



2007

# Avoiding Harm Otherwise: Reframing Women Employees' Responses to the Harms of Sexual Harassment

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## Recommended Citation

Margaret E. Johnson, *Avoiding Harm Otherwise: Reframing Women Employees' Responses to the Harms of Sexual Harassment*, 80 *Temple Law Review* 743 (2007).

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## **“AVOIDING HARM OTHERWISE”: REFRAMING WOMEN EMPLOYEES’ RESPONSES TO THE HARMS OF SEXUAL HARASSMENT**

*Margaret E. Johnson\**

*This Article concerns the concepts of employee harm and harm avoidance within the liability framework for hostile work environment sexual harassment by a supervisor. Whether an employer is liable for supervisor sexual harassment depends in part on whether the employee avoids her harm or mitigates her damages resulting from the sexual harassment. Despite the law’s interest in employee’s harm avoidance, courts have failed to explore fully the vast array of harms resulting from sexual harassment and the variety of ways in which an employee avoids these multiple harms. This Article reframes the legal discussion of an employee’s actions in response to sexual harassment from one that almost exclusively focuses on whether the employee failed to report the sexual harassment. To assist in the reconceptualization, this Article explores women employees’ responses to sexual harassment: the ways in which they are harmed by sexual harassment, beyond the act of sexual harassment itself; and the ways in which they avoid that harm, beyond simply reporting the sexual harassment. There are at least two benefits from this reframing. First, a more inclusive depiction of women employees’ injuries from, and responses to, sexual harassment would far better inform sexual harassment liability determinations. As a result, the determinations can fulfill the legislative intent of Title VII of the Civil Rights Act of 1964 to encourage and reinforce employees’ efforts to “avoid harm.” Second, through this process, there is an opportunity to reveal the existing reality that highlights women’s partial agency but often is obscured with the dominant picture of a sexual harassment victim as “suffering in silence.”*

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## INTRODUCTION

This Article examines how concepts of “harm” and “avoidance of harm” should inform the liability framework for supervisor sexual harassment in employment under Title VII of the Civil Rights Act of 1964.<sup>1</sup> In *Faragher v. City*

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1. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to e-17 (2000); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (establishing affirmative defense for supervisor liability for hostile work environment sexual harassment under Title VII); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (establishing affirmative defense for supervisor liability for quid pro quo sexual harassment under Title VII).

of *Boca Raton*<sup>2</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>3</sup> the Supreme Court established that once a plaintiff proves that she was subjected to sexual harassment by her supervisor that did not involve a tangible employment action,<sup>4</sup> an employer will be vicariously liable unless the employer satisfies a two-part affirmative defense.<sup>5</sup> The employer must prove both (a) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (hereafter the “employer-focused prong”) and (b) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to *avoid harm otherwise*” (hereafter the “employee-focused prong”).<sup>6</sup>

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2. 524 U.S. 775 (1998).

3. 524 U.S. 742 (1998).

4. See *Faragher*, 524 U.S. at 808 (stating that “tangible employment action” includes “discharge, demotion, or undesirable reassignment”); *Ellerth*, 524 U.S. at 761 (stating that “tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”); see also *Pa. State Police v. Suders*, 542 U.S. 129, 144 (2004) (approving *Ellerth*’s definition of tangible employment action (citing *Ellerth*, 524 U.S. at 761)).

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

6. *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added); accord *Suders*, 542 U.S. at 152 (“[T]he plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard.”). Many insightful articles have been written regarding the affirmative defense to employer liability for sexual harassment. E.g., Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 291-339 (2001) [hereinafter Beiner, *Sex, Science and Social Knowledge*] (discussing disconnect between law and actual operation of sexual harassment in workplace and recommending changes in court’s assessment, including evaluation of entire workplace culture and award of punitive damages); Theresa M. Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 131-41 (2001) [hereinafter Beiner, *Women’s Stories*] (discussing how affirmative defense and its interpretation by lower courts does not properly reflect reality of how sexual harassment operates in workplace); Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 DUKE J. GENDER L. & POL’Y 3, 13-15 (1999) (arguing that affirmative defense inappropriately emphasizes effect of harassment as opposed to harassment itself for liability determinations); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 4 (2003) [hereinafter Grossman, *Culture of Compliance*] (using social science and other research to critique legal and extralegal discourse that trumpets policies, complaint mechanisms, and investigations as effective deterrence and corrective mechanisms for sexual harassment); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 720 (2000) [hereinafter Grossman, *The First Bite*] (explaining that affirmative defense’s creation of employer’s “safe harbor” to liability unless employer’s own conduct is deficient limits employees’ compensation for actionable sexual harassment); Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 80-81 (1999) (using cost-benefit analysis to analyze how affirmative defense would resolve remaining questions about employer liability); L. Camille Hébert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 721-34 (2007) (comparing courts’ conclusions about reasonableness of victims’ reactions to sexual harassment with research on ways in which women typically respond to such harassment); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 198 (2001) (describing affirmative defense as

The Supreme Court stated that in proving the employer-focused prong, the employer could show whether the employer promulgated a sexual harassment policy with a complaint procedure.<sup>7</sup> The Court stated that such a showing would be relevant, though not dispositive, to satisfying the employer-focused prong.<sup>8</sup> Regarding the employee-focused prong, the Court stated that “a demonstration of [plaintiff’s unreasonable failure to use any employer-provided complaint mechanism] will normally suffice to satisfy the employer’s burden under the second element of the defense.”<sup>9</sup> As discussed throughout this Article, however, if the employee avoided harm otherwise, the employer should not be able to meet its burden.

Subsequent case doctrine for supervisor hostile work environment sexual harassment has evolved to require, almost without exception, that employees report sexual harassment promptly and appropriately through the designated employer-mandated channels.<sup>10</sup> If the employee fails to report her harasser

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legal standard created to change victim responses to sexual harassment and prevent discrimination in workplace and observing that standard is flawed because it is based on “a faulty descriptive account of how people and organizations actually behave”); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 266 (2004) (stating that affirmative defense is flawed because it assumes that victims of sexual harassment report harassment, that sexual harassment policies and procedures discourage sexual harassment, and that lower courts have failed to interpret properly affirmative defense’s requirement that employers’ policies and procedures be effective in deterring sexual harassment); John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1435-36 (2002) (explaining that lower courts have failed to implement properly affirmative defense); Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 616-25 (2006) (arguing for contextualized fact-finding regarding whether individual employee unreasonably failed to avoid harm if she decided to submit to sexual harassment given her credible fear of retaliation that could result in career or financial harm); David Sherwyn, Michael Heise & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1298-1301 (2001) (arguing that current affirmative defense incentivizes employers to do only enough to meet standard and not enough to actually aid in prevention and early reporting of sexual harassment); Michael Taylor, *Let’s Talk About Sex: A Clarification of Employer Liability for Supervisor Sexual Harassment Under Title VII*, 27 OHIO N.U. L. REV. 607, 640-55 (2001) (proposing solutions to lack of clarity in affirmative defense’s definition of supervisor and interpretation of affirmative defense); Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 497 (2002) (arguing that federal courts need to require significant action by employers to show effectiveness of sexual harassment policies). As seen in these articles, many legal scholars have already provided very informative descriptions and critiques of the affirmative defense and its interpretation by the courts. Accordingly, this Article seeks to build on that body of scholarship and explore a different area of the affirmative defense. Specifically, this Article explores the full meaning and use of the affirmative defense as it relates to sexually harassed employees’ harm and avoidance of harm.

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

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

9. *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

10. See, e.g., Marks, *supra* note 6, at 1432 n.188 (citing *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2001), for “treating plaintiff’s failure to use employer’s complaint procedure as a complete bar to recovery with no discussion of how much harm a reasonably prompt complaint would have

appropriately, in most instances, she will be barred from holding the employer liable for the sexual harassment to which she was subjected.<sup>11</sup> Yet this requirement is in tension with the reality of women workers' lives. The vast majority of women employees do not report sexual harassment, and if they do report it, most do so after a period of time has elapsed or complain to persons that may not be included in the employer's prescribed procedures for complaining.<sup>12</sup>

Commentators have discussed thoughtfully aspects of this tension between the doctrine and women employees' reality.<sup>13</sup> Even the Supreme Court, in creating the footprint for the lower courts' case law, recognized the incongruence. In crafting the affirmative defense to liability for supervisor sexual harassment in 1998, the Supreme Court noted that a requirement that employees show how they avoided the harm of sexual harassment by formally reporting the sexual harassment to their employer stood in contrast to the reality that the vast majority of women employees do not complain for various reasons.<sup>14</sup> In response, the Supreme Court articulated that a reporting requirement would hopefully change women employees' behavior in mitigating this harm.<sup>15</sup> But since 1998, studies show that reporting behavior has decreased, not increased, in frequency despite the requirement.<sup>16</sup> The Armed Forces 2002 Sexual

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prevented”).

11. *See, e.g.,* *Watkins v. Prof'l Sec. Bureau Ltd.*, No. 98-2555, 1999 WL 1032614, at \*4 (4th Cir. Nov. 15, 1999) (holding that where employee delayed in reporting hostile environment claim arising from her rape, employer was not liable as matter of law).

12. *See, e.g.,* U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 29 (1995) [hereinafter *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE*] (noting that inaction is most common reaction to sexual harassment even though filing formal complaint is more likely to stop harassment).

13. *See, e.g.,* Beiner, *Women's Stories*, *supra* note 6, at 117 (“The legal standards the United States Supreme Court has developed concerning sexual harassment law do not always reflect the reality of how sexual harassment operates in the workplace.”); Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 374 (2004) (stating that “[t]here is . . . a considerable gulf between the legal expectations of courts and the actual behavior of employees” because vast majority of women employees do not report sexual harassment and reporting is what law, interpreted most narrowly, requires (citing Grossman, *Culture of Compliance*, *supra* note 6, at 8)); Grossman, *The First Bite*, *supra* note 6, at 677 (asserting that existing legal doctrine unfairly penalizes majority of employees who fail to use formal complaint mechanisms, thereby undermining legal system's ability to compensate employees and pursue gender equality in workplace).

14. *Faragher*, 524 U.S. at 803.

15. *See Ellerth*, 524 U.S. at 764 (stating that limiting employer liability in order to encourage employees to report offensive conduct before it becomes pervasive fulfills Title VII's deterrent rationale). *But see* Chamallas, *supra* note 13, at 377 (“Despite the incentive provided by legal reporting requirements, these patterns are unlikely to change because the social science evidence on lack of reporting has been so consistent and the pressures not to report are still present in the workplace. Thus, when a court regards a victim's failure to report as presumptively unreasonable, it is making a negative judgment that applies to a large majority of sexual harassment victims.”).

16. RACHEL N. LIPARI & ANITA R. LANCASTER, *ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY* 30 (2003), <http://www.defenselink.mil/news/Feb2004/d20040227shs1.pdf> [hereinafter 2002 ARMED FORCES SURVEY]; RACHEL N. LIPARI ET AL., *2004 SEXUAL HARASSMENT SURVEY OF RESERVE COMPONENT MEMBERS* 15 (2005), <http://www.sapr.mil/contents/references/>

Harassment Survey showed a decrease of reporting by women.<sup>17</sup> This survey showed that a smaller percentage of women reported sexual harassment in 2002 than in 1995.<sup>18</sup> The 2004 Sexual Harassment Survey of Reserve Component Members showed that sixty-seven percent of women and seventy-eight percent of men who were subjected to sexually harassing behavior did not report it.<sup>19</sup> Large percentages of women decided not to report despite the fact that eighty-five to ninety percent of them reported that they had received the policies setting out the employer's complaint procedures.<sup>20</sup>

Yet simply because women employees often do not complain officially about the sexual harassment to which they are subjected does not equate to a wholesale failure by women employees to respond in any way or otherwise avoid harm. Too often this flawed logic is articulated in case law.<sup>21</sup> For instance, in *Jones v. District of Columbia*,<sup>22</sup> the court correctly identified that the affirmative defense to liability in part focuses on whether the plaintiff "avoided suffering harm by taking some action."<sup>23</sup> Nonetheless, despite this accurate assertion of the rule, the court failed to actually analyze the "avoid harm otherwise" component. Therefore, the court failed to analyze whether the plaintiff avoided harm when, in response to a sexual advance, the plaintiff screamed, causing another employee to intervene and stop the advances.<sup>24</sup> The court also failed to consider whether the plaintiff avoided harm when she told the harasser to stop.<sup>25</sup> This decision demonstrates the pervasive gap between what employees do when they are sexually harassed and what they are credited with doing. The gap seems to result in part from the unreasonable expectation by the observer, or judge, of the action as to what is a suitable response. If the expectation is that an employee must respond to sexual harassment by filing a complaint, then all other actions—including those attempts to stop the harassment or mitigate other

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2004%20Sexual%20Harassment%20Survey%20of%20Reserve%20Component%20Members.pdf [hereinafter 2004 ARMED FORCES SURVEY].

17. 2002 ARMED FORCES SURVEY, *supra* note 16, at 30.

18. *Id.* (reporting that thirty percent of women subjected to sexually harassing behavior reported behavior in 2002 versus thirty-eight percent who reported in 1995).

19. 2004 ARMED FORCES SURVEY, *supra* note 16, at 15.

20. *Id.* at 110. The survey included the reasons such persons gave for not reporting the sexual harassment. These reasons included fear of social reprisals, belief that they had taken care of the problem themselves, concern that harassment was not important enough to report, discomfort with reporting, view that reporting would achieve nothing, and fear of being labeled a troublemaker if they reported. *Id.* at 71.

21. *See, e.g., MacKenzie v. Potter*, No. 04-C-4070, 2006 WL 1005127, at \*9 (N.D. Ill. Apr. 14, 2006) (finding that plaintiff's failure to take advantage of complaint system was unreasonable and therefore employer met second prong of *Ellerth/Faragher* defense); *Jones v. District of Columbia*, 346 F. Supp. 2d 25, 51 (D.D.C. 2004), *aff'd in part, rev'd in part*, 429 F. 3d 276 (D.C. Cir. 2005) (finding that plaintiff failed to prevent hostile work environment because of her failure to report behavior to supervisor); *Kresko v. Rulli*, 432 N.W.2d 764, 768 (Minn. Ct. App. 1988) (deciding that plaintiff's failure to complain indicated that she welcomed her supervisor's behavior).

22. 346 F. Supp. 2d 25 (D.D.C. 2004), *aff'd in part, rev'd in part*, 429 F.3d 276 (D.C. Cir. 2005).

23. *Jones*, 346 F. Supp. 2d at 50.

24. *Id.* at 33, 51.

25. *Id.*

harms from being sexually harassed—become nonactions or invisible.

This gap is also evident in conclusions and findings made from workplace studies.<sup>26</sup> For instance, a federal workplace study often categorized employees’ responses to sexual harassment as “inaction.”<sup>27</sup> Specifically, in its report, the Merit Systems Protection Board (“MSPB”) stated that “the most frequently occurring reaction to sexual harassment is inaction. The single most common response of employees who are targets of sexually harassing behaviors . . . has been, and continues to be, to ignore the behavior or do nothing.”<sup>28</sup> At the same time, however, the report catalogued a vast range of complex employee responses to sexual harassment, including confronting the harasser, avoiding the harasser, and threatening to tell others about the harassment.<sup>29</sup> Such responses stand in stark contrast to the conclusion that employees largely fail to act, as mentioned above. Subsequent studies similarly showed that employees subjected to sexual harassment take many actions in response to sexual harassment.<sup>30</sup>

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26. See, e.g., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 29 (discussing how efficacy of solutions to harassment depend on one’s perspective as employee, victim, supervisor, or official and noting that most victims respond with inaction); 2004 ARMED FORCES SURVEY, *supra* note 16, at 15 (noting that most incidents of sexual harassment were not reported); 2002 ARMED FORCES SURVEY, *supra* note 16, at 30 (noting decrease in employees reporting sexually harassing behavior from 1995 to 2002).

27. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 29.

28. *Id.*

29. *Id.* at 29-33. Specifically, the report stated that thirty-five percent of victims of sexual harassment asked or told the harasser to stop, twenty-eight percent avoided the harasser, fifteen percent made a joke of it, twelve percent reported it to a supervisor or other friend, ten percent threatened to tell or told others, and seven percent went along with the behavior. *Id.* The report found that forty-four percent of the victims ignored it or did nothing. *Id.* As discussed by several commentators those studies that characterized responses as “doing nothing” failed to explore the multiplicity of responses, asked open-ended questions about responses, and permitted internal responses to be included in survey responses. Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 117-38 (1995).

30. See JAMES B. GREENLEES ET AL., 2 TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY – WORKPLACE AND GENDER RELATIONS 1157-1228 (Aug. 2003) (listing responses to military sexual harassment survey detailing eighteen possible options when faced with harassment). The data in this study includes responses to “Question 65” of the Armed Forces 2002 Sexual Harassment Survey, which asked:

To what extent did you . . .

- a. Try to avoid the person(s) who bothered you?
- b. Try to forget it?
- c. Tell the person(s) you didn’t like what he or she was doing?
- d. Stay out of the person’s or persons’ way?
- e. Tell yourself it was not really important?
- f. Talk to some of your family about the situation?
- g. Talk to some of your coworkers about the situation?
- h. Talk to some of your friends about the situation?
- i. Talk to a chaplain or counselor about the situation?
- j. Try to avoid being alone with the person(s)?
- k. Tell the person(s) to stop?

Perhaps highlighting the invisibility of such responses to sexual harassment is the 2002 Armed Forces Survey, which gathered data on, but then did not publish, the broad array of actions taken in response to sexual harassment.<sup>31</sup> Instead, the only responses that the survey reported and analyzed were employees' official reports of the harassment.<sup>32</sup> The fact that response data was not reported underscores the premise of this Article, which is that responses other than reporting are not being discussed in any systematic way—in workplaces, in workplace studies, or in the law. Indeed, the label of “inaction” for any response to sexual harassment that is not officially reporting the sexual harassment can be seen in legal scholarship as well.<sup>33</sup>

This Article seeks to bridge this ongoing gap by bringing the reality of employees' harm avoidance actions into sexual harassment doctrine and theory.<sup>34</sup> The sexual harassment legal liability framework is charged with crediting women employees' actions to avoid harm, and, therefore, the documented reality of employees' actions taken to avoid harm needs to be included in this analysis. This gap can only be repaired if employees, employers, lawyers, judges, and scholars understand and recognize all of the sexual harassment harms and avoidance mechanisms thereto that need to be accounted for in determining liability.

