the Rehabilitation Act.”<sup>217</sup>

This reasoning has been followed by a number of other circuits.<sup>218</sup> It suggests that Eleventh Amendment immunity may continue to be limited by the federal courts in a manner that offers a state institution only minimal relief from potentially significant damage assessments. The threat of significant punitive damages assessments remains, even for public institutions. This continues to lend urgency to the need for an effective EEO compliance program that not only eliminates or minimizes the effects of actionable misconduct but also underscores the institution’s commitment to doing so.

#### V. EMERGING AREAS OF RISK

Finally, it is worth noting that, as effective compliance programs become standard across the corporate world and in higher education, institutions that still fail to adopt them will run the risk of being seen not only as short-sighted but as negligent or perhaps even intentionally discriminatory. As courts increasingly come to describe an effective EEO compliance program as a “duty,” rather than simply as a good employment practice, colleges and universities that fail to comply with that duty risk being found to have departed from the industry standard of care. The implications of failing to comply are not only legal, but also financial, reputational, and in some circumstances, moral. No institution of higher learning should court these risks.

The trend toward attributing discriminatory intent to an employer with a

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214. *Id.* at 300 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

215. 29 U.S.C. § 794(d) (2000) (stating that section 504 uses the same standards for determining employment discrimination as Title I of the ADA).

216. *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 344 F.3d 1288 (11th Cir. 2003).

217. *Id.* at 1293.

218. *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005); *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1164 (D.C. Cir. 2004). *But see* *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (holding that a state could not knowingly waive its Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act because the state would believe that Congress had already abrogated its immunity to claims under the ADA).

substandard compliance program can already be seen in some of the decisions in which punitive damage awards were upheld. In *Wagner v. Dillard Department Stores Inc.*,<sup>219</sup> the court termed the employer's deficient program not just insufficient but "reprehensible."<sup>220</sup> In the *University of Wisconsin* case, the court termed the absence of training an "extraordinary mistake" from which a jury could infer "reckless indifference."<sup>221</sup> There is every reason to believe that as effective compliance programs become more common, any college or university lacking one will have this omission used against it as alleged evidence of discriminatory intent.

This risk has only increased now that at least three states have passed laws imposing a duty upon employers to conduct anti-harassment training.<sup>222</sup> Failure to comply with these statutory requirements could well be cited as evidence of discriminatory intent or, at least, "reckless indifference" to the requirements of the law. Indeed, given the trend toward statutory training requirements, it is not outlandish to predict that employers could eventually be accused of negligence for failing to implement effective compliance programs. Each of the state statutes that require training could, if disregarded, conceivably supply the "breach of duty" component in a negligence action alleging that sexual harassment resulted in injury to an employee.<sup>223</sup> Significantly, the term used by the Supreme Court in *Ellerth*—

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219. No. 1:98CV499, 2000 WL 1229648 (M.D. N.C. July 20, 2000).

220. *Id.* at \*9.

221. EEOC v. Bd. of Regents of Univ. of Wis. Sys., 288 F.3d 296, 304 (7th Cir. 2002).

222. Maine requires that employers with fifteen or more employees:

[C]onduct an education and training program for all new employees . . . that includes, as a minimum, the following information: the illegality of sexual harassment; the definition of sexual harassment under state and federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964 . . . ; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided [by statute].

ME. REV. STAT. ANN. tit. 26, § 807 (Supp. 2005). The statute also mandates follow-up training for supervisory and managerial employees. *Id.*

Similarly, Connecticut requires employers with fifty or more employees to provide two hours of training and education to all supervisory employees within one year of enactment of the statute and to provide such training to all new supervisory employees within six months of their assumption of a supervisory position. CONN. GEN. STAT. § 46a-54(15)–(16). See also CONN. AGENCIES REGS. § 46a-54-204 (establishing requirements provided by statute). Like the Maine law, the Connecticut law specifies the information to be included in such training. *Id.*

Finally, California requires employers with fifty or more employees to "provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position" (with ongoing training required for supervisory employees). CAL. GOV'T CODE § 12950.1 (2005). The statute specifies the subjects to be addressed in training, including "practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." *Id.*

223. In some states, failure to comply with a duty imposed by statute can form the basis for a negligence action. See, e.g., *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E. 2d 1193, 1198 (Ill. App. Ct. 1987) (fraternity's violation of state law against hazing was sufficient

“reasonable care”—borrows from the language of common-law negligence. Just as conduct falling below the standard of reasonable care often forms the basis for state law negligence awards, so courts may also begin to conclude that a failure to implement effective compliance programs constitutes an actionable breach of duty.

## VI. CONCLUSION

The revolution in employment discrimination law may have been quiet but its effect has been profound. Courts have turned an affirmative defense into a broad, affirmative duty. When viewed as a whole, judicial applications of *Faragher*, *Ellerth*, and *Kolstad* leave little doubt that effective compliance programs are no longer optional but are now essential “best practices” in human resources and civil rights compliance. Courts have repeatedly emphasized the value of an effective compliance policy and articulated the components of an effective compliance program. In decision after decision, they have offered useful guidance about how to structure a program that will give the college or university the best chance to prevent and control misconduct and place it in the best position to defend itself in court. In the process, courts have greatly encouraged any institution remaining in doubt about the value of effective, comprehensive compliance from a risk management standpoint.

The Supreme Court’s decisions in *Faragher*, *Ellerth*, and *Kolstad* offer educational institutions an opportunity that should not be overlooked. The primary focus of the effective compliance defense is upon a good faith commitment to educate employees in doing the right thing—something that colleges and universities should be uniquely suited and motivated to do. Educational institutions should view the need to implement and publicize compliance programs as another opportunity to educate, and they should use their considerable resources to develop appropriate programs and publicize them throughout the campus community. Doing so will yield numerous benefits. Failing to do so will expose an institution to multiple levels of risk.

Simply put, there is no longer any room for colleges and universities to claim ignorance of the law. Courts have grown increasingly hostile toward employers who fail to implement effective EEO compliance programs, and they do not hesitate to impose severe penalties by way of litigation costs and punitive damages. This risk will only increase as more institutions awake to the importance of implementing effective policies and procedures. Those colleges and universities that remain unwilling to invest time and resources in achieving compliance will find themselves branded as reckless, indifferent, negligent, or even “reprehensible.” If nothing else, courts have made it clear that this “quiet revolution” in employment law can no longer be ignored.

