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License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers

Kerri Lynn Stone

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**LICENSE TO HARASS: HOLDING DEFENDANTS
ACCOUNTABLE FOR RETAINING RECIDIVIST
HARASSERS**

*Kerri Lynn Stone**

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I. INTRODUCTION

The Supreme Court has long held that its goal in crafting the jurisprudence surrounding sexual harassment cases brought under Title VII has been to eradicate sexual harassment in the workplace, to encourage victims to report harassment promptly, and to set in place adequate incentives for employers to stave off the harms associated with sexual harassment.¹ This Article, however, contends that in constructing the framework within which sexual harassment claims are adjudicated,

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1. *See generally* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998); *see generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

the Supreme Court might have actually incentivized employers to deal with each isolated harassment complaint in a vacuum, ensuring nothing more than that the specific reporting victim at issue is not harassed again by the same harasser.²

Based on the affirmative defense available to defendant employers in cases in which no tangible employment action has been inflicted by a harasser, a one-time incident between a given harasser and a given victim, even one of rape, may very well be not ultimately compensable under Title VII.³ Thus, a recidivist harasser who harasses different victims at different times may, under the current state of the law, repeat and even escalate his behavior, without incurring Title VII liability for his employer. This Article proposes that courts change the way in which they adjudicate Title VII disputes by evaluating the harm avoidance demonstrated by plaintiffs and employers in light of the totality of what each party knew or should have known about the potential harm, and what each party did or could have done to prevent it. Specifically, this Article is premised on the ideas that 1) harassment complaints are, typically, initially dealt with internally; often, an employer will remediate reported harassment by ordering or granting a transfer to separate a harasser and his victim;⁴ and 2) many harassers are, in fact recidivists.⁵

Employer liability for supervisory harassment is conferred automatically upon defendants when a plaintiff has, in the course of her harassment, incurred or endured a “tangible employment action,” like a pay cut, demotion, or termination, which is seen to have been ratified by the entity.⁶ In harassment scenarios where no such action was taken, the defendant can interpose an affirmative defense, asserting both that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,”⁷ and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁸ As one scholar has noted, “[b]y creating this . . . affirmative defense for employers, the Supreme Court is, in effect, telling women that they must be willing to come forward and complain to employers about sexual

2. See discussion *infra* Section III.

3. See discussion *infra* Section IV.

4. See discussion *infra* Section II.

5. See discussion *infra* Section II.

6. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

7. *Ellerth*, 524 U.S. at 765.

8. *Id.*

harassment before filing suit. Otherwise, they risk losing their right to obtain any legal redress under federal law.”⁹

Courts have found again and again that the law’s requirement that an employer provide a prompt remedial response to a harassment complaint is met where the harasser is retained (with or without a slap on the wrist) and merely transferred away from the victim.¹⁰ Where the harasser in question is a recidivist, this contravenes Title VII’s goal of eradicating harassment. Specifically, employers with harassers who otherwise add value to their enterprise are incentivized to retain these individuals, and, fully cognizant of their harassing or violent tendencies, are not amply deterred from merely shuffling or transferring them around so as to put a bandaid on the instant situation.¹¹ The courts have given little regard, and thus employers have given little thought, to the plight of future victims subjected to the supervision of recidivist harassers or abusers.

The premise of this Article, then, is straightforward. Because so many harassers are recidivists,¹² and because of the fact that so many employers are able, under the current state of the law, to fulfill their obligation to remediate reported harassment by simply separating the victim and her harasser,¹³ many employees will fall victim to known harassers. Moreover, because of the way in which courts have applied the affirmative defense, the employer, having never received a complaint from *that victim*, will typically evade liability for any “new” act of harassment (i.e., one with a new victim), irrespective of how severe it was.¹⁴ This Article thus posits that in instances where an employer situated a known harasser to supervise a new group of people, the risk that the harasser will offend again should fall on the employer, which acted affirmatively and with knowledge of the existing risk in retaining the employee, rather than on the employee, who, under current case law,

9. Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call For Women*, 68 BROOK. L. REV. 457, 461 (2002).

10. See, e.g., *Howard v. Winter*, 446 F.3d 559, 571 (4th Cir. 2006).

11. See *id.* at 569-70.

12. Gordon C. Nagayama Hall et al., *Initiation, Desistance, and Persistence of Men’s Sexual Coercion*, 74 J. OF CONSULTING AND CLINICAL PSYCHOL. 732, 732 (2006) (“[T]here is evidence of sexual offenders being at higher risk for reoffense than other types of offenders.”). “In a review of 61 studies and nearly 24,000 sexual offenders, the recidivism rate for new sexual offenses within a 4- to 5-year period was 13.4%.” *Id.*

13. West, *supra* note 9, at 461 (“A disturbing trend is developing among the federal courts. They are interpreting ‘reasonable care’ in the first prong of the new affirmative defense to require only minimal prevention efforts by the employer.”).

14. See discussion *infra* Section VII.

must absorb the initial act of harassment and report it before she can potentially be compensated under Title VII.¹⁵ Courts can accomplish this by finding that the affirmative defense, designed to afford employers notice of a problem and an opportunity to remediate it, cannot be met where the plaintiff has sustained otherwise actionable harm without the opportunity to report it before it occurred, and where the employer situated a known harasser as that victim's supervisor.¹⁶

Specifically, when dealing with a single act of recidivist harassment that cannot be reported preemptively, but which rises, due to its severity, to the level of being actionable, courts ought to find that the defendant cannot, as a matter of law, meet its burden of showing that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."¹⁷ Thus, in cases involving single acts of the most noxious and nefarious variety, such as rapes and physical assaults, plaintiffs who would otherwise fall through the cracks for want of an opportunity to report the harm, may be made whole for the harm that they have sustained in certain circumstances.

In 1998, the Supreme Court attempted to resolve widespread disagreement and confusion among circuit courts as to how and when to impute liability to a plaintiff's employer for supervisory sexual harassment sustained by the plaintiff.¹⁸ In the cases of *Burlington Industries, Inc. v. Ellerth*¹⁹ and *Faragher v. City of Boca Raton*,²⁰ the Supreme Court, mindful of its previous holding that "agency principles constrain the imposition of vicarious liability in cases of supervisory harassment,"²¹ was careful to steep its resolution of the issue in the law of agency.²² In this vein, the Court noted that while "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation,"²³ essentially, "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive

15. See discussion *infra* Section VII.

16. See discussion *infra* Section VII.

17. *Faragher v. City of Boca Raton*, 524 U.S.775, 807 (1998); *Burlington Indus. v. Ellerth* 524 U.S. 742, 765 (1998).

18. See generally *Ellerth*, 524 U.S. 742, *Faragher*, 524 U.S. 775.

19. *Ellerth*, 524 U.S. at 742.

20. *Faragher*, 524 U.S. at 775.

21. *Ellerth*, 524 U.S. at 763 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)).

22. *Faragher*, 524 U.S. at 776; *Ellerth*, 524 U.S. at 754-55.

23. *Ellerth*, 524 U.S. at 763.

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pool of potential victims.”²⁴ The Court thus concluded that it could not confer strict liability upon employers for all acts of supervisory harassment because “[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself.”²⁵

So, the Court reasoned, a supervisor’s tangible employment action transforms into an act of the employer because:

[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.²⁶

The Court thus bifurcated harassment claims, isolating those in which a harassed employee sustained what it called a “tangible employment action,” which “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”²⁷ A defendant employer, the Court held, was automatically liable for sexual harassment where the plaintiff had sustained a tangible employment action.²⁸ In the absence of a tangible employment action, the Court held that the plaintiff’s *prima facie* case, once successfully made, would be rendered vulnerable to the interposition of a two-pronged affirmative defense asserting that 1) “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,”²⁹ and 2) “that the plaintiff employee

24. *Id.* at 760.

25. *Id.*

26. *Id.* at 761-62.

27. *Id.* at 761.

28. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

29. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁰

In 2004, the Supreme Court held that even a constructive discharge, the legal point at which a court determines that any reasonable person in the plaintiff’s shoes would have felt compelled to quit employment, is not tantamount to a tangible employment action sufficient to insulate a plaintiff’s claim from the interposition of the affirmative defense.³¹ The Court held that “when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer,” because the plaintiff’s decision to leave does not, unlike an act that bears the imprimatur of the enterprise, afford the defendant notice of the harassment.³² Thus, any harassment scenario, irrespective of its severity, that does not entail an “official company act” that somehow ratifies the harassment, appears vulnerable to the affirmative defense.³³

The promulgation of Title VII’s jurisprudential framework in *Faragher* and *Ellerth* met with a skeptical response from many scholars.³⁴ Professor Joanna Grossman examined the promulgation of

30. *Ellerth*, 524 U.S. at 765.

31. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004).

32. *Id.* at 148-49 (adding that “[a]bsent such an official act, the extent to which the supervisor’s misconduct has been aided by the agency relation, as we earlier recounted . . . is less certain”). The *Suders* decision was eagerly awaited by many members of the legal and academic communities. See, e.g., Shari M. Goldsmith, Casenote, *The Supreme Court’s Suders Problem: Wrong Question, Wrong Facts Determining Whether Constructive Discharge is a Tangible Employment Action*, 6 U. PA. J. LAB. & EMP. L. 817, 819, 844 (2004) (arguing, after certiorari had been granted by the Court, that *Suders*’ “resignation was ‘ratified by the employer,’” and contending that the Supreme Court should “guarantee that resignations classified as constructive discharges would genuinely be the functional equivalents of formal discharges”).

33. See *Suders*, 542 U.S. at 148-49.

34. Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 671 (2000) (“[The *Faragher* and *Ellerth* decisions], far from imposing additional liability on innocent employers, . . . instead created a virtual safe harbor that protects employers from liability unless their own conduct is found wanting.”); Goldsmith, *supra* note 32, at 819, 844 (arguing, “if the Supreme Court were to resolve the inquiry of whether a constructive discharge is a tangible employment action in the context of a decision applying the [notice] approach it would answer in the affirmative”); Kerri L. Stone, *Consenting Adults? Why Women Who Submit to Supervisory Sexual Harassment are Faring Better in Court Than Those Who Say No . . . and Why They Shouldn’t*, YALE J.L. & FEMINISM (forthcoming 2008).

[W]hen the [*Faragher*/*Ellerth*] cases and the principles and preferences that have emerged from their jurisprudence are properly viewed, it is clear that modern society continues to suffer from what may be called “Lewinsky syndrome,” a tendency to “rescue” from the consequences of their actions younger or less powerful women who decide to initiate or enter into intimate relations with powerful, often older men, for whom they work.

Id.

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the strictures placed upon liability in *Faragher* and *Ellerth* and observed that:

[t]he common law extends to a dog the ‘prestigious distinction’ of being entitled to one bite before its owner becomes strictly liable for damages. While this common law privilege for dog owners has been largely abrogated by statute, the Supreme Court recently adopted a variation of it for employers of supervisors who sexually harass their subordinates.³⁵

Essentially, Professor Grossman explained, the Supreme Court’s view on enterprise liability for supervisory harassment, “ostensibly grounded in traditional agency principles,”³⁶ means that

employers are now liable for the hostile environment created by their supervisors, for the most part, only after being given a chance to react and failing to do so. In other words, for employers of harassing supervisors, as for the dog owners that preceded them, the first bite is free.³⁷

The significance of this insight cannot be overstated. For better or worse, the Supreme Court has attempted to mediate and negotiate a balance between compensating harassment victims and contouring a reasonable scope of employer liability.³⁸ That having been said, when an employer knowingly situates a harasser as a new potential victim’s supervisor, it may not have acted negligently as a de facto matter, but the employer ought to be seen as having assumed the risk that it did not adequately cure the problem because the harasser may offend again in his new situation. Thus, the victim, who had no ability to know of her harasser’s predilections or violent tendencies and had no ability to prospectively ward off harm prior to its occurrence, should be able to hold the defendant, who had every opportunity to act, for example by terminating or adequately disciplining the harasser, legally accountable for the harm sustained.

II. PREMISES

There are two premises upon which this idea is based. The first is

35. Grossman, *supra* note 34, at 671.

36. *Id.*

37. *Id.*

38. *Burlington*, 524 U.S. at 764-65 (“[A]ccomodat[ing] the agency principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees . . .”).

that the population of supervisory harassers is rife with recidivist offenders whose behavior, far from stemmed by the slaps on the wrist they often received, often escalates over time.³⁹ The second is that most claims of harassment are typically dealt with internally and not argued before a court. However, in those cases that are adjudicated, courts have sanctioned the mere physical separation of a harasser and his complaining victim as a legally adequate remedial response to a complaint.⁴⁰

It is often the case that sexual harassers who engage in physical assaults or rape of their subordinates are recidivist offenders in that they either have a criminal record of sexual violence or a discernible tendency toward sexual harassment revealed by their record on the job.⁴¹ It is often the case that a sexual harasser has already engaged in harassing or even criminal behavior, either at his current workplace or a previous one.⁴²

Moreover, employers will often slap harassers on the wrist and merely transfer them away from their victims, rather than expose the harasser's wrongdoings and end their opportunities to engage in such acts.⁴³ Most of the information that scholars have gathered about the handling of sexual harassment under the law comes from court records

39. Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 350 (1990).

40. Hall et al., *supra* note 12, at 732 (“[R]ecidivism rates are most commonly based on official arrest data, which may underestimate actual rates of offending.”).

41. See Paul, *supra* note 39, at 350 (“[I]t is undoubtedly true that many practitioners of sexual harassment are recidivists. . . .”).

42. See West, *supra* note 9, at 505 (“Large employers, primarily public employers, face the problem of repeat harassers.”). See also Jordana Mishory, *Teen Sues Over Sex with Boss*, MIAMI DAILY BUS. REV. June 20, 2007, at 1 (discussing a case in which a fifteen year old and her mother sued McDonalds over what they alleged was her sexual harassment by a McDonalds franchisee. In the suit, the teenager alleged that her harasser dated another minor employee prior to commencing his inappropriate relationship with her and that the company knew about this.); Paul, *supra* note 39, at 350.

43. See Diane Gentry, *Title VII Limitations — Keeping the Workplace Hostile*, 9 CARDOZO WOMEN'S L.J. 393, 406 (2003).

[T]he remedies provided by employers to redress harassment further promotes sexism because they do not really change the male dominated work culture. Employees who are harassed are “protected” by their employer, while the offending party may be re-routed, and the behavior temporarily pre-empted Separating women from individual harassers without addressing the pervasiveness of sexist conduct does nothing to effectively end sexism. Instead, it reinforces the perception that women do not belong in the workplace.

Id.

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and opinions in cases brought against defendant entities.⁴⁴ However, most claims of sexual harassment on the job are handled internally.⁴⁵

Numerous cases' facts and records reveal that separating a harasser and a complaining victim is a common practice when employers attempt to grapple with complaints of harassment made through established internal channels.⁴⁶ To the extent that a harassing supervisor adds value to a defendant enterprise, it has every reason to want to allay a harassment situation without losing or exacting too much retribution upon him; he may even be promoted within the enterprise.⁴⁷

All too often employers respond to allegations of sexual harassment by offering the complainant an opportunity to transfer to a different branch, division, or department.⁴⁸ In one particularly egregious scenario, a sexual harassment complainant requested a transfer so that she would no longer be under the supervision of her alleged harasser. She was subsequently discharged after rejecting the only transfer offered, which was to a unit in which she had been physically attacked previously by a client.⁴⁹

One scholar has taken note of the problem of employers retaining and resituating harassers as other employees' supervisors, suggesting that:

if an employer continues to employ a harassing supervisor or other employee, employers should be obligated to inform employees who must work with the harasser about the resolution of the prior complaint

44. See West, *supra* note 9, at 465-66.

45. Dave Simanoff, *Law Firms Address Harassment Issues*, TAMPA TRIB., April 6, 2005, at 1 (calling harassment at law firms "an industrywide issue often dealt with behind closed doors").

46. See, e.g., *McCombs v. Meijer, Inc.*, 395 F.3d 346, 351 (6th Cir. 2005); *Scarberry v. Exxonmobil Oil Corp.*, 328 F.3d 1255, 1259 (10th Cir. 2003); *Stephens v. Rheem Mfg. Co.*, 220 F.3d 882, 884 (8th Cir. 2000); *Mikels v. City of Durham, N.C.*, 183 F.3d 323, 326 (4th Cir. 1999); *Speaks v. City of Lakeland*, 315 F. Supp. 2d 1217, 1221 n.7 (M.D. Fla. 2004).