Specifically, this Article focuses on women employees' responses to sexual harassment: the ways in which they are harmed by the sexual harassment, beyond the act of sexual harassment itself; the ways in which they respond to those harms, beyond simply reporting the sexual harassment; and the effectiveness of those responses in avoiding the multiple harms of sexual harassment. By recognizing these harm avoidance actions, this Article hopes to reframe the discussion of employees' actions in response to sexual harassment from failures to report to complex amalgamations of harms and the effects of

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- l. Just put up with it?
  - m. Ask the person(s) to leave you alone?
  - n. Blame yourself for what happened?
  - o. Assume the person(s) meant well?
  - p. Pray about it?
  - q. Pretend not to notice, hoping the person(s) would leave you alone?
  - r. Do something else in response to the situation?

2002 ARMED FORCES SURVEY, *supra* note 16, app. A at 12. The results were not included in the survey, but Rachel Lipari did provide the underlying raw data to this author.

31. 2002 ARMED FORCES SURVEY, *supra* note 16, app. A at 12.

32. *Id.*

33. *See, e.g.,* Murr, *supra* note 6, at 609 (using word “inaction” to discuss instances of failure to report sexual harassment officially).

34. *See generally* Beiner, *Sex, Science and Social Knowledge*, *supra* note 6, at 323-38 (discussing inconsistency between legal requirement that women complain about workplace sexual harassment and social science research showing that women employees rarely complain); Chamallas, *supra* note 13, at 374 (noting that research shows that few victims follow official grievance procedures despite expectations implied in legal doctrine); Grossman, *Culture of Compliance*, *supra* note 6, at 26-27 (recognizing various ways in which harassed employees seek to avoid harm and observing that these employees rarely make formal reports of harassment).

employees' responses thereto in mitigating or otherwise avoiding the damages from their supervisors' sexual harassment.<sup>35</sup>

As stated above, women employees<sup>36</sup> who are sexually harassed experience a wide range of harms and employ a wide range of strategies to avoid the harm. The multiple forms of harms resulting from sexual harassment include the sexual harassment itself; the stigma of discrimination; the resulting tangible job harm, such as a termination or nonpromotion; the resulting intangible job harm, such as an abusive work environment and loss of employment advancement; economic harm; and emotional, psychological and physical harm.<sup>37</sup> In response

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35. As many commentators have noted, the focus on female employees' failure to complain about sexual harassment echoes the much-critiqued focus on females' failure to leave their abusers when subjected to domestic violence. See Chamallas, *supra* note 13, at 375 (contending that asking sexual harassment or domestic violence victim why she did not complain or leave is in fact insinuating that abuse or harassment either did not occur or was not serious); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1286 (1992) (noting that Anita Hill's failure to leave her job with Clarence Thomas was raised to dispute truthfulness of her sexual harassment claims, just as battered women's mere presence in abusive relationship raises questions about their claims).

36. Throughout this Article, I will refer to the sexually harassed employee as female. This decision is based in part on the statistical information showing that women are more frequently sexually harassed in the workplace than men. About fifty percent of women will experience sexual harassment during their working lives as opposed to only between fourteen to seventeen percent of men. Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 687 (1997) (citing, inter alia, BARBARA A. GUTER, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 46-47 (1985); U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11 (1988) [hereinafter AN UPDATE]); U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 36 (1981) [hereinafter IS IT A PROBLEM?]; Louise F. Fitzgerald & Sandra L. Shullman, *Sexual Harassment: A Research Analysis and Agenda for the 1990s*, 42 J. VOCATIONAL BEHAV. 5, 7 (1993); Donald B. Mazer & Elizabeth F. Percival, *Students' Experiences of Sexual Harassment at a Small University*, 20 SEX ROLES 1, 1-22 (1989)). In addition, the Armed Forces 2002 Sexual Harassment Survey found that more women than men reported experiencing sexual harassment (twenty-four percent of women versus three percent of men). 2002 ARMED FORCES SURVEY, *supra* note 16, at iv. Specifically, forty-five percent of women and twenty-three percent of men who reported experiencing sexual harassment reported experiencing "Crude/Offensive Behavior," twenty-seven percent of women and five percent of men reported being subjected to "Unwanted Sexual Attention," eight percent of women and one percent of men experienced "Sexual Coercion," and three percent of women and one percent of men reported experiencing "Sexual Assault." *Id.* at iii-iv.

The decision to discuss women employees in this Article is also based on the fact that women work at the interstices of various power hierarchies, such as those inherent in supervisor-subordinate and male-female relationships that affect the operation of power in the workplace. Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 111, 113 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (recognizing that supervisor's power invests his harassing conduct of subordinate employee with particularly threatening character).

37. See *infra* notes Part III.A.1-2 and accompanying text for a discussion of the various harms sexual harassment causes. This Article, as with many other articles discussing sexual harassment, relies on social science research in discussing the real experiences of women employees who are subjected to sexual harassment. E.g., Beiner, *Women's Stories*, *supra* note 6, at 131-41 (considering promptness requirement for employee reporting under *Faragher* and *Ellerth* affirmative defense in light of social and medical science research explaining reluctance of female employees to report harassment);

to these harms, women who are sexually harassed utilize a wide range of strategies to avoid these harms, such as avoiding the harasser, objecting to the harasser, formally complaining about the sexual harassment, seeking support from friends and family, ignoring thoughts about the sexual harassment, and denying that the harassment occurred.<sup>38</sup>

To date, most courts and scholars have not recognized the meaning and potential power of the “avoid harm otherwise” component of the affirmative defense.<sup>39</sup> In part, this results from the broader discourse’s narrow construction of the concepts of “harm” and “avoid[ing] harm” when discussing the affirmative defense to liability.<sup>40</sup> In general, judges, lawyers, and academics have discussed “harm” as solely synonymous with the act of sexual harassment itself, such as sexual touching or advances.<sup>41</sup> They have discussed “avoiding harm” as only an employee’s complaint to the employer about sexual harassment.<sup>42</sup> As a result,

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Grossman, *The First Bite*, *supra* note 6, at 723-29 (describing social science research regarding victims’ responses to sexual harassment as informing need for additional employer actions, such as sexual harassment training); *see also, e.g.*, *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 n.24 (9th Cir. 2003) (“[I]n some cases, a victim’s particular circumstances may render the failure to seek relief through the employer’s available procedures objectively reasonable.” (citing Fitzgerald et al., *supra* note 29, at 121)).

38. *See, e.g.*, 2002 ARMED FORCES SURVEY, *supra* note 16, app. A at 12 (listing these and additional actions women took in response to sexual harassment).

39. *E.g.*, *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*8 (N.D. Tex. Aug. 14, 2001) (omitting “avoid harm otherwise” component from employee-focused prong); THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 172-73 (2005) (recommending that “avoid harm otherwise” language should be eliminated because it is so vague); Harper, *supra* note 6, at 80-81 (limiting “avoiding harm otherwise” to avoiding harassment only as opposed to other harms); Taylor, *supra* note 6, at 655 (limiting applicability of “avoid harm otherwise” component to small employers or employees who invite harassment (citing *Faragher*, 524 U.S. at 805-08)).

40. *But see* Chamallas, *supra* note 13, at 314 (“I urge recognition of the interrelationship between economic harms on the one hand and psychological harms on the other. Because one type of harm frequently coexists with the other, or tends to produce the other, I believe it is futile and unwise for courts to try to draw sharp lines between economic and other losses. Instead, each should be treated as a legitimate, job-related injury worthy of compensation.” (citation omitted)); Murr, *supra* note 6, at 608-09 (proposing standard that takes into account victim’s individual circumstances in determining whether victim reasonably attempted to avoid harm when she did not utilize employer’s official channels to report harassment).

41. *See, e.g.*, DiLorenzo & Harshbarger, *supra* note 6, at 13-15 (discussing fact that affirmative defense inappropriately focuses on harm sustained by plaintiff not for damages purposes but for liability determinations); Grossman, *Culture of Compliance*, *supra* note 6, at 6 (describing sexual harassment as sexual remarks, sexual teasing, sexual touching, and demands or pressure for sexual favors); Grossman, *The First Bite*, *supra* note 6, at 708 (stating that within context of affirmative defense to liability, as opposed to damages, harm referred to means legal harm established by actionable hostile environment, not subjective harm felt by employee subjected to any unwelcome sexual touching, gesture, or comment regardless of its severity or pervasiveness); Marks, *supra* note 6, at 1425, 1430-37 (critiquing lower courts’ conversion of harm-avoidance doctrine to contributory negligence doctrine, but equating harm to sexual harassment and harm-avoidance to formal complaints). *But see* Murr, *supra* note 6, at 614-15 (providing slightly expanded, but generalized, view of harm to include submitting to sexual harassment, job detriment resulting from failure to submit, and emotional harm resulting from sexual harassment).

42. Grossman, *The First Bite*, *supra* note 6, at 708 (stating that only harm plaintiff could avoid

the discourse by courts, lawyers, and scholars often focuses only on what a woman employee did not do, namely failing to file a formal complaint of sexual harassment pursuant to the company’s policy.<sup>43</sup> The employee is perceived as having not responded; the many actions actually taken by the employee to avoid harm are rendered hidden and insignificant.<sup>44</sup>

Instead, the concepts of “harm” and “avoid[ing] harm” should reflect and account for the actual experiences and actions taken by women employees subjected to supervisor sexual harassment.<sup>45</sup> The resuscitation of the full meaning of harm and avoidance of harm within women employees’ lives provides the opportunity to correct for the to-date unrealistic discussion in legal discourse and in the workplace about sexual harassment.<sup>46</sup> A more inclusive depiction of women employees’ injuries from, and responses to, sexual harassment would far better inform liability determinations based on their efforts to “avoid harm.” Through this process, there is an opportunity to reveal the existing reality that highlights women’s agency<sup>47</sup> but often is obscured with the dominant picture of a sexual harassment victim as “suffering in silence.”<sup>48</sup> As such, women’s agency, women’s choices, acts of resistance, self-direction, and self-definition,<sup>49</sup> within the broader context of systemic oppression through

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entirely is one where “hostile environment develops gradually” because then “the plaintiff might have the opportunity to complain before any legally recognizable harm is done”); Marks, *supra* note 6, at 1445-47 (equating employee’s harm-avoidance burden with duty to use formal channels of complaint); Murr, *supra* note 6, at 614 (identifying harm avoidance as either submitting to sexual harassment or reporting sexual harassment).

43. See, e.g., Oleyar v. County of Durham, 336 F. Supp. 2d 512, 519-20 (M.D.N.C. 2004) (finding that employer satisfied second prong of affirmative defense because plaintiff “never filed a formal grievance alleging discrimination”); Dennis v. Nevada, 282 F. Supp. 2d 1177, 1185 (D. Nev. 2003) (granting summary judgment based on plaintiff’s “complete failure to formally report the alleged harassment”); Beiner, *Women’s Stories*, *supra* note 6, at 139 (discussing courts’ focus on women’s failure to avail themselves promptly of employers’ official complaint procedures when harassed); Lawton, *supra* note 6, at 255-60 (noting courts’ emphasis on harassment victims’ failure to utilize employers’ formal reporting channels).

44. See Beiner, *Women’s Stories*, *supra* note 6, at 139 (stating that women’s active response of avoiding harasser and harassment are instead seen as “‘doing nothing’ by the courts”).

45. Beiner has also discussed the courts’ failure to reflect the reality of sexual harassment and its operation in the workplace in considering other aspects of the affirmative defense. *Id.* at 117.

46. *Id.* at 117-18.

47. See Abrams, *supra* note 36, at 112-13 (defining agency as “the capacity for self-definition or self-direction, a capacity that has often been comprehended within the term ‘autonomy’ in classical liberal analysis”).

48. See Abrams, *supra* note 36, at 120 (listing strategies employed by harassed employees “to protect themselves and their jobs”); Chamallas, *supra* note 13, at 375 (underscoring parallel arguments between questioning judgment of women who do not leave abusive intimate relationship and women employees who do not report sexual harassment at work); Louise F. Fitzgerald, *Who Says? Legal and Psychological Constructions of Women’s Resistance to Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 36, at 94, 99-101 (observing that women resist unwelcome sexual harassment in many ways even if “[t]he response the law apparently finds most compelling is the one that woman [sic] make least often”).

49. Abrams, *supra* note 36, at 113-14.

sexual harassment, come into sharper focus.<sup>50</sup>

Part I of this Article discusses the development of the affirmative defense to employer liability for supervisor sexual harassment. Part II of this Article relates a brief fictional story about Lena, a female employee, who is a composite of many real women employees. Lena alleges that her supervisor, Dave, has sexually harassed her. This story contextualizes this Article's discussion of the affirmative defense to supervisor sexual harassment. Part III explores the concepts of "harm" and "avoidance of harm" within the liability framework for supervisor sexual harassment under Title VII law and social science research. Part IV discusses the current doctrine regarding employer liability and its relation to employee harm avoidance. Part V argues that, based on Title VII's animating principle of harm avoidance as well as the realities of harm avoidance actions taken by women employees, courts, lawyers, employees, employers, and scholars need to reconceptualize the import and power of the "avoid harm otherwise" component of the affirmative defense.

#### I. AFFIRMATIVE DEFENSE TO SEXUAL HARASSMENT

In 1998, the Supreme Court articulated a specific liability scheme for sexual harassment committed by a supervisor (hereinafter described as "supervisor sexual harassment"). This articulation provided guiding principles for such liability determinations and created an affirmative defense based on those principles. The Court articulated this framework in two companion cases, *Burlington Industries, Inc. v. Ellerth*<sup>51</sup> and *Faragher v. City of Boca Raton*.<sup>52</sup> Specifically, the proof framework required that once a court determined that a supervisor sexually harassed an employee, the next inquiry was whether liability for the sexual harassment could be imputed to the employer.<sup>53</sup> The Court determined that employers were to be held vicariously liable for supervisor sexual harassment.<sup>54</sup> If the supervisor sexual harassment resulted in a tangible employment action,<sup>55</sup> such as a firing or a demotion, the employer would be

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50. *Id.* at 114; *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (recognizing that supervisor draws on his superior position, making it difficult for subordinate employee to deal with harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) (acknowledging power differential and antisubordination theory when supervisor sexually harasses subordinate); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1748-55 (1998) (discussing sexual harassment as part of larger problem that workplace is systematically gender biased and produces disadvantages for women).

51. 524 U.S. 742 (1998).

52. 524 U.S. 775 (1998).

53. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 765.

54. *Ellerth*, 524 U.S. at 765; *accord* *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63 (2d Cir. 1998) (stating that employer is presumed to be absolutely liable for supervisory sexual harassment, as opposed to coworker harassment, for which employer will only be liable for negligence); *McPherson v. City of Waukegan*, 379 F.3d 430, 439 (7th Cir. 2004) ("When a supervisor is the harasser, the employer is strictly liable for his or her conduct, subject to any affirmative defenses that may preclude its liability.").

55. *See supra* note 4 for *Faragher* and *Ellerth's* definition of a tangible employment action.

automatically liable without any affirmative defense to such liability.<sup>56</sup> On the other hand, if the sexual harassment created a hostile work environment without any tangible employment action, the employer would be vicariously liable subject to a two-part affirmative defense.<sup>57</sup> Under the defense, to be free of liability, the employer has to prove successfully both parts of the test.<sup>58</sup> Under the first part, the employer must prove “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (hereinafter described as the “employer-focused prong”).<sup>59</sup> Under the second part, the employer must prove “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (hereinafter described as the “employee-focused prong”).<sup>60</sup>

In crafting the entire affirmative defense, the Supreme Court relied on a number of principles, including harm avoidance, common law agency, respondeat superior, conciliation, and notice.<sup>61</sup> Below, this section focuses on the harm avoidance doctrine because it is the specific principle that the Court articulated as the basis for the “avoid harm otherwise” component of the employee-focused prong.

The Court relied on the avoidable consequences doctrine in creating the affirmative defense in general and the “avoid harm otherwise” component of the employee-focused prong of the affirmative defense in particular.<sup>62</sup> The avoidable consequences doctrine focuses on the mitigation of injuries and damages.<sup>63</sup> One

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

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

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

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

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

61. *Ellerth*, 524 U.S. at 763 (developing affirmative defense based on other principles because “aided in the agency relation[ship]” standard had not developed enough to help clarify further whether automatic liability should attach in supervisor hostile environment sexual harassment cases). Please note that this Article does not discuss the common law agency and respondeat superior principles at length because, in the end, the Court crafted the “avoid harm otherwise” requirement based on harm avoidance principles.

62. *Faragher*, 524 U.S. at 806-07. The court in *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999), stated that:

The “failure to avail” standard is not intended to punish the plaintiff merely for being dilatory. Rather, it “reflects an . . . obvious policy imported from the general theory of damages,” namely, that the victim has a duty to mitigate her damages. “If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and . . . no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.”

*Greene*, 164 F.3d at 674 (first omission in original) (citation omitted) (quoting *Faragher*, 524 U.S. at 807); see also *Savino v. C.P. Hall Co.*, 199 F.3d 925, 934-35 (7th Cir. 1999) (stating that second prong incorporates avoidable consequences doctrine); Murr, *supra* note 6, at 609-12 (discussing Supreme Court’s reliance on avoidable consequences doctrine in crafting employee-focused prong).