47. See, e.g., Simanoff, *supra* note 45, at 1 (noting that in 2005, a prominent Florida law firm promoted to its number three spot a partner who had been disciplined for sexual harassment).

48. See, e.g., *Stuart v. GMC*, 217 F.3d 621, 633 (8th Cir. 2000) (finding defendant employer's response to sexual harassment was adequate as a matter of law where it promptly investigated the complaint, redistributed sexual harassment policy, and offered the plaintiff a transfer to a different department, thus ending the harassment); *Dees v. Johnson Controls World Serv. Inc.*, 168 F.3d 417, 420-21 (11th Cir. 1999) (following plaintiff's formal complaint of harassment, employer's prompt remedial response of transferring her to another department warranted its summary judgment on her sexual harassment claim); see, e.g., *Ford v. West*, 222 F.3d 767, 779 (10th Cir. 2000) (transferring sexual harassment complainant was a reasonable remedial reaction to complaint); *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 540 (5th Cir. 1998) (finding reasonable remedial response to offer to transfer plaintiff to another office so that she would have no further contact with her alleged harasser).

49. *Yancey v. Nat'l Ctr. on Inst. and Alternatives*, 986 F. Supp. 945, 950 (D. Md. 1997).

and any discipline taken. Otherwise, if the person harasses another employee, the employer should be liable for greater damages for the subsequent harassment.⁵⁰

Thus, it is clear that unwitting first-time victims of harassment are being victimized, in many cases, by recidivist harassers, known to be such by their employers.

III. THE LAW INCENTIVIZES MANY EMPLOYERS' "BANDAID" APPROACH TO DEALING WITH RECIDIVIST HARASSERS: AN ILLUSTRATIVE CASE

These premises having been established, the problem inherent in a workforce replete with recidivist harassers that companies are likely to transfer rather than terminate or reform is compounded by the courts' treatment of these scenarios. The problem of courts' failure to hold employers to high enough standards for staving off harm is epitomized by a 2002 Seventh Circuit sexual harassment case. In *Longstreet v. Illinois Department of Corrections*,⁵¹ the plaintiff alleged that two incidents, occurring thirty days apart, amounted to actionable sexual harassment.⁵² The first incident involved a co-worker verbally harassing her and masturbating in front of her,⁵³ and the second was a sexual assault that she sustained from a different co-worker.⁵⁴ As the court recited, "[i]t is, we think, difficult to determine which of the two incidents [she] complains about, if true, was worse. Both were close to 9's on a scale of 10."⁵⁵

As the court further explained, however, because the individual in the first incident was, "in all practical respects"⁵⁶ fired, while the other harassment (the alleged sexual assault) was an "isolated incident," her evidence could "hardly" form the basis of an actionable sexual harassment claim.⁵⁷ The plaintiff could not contend that the defendant's actions were "not sufficient to remedy the harassment."⁵⁸ "The answer," the court deduced,

50. West, *supra* note 9, at 506.

51. *Longstreet v. Ill. Dep't. of Corr.*, 276 F.3d 379 (7th Cir. 2002).

52. *Id.* at 381.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Longstreet*, 276 F.3d at 381.

57. *Id.* at 383.

58. *Id.* at 382.

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seems to be that her real contention is that the DOC was negligent not so much in its response to her complaints but in not preventing the harassment in the first place. She says that both Bester and Bills harassed others before her. The contention is that if the DOC had taken reasonable steps in connection with those prior incidents, these unpleasant things would not have happened to her.⁵⁹

Recognizing that there had been a prior incident of one of her harassers having harassed another woman at work and been reassigned, the court nonetheless rejected the plaintiff's argument that "if the men had been properly dealt with in the other incidents, they would not have been recidivists,"⁶⁰ and that although the other harassed employee "was satisfied with the resolution of her case, the DOC had an independent obligation to make a further investigation and to make certain that [he] clearly understood that his reassignment was a result of his bad behavior."⁶¹

The court acknowledged that "[a]n employer must take more care to protect employees, depending on the seriousness of the harassment,"⁶² but equivocated, stating that, "[i]n this case, we must determine how far those principles can be stretched."⁶³ Refusing to link its assessment of the defendant's handling of the prior instance of harassment to employer liability for any harm sustained in the plaintiff's current case, the court determined that "[t]he proper measure of the reasonableness of the DOC's response was dependent on the facts and circumstances of that case. Short of litigating Terry's situation in Longstreet's case, there is little to be said about it except that the DOC response was not obviously unreasonable."⁶⁴ Rejecting the idea that the defendant was obligated to be on notice of the possibility that the harasser would be a recidivist, the court concluded that:

[i]t would push the role of deterrence too far to say that a response which seemed to be within the realm of reasonableness in one situation can, if ultimately it did not have the proper deterrent effect, be the sole basis for liability in another case even if the employer's response in the second case was clearly sufficient.⁶⁵

59. *Id.*

60. *Id.*

61. *Longstreet*, 276 F.3d at 382.

62. *Id.* (citing *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991)).

63. *Id.*

64. *Id.*

65. *Id.*

Disciplining the harasser without firing him the first time, the court conceded, “did not cure him of disgusting and boorish behavior,”⁶⁶ and the plaintiff’s argument that she would have been spared the indignity of her own harassment if he had been fired after his first offense did have “superficial appeal.”⁶⁷ Nonetheless, the court found,

we cannot conclude that an employer is subject to what amounts to strict liability for every second incident of harassment committed by an employee, especially when the first incident was far less serious than the second To say that the employer must be held liable in the second incident would be to impose strict liability on an employer any time an employee commits two acts of harassment. It would be a two-strikes-and-you’re-out rule. To be safe from liability, an employer would always have to discharge a person accused of any kind of harassment because no employer can predict with certainty, any more than any judge sentencing a criminal defendant can predict with certainty, that an offender will not offend again.⁶⁸

This case illustrates how a plaintiff may be denied compensation for harassment which she could not foresee but which her employer may have been able to prevent even without her complaint.

IV. FACTORING IN THE GOALS OF TITLE VII

It goes without saying that one’s rights to bodily safety and integrity in the workplace are inviolable. Along those lines, numerous courts have held that a single instance of physical violence may rise to the level of an actionable hostile work environment, which, according to the Supreme Court must include conduct that is “severe or pervasive.”⁶⁹

66. *Longstreet*, 276 F.3d at 383.

67. *Id.*

68. *Id.*

69. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998).. See also *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999) (finding that plaintiff’s being called a “bitch,” being pinned against a wall, and having had her wrist twisted until she sustained ligament damage, drew blood, and required surgery created an actionable hostile work environment because “[a]lthough less severe acts of harassment must be frequent or part of a pervasive pattern of objectionable behavior in order to rise to an actionable level, ‘extremely serious’ acts of harassment do not”); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (“[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability.”) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995)); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir. 1998) (finding a one time event in which a waitress had her hair pulled by a customer, who also grabbed and placed his mouth on her breast was severe enough to create an actionable hostile work environment); *Jones v. U.S. Gypsum*, No. C99-3047-MWB, 2000 WL 196616, at *3-4 (N.D. Iowa Jan. 21, 2000) (rejecting the argument that physical assault committed

It would seem to follow that allowing recovery under Title VII for a first-time, single incident of physical/sexual violence by a recidivist harasser comports entirely with the objectives and goals of Title VII, as well as those of the Supreme Court in crafting its jurisprudence. The Supreme Court declared in *Faragher* that properly determining the contours of *respondeat superior* liability for supervisory sexual harassment “calls not for a mechanical application of indefinite and malleable factors . . . but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor’s employment, and the reasons for the opposite view.”⁷⁰ The linchpin of the proper query, or, as the Supreme Court put it, the “integrating principle” of respondeat superior is “that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not.”⁷¹ It ought to go without saying that merely transferring or shuffling around a known harasser without regard for what he does until a new instance of harassment is reported engenders a risk for an employer that may only be seen as attendant to the defendant’s business and the way in which it knowingly chose to run it.