63. See *Faragher*, 524 U.S. at 807 (basing its holding on “the 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”); *Ellerth*, 524 U.S.

of Title VII's primary objectives, according to the Court, is to prevent harm.<sup>64</sup> Accordingly, the harm avoidance rationale is a basis for both the employer- and employee-focused prongs of the affirmative defense. Specifically, the Court found that the employer-focused prong, which requires the employer to "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior,"<sup>65</sup> explicitly underscored the employer's obligation to prevent violations of the statute, identified as acts of sexual harassment, and correct the behavior if violations occur.<sup>66</sup> The Court indicated that reasonable prevention would include an employer having an antiharassment policy and effective, reasonable procedures by which an employee subjected to sexual harassment could report and resolve the behavior.<sup>67</sup> Reasonable corrective efforts would include an employer taking prompt remedial action to deal with the sexual harassment.<sup>68</sup>

The Court also stated that the employee-prong of the affirmative defense to liability and damages for supervisor sexual harassment was consistent with the policy rationale of harm avoidance by the employee.<sup>69</sup> The defense only credits an employer who takes reasonable care to prevent and correct sexual harassment in the workplace if the employee did not fulfill her equally important "coordinate duty" to avoid or mitigate harm.<sup>70</sup> As one commentator stated, "the Court's simple pronouncements in [*Faragher* and *Ellerth*] require that employers be held liable . . . for harm that the victimized employee could not have avoided through reasonable care."<sup>71</sup> Accordingly, in establishing the affirmative defense, the Court stated that the employer should be permitted to show an affirmative defense to automatic liability that both showed that it "had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that

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at 764 (declaring that Court is bound by precedent that seeks to promote Congress's goal of "conciliation rather than litigation" in Title VII disputes); Marks, *supra* note 6, at 1439-40 ("[T]he Court sought "to accommodate" a comprehensive range of competing principles and policies: specifically, the panoply of agency principles counseling in favor of vicarious liability when supervisors abuse their power, versus policies of prevention and mitigation furthered by limiting liability when employers exercise forethought and employees fail to pursue reasonable harm-avoidance strategies.").

64. *Faragher*, 524 U.S. at 805-06; *Ellerth*, 524 U.S. at 764.

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

66. *Id.* at 806 (stating that statutory policy provides incentives to prevent sexual harassment through establishment of complaint procedures).

67. *Id.*

68. *See id.* at 807 (stating that necessary element of affirmative defense is "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior"); *cf.* *Ellerth*, 524 U.S. at 764 (noting Title VII is designed to promote effective grievance mechanisms).

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

70. *Id.* at 806; Marks, *supra* note 6, at 1419-20 & n.11 (quoting *Faragher*, 524 U.S. at 806); *see also Ellerth*, 524 U.S. at 765 (stating that defense is only applicable where employee failed in obligation to avoid harm); *cf.* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 128 (1935) ("[I]t seems more realistic to recognize that denial of recovery for avoidable injury is really a doctrine restricting the limits of liability for the reasons of social and economic policy . . .").

71. Marks, *supra* note 6, at 1435.

could have been avoided.”<sup>72</sup> As such, the entire defense focuses on not only the employer’s duties to prevent and correct sexual harassment but on an employee’s duty (to be proven by the employer) to avoid harm.<sup>73</sup>

Regarding the employee-focused prong, the Court provided two ways in which the employee might meet her duty: either she can avail herself of the employer’s preventive or corrective opportunities, or she can avoid harm otherwise.<sup>74</sup> In *Faragher*, the Court identified that a sexual harassment “victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize the damages’ that result from violations of the statute.”<sup>75</sup> This policy, the Court stated, was “imported from the general theory of damages.”<sup>76</sup> The Court grounded the employee-focused prong in tort law’s “avoidable consequences” doctrine, which governs mitigation of damages by plaintiffs *after* the harm has occurred.<sup>77</sup> This doctrine is distinct from the doctrine of “contributory negligence,” which is a liability concept that discusses a plaintiff’s duty to take measures to stop the harm *before* it occurs.<sup>78</sup>

By justifying the affirmative defense’s focus on the employee’s duty to avoid harm as relating to the avoidable consequence doctrine, as opposed to the contributory negligence doctrine, the Court dictates that employers focus on actions taken by employees *after* experiencing harm when invoking the affirmative defense to liability determinations in supervisor sexual harassment cases.<sup>79</sup> If an employee’s “damages could reasonably have been mitigated[,] no

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72. *Faragher*, 524 U.S. at 805. In addition, the Court stated that “a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.” *Id.* at 806.

73. *See* Pa. State Police v. Suders, 542 U.S. 129, 146 (2004) (reiterating that, in proving affirmative defense to liability, defendant bears burden of proving that plaintiff could have reduced her loss or avoided harmful consequences). The Court clarified that a plaintiff may, but is not required to, make factual allegations showing her acts to avoid or mitigate harm in anticipation of the employer’s affirmative defense. *Id.* at 152.

74. *Faragher*, 524 U.S. at 806-07 (“If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and 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.”).

75. *Id.* at 806 (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982)); *accord* *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1178 (9th Cir. 2003) (confirming that employee-focused prong of employer’s affirmative defense addresses victim’s duty to avoid or minimize her damages).

76. *Faragher*, 524 U.S. at 806.

77. *Id.* (stating general damages theory that victim must use reasonable means to avoid or minimize damages); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (“Title VII borrows from tort law the avoidable consequences doctrine . . . and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.”); *Murr*, *supra* note 6, at 535 (stating that second prong of affirmative defense is based on avoidable consequences doctrine and associated with mitigation of damages).

78. *MCCORMICK*, *supra* note 70, at 128-29 (contrasting doctrine of avoidable consequences with doctrine of contributory negligence and stating that where plaintiff is negligent prior to completion of defendant’s wrongdoing, under doctrine of contributory negligence, plaintiff is barred from any relief).

79. *Ellerth*, 524 U.S. at 764 (citing *Ford Motor Co.*, 458 U.S. at 231 n.15; *see also Holly D.*, 339

award against a liable employer should reward a plaintiff for what her own efforts could have avoided.”<sup>80</sup> As stated by one commentator:

Under [the avoidable consequences] doctrine, the employer’s task is one of causal apportionment. To fully avoid liability, the employer must prove that the plaintiff unreasonably failed to avoid *all* harm; otherwise, the doctrine of avoidable consequences allows imposition of liability, subject only to “mitigation” of damages that the plaintiff unreasonably failed to avoid.<sup>81</sup>

If the employee “could have avoided suffering harm by taking some action that a reasonable person in the plaintiff’s position would likely take,” and if she does not take that action, then the employer should not be liable.<sup>82</sup> Another commentator underscored the importance of analyzing the reasonableness of the harm avoidance actions taken in determining liability.<sup>83</sup> For instance, if the plaintiff submitted to the sexual harassment rather than reporting it because she reasonably calculated that she would lessen her job-related harm of possible retaliation and economic harm of lost wages if fired, then the plaintiff’s harm avoidance actions should be evaluated under a reasonableness standard.<sup>84</sup>

In crafting the affirmative defense, the Supreme Court rejected Justice Thomas’s concerns raised in his dissenting opinion in *Ellerth*, that “employers will be liable notwithstanding the affirmative defense, *even though they acted reasonably*, so long as the plaintiff in question fulfilled *her* duty of reasonable

F.3d at 1178 (observing that second prong is based on damages theory that victim has duty to avoid or mitigate damages through reasonable means (citing *Faragher*, 524 U.S. at 806)).

It should be noted that the Court is frequently, but not always, consistent in its recitation of the avoidable consequences doctrine. In *Faragher*, the Court at one point seemingly confuses the avoidable consequences doctrine with the contributory negligence doctrine. 524 U.S. at 807. Specifically, the Court stated that if the employee unreasonably failed to avoid the sexual harassment, liability is barred against the employer. *Id.* Although the Court made this statement within its broader discussion of the avoidable consequences doctrine, this reasoning seems grounded in contributory negligence doctrine. As one commentator noted, contributory negligence is “a largely rejected defense from antiquated tort law.” Marks, *supra* note 6, at 1445. This rejection of the defense occurred because “[t]he defense ‘departed seriously from ideals of accountability and deterrence because it completely relieved the defendant from liability even if he was by far the most negligent actor.’” *Id.* at 1445 n.248 (quoting DAN B. DOBBS, *THE LAW OF TORTS* 494 (2000)). Accordingly, the contributory negligence defense has been rejected and “largely replaced with various systems of ‘comparative fault’ that generally attempt to apportion accountability based on the relative fault of the parties.” *Id.* In light of the disfavor of contributory negligence and the fact that the Court only made one isolated reference to the doctrine, it cannot be given much significance here. Rather, because the Court discussed at length the avoidable consequences doctrine, it appears to be the animating principle of the “avoid harm otherwise” component.

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

81. Marks, *supra* note 6, at 1420 (footnote omitted).

82. *Jones v. District of Columbia*, 346 F. Supp. 2d 25, 50 (D.D.C. 2004), *aff’d in part, rev’d in part*, 429 F.3d 276 (D.C. Cir. 2005).

83. See Murr, *supra* note 6, at 613-15 (recognizing that economic and job-related harms can result from sexual harassment and that calculation of avoiding harm by either submitting to sexual harassment or reporting sexual harassment has to be evaluated based on which action more reasonably would be effective at avoiding harm).

84. *Id.* at 614-15.

care to avoid harm.”<sup>85</sup> Indeed, the Equal Employment Opportunity Commission’s (“EEOC”) Enforcement Guidance illustrates the harm-avoidance rationale by stating that the employer will not successfully establish the affirmative defense if the employee made efforts other than utilizing the complaint process in order to avoid harm.<sup>86</sup> Some examples provided by the EEOC include “a prompt complaint by the employee to the EEOC or state fair employment practices agency while the harassment is ongoing”<sup>87</sup> or “a staffing firm worker who is harassed at the client’s workplace might report the harassment either to the staffing firm or to the client, reasonably expecting that either would act to correct the problem.”<sup>88</sup> Of course, the EEOC Guidance does not purport to provide exhaustive examples of harm avoidance actions by employees or to address directly many of the harms and avoidance mechanisms this Article seeks to identify.<sup>89</sup> Nonetheless, the EEOC Guidance is helpful in illustrating that harm avoidance mechanisms other than filing a grievance with the employer should be recognized in liability determinations under the affirmative defense.

One scholar provides the following helpful analogy from the Restatement (Second) of Torts in order to explain the avoidable consequences doctrine and what types of harm and harm avoidance mechanisms are included in the analysis:

In the first scenario, a tort victim suffers bodily injury but then fails to protect her own interests by stubbornly refusing to promptly seek treatment for those injuries. Under such circumstances, the victim may recover only for the harm proximately caused by the tortfeasor and not the aggravation of the initial injuries attributable to her stubborn and thus unreasonable failure to obtain prompt medical treatment. . . . Her choice to pursue the second alternative [delaying medical treatment] is unreasonable in the absence of any explanation other than sheer stubbornness.

In a second scenario . . . the same tort victim suffers the same bodily injury but is faced with additional risks relevant to her decision-making process. Although the victim in this second scenario realizes that her injury likely requires prompt expert treatment, seeking such treatment would require traveling ten miles over treacherous ice-covered roads. Due to the hazards of travel, the victim waits until the following day to go to the nearest physician. Because of the delay, the victim suffers further injury. Under circumstances such as these where the victim is choosing between two potentially costly or harmful alternatives, harm-avoidance principles dictate that a trier of fact may reasonably

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85. Marks, *supra* note 6, at 1440 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting)).

86. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS § V.D.2 (1999), available at <http://www.eeoc.gov/policy/docs/harassment/html#vd>. [hereinafter EEOC GUIDANCE].

87. *Id.* (citing *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999)).

88. *Id.* (explaining that both staffing firm and client may be responsible for taking corrective action).

89. *See id.* (beginning its list of illustrations with “[f]or example”).

conclude that the victim did not act unreasonably in delaying professional treatment. If the trier of fact so concludes, the victim can recover for the additional damages caused by the delay in seeking treatment. What makes this second scenario different from the first are the circumstances facing the victim—two competing alternatives each with a corresponding potential harm—when she is deciding upon the appropriate course of action. The potentially different outcome in the second scenario is driven by a cost-benefit analysis of the two competing alternatives.<sup>90</sup>

In the second example provided above, the victim's harms include her original bodily injury, the exacerbation of her original bodily injury due to her delayed treatment, and the potential additional harm from a car accident due to the icy conditions. The harm avoidance mechanisms in the second example include expert treatment for the bodily injury, which would mitigate the original injury and avoid the harm of exacerbation to that injury, and not driving on the treacherous ice-covered roads. Accordingly, here the harm avoidance analysis is a cost-benefit analysis of the multiple harms which would be avoided or exacerbated by the potential harm avoidance actions. As seen in this example, seeking expert treatment can reduce or eliminate the bodily injuries but may create a new injury. Therefore, whether this action must or should be taken for harm avoidance requires a balancing of the harms and how those harms might be impacted by the actions. Under the Restatement (Second) of Torts, harm avoidance analyses require an understanding that certain actions may not only decrease specific harms but can also increase other harms.<sup>91</sup> As a result, a determination of whether an individual avoided harm needs to consider the cost-benefit analysis involved in the individual's decision making as to her course of action to avoid harm.<sup>92</sup> To make this determination, the fact finder must consider all harms, all harm avoidance mechanisms, and all of the varying and multiple effects on harms that will result or do result from the harm avoidance actions. It is this complex analysis that has been missing and that needs to be introduced into the liability determinations.

Accordingly, applying the avoidable consequences doctrine to sexual harassment cases, a court must consider the employee's broad range of harms resulting from the sexual harassment and the employee's attempts and successes at avoiding the harm. In determining whether an employee avoided harm otherwise, a court must consider the cost and benefit of each harm-avoidance action available to the employee with regard to its impact on all harms from sexual harassment. In order to provide context to the harm avoidance analysis, the next section provides a brief discussion of a woman employee's experience with sexual harassment, the harms to which she is subjected, and the harm avoidance actions she takes.

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90. Murr, *supra* note 6, at 613-14 (footnotes omitted) (citing RESTATEMENT (SECOND) OF TORTS § 918 cmt. a, illus. 1, 10 (1979)).

91. RESTATEMENT (SECOND) OF TORTS § 918 cmt. c.

92. Murr, *supra* note 6, at 613-14.

## II. LENA’S STORY

Lena is a computer specialist at a company where she has worked for about five years. Lena is twenty-four years old. Lena started working at the company as an administrative assistant. At the same time, she enrolled in classes to learn about computer software and systems. Once completing several classes, she applied, and was selected, for the position of computer specialist about eighteen months ago. Lena is a bit of a loner at work; she is very intelligent, energetic, slightly high strung, incredibly hardworking, and insistent on doing an excellent job. Lena and her husband have two young children. After the birth of each of her children, Lena returned to work after only two weeks time because of her love for her job and the sense of competence and satisfaction that she derived from work. She often volunteers for and works overtime and weekends. Lena is known by the other company employees as the person who will do whatever it takes to get the job done.

Since Lena began as a computer specialist, Dave, the head of the computer services department, has served as her direct supervisor. Over the past year, Dave regularly has called Lena to his office for one-on-one meetings in which he closes the door, sits close to her, and touches her. Initially, he brushed his hands slightly against her thigh, but over the past few months or so, he has begun rubbing his hand over her thigh, arm, and back.

Lena has begun making excuses to Dave for why they should meet in her open cubicle rather than in his closed office. When Dave has touched Lena inappropriately, she has always responded by moving her body away from him—or standing up to end the meeting with excuses of needing to attend to other necessary work. She also instant-messaged Victor, another computer specialist who serves as the acting director of the department when Dave is on leave, about Dave’s behavior. Victor has been kind to Lena since she joined the company. In her instant message, Lena tried hard to minimize her alarm at Dave’s actions. Victor responded with a joke about Dave’s desperation for finding a date. Lena felt humiliated and decided to not provide any more information to Victor.

Recently, Lena has started talking to her best friend, Karen, about Dave’s actions. Lena asked Karen whether it is possible that Lena is mistaking Dave’s actions and whether he could be a touchy person or unaware of what he is doing. Lena has also started to tell Karen that the joy she used to feel when going to work is no longer there. Instead Lena feels a lot of dread. She no longer volunteers for, and instead turns down, overtime work opportunities. She has started calling in sick—something she never did in the past unless she absolutely had no other choice. She also has started to have difficulty sleeping at night and has no interest in eating. She has noticed that she feels even more on edge than she ever had in the past.

As time passes, Lena is upset with the emotional toll and the toll on her work caused by the turmoil at work. She talks to Karen, who says that it sounds like Dave is sexually harassing Lena. Karen asks Lena whether the company has a sexual harassment policy and Lena says it does. Lena investigates the policy and learns she can complain to the director of human resources, her supervisor,

and her supervisor's supervisor. Lena does not want to complain to an official at the company. For one thing, she worries that Karen is wrong and Dave's conduct is not sexual harassment. After all, Victor did not seem alarmed by it. Also, Lena is worried that her coworkers will not back her up and will make fun of her, as Victor had. And, she is concerned about how she will be able to do her job after Dave and the others learn that she complained about him. She fears they might not ever speak to her again. Lena does not think that the risk of losing her job is worth reporting the behavior.

### III. EMPLOYEES' HARMS FROM SEXUAL HARASSMENT AND THEIR HARM AVOIDANCE MECHANISMS

Using Lena's story, this Part will explore all of the harms suffered by employees who experience sexual harassment and all harm avoidance actions employees take in order to analyze and make liability determinations. If Lena did bring suit, the court most likely would ask the parties to address the question of employer liability early on in the litigation. As stated above, the affirmative defense requires the employer to prove both (a) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (b) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to *avoid harm otherwise*."<sup>93</sup>

In determining liability and addressing the employee-focused prong, this Article argues that the employer should need to identify Lena's harms from the sexual harassment, Lena's responses to the various harms, and whether and how those responses might have assisted in her avoidance of harm or mitigation of damages. All of these factors should be relevant to a determination of whether Lena avoided harm as required under the affirmative defense to sexual harassment liability.

#### A. *Harms from Sexual Harassment*

Despite its underutilization, the "avoid harm otherwise" component of the affirmative defense is well suited to unifying the rationales of Title VII and the affirmative defense with the reality of women employees' experiences with sexual harassment. The job-related, economic, and psychological harms are intertwined injuries resulting from sexual harassment and should be analyzed as such in liability determinations.<sup>94</sup> Many sources, including the law, workplace studies, and social science studies, identify the multiple harms resulting from sexual harassment.<sup>95</sup> Harm is more complex and varied than one discrete act of

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

94. See Chamallas, *supra* note 13, at 384-85 (discussing reality that women employees suffer economic and psychological harms as job-related injuries resulting from sexual harassment).

95. See Part III.A.1 for a discussion of sexual harassment harms identified in the law and Part III.A.2 for a discussion of sexual harassment harms identified in workplace and social science studies.

discrimination—such as a termination based on one’s sex. Rather, harm includes all of the multiple injuries that result from the discrimination in addition to the discrimination itself.

### 1. Legal Support for Identifying a Broad Range of Harms

Under Title VII, harm has had a distinct meaning that is more extensive than the discriminatory act. For instance, Title VII, as originally enacted, makes illegal and remedies harm that results from the discrimination (for instance, being sexually harassed); tangible employment harm, such as being fired, not hired, and demoted; and intangible employment-related harm, such as the altering of an employee’s terms and conditions of employment.<sup>96</sup>

In addition, a broad notion of harm in sexual harassment cases is consistent with the Civil Rights Act of 1991,<sup>97</sup> which amended Title VII.<sup>98</sup> The Civil Rights Act of 1991 recognizes other forms of harm resulting from actionable discrimination under Title VII, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.<sup>99</sup> As explained in the legislative history of the Act, many harms of discrimination were identified as compensable harms: “injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”<sup>100</sup>

The Supreme Court’s own definition of “sexual harassment” indicates that the harm from sexual harassment is broader than simply the acts of harassment. For example, the Court has held that for sexually harassing behavior to be legally cognizable it has to be so severe or pervasive as “to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>101</sup> Under *Harris v. Forklift Systems, Inc.*,<sup>102</sup> the employee herself has to feel that the harassment is severe or pervasive, and the harassment has to be severe or pervasive to the reasonable person.<sup>103</sup> Thus, an employee’s perception of the sexual harassment is included in the calculation of what constitutes sexual harassment. Accordingly, if an employee takes actions that prevent unwanted sexual touching, for instance, from causing her psychological injury, the employee’s own actions may prevent the abusive conduct from becoming sufficiently severe or pervasive to her.<sup>104</sup> From this calculation we understand

96. 42 U.S.C. § 2000e-2 (2000).

97. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000).

98. Civil Rights Act of 1964, tit. vii, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

99. 42 U.S.C. § 1981(b)(3).

100. H.R. REP. NO. 102-40(I), at 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03. As one commentator has noted, despite the recognition of both economic and psychological harms under Title VII, courts have tended to prioritize the economic harms, such as job-related harms, over psychological ones, creating unnecessarily a hierarchy of harms. Chamallas, *supra* note 13, at 386.

101. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

102. 510 U.S. 17 (1993).

103. *Harris*, 510 U.S. at 21-22.

104. *See id.* at 21-22 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or

that the harms of sexual harassment include the psychological, emotional, and physical responses to sexual harassment that affect whether the employee views her work environment as abusive. It is important to note, however, that the Supreme Court in *Harris* made clear that severe psychological injury is not required for an employee to feel that the harassment is sufficiently severe or pervasive.<sup>105</sup> Accordingly, less severe forms of psychological injury also qualify as “harms” from sexual harassment.<sup>106</sup>

Even the affirmative defense itself demonstrates that the concept of harm begins with, but does not end with, the act of sexual harassment. Whereas the employer is required to prevent and correct “*any sexually harassing behavior*” to avoid liability, the employer needs to show that the employee unreasonably failed to avoid “*harm*”—not simply the sexual harassment.<sup>107</sup> To do so, she may use the employer-provided mechanisms for addressing sexual harassment, or she can avoid harm otherwise. Accordingly, the employer must show that the employee failed to mitigate her cognizable injuries resulting from the sexual harassment.

In *Faragher v. City of Boca Raton*,<sup>108</sup> the Court described the meaning of harm as those damages resulting from sexual harassment and that need to be avoided or mitigated in order to “avoid harm” under the affirmative defense.<sup>109</sup> Specifically, the Court stated that if the plaintiff unreasonably failed to use the employer’s complaint and grievance mechanisms, the employee should not recover for any damages that could have been avoided by using the

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abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”).

105. *See id.* at 22 (“So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.” (citation omitted)).

106. It is important to note that tangible psychological harm or injury is not required for a hostile work environment to violate Title VII. *Id.* at 22; *see also* Marks, *supra* note 6, at 1433 n.190 (discussing “gradual-onset” cases which “contemplate[] a gradual building of incidents that eventually crosses Title VII’s abuse threshold”). Discussing only the harm of sexual harassment, Marks states that only if plaintiff’s dilatory behavior in reporting contributes to the sexual harassment should it impact recovery. *See id.* at 1434-35 (“Because of this purportedly unreasonable delay, the court decided, as a matter of law, that the plaintiff could recover nothing for the rape, even though the plaintiff’s delay—which, of course, came *after* the sudden rape—bore absolutely no causal connect to the occurrence of the rape.” (footnote omitted)). Marks therefore notes that the “[h]arm-avoidance analysis under *Ellerth* and *Faragher* thus contemplates the possible avoidance of a truly imprecise and intangible type of legal harm.” *Id.* at 1448. Specifically, it is imprecise because it is difficult to distinguish between nonactionable and actionable misconduct that does not rest on “actual harm” but legal harm. *Id.* at 1447-48.

107. *Faragher*, 524 U.S. at 807 (emphasis added).

108. 524 U.S. 775 (1998).

109. *Faragher*, 524 U.S. at 806-07 (stating that requiring employer to show that “the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize the damages’” (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982))).

mechanisms.<sup>110</sup> Additionally, if the employer would be held liable, no damages should be awarded for harm that could have been mitigated but was not.<sup>111</sup> A commentator succinctly stated that in making the above pronouncements, the Court was incorporating the “harm-avoidance concept,” which does not look at “whether, or to what extent, a negligent plaintiff is blameworthy and thus undeserving of compensation; instead, the fact finder tries to determine how much harm the plaintiff should have avoided.”<sup>112</sup> Much of the law, therefore, has defined harm broadly—from employment harms to economic harms to psychological harms.

## 2. Harms Documented in Workplace and Social Science Studies

A broad range of injuries resulting from sexual harassment are documented in workplace and other social science studies as well.<sup>113</sup> The 1995 MSPB workplace study estimated the following job-related harms from sexual harassment over a two year period. First, the study documented \$4.4 million in lost wages due to the taking of leave without pay.<sup>114</sup> In addition, the study concluded that 973,000 hours of annual leave were taken as a result of sexual harassment.<sup>115</sup> In addition, employees subjected to sexual harassment may have resigned, been terminated, or faced reassignment as a result of the sexual harassment.<sup>116</sup> And twenty-one percent of the workers subjected to sexual harassment in the federal workplace study reported that they suffered a decline in productivity as a result of the sexual harassment.<sup>117</sup>

The MSPB’s 1995 federal workplace study also documented economic, emotional, psychological, and physical harms as a result of sexual harassment.

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110. *Id.*

111. *Id.* at 807.

112. Marks, *supra* note 6, at 1445-46 (emphasis omitted) (citing DOBBS, *supra* note 79, at 510-11).

113. See, e.g., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 13-27 (evaluating definition of sexual harassment and its impact on federal employees); Fitzgerald et al., *supra* note 29, at 117-38 (examining internal and external ways that women respond to sexual harassment). Well before the Supreme Court’s articulation of the affirmative defense to employer liability for supervisor sexual harassment, social psychologists were researching responses to sexual harassment as a way of informing the discourse about whether sexual harassment was “unwelcome.” See generally Fitzgerald et al., *supra* note 29, at 130-32 (discussing how courts have construed person’s failure to speak up as welcoming advances or comments, and person who “go[es] along” with situation as consenting to sexual behavior). See, for example, BEINER, *supra* note 39, at 62-96, for a more in-depth discussion of the social science research regarding sexual harassment, including responses to sexual harassment and their impact on the law, and Krieger, *supra* note 6, at 177-98, for a discussion of how social science research on responses to sexual harassment should inform the “reasonableness” of an employee’s failure to use an employer’s preventive and corrective mechanisms under the affirmative defense. In addition, Professor Beiner discusses the “great promise” social science research holds for clarifying the legal doctrine in sexual harassment cases even though methodological difficulties and the preliminary and incomplete nature of some of the research results in an imperfect fit between law and social science research. BEINER, *supra* note 39, at 2-14.

114. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 26.

115. *Id.*

116. *Id.*

117. *Id.*

Specifically, the study reported that “[f]or employees who experience it, sexual harassment takes its toll in the form of mental and emotional stress and even loss of income, if victims leave their jobs or take leave without pay as a result of their experiences.”<sup>118</sup> One survey respondent stated: “[m]y stomach would get sick when I’d hear his chair creak—because I knew he’d be coming back to my desk. I actually even had nightmares involving this man . . . .”<sup>119</sup> Another survey respondent recounted “[h]e has repeatedly, since I have worked there, said disgusting and vulgar things about women. I have gone home or stayed home many times so I wouldn’t have to face him or hear the remarks he would make throughout the day.”<sup>120</sup> And another survey respondent reported “I can perform under normal pressure very well, but added mental stress has reduced my productivity. I had to take time to report, talk about it, seek medical and mental assistance.”<sup>121</sup> Yet another stated:

“I was very upset by his request for a sexual favor. My superior performance rating was lowered by him to fully acceptable. I did not want to hurt his career, but it hurt mine. I felt I must resign. After six months on unemployment, which was very degrading, I returned to work with the government, having to take a downgrade. This experience has left me very bitter and down on myself and my abilities.”<sup>122</sup>

Even though a low percentage of victims of sexual harassment received medical or emotional help, many more reported that they would have found such help beneficial.<sup>123</sup>

Similarly, social science research offers identified categories of harm resulting from sexual harassment beyond the act of discrimination itself. Dr. Louise Fitzgerald and her colleagues (hereinafter collectively referred to as Fitzgerald) defines sexual harassment as a psychological stress where the person subjected to the sexual harassment is harmed because she views her relationship with her environment as “taxing or exceeding [her] resources” and endangering her well-being.<sup>124</sup> Fitzgerald has identified four categories of harm resulting from

118. *Id.* at 23. Similarly, Martha Chamallas has demonstrated that economic and psychological harms are interrelated injuries. Chamallas, *supra* note 13, at 384-85. See *infra* notes 151-54 and accompanying text for a discussion of physical and psychological harms associated with sexual harassment.

119. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 23 (omission in original).

120. *Id.* at 24.

121. *Id.* at 25.

122. *Id.* at 27.

123. See *id.* at 26 tbl.6 (showing that whereas only three percent of victims of sexual harassment reported receiving medical or emotional help, seven percent reported that such help would have been beneficial).

124. Fitzgerald et al., *supra* note 29, at 123-24 (quoting RICHARD S. LAZARUS & SUSAN FOLKMAN, STRESS, APPRAISAL, & COPING 21 (1984)) (emphasizing perception of woman who is sexually harassed in definition of sexual harassment); see also LAZARUS & FOLKMAN, *supra*, at 21 (recognizing that definition of stress accounts for relationship between person and environment); Knapp et al., *supra* note 36, at 697 (noting sexual harassment is stressful situation that can exceed

sexual harassment. First, her research identifies a multitude of job-related harms, including decreased satisfaction with coworkers and supervision, work withdrawal or absenteeism, increased willingness to change jobs, more time spent thinking about leaving the job, and increased job stress.<sup>125</sup> Similar findings have been made by other social psychologists as well.<sup>126</sup> Second, Dr. Fitzgerald’s research documents severe psychological harms, such as posttraumatic stress disorder (“PTSD”), a psychological disorder in which the person experiences a decrease in life satisfaction, a worsening of emotional condition, and a decrease in self-esteem.<sup>127</sup> Third, she has identified numerous emotional harms, including increased anger, fear, depression, anxiety, loss of self-esteem, and feelings of alienation.<sup>128</sup> Finally, Dr. Fitzgerald identified physical harms resulting from sexual harassment, such as gastrointestinal disturbances, jaw tightness, teeth grinding, nervousness, binge eating, headaches, inability to sleep, tiredness, nausea, loss of appetite, weight loss, and crying spells.<sup>129</sup>

Others have identified similar harms, even identifying five categories of harm from sexual harassment: “emotional and physical reactions; changes in self-perception; social, interpersonal relatedness; sexual effects; and career

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resources of harassed (citing GUTEK, *supra* note 36, at 46; AN UPDATE, *supra* note 36, at 11; IS IT A PROBLEM?, *supra* note 36, at 36; Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539, 539-44 (1982); Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment*, in THE SEXUALITY OF ORGANIZATION 71, 71-90 (Jeff Hearn et al. eds., 1989); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 171 (1988); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 32-35 (1993)).

125. Louise F. Fitzgerald & Alayne J. Ormerod, *Breaking Silence: The Sexual Harassment of Women in Academia and the Workplace*, in PSYCHOLOGY OF WOMEN: A HANDBOOK OF ISSUES AND THEORIES 553, 573-74 (Florence L. Denmark & Michele A. Paludi eds., 1993); *cf.* Ellen I. Shupe et al., *The Incidence and Outcomes of Sexual Harassment Among Hispanic and Non-Hispanic White Women: A Comparison Across Levels of Cultural Affiliation*, 26 PSYCHOL. WOMEN Q. 298, 305 (2002) (showing that Hispanic women least associated with U.S. culture revealed greater dissatisfaction with work and coworkers when sexually harassed than women more associated with culture).

126. *E.g.*, Knapp et al., *supra* note 36, at 688 (noting that those subjected to sexual harassment “may experience career interruption, lower productivity, less job satisfaction, lower self-confidence, loss of motivation, deterioration of interpersonal relationships, and loss of commitment to work and employer” (citing GUTEK, *supra* note 36, at 2-3; AN UPDATE, *supra* note 36, at 11; IS IT A PROBLEM?, *supra* note 36, at 36; Crull, *supra* note 124, at 539; DiTomaso, *supra* note 124, at 78-88; Louise F. Fitzgerald et al., *The Antecedents and Consequences of Sexual Harassment in Organizations: An Integrated Model*, in JOB STRESS IN A CHANGING WORKFORCE: INVESTIGATING GENDER, DIVERSITY, AND FAMILY ISSUES 55 (Gwendolyn Puryear Keita & Joseph J. Hurrell, Jr. eds., 1994); Fitzgerald et al., *supra* note 124, at 170-71; Gutek & Koss, *supra* note 124, at 33)).

127. Fitzgerald & Ormerod, *supra* note 125, at 573-74 (noting enormous psychological costs associated with sexual harassment); *cf.* Shupe et al., *supra* note 125, at 306 (observing that sexual harassment was linked with decreased life satisfaction and increased psychological distress for Hispanic women who participated in study).

128. Fitzgerald & Ormerod, *supra* note 125, at 573-74.

129. *See id.* (citing GUTEK, *supra* note 36, at 2-3; Crull, *supra* note 124, at 539) (listing potential physical harms from sexual harassment); *see also* Shupe et al., *supra* note 125, at 298 (finding higher rates of anxiety and depression in Hispanic women who were subjected to sexual harassment).

effects.”<sup>130</sup> Clearly, there is overlap between these categories. As one scholar has noted, sexual harassment:

affects not only career opportunities and job satisfaction but also has personal implications that go beyond the workplace. The impact on victims is somewhat difficult to study because it is multidimensional, including effects on physical health, mental health, and “work variables including attendance, morale, performance, and impact on career track.”<sup>131</sup>

Another study also shows that people subjected to workplace sexual harassment suffer job-related harms and psychological and physical harms.<sup>132</sup> And in fact such harms are often interrelated.<sup>133</sup> Sexual harassment may affect the interpersonal relationships in the workplace.<sup>134</sup> Sexual harassment that involves ostracism of the target of the harassment may lead to additional intangible job harms, such as loss of mentorship, as well as “decreased learning and networking opportunities, which can lead to decreased work opportunities.”<sup>135</sup> Many studies have shown that supervisor sexual harassment was strongly correlated to decreased job satisfaction as well.<sup>136</sup> For instance, one study showed that supervisor sexual harassment correlated to women’s “lower levels of satisfaction with work, supervision, and promotion as well as with higher levels of role ambiguity, role conflict, and stress.”<sup>137</sup> Another showed that sexual harassment of all levels of severity negatively impacted job satisfaction and work productivity.<sup>138</sup>

Other studies corroborated Fitzgerald’s finding of multiple physical harms resulting from sexual harassment. These physical harms include “stomach and appetite problems, sleep disorders, headaches, and crying spells.”<sup>139</sup>

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130. Beiner, *Sex, Science and Social Knowledge*, *supra* note 6, at 320-21 (citing Karen Maitland Schilling & Ann Fuehrer, *The Organizational Context of Sexual Harassment* (1998), reprinted in MICHELE A. PALUDI & RICHARD B. BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL* 123, 129-30 (1991)). Researchers have labeled these effects of sexual harassment as “Sexual Harassment Trauma Syndrome.” *Id.* at 320 (citing PALUDI & BARICKMAN, *supra*, at 27, 29-30 tbl.2.1).

131. BEINER, *supra* note 39, at 185 (quoting Gutek & Koss, *supra* note 124, at 30).

132. Gutek & Koss, *supra* note 124, at 30.

133. See *infra* notes 146-50 and accompanying text for a discussion of the relationship between job-related, psychological, and physical harms.

134. BEINER, *supra* note 39, at 186.

135. *Id.* (citing Gutek & Koss, *supra* note 124, at 31-32).