The Supreme Court acknowledged in *Faragher* that Title VII aims “to make persons whole for injuries suffered on account of unlawful

by defendant’s “employee was simply a one-time incident and was therefore not pervasive enough to create an abusive environment,” because it rose “to the same level of severity as sexual assault, and objectively carried sexual overtones”); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001) (“We have no doubt a single incident of rape can satisfy the first prong of employer liability under a hostile work environment theory.”); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (“[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive work environment for purposes of Title VII liability.”), *abrogated on other grounds by*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). There have, however, been numerous occasions in which single instances of sexual assault/physical sexual conduct were held not to rise to the level of an actionable hostile work environment. *See, e.g.*, *Jones v. Potter*, 301 F. Supp. 2d 1, 10 (D.D.C. 2004) (holding male supervisor’s one-time act of rubbing his penis against employee’s buttocks in the presence of co-workers was not severe or pervasive enough to create sexually hostile work environment under Title VII); *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 38-39, 45-46 (1st Cir. 2003) (finding female supervisor’s improper remarks to employee, which included telling employee to invite her to lunch and making comments about plaintiff’s co-workers’ “private lives and sexual preferences . . .” and, on one occasion approaching the plaintiff “from behind, hugg[ing] her, and whisper[ing] in her ear a request for a cookie from another table[.]” did not establish a hostile work environment); *Tatum v. Hyatt Corp.*, 918 F. Supp. 5, 7 (D.D.C. 1994) (holding single episode in which supervisor wrapped his arms around plaintiff and made sexually explicit statements was not sufficient to demonstrate a hostile work environment; “absent the most stringent circumstances, courts have refused to hold that one incident in itself was so severe as to create a hostile work environment”).

70. *Faragher*, 524 U.S. at 797.

71. *Id.* (quoting *Taber v. Maine*, 67 F.3d 1029, 1037 (2d Cir. 1995)).

employment discrimination,”⁷² but stated that its “primary objective,” was “not to provide redress but to avoid harm.”⁷³ Thus, the Court concluded that it was bifurcating the realms of cases with and without tangible employment actions and crafting the affirmative defense as the EEOC wanted, to “recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.”⁷⁴

Each of these aspirations comports squarely with courts preventing the affirmative defense from blocking a plaintiff’s claim that she was raped or assaulted in a one-time incident by a known harasser and had no opportunity to make meaningful use of complaint channels before sustaining harm. In the first place, a victim who has withstood the most noxious and egregious form of sexual harassment, an assault to, and violation of, her bodily integrity in her workplace or within the scope of her employment, will not be precluded from recovering damages. Further, avoiding harm is a goal best achieved when the law discourages employers, who are uniquely situated to know of supervisors with a history of harassment yet knowingly or recklessly place those individuals in a position to harass other victims, from doing so. Moreover, while it may be appropriate to credit employers who make reasonable efforts to stave off the harm associated with harassment, allowing certain employers to insulate themselves against liability sometimes rewards behavior that foments repeated instances of harassment.

The Supreme Court in *Faragher* stated that another policy underpinning of its creation of the affirmative defense was the common law precept of harm avoidance and mitigation by the victim, which is the notion that if a victim “unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.”⁷⁵ Thus, the Supreme Court determined, under its framework that “if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.”⁷⁶ Again, permitting recovery in cases involving the one-time act of physical violence of a recidivist harassing supervisor does not contravene the precept of harm avoidance because the victim in such a

72. *Id.* at 805.

73. *Id.* at 806.

74. *Id.*

75. *Id.* at 806-07.

76. *Id.* at 807.

case has no opportunity to furnish notice to the employer, and has already sustained harm that he or she could not have prevented. This Article next explores precisely how courts might go about applying the two-pronged affirmative defense in such a way as to accord less accountability to victims with no opportunity to report grievous harm that they sustain and confer more responsibility on employers who assume the risk of retaining a harassing supervisor.

V. CIRCLING AROUND A SOLUTION

An obvious thought is that perhaps a court might consider a one-time incident of physical/sexual violence to be a tangible employment action, removing the availability of the affirmative defense. Several plaintiffs, however, have tried to make this argument to no avail, and federal courts have unceremoniously and summarily rejected it. Other courts have refrained from addressing the issue altogether.

In the pre-*Suders* Eleventh Circuit case of *Walton v. Johnson*,⁷⁷ the plaintiff, a pharmaceutical sales representative, sued her employer under Title VII for sexual harassment, alleging that her district manager engaged in a variety of harassing behaviors on several occasions.⁷⁸ These behaviors included kissing her, grabbing her inappropriately, and, eventually, raping her.⁷⁹ In the course of resolving her claim, the Eleventh Circuit declined to address Walton's argument, made for the first time in her Reply Brief, that "the alleged rapes . . . by themselves, constitute tangible employment actions,"⁸⁰ noting that the argument "was not raised below."⁸¹

However, it appears that even in that pre-*Suders* era, courts were poised to view even the most horrific criminal assaults on victims at work as falling short of being tangible employment actions.⁸² In 2003, a district court in Virginia, adjudicating a harassment suit in which the plaintiff was allegedly "rape[d] at knife-point," found that "[e]ven if [the alleged harasser] were a supervisor, there was no tangible employment action taken . . . that would short-circuit [the plaintiff's] ability to claim the *Faragher / Ellerth* defense,"⁸³ because "[t]here was nothing done to

77. *Walton v. Johnson*, 347 F.3d 1272 (11th Cir. 2003).

78. *Id.* at 1276.

79. *Id.*

80. *Id.* at 1283 n.10.

81. *Id.*

82. *See generally* *Cooper v. City of Roanoke, VA*, No. Civ. 7:02-CV-00673, 2003 WL 24117704 (W.D. Va. Jan. 10, 2003).

83. *Id.* at *4.

[the plaintiff] that changed her employment condition through the use of supervisory power.”⁸⁴ The court observed that “nothing . . . made [the plaintiff] defenseless against the harassment in ways that comparable conduct by a mere co-worker would not have done.”⁸⁵

Certainly following the Supreme Court’s 2004 pronouncement in *Suders* that the touchstone for the analysis of when an act is a tangible employment action is whether or not an “official company act” took place,⁸⁶ it appears that even an actual rape would likely not qualify as a tangible employment action sufficient to confer vulnerability to the affirmative defense upon a plaintiff’s claim.

In *Allen v. Ohio Department of Job and Family Services*,⁸⁷ a sexual harassment plaintiff alleged that she had endured tangible employment actions in the form of her supervisor’s “‘making of unlawful threats of discipline against her,’ his ‘physical assault, and his ‘unfair and discriminatory treatment’”⁸⁸ The district court rejected this argument summarily, briefly noting that “[t]he physical assault did not change her employment status or reduce her job benefits.”⁸⁹

Another district court characterized a sexual harassment plaintiff’s contention that assaults she had sustained constituted tangible employment actions as an “effort to circumvent the *Ellerth/Faragher* affirmative defense,”⁹⁰ holding that:

[the] argument obviously lacks merit [because i]f sexually harassing behavior by a supervisor could, in itself, be construed as a tangible employment action, the affirmative defense set forth in *Ellerth* and *Faragher* would be a dead letter. That is, every case involving sexual harassment by a supervisor would also involve a tangible employment action and would therefore preclude resort to the affirmative defense.⁹¹

The problem seems intractable; as repugnant as the notion of being raped in the course of performing one’s own job and by the supervisor

84. *Id.*

85. *Id.* (internal quotations omitted).

86. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) (“[W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis . . . calls for extension of the affirmative defense to the employer.”).

87. *Allen v. Ohio Dep’t of Job & Family Serv.*, No. 2:05-CV-00707, 2007 WL 2815569, at *8 (S.D. Ohio Sept. 25, 2007).

88. *Id.* at *8.

89. *Id.*

90. *Conatzer v. Med. Prof’l Bldg. Serv., Inc.*, 255 F. Supp. 2d 1259, 1267 (N.D. Okla. 2003).

91. *Id.* at 1267. The Court went on to note, “[a]ssuming [that] the Supreme Court does not intend its rulings to lack all force and effect, this Court declines to adopt plaintiff’s interpretation of ‘tangible employment action.’” *Id.*

assigned by one's own employer is, unless the rapist is aided by something more than the agency relationship itself, the affirmative defense may preclude recovery.⁹² The mere situation of one who would rape or assault a subordinate as a supervisor is insufficient to warrant the imposition of respondeat superior liability under the current framework employed by courts in Title VII cases.⁹³ As stated, the Supreme Court has ruled that automatic employer liability for supervisory harassment "requires the existence of something more than the employment relationship itself."⁹⁴ Thus, it appears that even a one-time supervisory incident of the highest magnitude, like a violent rape, may permit an employer to elude legal accountability for Title VII damages.

VI. PROPOSED SOLUTION

So what is the best way for courts to deal with one-time incidents of harassment severe enough to be actionable by themselves because they transform the victim's terms and conditions of employment, but which do not qualify as tangible employment actions? In such situations, courts should, in their analysis of the first prong of the affirmative defense, refuse to view the incident in a vacuum. Thus, the fact that the harasser and the victim may never before have interacted with one another should not be dispositive proof that the employer should not have anticipated the harassing behavior and could not have "exercised reasonable care to prevent" it. Rather, by undertaking a fact-intensive query, the court should look at 1) any knowledge that the employer might have had as to the fact that the harasser at issue was prone to inflict harm; and 2) what, if any, actions it had previously taken regarding the discipline, education, transfer, and situation of the harasser as a supervisor, to determine whether or not the employer exercised reasonable care in the prevention of the harm inflicted. A proposal that revamps the analysis of the affirmative defense in order to further Title VII's deterrence goals is not without precedent.⁹⁵

92. Burlington Indus. v. Ellerth, 524 U.S. 742, 764-65 (1998).

93. *See id.*

94. *Id.* at 760.

95. In 2002, Professor Martha West proposed that courts require that in order to have a legally effective mechanism for processing and dealing with complaints, employers should furnish information about the resolution of prior complaints to employees on a regular basis and provide documentation for employees as to the actions it took in addressing prior sexual harassment complaints. West, *supra* note 9, at 497-98. As Professor West explained:

These steps would communicate to women that their fears are, in fact, unreasonable, and that they should be willing to report harassment in a timely fashion. If employers do not

This query should turn on a multitude of factors, and a host of varied scenarios will necessitate judgment calls as to the ultimate determination. For example, when examining what knowledge about the harasser's potential to harass might be imputed to the employer, ought it matter whether such knowledge was gleaned from the harasser's documented experience while in the defendant's employ, or from information received from a previous employer, a news report, a criminal record, or even from industry scuttlebutt?⁹⁶ Moreover, how are the courts to measure one's "potential" to harass? Is it reasonable to predict that a habitual offender who is known to repeatedly tell inappropriate jokes in the office will escalate his behavior to include sexual assault? Should it matter how much time has elapsed between incidents; after a long period of unremarkable behavior, might a harasser's slate be reasonably "wiped clean" by the employer? Finally, ought the courts treat an employer who has done more to discipline and educate a past offender differently from one who has done less or nothing upon a repeat offense; or should the fact and the severity of the new offense, a priori, establish that the former employer fell short of reasonable efforts to prevent it?

These are important questions that courts will have to answer if they adopt this proposed approach to the adjudication of the affirmative defense. The best way in which to address them is for courts to create a matrix in which to evaluate the strength of the factors of how and how much a defendant employer knew about the offender's tendency to harass, the strength of the evidence demonstrating this tendency, and what, if anything, the employer did in the face of this knowledge.⁹⁷ If

voluntarily release information to employees about the resolution of prior complaints, plaintiffs' attorneys should seek such information in future cases in order to evaluate the effectiveness of employer procedures and to challenge an employer's claim of reasonable care under the affirmative defense.

Id.

96. The question of what an employer should have known, in addition to what it actually knew, about a supervisor's work and criminal history should also be implicated in this analysis. Although beyond the scope of this Article, employers will need to be aware of the relevant federal, state, and local laws that entitle them to or prohibit them from procuring such information. *See, e.g.,* COL. STAT. ANN. § 24-72-204 (3)(a)(X)(A)(2007) ("[T]he custodian may deny the right of inspection of the following records . . . [a]ny records of sexual harassment complaints and investigations . . ."); N.J. STAT. ANN. § 47:1A-1.1 (2005) ("[I]nformation which is deemed to be confidential . . . [includes] information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint.").

97. *See* West, *supra* note 9, at 519. Professor West has advanced the argument that employers ought to inform employees that their new supervisor has a history of harassment. *Id.* She argues that:

Just as employers are not liable for the release of information at work about employees

courts use these guidelines, a workable jurisprudence developed against a variety of factual backdrops will emerge. Such a jurisprudence will counsel potential defendants to react to instances of harassment not only promptly and effectively vis-à-vis the reporting victim at issue, but with an eye toward the potential liability they could incur (or rather, fail to shield themselves from). This will not only promote better discipline of harassers, but will also encourage better record keeping, reporting, and information sharing within enterprises.⁹⁸ One scholar has already recommended that employers' reasonable actions upon handling a complaint include publicizing what occurred and warning potential new victims of a retained harasser. Professor West warns "[i]f victims and other potential targets of harassment are not informed, serious harassment could recur, an employer's liability will increase, and women will have little basis for trusting the employer's prevention policy."⁹⁹

Thus, if a court finds that an employer did not exercise reasonable care in comportment with the first prong of the affirmative defense, it will necessarily find that the defense cannot preclude liability, because the defense requires that both prongs be met.¹⁰⁰ This will obviate the need for a victim of a one-time incident severe enough to confer Title VII liability on her employer to argue her inability to report the harm before it occurred.

This argument works both ways. In the case of a one-time incident severe enough to confer liability on a defendant employer, the employer should not, as a matter of law, be able to make out the second prong of the affirmative defense, that "the plaintiff employee *unreasonably* failed to take advantage of any preventive or corrective opportunities provided

terminated for harassment, they will not be liable for informing employees that another employee or a supervisor assigned to their work area was found to have harassed in the past, but is being given a chance to improve.

Id.

98. Professor West has advocated that courts require better record keeping and publicity when it comes to reported instances of harassment by proposing that in order to ensure Title VII's jurisprudence comports and resonates more strongly with its stated goals of encouraging harm prevention of harassment, "courts should require an employer to demonstrate the effectiveness of its prevention policy by documenting for employees the actions it took in addressing prior sexual harassment complaints." West, *supra* note 9, at 497. The author maintains that "[p]roviding data on an annual basis would . . . increase women's courage and would assist them in overcoming their fears of complaining. It would also help prevent future sexual harassment, deterring would-be harassers by informing them that such behavior could result in discipline or discharge." *Id.* at 498.

99. *Id.* at 520.

100. Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998).

by the employer or to avoid harm otherwise.”¹⁰¹ This is tautological in all cases of one-time instances of harassment, despite various courts’ assertions that as a matter of fairness to an unaware defendant, such a reading of the requirement should not arrest the defense.¹⁰² However, in cases of a one-time incident perpetrated by a recidivist harasser, these fairness concerns evaporate.¹⁰³

It is important to note that any so-called “penalty” imposed on employers who situate a known harasser as a new victim’s supervisor by such an analysis of the affirmative defense is only meted out after the new harm has been inflicted; in other words, after the employer has been shown to have lost any bet it placed on the harasser’s ability to cease his behavior.

While no court has used the approach suggested above, some inroads have been made. Several courts have already evinced some open-mindedness in their adjudication of incidents like workplace rapes. Some courts have already recognized that rote, mechanistic application of the traditional framework and the affirmative defense may not always best serve justice.

In the first place, courts have recognized that “workplace rapes” need not always take place in the actual workplace to confer *respondeat superior* liability on defendants who fail to adequately protect their employees. This recognition evinces courts’ willingness to depart from a strict insistence that any act occurring off the employer’s physical premises cannot confer liability on the employer.

Moreover, under a negligence theory usually employed in cases of co-worker harassment, courts have deemed employers to be on notice of a harassing environment, whether or not any complaints have been filed. Additionally, courts have deemed employers negligent in their failure to cure the problem, and thus liable under Title VII for the harm inflicted. Courts have recognized that even though a given plaintiff may not have previously complained about a specific harasser, a defendant may be deemed to be on notice of the harasser’s potential to inflict harm upon those with whom he is situated such that formal prior notice in the form of a complaint by the instant plaintiff may not be a prerequisite for respondeat superior liability. The case of *Ferris v. Delta Air Lines, Inc.*,¹⁰⁴ which deals with an allegation of co-worker,¹⁰⁵ not supervisory,

101. *Id.* at 807 (emphasis added); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (emphasis added).