136. *E.g.*, *id.* at 186-87 (noting that sexual harassment appears to have effect on job satisfaction (citing David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 *INDUS. & LAB. REL. REV.* 594, 599-600 (1998); Vicki J. Magley et al., *The Impact of Sexual Harassment on Military Personnel: Is it the Same for Men and Women?*, 11 *MIL. PSYCHOL.* 283, 297 (1999); Paula C. Morrow et al., *Sexual Harassment Behaviors and Work Related Perceptions and Attitudes*, 45 *J. VOCATIONAL BEHAV.* 295, 303 (1994))).

137. *Id.* at 187 (citing Morrow et al., *supra* note 136, at 303).

138. *Id.* (citing Magley et al., *supra* note 136, at 297).

139. BEINER, *supra* note 39, at 187; see also Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 168 (William O’Donohue ed., 1997) (cataloging health-related effects of sexual harassment).

Unfortunately, the research is limited as to all of the physical harms of sexual harassment.<sup>140</sup>

Finally, studies have shown that there are many psychological effects of sexual harassment. Included in the psychological effects are “anger, fear, depression, anxiety, helplessness, and vulnerability.”<sup>141</sup> In addition, there are many disorders resulting from workplace sexual harassment such as “[a]nxiety disorders including panic disorder and generalized anxiety disorder; somatoform disorders, various forms of depression, and post traumatic stress disorder.”<sup>142</sup> Medical research shows that persons who are sexually harassed by being physically or sexually assaulted may suffer from PTSD.<sup>143</sup> PTSD is not a disorder specific to sexual harassment but rather results when one is subjected to “an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity.”<sup>144</sup> In addition, another large study showed that women who were subjected to supervisor sexual harassment were more likely to be diagnosed with psychiatric disorders such as major depressive disorder and PTSD.<sup>145</sup>

Of course, the employment-related harms of sexual harassment are tied closely to the physical and psychological harms. One study found that:

[W]omen who experienced high levels of harassment reported the worst job-related and psychological outcomes; women who were not sexually harassed reported the lowest negative outcomes. Women who reported moderate levels of harassment likewise had significantly worse outcomes than women who were not harassed. Even low levels of harassment increased negative outcomes.<sup>146</sup>

Professor Chamallas’s work demonstrating that economic and psychological harms are job-related injuries is highly relevant to sexual harassment harms analysis.<sup>147</sup> Chamallas argues that economic injury can lead to psychological harm.<sup>148</sup> For instance, when an employer takes an adverse action against the employee, the employee may then suffer from corresponding stress over economic opportunities and job security; similarly, an employee’s psychological distress resulting from the sexual harassment can lead to economic harm because

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140. BEINER, *supra* note 39, at 187 (citing Dansky & Kilpatrick, *supra* note 139, at 164).

141. *Id.* (citing Gutek & Koss, *supra* note 124, at 33).

142. *Id.* (alteration in original) (quoting Jane Goodman-Delahunty & William E. Foote, *Compensation for Pain, Suffering, and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 188 (1995)).

143. *Id.* at 158 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL]). If someone has suffered PTSD in the past, then less severe forms of sexual harassment can also trigger PTSD. *Id.*

144. DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 143, at 424.

145. Dansky & Kilpatrick, *supra* note 139, at 166-67 figs.9-1 & 9-2.

146. BEINER, *supra* note 39, at 188 (citing Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 412-13 (1997)).

147. Chamallas, *supra* note 13, at 384-85.

148. *Id.* at 384.

the employee may have difficulty in being as motivated or productive in the workplace.<sup>149</sup> In fact, the Supreme Court opinion in *Harris* lends support to Chamallas's argument. In *Harris*, the Court showed that psychological harm, even if not severe, is interconnected to economic harm when it noted that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."<sup>150</sup>

One study has indicated that there is a relation between the intensity of the sexual harassment and the resulting psychological and physical harms. Nevertheless, the data suggests that the employer's taking of negative tangible job action, such as the termination or transferring of an employee, may result more from retaliation than from the sexual harassment itself.<sup>151</sup> More research is needed in this area to help determine the linkage between sexual harassment, the reporting of sexual harassment, and the job-related and other harms.<sup>152</sup> As seen from the MSPB study discussed earlier, there does appear to be a relationship between the sexual harassment and job-related harm apart from any retaliation. In that study, employees reported quite a bit of job-related harm that resulted from the sexual harassment itself and not from the reporting of the sexual harassment.<sup>153</sup> For instance, eight percent of the employees subjected to sexual harassment reported using sick leave, eight percent reported using annual leave, one percent used leave without pay, two percent were reassigned or fired, two percent were transferred to a new job, and twenty-one percent reported a decline in productivity.<sup>154</sup>

One thing that is clear, however, is that there are multiple forms of harm and that the harms, at times, are interconnected. In addition, the harms from sexual harassment that are documented in the social science research strongly comport with those harms recognized under Title VII and the Civil Rights Act of 1991.<sup>155</sup>

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149. *Id.* at 384-85.

150. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

151. BEINER, *supra* note 39, at 164 (citing Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED SOC. PSYCHOL. 877, 896 (1997)).

152. *Id.* at 164-65 (hypothesizing that different results regarding frequency of termination of sexual harassment victims may be explained by whether victim filed formal complaint, as those who were sexually harassed and filed formal complaints were fired in much larger numbers than their counterparts who declined to file complaints (citing SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 26 tbl.6; Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986))).

153. See *supra* notes 114-23 for a discussion of the harms resulting from sexual harassment as documented by the MSPB study.

154. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 26 tbl.6.

155. Compare 42 U.S.C. § 2000e-2 (2000) (prohibiting discriminatory employment practices), and 42 U.S.C. § 1981a(b)(3) (allowing compensatory damages for "emotional pain, suffering, mental anguish, [and] loss of enjoyment of life," but limiting such damages).

### 3. Lena’s Harms

Returning to Lena’s situation, application of the expanded understanding of “harm” derived from the affirmative defense to employer liability for supervisor sexual harassment, Title VII, the Civil Rights Act of 1991, workplace studies, and social science research, facilitates identification of the numerous forms of harm suffered by Lena. She has endured a year of unwelcome, severe, and pervasive touching on various parts of her body. In addition to being sexually harassed and discriminated against, she has suffered various intangible job, economic, psychological, and emotional harms. As a result of Dave’s sexual harassment, Lena has suffered loss of enjoyment of her job. She now dreads what used to be her passion. She has withdrawn from work as a consequence of the sexual harassment, thus impacting her ability to gain overtime pay. She is also taking sick leave. She is feeling anxious, on edge, and stressed. She is suffering emotional pain and suffering in that she has difficulty sleeping, has a decreased appetite, and a loss of joy. She feels humiliated by Victor’s joking about Dave’s actions. Finally, she is worried that if she complains, she will be made fun of further, will be ostracized, and might even lose her job.

#### B. Harm Avoidance

Having identified all of the harms from sexual harassment, the harm avoidance actions in response to these harms must be identified. In fact, the acts taken to “avoid harm” from sexual harassment are more diverse than filing a formal complaint of sexual harassment. One workplace study summarized the reality, which is that “[t]he range of responses for a victim of sexually harassing behavior is probably as vast as the range of human behavior itself.”<sup>156</sup> The law and social science research again assist the understanding of what harm avoidance mechanisms are relevant to a supervisor sexual harassment liability determination.

##### 1. Legal and Social Science Support for Identifying Harm Avoidance Mechanisms

As discussed above, the Supreme Court’s rationale for the employee-focused prong of the affirmative defense specifically relied on the avoidable consequences doctrine.<sup>157</sup> One of the avoidable consequences doctrine’s goals is “to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts.”<sup>158</sup> Accordingly, the “avoid harm otherwise” component of the employee-focused prong is grounded in preventing and mitigating harm. It is not grounded in notice or conciliation rationales. Therefore, the analysis of the “avoid harm otherwise” component is not restricted to acts informing the

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156. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 29.

157. See *supra* notes 62-92 and accompanying text for a discussion of the avoidable consequences doctrine.

158. MCCORMICK, *supra* note 70, at 127.

employer of the sexual harassment or acts utilizing the employer's processes for complaining about and resolving the sexual harassment.<sup>159</sup>

Similarly, the legislative history of the Civil Rights Act of 1991 shows the importance of accounting for all employee harm avoidance mechanisms. Explaining the need for providing compensatory damages to victims of discrimination, the House Report stated that “[m]onetary damages simply raise the cost of an employer’s engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens.”<sup>160</sup> The affirmative defense operates to decrease monetary damages if the employee fails to avoid all otherwise compensable harms.

To understand how employees avoid the harms of sexual harassment, social psychology research and employer workplace surveys are again instructive.<sup>161</sup> It is important to note that some of the early research is limited because it was based on persons who were not subjected to sexual harassment. As recent social psychology research has shown, such prior sexual harassment studies were methodologically flawed.<sup>162</sup> Those studies reported what persons who had never experienced sexual harassment hypothesized would be their response to sexual harassment.<sup>163</sup> These responses did not correspond to those of real victims of sexual harassment.<sup>164</sup> In addition, the prior literature is limited because the studies tended to ask about “active” or “passive” responses only and did not request narrative descriptions of what the responses were.<sup>165</sup>

Recent studies have created new typologies, discussed below, to identify and research more completely the multitude of responses of women who are sexually harassed.<sup>166</sup> These typologies are modifications of the past incomplete ones, which inaccurately categorized responses into “active” and “passive” responses.<sup>167</sup> Unfortunately, even the new typologies, though more inclusive in

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159. See *infra* Parts V.B-C for a discussion of the applicability of the notice and conciliation rationales to the affirmative defense.

160. H.R. REP. NO. 102-40, pt. 1, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

161. See generally BEINER, *supra* note 39, at 82-83 (discussing social science literature regarding women’s responses to sexual harassment); SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 26-45 (detailing employees’ reactions to sexual harassment); Fitzgerald et al., *supra* note 29, at 119-23 (reviewing surveys reporting victim responses to sexual harassment).

162. *E.g.*, Fitzgerald et al., *supra* note 29, at 119 (describing earlier studies of harm avoidance as useful “starting point” but discounting value of these studies because they “are not derived from the reactions of actual victims”).

163. Beiner, *Sex, Science and Social Knowledge*, *supra* note 6, at 292-93.

164. Fitzgerald et al., *supra* note 29, at 119; see also Beiner, *Sex, Science and Social Knowledge*, *supra* note 6, at 291-94 (noting value of social science research in determining how harassment occurs in workplace and exploring legal standard despite various limitations regarding data).

165. Fitzgerald et al., *supra* note 29, at 119.

166. See, *e.g.*, Krieger, *supra* note 6, at 177-90 (surveying social science research regarding externally focused and internally focused response mechanisms).

167. Fitzgerald et al., *supra* note 29, at 118-19. Interestingly, social psychologists’ early research on responses to sexual harassment was flawed in much the same way current legal discourse is flawed; early research was limited to studying only one response to sexual harassment—the filing of a formal

the responses being studied, do not identify how the responses impact all of the harms resulting from sexual harassment. Therefore both the recent and the older studies do not address fully the effectiveness of the various responses of harassed employees in avoiding the harm.<sup>168</sup> As a result, the discussion below is a beginning of what will hopefully be a call for research on how all of the responses women employees take in response to sexual harassment affect the various harms resulting from the harassment.

Although more research is needed in this area, as the following discussion indicates, current social science research does provide insight into employee harm avoidance actions.<sup>169</sup> In a study conducted by Dr. Louise Fitzgerald and her colleagues regarding responses to sexual harassment, they identified various coping mechanisms used by those subjected to sexual harassment in order to avoid harm.<sup>170</sup> Fitzgerald identified that “coping (represents) constantly changing cognitive and behavioral efforts to manage specific external and/or internal demands that are appraised as taxing or exceeding the resources of the person.”<sup>171</sup> These cognitive and behavioral responses by women are undertaken “to manage or alter the distressing situation itself (*problem-focused coping*)”<sup>172</sup> and “to regulate emotional reaction (*emotion-focused coping*).”<sup>173</sup>

Based on the stress and coping literature, Dr. Fitzgerald’s research created a new typology that includes both the “problem-focused” and the “emotion-focused” responses used by women subjected to sexual harassment.<sup>174</sup> The “problem-focused” responses are externally focused responses that center on the

complaint. Knapp et al., *supra* note 36, at 690. Accordingly, Knapp, Fitzgerald, and others have created conceptual frameworks that permit the “full range of responses to [sexual harassment] to be identified.” *Id.*; see, e.g., Grossman, *Culture of Compliance*, *supra* note 6, at 23-26 (discussing victims’ responses to sexual harassment, including not filing formal complaints; responding with mild retributions; responding nonassertively, such as ignoring, rationalizing, avoiding the harasser, job, or situation; and identifying cognitive strategies for responses, including internally and externally focused responses”).

168. The research shows that while many of the strategies to avoid harm may be effective in decreasing some forms of harm, the same strategies may actually increase other forms of harm. See SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 31 (noting that avoidance of harasser may improve situation by removing victim from harassment but, conversely, may lead to decrease in productivity); see also Krieger, *supra* note 6, at 190-92 (discussing effectiveness of employees’ avoidance strategies and risks of confrontational alternatives). The tension between these strategies and their effect on the harm resulting from sexual harassment is an invaluable part of the necessary discourse in this area.

169. See, e.g., Beiner, *Sex, Science and Social Knowledge*, *supra* note 6, at 312-23 (discussing harm avoidance responses to sexual harassment and effects of sexual harassment on reporting).

170. Fitzgerald et al., *supra* note 29, at 127-28. Fitzgerald created this typology in response to case law finding that inaction or submission by women in response to sexual harassment indicated welcomeness to the harassing behavior, thus invalidating their claim of discrimination. *Id.* at 129-34.

171. *Id.* at 126 (quoting LAZARUS & FOLKMAN, *supra* note 124, at 178).

172. *Id.* at 127.

173. *Id.*

174. Fitzgerald et al., *supra* note 29, at 128. The responses to sexual harassment result from the victim’s assessment of the degree of danger posed by the unwanted conduct and the opportunities available at the time. *Id.* at 129; see also Fitzgerald & Ormerod, *supra* note 125, at 572-73 (analyzing reasons for women’s responses, or lack of responses, to sexual harassment).

woman's attempts to prevent future harassment.<sup>175</sup> The "emotion-focused" responses include the various internally focused responses that look to the woman's personal coping strategies.<sup>176</sup> All of these responses demonstrate employees' harm avoidance actions in response to sexual harassment.<sup>177</sup>

## 2. Externally Focused Harm Avoidance Mechanisms

The external coping mechanisms, or those strategies utilized to solve, manage, or alter the distressing situation itself, include a wide range of responses extending beyond a formal complaint to the employer pursuant to a nonharassment policy. As repeatedly discussed in the social psychology literature, the filing of a formal complaint is the least likely external response taken by women subjected to sexual harassment.<sup>178</sup> These findings are confirmed

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175. Fitzgerald et al., *supra* note 29, at 120-21.

176. *Id.* at 119-20. Fitzgerald cautions that the internally focused coping strategies have been underresearched due to the excessive focus on externally focused coping strategies. *Id.*

177. Fitzgerald notes that a particular response to sexual harassment cannot be judged for appropriateness or effectiveness without consideration of the individual woman herself because each response is influenced by factors such as the woman's cognitive evaluation of the situation's ability to impact her well-being, her evaluation of realistic and available options, and personal and situational resources and constraints. *Id.* at 129; *see also* Krieger, *supra* note 6, at 181 (recognizing that social science research shows that women employ many "reasonable" responses to cope with sexual harassment in workplace, including internally focused actions and externally focused behaviors).

178. *See* Fitzgerald et al., *supra* note 29, at 121 (stating that seeking institutional relief, whether by bringing formal complaint, filing charges, or taking some other institutionally prescribed steps, against harasser is least common response to sexual harassment and is used primarily when other responses have proved unsuccessful); Grossman, *Culture of Compliance*, *supra* note 6, at 23-26 (stating that formal complaints are least likely response to sexual harassment based on Fitzgerald's research and federal government studies of its workforce); Krieger, *supra* note 6, at 182-83 (describing various studies showing that between five to fifteen percent of employees seek organizational relief in response to sexual harassment); Schneider et al., *supra* note 146, at 408 tbl.2 (indicating that only 13.3% of private sector sample victims filed complaint; only 6% of university sample victims filed a complaint; 35.7% of sample one victims discussed situation with a supervisor or union representative; and 17.4% of sample two victims discussed the situation with a supervisor or union representative); Shupe et al., *supra* note 125, at 304 (indicating that Hispanic women least associated with U.S. culture have lowest report rate for sexual harassment while Hispanic women moderately affiliated with U.S. culture have higher report rates, and non-Hispanic white women have even higher report rates); S. Arzu Wasti & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment*, 83 J. PERSONALITY & SOC. PSYCHOL. 394, 402 (2002) (noting that even though Turkish, Hispanic American, and Anglo American working women all tended not to report or file complaint about being sexually harassed, Hispanic working class women were less likely than Anglo American working class women to report harassment). *But see* Janice D. Yoder & Patricia Aniakudo, *The Responses of African American Women Firefighters to Gender Harassment at Work*, 32 SEX ROLES 125, 130 (1995) (stating that fifty-five percent of African American women firefighters who were participants in study filed some sort of complaint); *cf.* Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 87 (2005) (interpreting Yoder and Aniakudo study to show that "resistance to sexual harassment is shaped by specific organizational settings characterized by particular power arrangements").

Given the social science research and the current case law's limiting of liability under the affirmative defense rubric, one set of scholars posits that the result is a "perverse incentive for employers" who seek to avoid liability to "exercise just enough reasonable care to satisfy a court, but

in the 1995 MSPB federal workplace study which reported that only twelve percent of workers who were subjected to unwanted sexual harassment reported the sexual harassment to a supervisor or other official.<sup>179</sup> When examining the same response by gender, sixteen percent of the male workers and thirteen percent of the female workers reported the sexual harassment to a supervisor or other official.<sup>180</sup> In the same federal workplace study, only six percent of the victims of sexual harassment actually made a formal complaint of sexual harassment.<sup>181</sup> In the 2002 Armed Forces Survey, a smaller percentage of women reported, in some manner, the sexual harassment than in 1995 (thirty-eight percent in 1995 versus thirty percent in 2002).<sup>182</sup> This decline is especially interesting because, as mentioned above, the Supreme Court opined that the affirmative defense, articulated in 1998, would encourage more employees to report than before the affirmative defense emerged in the legal doctrine.<sup>183</sup> The 2002 study shows that although reporting behavior has changed since the affirmative defense was created, the reporting behavior has decreased rather than increased.

Importantly, some research has provided insight into employees' decisions to not report sexual harassment by indicating that filing a formal complaint can, in many ways, worsen the employment situation of the employee and increase other harms to the employee.<sup>184</sup> For instance, the 1995 MSPB federal workplace study reported that filing a formal complaint made the situation worse for more employees subjected to sexual harassment.<sup>185</sup> Studies have shown that employees

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not enough to make it easy or comfortable for employees to complain of workplace harassment.” Sherwyn, Heise & Eigen, *supra* note 6, at 1267.

179. Chamallas, *supra* note 13, at 374 (citing SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 30). These results are consistent with earlier studies of federal workers showing that 11% reported their sexual harassment to superiors, but only 2.5% actually used the appropriate formal mechanisms to report. *Id.* (citing Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOLOGIST 497, 498 (1991)). These results are also consistent with the raw data from the 2002 Armed Forces Survey, which showed that 85.5% of employees did not report the situation to their immediate supervisor, 89.8% of employees did not report it to someone else in their chain of command, 88.1% of employees did not report it to the supervisor of the person who was engaging in the sexually harassing behavior, 95.9% of employees did not report it to the special military office responsible for handling these complaints, and 97.5% of employees did not report the behavior to any other military person or office. GREENLEES ET AL., *supra* note 30, at 1229, 1233, 1237, 1241, 1245.

180. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 31 tbl.9.

181. *Id.* at 33-34.

182. 2002 ARMED FORCES SURVEY, *supra* note 16, at 30. In fact, fewer than ten percent of employees who experienced incidents of sexual harassment reported it to the designated office handling sexual harassment complaints or another official. *Id.* Instead, twenty-one percent of women and twelve percent of men reported to their immediate supervisor, and sixteen percent of women and ten percent of men reported to the offender's supervisor. *Id.*

183. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

184. See Dansky & Kilpatrick, *supra* note 139, at 158 (providing insight into employees' decisions not to file formal complaints); Grossman, *Culture of Compliance*, *supra* note 6, at 3 (demonstrating that sexual harassment policies are not necessarily effective in deterring, preventing, or correcting sexual harassment).

185. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 34 (finding that

who file complaints have experienced retaliation. One study showed that one-third of the reporters were subjected to retaliation by the employer.<sup>186</sup> Another one showed that sixty-two percent of the reporters were subjected to retaliation by the employer.<sup>187</sup> The 2002 Armed Forces Survey found that twenty-nine percent of women and twenty-three percent of men reported experiencing work-related difficulties as the result of sexual harassment or the reporting of it.<sup>188</sup>

The 2002 study also showed that women did not report the sexual harassment for numerous other reasons, including because they felt uncomfortable making a report (thirty-seven percent); because they doubted that reporting would have any effect (thirty percent); because they thought they would be labeled a troublemaker if they reported (twenty-nine percent); because they did not want to hurt the sexual harasser's career, family or feelings (twenty-eight percent); because they thought their coworkers would be angry if they reported (twenty-three percent); because they feared retaliation from the sexual harasser (eighteen percent); because they doubted that they would be believed (fifteen percent); because they wanted to fit in (fifteen percent); because they thought reporting would negatively impact their performance evaluation or promotion consideration (fourteen percent); and because they feared retaliation from the sexual harasser's friends (thirteen percent).<sup>189</sup> Similarly, other research showed that employees did not report because of their "ambivalence about [sexual harassment] policies and the personnel who administer them."<sup>190</sup> Specifically, several federal workers explained their skepticism of formally complaining about sexual harassment because "they were worried that they would be blamed for the incident, that they would not be believed, or that the complaint would not be kept confidential."<sup>191</sup> The group also worried "that management's reaction to the complaint would be at best ineffectual and at worst threatening."<sup>192</sup> Because official sexual harassment policies and procedures "reflect the power dynamics at work in particular organizations . . .

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filing of formal complaint for thirty-seven percent of victims of sexual harassment made things worse and helped only twenty-one percent of them).

186. Chamallas, *supra* note 13, at 375 (citing Fitzgerald et al., *supra* note 29, at 123).

187. *Id.* Dr. Patricia A. Frazier, PhD, after conducting a literature review, found that retaliation occurs in about one out of four of the cases where the person subjected to sexual harassment formally complained. Patricia A. Frazier, *Overview of Sexual Harassment from the Behavioral Science Perspective*, A.B.A. CENTER FOR CONTINUING LEGAL EDUC., Oct. 15-18, 1997, at \*6, available at Westlaw, N97SHCB ABA-LGLED B-1. Frazier also noted that twelve percent of women reported lower evaluations after complaining, seven percent reported being denied promotions, five percent reported being terminated, and two percent reported being reassigned. *Id.* (citing Pamela Hewitt Loy & Lea P. Stewart, *The Extent and Effects of the Sexual Harassment of Working Women*, 17 SOC. FOCUS 31, 40 (1984)).

188. 2002 ARMED FORCES SURVEY, *supra* note 16, at v.

189. *Id.* at 34 tbl.4.12.

190. Marshall, *supra* note 178, at 87.

191. *Id.*

192. *Id.*; see also BEINER, *supra* note 39, at 161 ("[O]rganizational factors were the best predictors of response when severity of harassment was controlled." (quoting Fitzgerald et al., *supra* note 29, at 122)).

[they] may dampen rather than promote employee complaints."<sup>193</sup> In addition, many women subjected to sexual harassment did not complain formally about the harassment because they believed such complaints would be ineffective.<sup>194</sup> In fact, recent research has found that managers were more likely to side with the harasser, seen as the "institution," over the complainant, seen as the "troublemaker."<sup>195</sup>

In addition, some studies showed that persons subjected to sexual harassment do not report it because they do not recognize it as sexual harassment.<sup>196</sup> For instance, the 2002 Armed Forces Survey showed that sixty-seven percent of women and seventy-eight percent of men stated that they did not report incidents of sexual harassment because they felt that the situation was not important enough to warrant reporting.<sup>197</sup>

Further, many employees do not report sexual harassment formally because it would cause other and greater harms to them. For instance, one study showed that women who complain about sexual harassment are often fired or may face difficulty securing other employment because of bad references.<sup>198</sup> One study suggested that "negative job outcomes may derive more from retaliation and negative organizational response (e.g., victim blaming) than from the sexually harassing behavior itself."<sup>199</sup> Another study showed female blue-collar workers who confronted their harassers were subjected to more harassment and ostracism.<sup>200</sup> Another study showed that:

assertive and formal responses were actually associated with more negative outcomes of every sort. Women who reported harassment to their supervisors or who filed complaints were more likely to quit, be fired, or be transferred; to need or utilize medical and psychological assistance; to feel worse about their jobs; and so forth.<sup>201</sup>

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193. Marshall, *supra* note 178, at 87.

194. Krieger, *supra* note 6, at 185 (citing Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOC. PSYCHOL. 519, 520 (1995)).

195. Marshall, *supra* note 178, at 87 (internal quotation marks omitted).

196. BEINER, *supra* note 39, at 160 (citing Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 171 (1988)); see also Caroline C. Cochran et al., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. WOMEN Q. 207, 217 (1997) (noting that victims frequently did not report incidents because they were unsure if behavior was harassment); Schneider et al., *supra* note 146, at 407 (noting that only fifteen percent of female college students labeled their experiences as sexual harassment).

197. 2002 ARMED FORCES SURVEY, *supra* note 16, at 33.

198. BEINER, *supra* note 39, at 164 (citing Audrey Murrell et al., *Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers*, 51 J. SOC. ISSUES 139, 141 (1995)).

199. *Id.* (quoting Hesson-McInnis & Fitzgerald, *supra* note 151, at 896).

200. Kristen R. Yount, *Ladies, Flirts, and Tomboys: Strategies for Managing Sexual Harassment in an Underground Coal Mine*, 19 J. CONTEMP. ETHNOGRAPHY 396, 404 (1991).

201. Hesson-McInnis & Fitzgerald, *supra* note 151, at 896. Because this study is older and was conducted before widespread public attention to sexual harassment, the authors and others note that its findings may be limited. See BEINER, *supra* note 39, at 164 (recognizing that study by Hesson-McInnis and Fitzgerald was conducted before increased public awareness about sexual harassment).

In fact, one documented barrier to women employees' filing of formal complaints is the "embarrassment and psychological costs associated with such complaints."<sup>202</sup>

On the other hand, reporting harassment to a supervisor or other official may be effective in stopping one form of harm—the harassment. The research of Dr. Deborah Knapp and her colleagues (hereinafter referred to as Knapp's research) showed that "advocacy seeking" responses, including requesting outside intervention, reporting the harassment to a supervisor or to an outside agency, and filing a lawsuit, may be effective in ending the harassment.<sup>203</sup> Yet a different workplace study showed that employees felt that reporting the sexual harassment to a supervisor or other official provided mixed results.<sup>204</sup> These mixed results are not surprising given the research, discussed above, that shows that the effectiveness of reporting sexual harassment will depend on the formal and informal organizational culture relating to complaints of sexual harassment.<sup>205</sup>

Unfortunately, the research is silent as to other harms and how they are affected by these "advocacy seeking" responses. For example, Knapp's research did not identify the effectiveness of these responses in coping with the intangible employment harm or the psychological or emotional harm resulting from the sexual harassment.

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202. Marshall, *supra* note 178, at 87.

203. Knapp et al., *supra* note 36, at 693. Knapp created another typology of responses to the harm of psychological stress caused by sexual harassment. Her typology of coping mechanisms is based on the context of the sexual harassment, such as the mode of response and focus of response. *Id.* at 690-95. Knapp's research drew on research regarding whistle-blowing behavior as well as coping literature. *Id.* at 696-98. Knapp and her colleagues stated that the coping literature identified two types of coping: engagement or problem-focused coping emphasized altering or preventing the situation while disengagement or emotion-focused coping was characterized by self-blame, seeking social support, avoidance, or distancing. *Id.* at 698. To determine the victim's mode of response, Knapp considered the amount of outside support being sought through the coping mechanism: the mode may be self-response, which involves no outside resources to address sexual harassment, or the mode may be a supported response, which means that the harassed woman uses others, such as individuals and organizations, to address the sexual harassment. *Id.* at 691-92. When evaluating the focus of responses to harassment, Knapp considered what the focus of the coping mechanisms was: the woman who was harassed (self-focused) or the harasser or the event (initiator-focused). Knapp et al., *supra* note 36, at 690. Knapp identified four response strategies from these various modes and focuses of responses: (1) "Avoidance/Denial," (2) "Social Coping," (3) "Confrontation/Negotiation," and (4) "Advocacy Seeking." *Id.* at 690-92. Her research indicated that persons who are sexually harassed tend to employ more than one response strategy, sometimes sequencing them. *Id.* at 693. Further, Knapp stated that "response behavior may vary not only among individuals but also among different environments and organizational contexts." *Id.* at 695.

204. See *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE*, *supra* note 12, at 31 tbl.9 (noting that thirty-three percent of male workers and fifty-eight percent of female workers stated that reporting sexually harassing behavior to supervisor or other official had beneficial effect on sexual harassment, sixteen percent of male workers and thirteen percent of female workers reported that it had detrimental effect, and fifty-two percent of male workers and twenty-nine percent of female workers stated that it had no effect on sexual harassment).

205. See *supra* notes 178-83 and accompanying text for a discussion of the lack of sexual harassment complaints being filed.

And simply because few women file complaints of sexual harassment does not mean that they fail to respond or fail to react to the harassment in attempts to avoid harm. In fact, women's most common response to sexual harassment is avoiding the harasser himself.<sup>206</sup> It appears that those subjected to harassment often will avoid the harassment unless the actions taken to avoid harassment become intolerable.<sup>207</sup> Women employees may also use defusion in response to sexual harassment. Defusion is going along with the behavior, perhaps by making a joke of it in order to minimize conflict or by stalling.<sup>208</sup> Women employees appease the harasser by attempting to stop the harasser from engaging in sexually harassing behavior without conflict by using humor, excuses, or delay.<sup>209</sup> Knapp has categorized these types of behavior as an “avoidance/denial” behavior.<sup>210</sup> Referencing the social science research, Chamallas stated that women may use avoidance and appeasement because they typically have less power than men in the organization and are reluctant to use mechanisms, such as official reporting mechanisms, created by those in power because they tend to favor the organization or the harasser rather than not the victim of the harassment.<sup>211</sup>

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206. Schneider, *supra* note 146, at 408 tbl.2 (showing 74.1% of private sector victims responded by avoiding harasser, and 53.9% of university sample victims responded by avoiding harasser). Early research showed that fifty percent of the women subjected to sexual harassment responded by avoiding the harassers. Fitzgerald et al., *supra* note 29, at 120; cf. Yoder & Aniakudo, *supra* note 178, at 126 (noting that about half of federal employees avoided harasser (citing Sandra S. Tangri, Martha R. Burt & Leanor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 47 (1982))); Wasti & Cortina, *supra* note 178, at 402 (noting that Turkish and Hispanic American women relied on avoidance more than Anglo American women, although all women relied increasingly on avoidance as harassment increased in frequency)). In addition, in the 2002 Armed Forces Survey, 60.5% of employees to some extent stayed out of the harasser's way and 48.8% of employees to some extent avoided being alone with the harasser. GREENLEES ET AL., *supra* note 30, at 1169, 1193.

207. BEINER, *supra* note 39, at 160.

208. Fitzgerald et al., *supra* note 29, at 129; see also Knapp et al., *supra* note 36, at 689 (stating that defusion also includes such actions as stalling (citing James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. & SOC. RES. 3, 3 (1989))).

209. Fitzgerald et al., *supra* note 29, at 120. Summarizing the previous literature, Fitzgerald notes that humor is a common response to less serious harassment. *Id.* (citing AN UPDATE, *supra* note 36, at 24; IS IT A PROBLEM?, *supra* note 36, at 69). Delaying tactics were used by ten percent of blue-collar workers as a nonconfrontational way of communicating lack of interest in the harasser. *Id.* (citing James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 287 tbl.3 (1982)).

210. Knapp et al., *supra* note 36, at 690-91. “Avoidance/denial” behaviors include avoiding the harasser, changing the job situation by quitting or transferring, ignoring the behavior, going along with the behavior, treating the event as a joke, doing nothing, and blaming oneself. *Id.* at 691. Knapp's research shows that avoidance/denial behaviors are coping mechanisms that are self-focused and done without outside support. *Id.* at 690. In a different study, twenty-five percent of female faculty reported that ignoring the sexually harassing behavior was effective. Frazier, *supra* note 187, at \*6 (citing Elizabeth Grauerholz, *Sexual Harassment of Women Professors by Students: Exploring the Dynamics of Power, Authority, and Gender in a University Setting*, 21 SEX ROLES 789, 797 tbl.3 (1989)).

211. Chamallas, *supra* note 13, at 376 (citing James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 821 (1986); Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the*

The effectiveness of these “avoidance/denial” behaviors in reducing all harms seems mixed. The research shows that some of these actions reduce certain harms while increasing others. The 1995 MSPB federal workplace study showed that victims of sexual harassment found that avoiding the harasser beneficially affected the sexual harassment.<sup>212</sup> On the other hand, the MSPB study hypothesized, without offering any supporting data, that avoiding the harasser “can also have a negative effect on the victim’s work performance, if she or he spends a lot of time trying to avoid the harasser.”<sup>213</sup> Commentators have found that actions to avoid the harasser and ignore the harassment may create additional benefits, such as avoiding potential retaliation, for victims.<sup>214</sup>

The same MSPB study showed mixed results for defusion responses to sexual harassment as well. One commentator noted that making a joke of the harassment “may well be an attempt by the target [of the sexual harassment] to fit in and downplay the effects of the harassment.”<sup>215</sup> Another study showed that women miners who tried to fit in and be “one of the boys” were subjected to less harassment.<sup>216</sup>

Dr. Knapp’s research looked at these behaviors as a whole under the category of “avoidance/denial” behaviors. Dr. Knapp and her colleagues found that these behaviors are coping mechanisms that are generally more effective than other strategies in ending one specific type of harm: the sexual harassment behavior.<sup>217</sup> Their findings do not indicate whether these behaviors are effective at ending the emotional harm, the psychological harm, the tangible employment harm, or the intangible employment harm resulting from sexual harassment.

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*Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 86 (2000); Riger, *supra* note 179, at 501).

212. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 31 tbl.19 (noting fifty-two percent of male employees and forty-four percent of female employees found that avoiding harasser beneficially affected sexual harassment, thirteen percent of male employees and eight percent of female employees found that such behavior negatively affected sexual harassment, and thirty-six percent of male employees and forty-eight percent of female employees found that avoiding harasser had no impact on sexual harassment).

213. *Id.* at 31; *see also* BEINER, *supra* note 39, at 83 (avoiding harasser may interfere with employee’s ability to work “as the target rearranges his or her job duties to avoid the harasser” (citing Cochran et al., *supra* note 196, at 223)); Frazier, *supra* note 187, at \*6 (noting “those who avoided were less satisfied with the outcome of the situation in another study” (citing Cochran, *supra* note 196, at 224)).

214. BEINER, *supra* note 39, at 83 (citing Aysan Sev’er, *Sexual Harassment: Where We Were, Where We Are and Prospects for the New Millennium*, 36 CANADIAN REV. SOC. & ANTHROPOLOGY 469, 478 (1999)).

215. *Id.* at 82.