102. *See, e.g.,* *McCurdy v. Arkansas State Police*, 375 F.3d 762, 771 (8th Cir. 2004).

103. *See* *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001).

104. *Id.*

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rape and harassment, is instructive on these points. In that case, a female flight attendant sued the airline for which she worked under Title VII and made New York state law claims of negligent retention and supervision after a co-worker, a male flight attendant, allegedly raped her in his hotel room during her flight crew's brief layover in a foreign country.¹⁰⁶ The plaintiff raised evidence that the airline had previously been on notice of her alleged rapist's sexually abusive conduct, including a prior alleged rape and sexual assault, with other co-workers.¹⁰⁷

With respect to the defendant's duty to responsibly supervise the alleged harasser, the court found that a reasonable trier of fact could determine that the defendant's negligence made it accountable for the rape:

Delta had notice of Young's proclivity to rape co-workers. The fact that Young's prior rapes were not of Ferris but of other co-workers is not preclusive. If an employer is on notice of a likelihood that a particular employee's proclivities place other employees at unreasonable risk of rape, the employer does not escape responsibility to warn or protect likely future victims merely because the abusive employee has not previously abused those particular employees.¹⁰⁸

The Court, however, tempered its holding by noting that:

[h]ad the earlier non-work related incidents consisted of less grave conduct, such as off-duty flirtation, sexual innuendo, or crude talk, we might agree that such off-premises, off-duty conduct does not reasonably give notice of a likelihood that the person will represent a danger to co-employees or import his harassment into a work environment and therefore does not give rise to an employer's duty to protect co-workers.¹⁰⁹

Nonetheless, it stated, "rape is obviously a far more serious matter [and t]he more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required

105. "It is well settled that an employer can only be liable for harassment by a victim's co-worker if the employer was negligent – that is, only if it failed to provide a reasonable avenue for complaint or knew of the harassment but did nothing about it." *Ayers v. State of Conn. Judicial Branch*, No. Civ.3:99CV935 (AHN), 2002 WL 32094365, at *3 (D. Conn., March 28, 2002).

106. *Ferris*, 277 F.3d at 135.

107. *Id.* at 136.

108. *Id.*

109. *Id.* at 137.

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under a standard of reasonable care to take steps for the protection of likely future victims.”¹¹⁰

In *Faragher*, the Supreme Court expressly found that cases involving “actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop”¹¹¹ can result in employer liability where “the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer’s adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer’s policy.”¹¹² The proposed analysis of the prong of the affirmative defense is entirely in comportment with this mandate.

VII. NEGLIGENT RETENTION

It is important to examine the common law torts of negligent hiring, training, and retention when contemplating the form of analysis of the affirmative defense as has been posited. Often, plaintiffs allege these torts as pendant state law claims along with their Title VII claims where they have been harassed by a recidivist supervisor. Both these claims and the courts’ adjudication of the affirmative defense under Title VII are steeped in negligence theory.

Based on traditional principles of agency law, an employer is liable for his negligence or recklessness:

in the employment of improper persons or instrumentalities in work involving risk of harm to others; . . . in the supervision of the activity; or . . . in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.¹¹³

The tort of negligent hiring, for example, thus typically confers liability on an employer when: 1) the employer hires one whom, at the time of the hiring, the employer knew, or should have known with the exercise of ordinary care, was unfit,¹¹⁴ 2) through the negligent hiring of the employee, the employee’s incompetence, unfitness, or dangerous

110. *Id.*

111. *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998).

112. *Id.*

113. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

114. *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953, 960 (5th Cir. 1994); *Pennington v. Dollar Tree Stores, Inc.*, 28 Fed. App’x 482, 490 (6th Cir. 2002); *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1156 (11th Cir. 1993).

characteristics proximately caused the resulting injuries,¹¹⁵ and 3) an employment or agency relationship exists between the tortfeasor and the defendant employer.¹¹⁶ Many states, however, have relatively low thresholds when gauging an employer's responsibility at the outset of an employment relationship.¹¹⁷ Some jurisdictions additionally require that the hiring of the individual at issue create a foreseeable or unreasonable risk of harm to third parties.¹¹⁸ Once an employee is negligently hired, the employer is obligated to exercise reasonable care to exercise control over the employee to prevent him from harming others.¹¹⁹ This is so even if the employee is acting outside the scope of his employment, so long as the employee is on the employer's premises or on premises upon which the employee is privileged to enter only as an employee.¹²⁰ If the anticipated harm occurs, the employer may be liable for it, irrespective of what the employee intended to do once he gained access to the injured plaintiff.¹²¹

In terms of an employer's exercise of ordinary care to ascertain an employee's fitness, an employer is required to conduct a reasonable investigation into a prospective employee's work experience, background, qualifications, and experience.¹²² Liability will ultimately hinge upon whether, in light of the totality of the circumstances, the employer exercised reasonable care in its investigation.¹²³ The query undertaken by a court in adjudicating a negligent hiring suit will be whether the employee posed a reasonably foreseeable risk of harm to one situated in the plaintiff's position.¹²⁴ Some indices that such a

115. *Escobar v. Madsen Const. Co.*, 589 N.E.2d 638, 639 (Ill. App. Ct. 1992); *Di Cosala v. Kay*, 450 A.2d 508, 516 (N.J. 1982); *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 886 (Wash. Ct. App. 1994).

116. *Harvey Freeman & Sons, Inc. v. Stanley*, 378 S.E.2d 857, 858-59 (Ga. 1989).

117. Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 536 (2007) ("Much of the scholarship directed at employers advises them to avoid liability by checking conviction records, despite the fact that negligent hiring case law has consistently failed to find a general duty to check applicants' criminal records.").

118. *Id.* at 537.

119. *Id.*

120. *Hutchison ex rel. Hutchison v. Luddy*, 42 A.2d 1052, 1059-60 (Pa. 1999).

121. *Id.*

122. *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 440 (R.I. 1984); *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 887 (Wash. Ct. App. 1994).

123. *Perryman v. DeKalb County Hosp. Auth.*, 398 S.E.2d 745, 745-46 (Ga. Ct. App. 1990); *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1998); *Se. Apartments Mgmt., Inc. v. Jackman*, 513 S.E.2d 395, 397 (Va. 1999).

124. *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 166 (Ha. 1987); *Henley v. Prince*

reasonably foreseeable risk existed are an employee's discernible violent, destructive, or dishonest tendencies.¹²⁵ Specifically, for example, if an employer fails to do a background check on a new hire with a criminal record for sexual assault, and that new employee subsequently harasses or assaults someone in the workplace, the employer should, in theory, be liable under a negligent hiring theory.¹²⁶

More specifically, an employer will be liable for its employee's assaults against a third party under a negligent retention theory where the employer either knew or should have known, in its exercise of ordinary care, that the employee had violent tendencies.¹²⁷ Employers will also bear liability for their negligent retention of employees who inflict harm upon third parties where precautionary mechanisms implemented by the employers to ward off harm engendered by predictable risks, are improperly administered, or are somehow deficient in shielding innocent third parties from an unreasonable risk of harm at the hands of a known offender.¹²⁸

However, the law of negligent hiring, training, and retention varies from state to state making it difficult to prevail. Some states have Workers' Compensation statutes or other laws crafted by the judiciary or the legislature which operate to foreclose such claims.¹²⁹ Several courts have expressed doubt about or declined to answer the question of whether a Title VII violation can serve as a predicate tort in those jurisdictions that require that negligent retention, supervision, etc., entail

George's County, 503 A.2d 1333, 1340 (Ma. App. Ct. 1986); *Di Cosala v. Kay*, 450 A.2d 508, 516 (N.J. 1982).

125. *Island Associated Coop., Inc. v. Hartmann*, 118 A.D.2d 830 (N.Y. App. Div. 1986).

126. *Background Checks for New Hires are a Must*, N.J. RECORD, Sept. 18, 2007, at 1.

127. *Pennington v. Dollar Tree Stores, Inc.*, 28 Fed. App'x 482, 490 (6th Cir. 2002); *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 1986); *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1310-11 (Mass. 1988).

128. *Favorito v. Pannell*, 27 F.3d 716, 720 (1st Cir. 1994).