216. Yount, *supra* note 200, at 416. Yount also found that female miners’ flirting resulted in decreased harassment in the short term but in the long run led to more harassment. *Id.* at 407-09, 411-12. The results of the MSPB study correspond to the findings of sociologist Mary Lindenstein Walshok of various blue-collar workplaces. MARY LINDENSTEIN WALSHOK, BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER 232, 239-40 (1981) (finding that female employees’ integration into dominant group correlates to decreased targeting for sexual harassment but recognizing potential risk that fitting in may have negative consequence that victims are seen as welcoming sexual harassment).

217. Knapp et al., *supra* note 36, at 690-91.

In addition to the “avoidance/denial” responses, women employees also use so-called “assertive” responses, such as directly telling the harasser to stop,<sup>218</sup> threatening to report the harasser,<sup>219</sup> or verbally or physically attacking the harasser.<sup>220</sup> Taking each so-called “assertive” response in turn, some research shows that the strategy of confronting the harasser is effective in ending the harassment.<sup>221</sup> In fact, one review of the literature identified confronting the harasser as the most effective strategy at decreasing the harassment.<sup>222</sup>

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218. Forty-four percent of female respondents in one study responded to sexual harassment by confronting the harasser. Fitzgerald et al., *supra* note 29, at 121 (citing IS IT A PROBLEM?, *supra* note 36, at 18). In the 2002 Armed Forces Survey, 68.2% of employees to some extent told the harasser of their dislike for the harassment, 61.2% of employees to some extent told the harasser to stop, and 41.3% of employees to some extent asked the harasser to leave them alone. GREENLEES ET AL., *supra* note 30, at 1165, 1197, 1205; *see also* Yoder & Aniakudo, *supra* note 178, at 130 (stating that eighty-six percent of study participants challenged harasser); *id.* at 126 (noting that sixteen percent of another study’s participants ordered harasser to stop) (citing Mary Ellen Reilly, Bernice Lott & Sheila M. Gallogly, *Sexual Harassment of University Students*, 15 SEX ROLES 333, 346 (1986)). In one study, twenty-four percent of the subjects proposed that the sexual harassment victim verbally challenge the harasser or inform authorities of the harassment. Tricia S. Jones & Martin S. Remland, *Sources of Variability in Perceptions of and Responses to Sexual Harassment*, 27 SEX ROLES 121, 138 (1992); *see also* Wasti & Cortina, *supra* note 178, at 402 (noting that Turkish women indicated greater propensity than Hispanic American and Anglo American working women to confront harasser).

219. Fitzgerald et al., *supra* note 29, at 121 (stating that fourteen percent of women subjected to sexual harassment threatened to disclose harassment to harasser’s coworkers).

220. Fifteen percent of blue-collar workers responded verbally and seven percent responded physically. *Id.* at 121; *see also* Yoder & Aniakudo, *supra* note 178, at 130 (finding that of nineteen study participants, nine responded “assertively” and ten responded “aggressively,” including four who used physical force). Yoder and Aniakudo’s study suggested that black female firefighters responded to harassment first assertively with direct confrontation, then if unsuccessful, aggressively and possibly by taking legal recourse. Yoder & Aniakudo, *supra* note 178, at 135. Interestingly, Yoder and Aniakudo hypothesized that the women used confrontation because it proved successful and permitted them to retain their dignity. Because the women were marginalized at work, possibly due to their gender and race, they felt that they had little to lose when challenging their harassers. *Id.* at 132. Unsurprisingly, the women’s circumstances influenced their responses to sexual harassment. *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC’Y REV. 67, 86-88 (1999) (finding that relationships with children, spouses, and parents, and availability of moral and emotional support, influenced women’s litigation decisions, and if filing suit appeared likely to detrimentally affect family members, women relied on “extralegal means to solve their sexual harassment problems”).

221. *E.g.*, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 31 (discussing study finding that of those who asked or told person to stop, sixty-one percent of male employees and sixty percent of female employees indicated that their response made things better regarding sexual harassment, fifteen percent of male employees and eight percent of female employees reported that telling harasser to stop made sexual harassment worse, and twenty-five percent of male employees and thirty-two percent of female employees believed that it made no difference); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 248 (1993) (observing that knowledge about effect of confrontation of harassers by victims is limited, but some research suggests that such confrontations can be helpful); Cochran et al., *supra* note 196, at 224 (reporting that victims who confronted sexual harassers experienced greater satisfaction); *see also, e.g.*, Krieger, *supra* note 6, at 190 (showing that fifty to sixty percent of harassed women found confrontation effective).

222. Frazier, *supra* note 187, at \*6. Interestingly, Dr. Frazier posed the important question of why we prioritize reporting the harassment rather than facilitating the conversations between the person

Regarding employees who threatened the harasser that they would tell others about his harassment, one workplace study showed that many employees found this response to affect beneficially the sexual harassment itself.<sup>223</sup> One review of the literature showed that “confronting [the harasser] is rated more effective than other strategies, but it only seems to be effective about half of the time.”<sup>224</sup>

The research, however, is scant as to whether such “assertive” responses decrease or increase harms other than the actual sexual harassment.<sup>225</sup> A few studies do show that “assertive” responses increase job harm and emotional harm. One study found that “women who used aggressive communication strategies, such as using threats to get the person to stop, were less satisfied with the outcome of the situation than those who used less aggressive strategies.”<sup>226</sup> Some of the reasons for finding the confrontation action ineffective or not satisfying may be related to the resulting retaliation on the job that resulted from the confrontation.<sup>227</sup> This retaliation included such job harm as lower performance evaluations, nonpromotion, reassignment, and termination.<sup>228</sup> Women who were sexually harassed also used negotiation, which included efforts to make the harasser stop without involving the employer.<sup>229</sup> Knapp’s research showed that these responses, which she categorized as “confrontation/negotiation” behaviors,<sup>230</sup> were “associated with greater

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being harassed and the harasser if the goal was true deterrence. *Id.* She partially answered her own question by stating that reporting may provide some punishment value, though punishment not one of the rationales provided by the Supreme Court in articulating the affirmative defense. *Id.*; see also Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (describing policies behind affirmative defense); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (same).

223. SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, *supra* note 12, at 31 (indicating that fifty-five percent of male employees and thirty-seven percent of female employees subjected to sexual harassment found that threatening to tell or telling others about harassment beneficially affected sexual harassment, no male employees and fourteen percent of female employees found such action to make sexual harassment worse, and forty-six percent of male employees and forty-nine percent of female employees found such action to have no effect on sexual harassment).

224. Frazier, *supra* note 187, at \*5.

225. See, e.g., Bingham & Scherer, *supra* note 221, at 263 (citing difficulty in drawing conclusions about effect of aggressive responses to sexual harassment).

226. Frazier, *supra* note 187, at \*5 (citing Bingham & Scherer, *supra* note 221, at 263-65).

227. *Id.*

228. *Id.* at \*6 (citing Loy & Stewart, *supra* note 187, at 40) (finding that of those who were harassed and confronted their harassers, twelve percent received lower performance evaluations, seven percent were not promoted, five percent were terminated, and two percent were reassigned); see also Krieger, *supra* note 6, at 190-91 (identifying that more recent studies have yielded similar results).

229. Fitzgerald et al., *supra* note 29, at 120; see also Knapp et al., *supra* note 36, at 689 (stating that negotiation may include direct requests for harasser to stop behavior (citing Gruber, *supra* note 208, at 3)); Wasti & Cortina, *supra* note 178, at 402 (noting that in studying responses to sexual harassment reported by Turkish, Hispanic American, and Anglo American working women, researchers found that Turkish women relied on negotiation more than Anglo American women, working class women relied more on negotiation than professional women when harasser was of a high status, and all women relied increasingly on negotiation responses as harassment incidences increased).

230. Knapp’s research showed that these responses focus on the harasser and involve little outside support. Knapp et al., *supra* note 36, at 692.

emotional distress,”<sup>231</sup> even though they seemed to be effective in ending the behavior.<sup>232</sup> Unfortunately, the Knapp research was silent as to the tangible and intangible employment-related harms associated with “confrontation/negotiation” behaviors. Therefore, although the research is limited, taking the research as a whole, it appears that “assertive” responses are mixed in their success of harm avoidance. Although “assertive” responses can be effective in decreasing the sexual harassment, that impact must be weighed against the fact that such responses increase the tangible job harm through retaliation and increase the emotional distress.

Women also attempt to avoid harm by seeking social and family support in an effort to cope with the sexual harassment.<sup>233</sup> Knapp stated that these responses were not effective in stopping the harassment, “although [they] may assist the target in managing the psychological and somatic outcomes associated with the event and may provide him or her with suggestions for more effective coping.”<sup>234</sup> In addition, seeking medical or emotional counseling was included in this category of responses, and although it was not necessarily effective in ending the harassment, “counseling may assist the individual in diffusing the event and finding more effective solutions to the problem.”<sup>235</sup> Therefore, although the research is again limited, it indicates that seeking social and family support has no impact on the sexual harassment but helps to avoid the psychological, emotional, and physical harms of sexual harassment.<sup>236</sup> The research is silent as to the effect of these coping mechanisms in avoiding or mitigating tangible or intangible employment harm, although such support seeking may result in the employee’s learning of new harm avoidance mechanisms. And, as seen above in the discussion of Chamallas’s theory, a decrease in emotional harm should benefit employment performance and productivity.<sup>237</sup>

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231. *Id.* (citing Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational, and Individual Actions*, 38 J. SOC. ISSUES 5, 13 (1982)).

232. *Id.*

233. Fitzgerald et al., *supra* note 29, at 120-21 (citing IS IT A PROBLEM?, *supra* note 36, at 69) (finding that sixty-eight percent of study respondents talked with colleagues about sexual harassment and sixty percent talked with friends and family members); *see also* Knapp et al., *supra* note 35, at 689 (recognizing practice of “using sympathetic others to express anger and provide emotional support” (citing Gruber, *supra* note 208, at 3)); Wasti & Cortina, *supra* note 178, at 402 (noting that Turkish, Hispanic American, and Anglo American women relied on friends, family, and coworkers on a relatively equal basis, except that professional women relied increasingly on social support as harassment incidences increased). Social coping responses, which include self-focused strategies that seek outsider support, may rely on ensuring that others are present when the harasser is present or discussing harassment with others who are sympathetic, such as peers, coworkers, friends, and family. *Id.* at 692. In the 2002 Armed Forces Survey, 32.9% of employees to some extent talked to family about the situation; 49.2% of employees to some extent talked to their coworkers about the situation; 47.8% of employees to some extent talked to their friends about the situation; and 7.7% of employees to some extent talked to a chaplain or counselor about the situation. GREENLEES ET AL., *supra* note 30, at 1177, 1181, 1185, 1189.

234. Knapp et al., *supra* note 36, at 692.

235. *Id.*

236. *Id.*

237. *See supra* notes 147-49 and accompanying text for a discussion of Chamallas’s theory.

In sum, the research shows that while there are multiple externally focused harm avoidance mechanisms, not one particular mechanism can help the employee to avoid *all* the harms of sexual harassment. Rather, what emerges from the research is that each mechanism, based on the context, may result in both increasing and decreasing different harms.

### 3. Internally Focused Harm Avoidance Mechanisms Documented in the Social Science Literature

Women who are sexually harassed also utilize internal coping mechanisms to regulate and manage cognitive and emotional harms resulting from the sexual harassment.<sup>238</sup> These responses focus on an individual's personal management of cognitive and emotional reactions.<sup>239</sup> Prior to Dr. Fitzgerald's work in this area, researchers commonly mislabeled the employee as being "passive"<sup>240</sup> in part because the internally focused responses were not visible to outsiders.<sup>241</sup>

One internally focused strategy used in response to sexual harassment is endurance, which is tolerating the harassment because it is unavoidable, one knows of no other option, or one is afraid.<sup>242</sup> Previous research mistakenly labeled this as a lack of response because endurance would often be externally manifested as "ignore[ing] the situation" or "doing nothing."<sup>243</sup> In addition, women subjected to sexual harassment employ thought avoidance as a coping strategy, which includes ignoring thoughts about the harassment.<sup>244</sup> Other coping mechanisms include denial, which is deliberately deciding to "ignore the situation, to pretend it is not happening, or that one does not care";<sup>245</sup>

238. Fitzgerald & Ormerod, *supra* note 125, at 572.

239. *Id.*

240. Yoder & Aniakudo, *supra* note 178, at 126-27 (citing, inter alia, Gruber & Bjorn, *supra* note 209, at 819; Reilly, Lott & Gallogly, *supra* note 218, at 346; Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 47-48 (1982); AN UPDATE, *supra* note 36, at 24).

241. Krieger, *supra* note 6, at 181-82 (describing how internally focused strategies to cope with sexual harassment were previously inaccurately categorized as passive responses).

242. Fitzgerald et al., *supra* note 29, at 120. In the 2002 Armed Forces Survey, 64.3% of employees tolerated the harassment to some extent. GREENLEES ET AL., *supra* note 30, at 1201.

243. Fitzgerald et al., *supra* note 29, at 120.

244. *Id.* Avoidance has been defined as a "passive" response that may include behavior such as ignoring the sexual harassment or doing nothing. Knapp et al., *supra* note 36, at 689 (indicating that Gruber's "avoidance" response category included "most passive responses," such as ignoring harasser or doing nothing (citing Gruber, *supra* note 208, at 3)). As noted in the DSM-IV, those employees suffering from PTSD, a harm that may result from sexual harassment, will attempt to "avoid thoughts, feelings, or conversations about the traumatic event . . . and to avoid activities, situations, or people who arouse recollections of it." DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 143, at 424-25. In the 2002 Armed Forces Survey, 72.4% of employees tried to forget about the harassment to some extent and 65.8% of employees to some extent told themselves it was not important. GREENLEES ET AL., *supra* note 30, at 1161, 1173.

245. Fitzgerald et al., *supra* note 29, at 120. In the 2002 Armed Forces Survey, 43.1% of employees to some extent pretended not to notice the harassment. GREENLEES ET AL., *supra* note 30, at 1221.

detachment;<sup>246</sup> self-blame,<sup>247</sup> or believing one has illusory control over the situation;<sup>248</sup> and reattribution, such as reinterpreting the situation in order to make it not able to be categorized as harassment<sup>249</sup> or empathizing with the harasser.<sup>250</sup>

The research indicates that these internal coping mechanisms are helpful in eliminating some of the emotional and psychological harm in the short run.<sup>251</sup> The research also indicates that whether these strategies are effective in avoiding emotional and psychological harm in the long run depends on the individual person.<sup>252</sup> Unfortunately, the research is again silent as to the effect of these internal coping mechanisms on other forms of harm, though one would anticipate they do not decrease sexual harassment. There may be a possibility that such internally focused strategies could decrease job harm because, as Chamallas states, there is an interconnection between psychological harm and job harm.<sup>253</sup>

#### 4. Lena’s Harm Avoidance Responses

Returning to Lena’s situation, after considering the social psychology research, the workplace studies, and the policy behind the avoidable consequences doctrine, a more complete picture of Lena—the harms she has suffered and the actions she took to avoid harm—emerges for the liability determination. Perhaps most importantly, by considering all of Lena’s externally and internally focused actions, Lena clearly appears as an actor—she is responding to the sexual harassment, she is harm avoiding, she is not passive. Her actions are many.

Lena employed a variety of externally focused coping mechanisms to avoid harm. She physically avoided Dave by calling in sick frequently, avoiding overtime work, and asking that her meetings with Dave be in her cubicle rather than in his closed office. Lena also appeased Dave by trying to deter him without

246. Fitzgerald et al., *supra* note 29, at 120 (stating that very little research has been conducted on prevalence of detachment as coping strategy by women who are sexually harassed).

247. GREENLEES ET AL., *supra* note 30, at 1209 (finding that in 2002 Armed Forces Survey, fifteen percent of employees to some extent blamed themselves for what was happening).

248. Fitzgerald et al., *supra* note 29, at 120 (citing study that found that twenty-five percent of female victims attributed harassment in some way to their own behavior (citing Inger W. Jensen & Barbara A. Gutek, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. SOC. ISSUES 121, 127 (1982))). Other than the Jensen and Gutek study, little else is known about the prevalence of illusory control in sexual harassment victims. *Id.*

249. *Id.* (citing Gruber & Bjorn, *supra* note 209, at 286). In the 2002 Armed Forces Survey, thirty-four percent of employees to some extent assumed the harasser meant well. GREENLEES ET AL., *supra* note 30, at 1213.

250. See Fitzgerald et al., *supra* note 29, at 119-20 (stating that, similar to research regarding detachment and illusory control, research on reattribution needs to be studied further to understand its rate of utilization by women who are sexually harassed).

251. Fitzgerald & Ormerod, *supra* note 125, at 572.

252. *Id.*

253. See *supra* notes 147-49 and accompanying text for a discussion of Chamallas’s theory on how psychological stress and job harm are related.

conflict when she moved her body away from him and by standing up to leave a meeting with a false, work-related excuse. Lena also informally complained to Victor. She then stopped giving Victor information once he humiliated her. Lena sought social support by telling Karen, her best friend, about Dave's sexual harassment of her and how it made her feel. Lena also used the internally focused mechanism of reattributing Dave's sexual harassment of her as accidental or resulting from Dave's personality as a "touchy" person. Finally, Lena endured the harassment and did not formally complain in order to lessen further humiliation and avoid ostracism and possible retaliation.

According to Knapp's research and other studies, Lena's externally focused appeasement and avoidance behaviors could be effective at stopping the sexual harassment but may impair Lena's ability to perform her work.<sup>254</sup> Unfortunately, the research is silent as to how avoidance actions impact emotional and psychological harms.<sup>255</sup> Knapp's research also indicates that while Lena's discussions with Karen are not effective at ending the sexual harassment, they may be effective in managing her resulting emotional and psychological harm.<sup>256</sup> Regarding Lena's informal complaint to Victor, the informal organizational structure impacted the effectiveness of her complaint.<sup>257</sup> Victor responded with a joke and did not follow up in any way. This response resulted in Lena feeling humiliated and not complaining further. And the sexual harassment continued. Therefore, in this situation, reporting did not avoid any of her harms. The research indicates that Lena's use of reattribution may be helpful in eliminating some of the emotional and psychological harm as well. Lena's endurance of the harassment is an internally focused coping mechanism designed to avoid the harm of the stress of sexual harassment. The mechanism may vary in its effectiveness at reducing the harm in the short and long term. Unfortunately, the research is silent as to the effect of internal coping mechanisms on avoiding other harms from sexual harassment such as the acts of sexual harassment and employment-related harms.