129. *See, e.g., Pickett v. Colonel of Spearfish*, 209 F.Supp. 2d 999, 1005 (D.S.D. 2001). According to South Dakota law,

[u]nless the employer has commanded or expressly authorized an assault, it cannot be said to be the intentional from his standpoint any more than from the standpoint of any third person. Realistically, it to him is just one more industrial mishap in the factory, of the sort he has the right to consider exclusively covered by the compensation system.

Id. (quoting ARTHUR LARSON & LEX LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 103.06[1] (2007); *McClure v. Nolan*, No. 96-2357-JWL, 1997 WL 458362, at *1 (D. Kan. July 15, 1997) ("Kansas law does not permit employees to sue their employers based on a theory of negligent retention and/or supervision of another employee."); *Williams v. Dowell*, No. LX-725-3, 1994 WL 1031277, at *3 (Va. Cir. July 25, 1994) ("Virginia's Supreme Court has held that there is no cause of action for the tort of negligent supervision in Virginia."); *McClements v. Ford Motor Co.*, 702 N.W.2d 166, 170 (Mi. 2005) (explaining that under Michigan state law, a common-law claim for negligent retention cannot be premised on workplace sexual harassment).

an employer's disregard of an employee's prior tortious acts.¹³⁰ Moreover, the standards for the torts of negligent retention, hiring, and training have been interpreted by those courts willing and able to entertain such claims in tandem with a Title VII claim as prohibitively exacting and high in many cases.

In one 2007 Georgia district court case involving allegations of an employer's negligent hiring, supervision, and retention of a sexual harasser,¹³¹ the court identified the central issue as "whether the employer knew or had reason to know that the employee was engaged in harassing behavior."¹³² However, the court examined and rejected evidence that another employee had told the employer's human resources employee about a third employee who had "hinted about sexual harassment" by the supervisor at issue, alleged that he had an affair with this third employee, and asserted that seven employees had resigned because of him, resulting in the employer's investigation into these charges.¹³³ The court found this evidence insufficient to place the defendant on notice that the supervisor "had a reputation for sexual harassment."¹³⁴ The court also rejected the contention that the supervisor's multiple sexual advances against the plaintiff were adequate to place the defendant on notice, noting that "all of the sexual advances occurred away from the workplace,"¹³⁵ even though one occurred on a business trip and another happened on a lunch break during a work day.¹³⁶ The court thus granted the defendant summary judgment on the claims of negligent hiring, retention, and supervision because the harassment was considered neither knowable nor foreseeable by the defendant.¹³⁷

Other courts have been similarly demanding. In another recent case from an Alabama federal court,¹³⁸ the plaintiff was wary of the man that she later identified as her supervisory harasser "[f]rom day one of [her]

130. See, e.g., *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 250 n.12 (4th Cir. 2000) ("[W]e decline to decide whether a Title VII violation can be the underlying tort for a negligent supervision or retention claim under North Carolina law."); *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 774 (4th Cir. 1997) ("On appeal, [plaintiff] argues that a violation of Title VII satisfies the underlying tort requirement [for a negligent supervision/retention claim]. Because we find neither an underlying tort nor a violation of Title VII, we need not address the question.")

131. *Orquiola v. Nat'l City Mortg. Co.*, 510 F. Supp. 2d 1134, 1137 (N.D. Ga. 2007).

132. *Id.* at 1162.

133. *Id.* at 1139.

134. *Id.* at 1163.

135. *Id.*

136. *Id.*

137. *Id.* at 1163-64.

138. *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075 (M.D. Ala. 2005).

employment.”¹³⁹ She produced evidence that “[h]is sexual prowess was a topic of conversation in the . . . distribution center. There were many discussions among hourly employees about his alleged sexual affair with a subordinate employee, and rumors abounded that he had impregnated her.”¹⁴⁰ His verbal harassment of the plaintiff eventually “escalated into physical contact.”¹⁴¹ However, the court granted summary judgment to the defendant on the plaintiff’s claims for negligent training, supervision and retention, noting that under Alabama law, “the ‘incompetency’ of the offending employee in a negligent supervision claim must be based on an injury resulting from a tort which is recognized under Alabama common law.”¹⁴² Because, among other things, the plaintiff had not “identified the underlying tort claim upon which she relie[d] to establish her negligent supervision claim,”¹⁴³ the court noted that “under Alabama law, ‘an independent cause of action for sexual harassment does not exist.’”¹⁴⁴ Additionally, because of the defendant’s prompt attention to plaintiff’s complaints, once made, the court rejected the contention that the defendant had any actual knowledge of the supervisor’s harassing tendencies.¹⁴⁵ The court similarly rejected the argument that the defendant was on constructive notice of these tendencies based on the private nature of the reported harassment and the fact that there was “no evidence that another employee made a similar claim to a managerial employee.”¹⁴⁶ The court held that it was “not persuaded that the ‘rumors’ of [the] alleged consensual affair with another subordinate employee is sufficient to place [the defendant] on constructive notice of [the supervisor’s] alleged propensity to engage in unwelcome sexually harassing conduct.”¹⁴⁷

State courts have also made prohibitive demands of plaintiffs alleging negligent hiring, retention, and training. A security guard plaintiff in *Brown v. Brown*¹⁴⁸ asserted a negligent retention claim and alleged that she had been raped by the defendant’s employee after having complained about lewd comments that he had made to her about

139. *Id.* at 1080.

140. *Id.*

141. *Id.*

142. *Id.* at 1098.

143. *Id.* at 1100.

144. *Id.* at 1100-01.

145. *Id.* at 1101.

146. *Id.*

147. *Id.*

148. *Brown v. Brown*, 739 N.W.2d 313 (Mich. 2007).

wanting to assault her.¹⁴⁹ Citing “concerns of foreseeability and duty,” the court granted summary judgment to the defendant.¹⁵⁰ It noted that:

Employers generally do not assume their employees are potential criminals, nor should they The harm suffered by plaintiff in this case was a criminal rape. It is argued that this rape was a foreseeable result of Brown’s offensive speech. We disagree. Without question, Brown’s words were crude and highly offensive. Plaintiff’s complaints to one of defendant’s plant managers that Brown’s comments were offensive and made her uncomfortable, when coupled with her request that defendant make Brown cease making such comments, gave defendant awareness of Brown’s propensity for vulgarity and arguably positioned her for remedies However, an employer can assume that its employees will obey our criminal laws. Therefore, it cannot reasonably anticipate that an employee’s lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry comment inexorably results in a violent criminal assault.¹⁵¹

The court disavowed the holding “that an employee’s words alone can never create a duty owed by the employer to a third party,”¹⁵² noting that it would be “an entirely different case if Brown had threatened to rape plaintiff and defendant was aware of these threats and failed to take reasonable measures in response.”¹⁵³ This required level of precision under the state law theory, however, is simply too high for most plaintiffs to meet. As the dissent in *Brown* pointed out:

Plaintiff reported Brown’s conduct not once, not twice, but at least three times to Brown’s supervisor Plaintiff told . . . the plant manager, that Brown continually made crude sexual comments to her, and she asked [him] to make Brown stop. Three other security guards informed plaintiff that they, too, had complained to their superiors regarding Brown’s conduct. Plaintiff also asked Brown to stop making the comments on numerous occasions. Despite these multiple complaints, and despite Gardner’s telling plaintiff each time that he would “take care of it,” Brown continued to bombard plaintiff with his

149. *Id.* at 315.

150. *Id.* at 318.

151. *Id.*

152. *Id.*

153. *Id.*

sexually aggressive comments until he eventually raped her. . . . The obligation to assess its employee's fitness for a job falls on the employer, not on the victims of that employee's actions Indeed, the essence of a negligent retention claim is that the employer breached a duty to ensure that the workplace was safe¹⁵⁴

Taking issue with the majority's finding that "sexually aggressive comments can never put an employer on notice,"¹⁵⁵ and that "absent a criminal record or violent history, an employer cannot be held liable, 'solely on the basis of the employee's lewd comments,'"¹⁵⁶ the dissent argued that "any number of things can suffice to provide notice to the employer that its retention of a particular employee may need a second look."¹⁵⁷ Thus, it argued, the majority's "new rule, . . . that as a matter of law, employers who are notified that an employee is verbally harassing another in a sexually aggressive way can never be held liable for retaining that employee if that employee undertakes to carry out the sick sexual fantasies,"¹⁵⁸ is untenable. This is but one exposition of the ways in which state courts have made the torts of negligent hiring, training, and retention copiously difficult for plaintiffs to make out successfully.

Despite the fact that so many victims of recidivist harassers cannot prevail on claims of negligent hiring, retention, and training, the affirmative defense should nonetheless be read to permit a finding that an employer who has ample notice of a supervisor's harassing tendencies or proclivities is liable for his recidivist acts. In the first place, in *Faragher*, the Supreme Court expressly condoned a negligence theory of Title VII liability, finding that cases involving "actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop"¹⁵⁹ can result in employer liability where "the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."¹⁶⁰ The proposed analysis of the efficacy of employers' policies and efforts is entirely in comportment with this mandate. Thus, "an employer may be charged

154. *Id.* at 327 n.1 (Cavanagh, M., dissenting).

155. *Id.* at 328 n.2.

156. *Id.*

157. *Id.* at 328.

158. *Id.* at 330.

159. *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998).

160. *Id.* at 789.

with constructive knowledge of previous sexual harassment by a supervisor, even if unreported, if the harassment was so broad in scope, and so permeated the workplace, that it must have come to the attention of someone authorized to do something about it.”¹⁶¹

Further, the language of the first prong of the affirmative defense says that the employer must exercise “reasonable care to prevent and correct promptly any sexually harassing behavior.”¹⁶² As at least one district court has noted, “[i]t is hornbook law that the term ‘reasonable care’ defines the traditional negligence standard, which, of course, requires proof that the [defendant] knew or *should have known* that . . . sexual harassment was taking place, and did nothing to prevent its continuance.”¹⁶³ The affirmative defense analysis should be done with a careful eye toward what an employer ought to know or reasonably foresee based upon that employer’s experience with and knowledge of a harasser with an eye toward its responsibilities under Title VII. After all, in a scenario in which a harassing supervisor is able to exact a tangible employment action upon his victim, such as a demotion or a paycut, by using the employer as his unwitting instrumentality and deceiving it into thinking that such an action is warranted, liability is imputed to the employer, irrespective of what the employer knew or expressly ratified. In a scenario in which an employer, operated with constructive or actual notice about an employee’s harassing tendencies, courts should be obligated to at least delve into a qualitative and quantitative search of that knowledge before denying the plaintiff Title VII relief on the basis of the affirmative defense.

Moreover, the scope of Title VII and its aggressive aim to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”¹⁶⁴ justifies the interposition of a heightened standard of care when it comes to an employer’s ridding the workplace of harassment, especially when it comes to physical violence inflicted in the course of sexual harassment. If permitted to do so as a piece of protective federal legislation, Title VII can operate to deter recidivist

161. *Fall v. Indiana Univ. Bd. of Trustees*, 12 F. Supp. 2d 870, 882-84 (N.D. Ind. 1998) (citing *E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1072 (C.D. Ill. 1998); *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988)); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673-74 (10th Cir. 1998)

162. *Faragher*, 524 U.S. at 807.

163. *Fall*, 12 F. Supp. 2d at 883 n.14 (citing, inter alia, W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 75, at 534 (5th ed. 1984)).

164. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (internal quotation marks omitted).

harassment and employer negligence where state tort claims cannot do the job.

In light of the fact that both prongs of the affirmative defense must be established for a defendant to preclude a finding of liability, the second prong of the affirmative defense warrants special examination in the context of recidivist harassment. A challenge to *any* plaintiff faced with a one-time incident of harassment is the fact that she is rendered incapable of utilizing a complaint mechanism to stem the harm prior to its occurrence, and thus incapable of meeting the second prong of the affirmative defense. The Fourth Circuit in *Watkins* explained this principle:

[a]lthough the Supreme Court did not speak to this issue in *Burlington* . . . , we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment . . . would be held liable for the harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense.¹⁶⁵

The court continued, reasoning that “[s]uch a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in *Burlington Industries*: to promote conciliation.”¹⁶⁶

In *McCurdy v. Arkansas State Police*,¹⁶⁷ the Eighth Circuit held that the affirmative defense is available even where a severe act of supervisory harassment engenders an actionable hostile work environment prior to the victim’s opportunity to make a complaint, providing that the employer “takes swift and effective action to insulate the complaining employee from further harassment the moment the employer learns about the harassing conduct.”¹⁶⁸ The court found that “[w]ithout expressly advocating strict liability,”¹⁶⁹ the argument that a plaintiff with no opportunity to report harassment could not have unreasonably failed to act to prevent it, “when boiled down, leads inevitably to strict liability,”¹⁷⁰ an intolerable result. Thus, the court

165. *Watkins v. Professional Sec. Bureau, Ltd.*, No. 98-2555, 1999 WL 1032614, at *5 n.16 (4th Cir. Nov. 15, 1999).

166. *Id.* (citing *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-66 (5th Cir. 1999)); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999).

167. *McCurdy v. Ark. State Police*, 375 F.3d 762 (8th Cir. 2004).

168. *Id.* at 772.

169. *Id.* at 771.

170. *Id.*

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determined, “[s]trict adherence to the . . . affirmative defense in this case is like trying to fit a square peg into a round hole,”¹⁷¹ and it was necessary to craft this “modified *Ellerth/Faragher* affirmative defense.”¹⁷²

Irrespective of the wisdom of this “modified defense” generally,¹⁷³ its application is wholly unjust in the case of a recidivist harasser who has engaged in a single act of harassment with a new victim.¹⁷⁴ In *McCurdy*, the court deemed it “a fair question to ask who should bear the responsibility for a single incident of supervisor sexual harassment, an innocent employee . . . or an employer like the ASP who effectively stops the harassment after it learns about it.”¹⁷⁵ The court noted that the Supreme Court did not contemplate a one-time incident when it crafted the affirmative defense, but that:

[t]o reach a conclusion that the affirmative defense is unavailable in single incident cases in which the employee takes advantage of preventative or corrective opportunities provided by the employer and the employer thereafter takes swift and effective action to avoid further offensive conduct stands the underlying policy behind the affirmative defense on its head.¹⁷⁶

The court found that “[d]enying such an employer an opportunity to avail itself of the affirmative defense, when the employer has done all that an employer could reasonably be expected to do to avoid and remedy the offending behavior, effectively creates strict liability for employers in a single incident case.”¹⁷⁷

However, in the case of a recidivist harasser, an employer has *not* done all that it could be reasonably expected to do to stem the harmful behavior in the workplace, or at least to ensure that no additional employees would fall victim to it. For this reason courts should find that, in the case of recidivist harassment, a victim has not unreasonably failed to avail herself of effective channels of complaint where she, with no warning, sustained a single incident of harm severe enough to be actionable on its own. Notwithstanding, a court need only find that one

171. *Id.*

172. *McCurdy*, 375 F.3d at 772.

173. See John C. Ayres, Note, *Is It Sexual Harassment Or Not? The Single Incident Exception: McCurdy v. Arkansas State Police*, 71 MO. L. REV. 205, 221-22 (2006).

174. *Id.* at 221-26.

175. *McCurdy*, 375 F.3d at 772.

176. *Id.*

177. *Id.*

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of the two prongs of the affirmative defense was not met for liability to be conferred upon a defendant.

VIII. CONCLUSION

The current way in which courts approach the framework for adjudicating sexual harassment cases brought under Title VII does an immense disservice to victims of recidivist harassment. Because courts have sanctioned, and thus incentivized employers' mere movement of harassers around an enterprise and away from their prior victims, and because so many who engage in harassment are likely to continue or escalate their behavior without ample deterrence from doing so, new victims of recidivist harassers are especially vulnerable. Courts need to conduct their analyses of the affirmative defense available to defendants with an eye toward whether or not the harasser at issue is a repeat offender, and stop looking at each incident of harassment in a vacuum. Only when employers are incentivized to view themselves and their various departments as an integrated whole and to respond to each viable complaint of harassment by actually exercising "reasonable care to prevent and correct promptly any sexually harassing behavior"¹⁷⁸ will the unwitting victims of one-time, often violent acts by recidivists stop paying the price exacted by courts' lenience.

178. *Faragher v. City of Boca Raton*, 524 U.S.775, 807 (1998).