Nonetheless, through this discussion, it becomes apparent that broader notions of avoiding harm will result in a more complete view of Lena and how she is attempting to mitigate her damages and avoid injury. Such a view permits a more thorough liability determination under the affirmative defense because the court can determine more accurately whether Lena is reasonably avoiding harm, such as sexual harassment, emotional harm, and psychological harm, by actions other than filing a formal complaint. At the same time, the complexity of determining whether an employee has reasonably avoided or attempted to avoid harm becomes clear. Perhaps the most striking example of this complexity is the

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254. See *supra* notes 210, 217 and accompanying text for a discussion of Knapp's theories on the effectiveness of avoidance behaviors and the impact on the victim's job performance.

255. *Id.*

256. See *supra* notes 233-36 and accompanying text for a discussion of the effectiveness of seeking social and family support.

257. See *infra* notes 304-15 and accompanying text for a discussion of how courts have viewed alternative or informal methods of "avoiding harm" that are not included in the employer's sexual harassment policy.

research that supports Lena’s experience that complaining about the harassment increased her emotional harm.<sup>258</sup>

#### IV. EMPLOYER LIABILITY AND “AVOIDING HARM OTHERWISE”

As previously stated, in deciding liability for supervisor sexual harassment cases, the courts to date have focused primarily on the limited questions of whether the employer had a policy, and, if so, whether the plaintiff employee unreasonably failed to use the formal complaint mechanism pursuant to the policy.<sup>259</sup> The courts have also examined whether the employer properly responded to any employee reporting of sexual harassment.<sup>260</sup> In evaluating whether the employer satisfied the employer-focused prong, the courts have focused on whether the company had a nonharassment policy and whether the policy contained an appropriate complaint mechanism.<sup>261</sup> In general, despite the fact that harm avoidance is an animating principle of the affirmative defense,<sup>262</sup> the courts have not scrutinized the effectiveness of employer policies in avoiding harm. Specifically, the courts have not properly scrutinized whether an employer’s policy was actually effective in getting employees to report sexual harassment or whether the complaint mechanism effectively deterred sexual harassment and protected employees from retaliation.<sup>263</sup> Such failings show that

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258. See *supra* notes 198-202 and accompanying text for a discussion of how complaining about the harassment may result in humiliation, embarrassment, and the attachment of negative stigmas.

259. See Sherwyn, Heise & Eigen, *supra* note 6, at 1285-86 (noting that in study of seventy-two cases, employer defendants were granted summary judgment in all twenty cases in which employee failed to complain pursuant to employer harassment policy and employer generally exercised reasonable care to prevent and correct sexual harassment); see, e.g., *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 993 (S.D. Iowa 2003) (granting summary judgment where plaintiff failed to report harassment pursuant to employer’s plan); *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*7 (N.D. Tex. Aug. 14, 2001) (denying summary judgment because plaintiff reported harassment pursuant to employer’s plan).

260. See Sherwyn, Heise & Eigen, *supra* note 6, at 1281, 1292 (showing that if employee properly complained, courts also have examined whether employer responded appropriately to complaint, such as by conducting an investigation or changing environment to control harassment, and whether employee reasonably participated in investigation process). Such actions relate to the employer prong’s requirement that the “employer exercise[] reasonable care to . . . correct promptly any sexually harassing behavior.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

261. E.g., *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) (stating that “the existence [of sexual harassment policy] militates strongly in favor of a conclusion that the employer ‘exercised reasonable care to prevent’ and promptly correct sexual harassment” (quoting *Faragher*, 524 U.S. at 807)); see also Grossman, *Culture of Compliance*, *supra* note 6, at 11 (“Courts have been strict with employers who do not meet this basic requirement of having a policy specifically dealing with sexual harassment, but have been flexible in approving different types of policies.”).

262. See *supra* Part I for a discussion of affirmative defenses to sexual harassment.

263. See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (holding that distribution of acceptable policy equates to convincing proof of sufficient prevention that can be rebutted only by evidence that “‘employer adopted or administered [a policy] in bad faith or that the policy was otherwise defective or dysfunctional’” (quoting *Brown*, 184 F.3d at 396)); see also *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999) (holding that company’s distribution of acceptable policy often satisfies first prong of affirmative defense).

“file cabinet compliance,”<sup>264</sup> having a policy regardless of its effectiveness, is credited to the employer even though it is not necessarily related to decreasing sexual harassment or otherwise avoiding the harms of sexual harassment.<sup>265</sup>

The focus of this Part is to examine the case doctrine regarding the employee-focused prong of the affirmative defense and how such doctrine meets or fails to meet the driving rationale of avoiding harm. Since the Supreme Court first articulated the employer’s affirmative defense to hostile work environment sexual harassment, the courts have failed to analyze all of the types of harm experienced by women employees subjected to supervisor sexual harassment. Similarly, the courts have failed to acknowledge fully all of the strategies such employees use to avoid those harms. As a result, because courts have judged employees’ responses almost exclusively based on whether employees reported the sexual harassment,<sup>266</sup> and because few employees actually do so,<sup>267</sup> the courts have regularly found no employer liability due to the employers’ satisfaction of the employee-focused prong.<sup>268</sup> One study showed that between June 1998 and January 2000, courts dismissed approximately seventy percent of supervisor sexual harassment cases based on defendants’ ability to prevail on the affirmative defense.<sup>269</sup> Such a limited analysis of harms and harm avoidance is inconsistent with the affirmative defense and the policy behind it and Title VII. This Part analyzes the body of case law regarding the employee-focused prong and concludes that the courts are almost consistently failing to properly credit employees with all of their harm avoidance actions and thus are not properly determining liability for supervisor sexual harassment.

A. “*Avoid Harm Otherwise*” Analysis Absent from Court Decisions

Regarding the employee-focused prong of the affirmative defense, many courts simply fail to consider whether the employee “avoided harm otherwise”

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264. Lawton, *supra* note 6, at 198.

265. *Id.*

266. See *supra* note 263 and accompanying text for examples of how courts almost exclusively look to whether employees reported the harassment instead of using other avoidance mechanisms.

267. See *supra* notes 178-83 and accompanying text for a discussion of research indicating that sexually harassed victims are unlikely to file a formal complaint.

268. See *Shaw*, 180 F.3d at 812-13 (finding affirmative defense to protect employer when harassment policy complaint procedure was not used by employee even though employee claimed to have never seen policy); *Fisher v. Elec. Data Sys.*, 278 F. Supp. 2d 980, 993 (S.D. Iowa 2003) (finding no liability for employer, as employer exerted reasonable care and employee unreasonably failed to take advantage of complaint filing procedure).

269. Marks, *supra* note 6, at 1453-54; Sherwyn, Heise & Eigen, *supra* note 6, at 1280-81; see also Chamallas, *supra* note 13, at 325 (stating that numerous courts have ruled in favor of employers on summary judgment since affirmative defense was created); Grossman, *The First Bite*, *supra* note 6, at 708-15 (stating that many trial courts do not examine facts to determine if employee complaint prior to harassment could have prevented harassment—instead they simply assume hostile work environment exists and look to see whether employer has sufficient evidence to prevail on affirmative defense). *But see* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 591 (2001) (explaining that prior to affirmative defense, plaintiffs who did not report harassment lost majority of time).

when analyzing the affirmative defense. This failure is a result of either conflating the two components of the employee-focused prong into one component or truncating the prong to exclude the “avoid harm otherwise” component altogether. For example, some courts simply delete the “avoid harm otherwise” component from the affirmative defense and state that the employer need show only that plaintiff failed to utilize the employer’s preventative or corrective opportunities.<sup>270</sup> More often, the courts recognize that the avoid harm otherwise component is a part of the rule but then fail to analyze it. These courts then conflate the two components of the employee-focused prong into the single analysis of whether the employee complained pursuant to the company’s policy and cooperated in any subsequent investigation.<sup>271</sup>

One case exemplifying this conflation is *Lane v. State of Oregon Department of Corrections*.<sup>272</sup> In this case, the court denied defendant’s motion for summary judgment stating that there was a dispute of facts as to the reasonableness of the employee’s failure to timely initiate a report of her supervisor’s sexual harassment.<sup>273</sup> The court found that because the supervisor had threatened that more harm would result if she complained and because the supervisor was respected and seen as a father-figure by other employees, a fact finder could decide it was not unreasonable for the employee to not timely complain.<sup>274</sup>

In denying the summary judgment motion, the court did not conduct any analysis of the “avoid harm otherwise” component, though there were many facts relevant to this analysis. For instance, the record showed that the employee, Lane, took specific actions in response to the sexual harassment in an attempt to mitigate her resulting harms. In order to mitigate possible job loss, Lane did not timely report the sexual harassment. She was a trial employee and feared termination because she was actually told by her supervisor that everyone would believe him and not her if she were to complain.<sup>275</sup> In addition, Lane stated that she did not file a complaint initially because “those in the chain of command were ‘tight,’ and she did not want the humiliation and embarrassment associated

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270. See, e.g., *Olson v. Lowe’s Home Ctrs., Inc.*, 130 Fed. App’x 380, 389-90 (11th Cir. 2005) (recognizing that second prong of affirmative defense is met where employee unreasonably failed to take advantage of employer’s preventative and corrective opportunities); *Newman v. Coll. of Mainland*, No. G-05-667, 2006 WL 3391445, at \*5 n.8 (S.D. Tex. Nov. 21, 2006) (finding that defendant did not meet burden of demonstrating that plaintiff failed to “take advantage of any preventative or corrective opportunities”); *MacKenzie v. Potter*, No. 04-C-4070, 2006 WL 1005127, at \*7, \*9 (N.D. Ill. Apr. 14, 2006) (correctly stating rule initially, but in actual analysis of employee-focused prong, failing to identify “avoid harm otherwise” component).

271. See, e.g., *Jernigan v. Alderwoods Group, Inc.*, 489 F. Supp. 2d 1180, 1197 (D. Or. 2007) (misstating prong as requiring employer-defendant to show that plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided [by the employer] to avoid harm”). Following the courts’ lead, scholars often conflate the two components of the employee-focused prong as well. See, e.g., *Sherwyn, Heise & Eigen*, *supra* note 6, at 1290 (finding employee’s failure to report is “tantamount to per se ‘unreasonable’ behavior” under employee-focused prong).

272. 2006 WL 3762104, No. G-05-1497-AA, at \*6 (D. Or. Dec. 18, 2006).

273. *Id.* at \*7.

274. *Id.*

275. *Id.* at \*4.

with filing a complaint of sexual harassment.”<sup>276</sup> Therefore, in not initially filing her complaint, Lane was managing the effect of reporting the harassment on two different harms—Lane was attempting to balance the increased emotional harms that would result from the filing with the potential that reporting might decrease the incidence of the sexual harassment itself. Lane also avoided her emotional harm and the sexual harassment when she made up “excuses so that ‘[the supervisor] would get the hint and not continue.’ For example, when [the supervisor] asked Lane if she ‘was ever going to meet him,’ Lane told [him] directly that she would not because of his wife, after which they rarely spoke.”<sup>277</sup> This action by Lane is a great example of the use of the external coping mechanism of assertion in order to manage the stressor—the harm—of sexual harassment.<sup>278</sup> Moreover, based on the court’s recounting of the supervisor’s response to Lane’s avoidance behavior, her behavior actually succeeded in stopping his sexual advances.<sup>279</sup> Accordingly, Lane took multiple harm avoidance actions. Nonetheless, the court did not use these harm avoidance actions as part of its affirmative defense analysis under the “avoid harm otherwise” component. Rather, the court only focused on the reasonableness of her failure to initiate a complaint, and that determination did not adequately acknowledge Lane’s full range of harms other than sexual harassment and her multiple harm avoidance actions other than reporting the harassment.

Returning to Lena and her situation, despite her multiple harms and harm avoidance actions discussed above, a court, following the trend in *Lane* and other court decisions, would inappropriately omit any “avoid harm otherwise” analysis in determining liability. Lena’s employer would most likely prevail on the affirmative defense and avoid liability by concentrating on the employer-focused prong and the first component of the employee-focused prong. Specifically, the employer would show that it had a policy and that Lena “unreasonably failed to take advantage of preventive and corrective opportunities” by failing to file a formal complaint under the policy.<sup>280</sup> The employer and the court would either ignore the second component of the employee-focused prong altogether or conflate it with the first component.<sup>281</sup> As a result, they would pay no attention to Lena’s other actions that were taken to avoid harm, including those harms other than sexual harassment. Lena might argue that it was not “unreasonable” for her to fail to complain because of Victor’s response to her informal complaint.<sup>282</sup> To date, such arguments, by and

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276. *Id.* at \*6.

277. *Lane*, 2006 WL 3762104, at \*6 (citation omitted).

278. See *supra* notes 178-84, 206-11, 218-20 and accompanying text for a discussion of employee coping mechanisms.

279. *Lane*, 2006 WL 3762104, at \*6 (explaining that Lane’s supervisor rarely spoke to her after she told him she would not “meet” him because he was married).

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

281. See *supra* note 39 and accompanying text for a discussion of limited applications of the second prong.

282. A very common analysis under the employee-focused prong is whether any delay by

large, have been unsuccessful.<sup>283</sup> Lena might also argue that her failure to complain was not “unreasonable” given her other actions to try to avoid the harm, such as moving away from Dave when he touched her inappropriately, avoiding Dave at work, trying to defuse the situation, and discussing her problem and the emotional toll on her with Karen.<sup>284</sup> Such arguments are becoming a bit more frequent in courts and courts have responded to these arguments with mixed success. At times, courts recognize that such actions may be a reasonable justification for employees’ delay in reporting, but usually courts do not credit the employees with avoiding their harm.<sup>285</sup>

As a result, despite the affirmative defense’s inclusion of the word “otherwise” to indicate that availing oneself of the employer’s formal mechanisms might be one of many ways to avoid harm,<sup>286</sup> in Lena’s case a narrow liability interpretation by the court most likely would only examine whether Lena complained pursuant to the employer’s policy.<sup>287</sup> This narrow

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plaintiff in reporting the sexual harassment was “reasonable.” See *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1178-79 (9th Cir. 2003) (holding that plaintiff’s hesitation in complaining to employer was unreasonable); *Hardy v. Univ. of Ill. at Chi.*, 328 F.3d 361, 365 (7th Cir. 2003) (finding that second prong was not satisfied because employer could not demonstrate that plaintiff’s delay in filing complaint was unreasonable); *Payano v. Fordham Tremont CMHC*, 287 F. Supp. 2d 470, 477 (S.D.N.Y. 2003) (explaining that, despite plaintiff’s fear, his failure to complain pursuant to policy was unreasonable); see also Grossman, *Culture of Compliance*, *supra* note 6, at 21-23 (discussing reasonableness of plaintiff’s failure to complain).

283. See, e.g., *Holly D.*, 339 F.3d at 1178-79 (finding plaintiff’s failure to complain third time was unreasonable, despite her discomfort and dissatisfaction with how employer handled situation on previous occasions). *But see Lane v. Or. Dep’t of Corr.*, No. G-05-1497-AA, 2006 WL 3762104, at \*7 (D. Or. Dec. 18, 2006) (recognizing outstanding factual issue as to whether employee’s failure to initiate a timely complaint was unreasonable under circumstances).

284. See *supra* Parts II and III.B.4 for a discussion of Lena’s harm avoidance actions based on the social science research regarding coping mechanisms for the stressors of sexual harassment.

285. See, e.g., *Mackenzie v. Potter*, No. 04-C-4070, 2006 WL 1005127, at \*9 (N.D. Ill. Apr. 14, 2006) (finding plaintiff’s attempts to ignore and personally remedy harassing behavior could not explain unreasonably long wait to file formal complaint, which denied employer chance to remedy situation). Clearly in *Mackenzie*, the plaintiff was employing harm avoidance mechanisms. Because the court failed to conduct an “avoid harm otherwise” analysis, the court did not credit plaintiff with any of her actions. See *Mackenzie*, 2006 WL 1005127, at \*9 (finding that plaintiff unreasonably failed to take advantage of employer’s corrective procedure due to seven-month delay in reporting). The court’s failure could be attributed to its incorrect reliance on notice to employer, rather than harm avoidance, as the policy rationale underlying the affirmative defense and liability determinations. See *infra* Part V.B for a discussion of how the “avoid harm otherwise” component of the affirmative defense should be discussed and analyzed in liability determinations of supervisor sexual harassment cases.

286. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). *But see* Grossman, *Culture of Compliance*, *supra* note 6, at 3 (suggesting that sexual harassment policies are not necessarily effective in deterring, preventing, or correcting sexual harassment).

287. In fact, one study shows that courts fail to consider any employee-related conduct, save for whether she filed a formal complaint of sexual harassment, in analyzing the employee-focused prong of the entire affirmative defense. Sherwyn, Heise, & Eigen, *supra* note 6, at 1285-86. This study shows that as long as the employer had an adequate policy and an adequate response to workplace sexual harassment, the employer would prevail on both prongs of the affirmative defense. *Id.* at 1286.

interpretation is consistent with many court decisions.<sup>288</sup> There would likely be no focus on the “avoid harm otherwise” component of the affirmative defense. As a result of its lack of attention to the second component, the court would fail in basing its liability decision on the affirmative defense’s animating principle of harm avoidance.

An even larger problem created by such an analysis is that the court would be constructing Lena as a nonactor because she failed to report the sexual harassment formally. Because we know that women employees do not complain but do take many other steps in response to sexual harassment,<sup>289</sup> the court’s focus on formal reporting alone necessarily focuses on an absence of action by the employee. Yet, women are taking other important mitigating actions to avoid harm, as discussed above.<sup>290</sup> Until courts properly analyze the “avoid harm otherwise” component of the affirmative defense and consider all harm avoidance actions,<sup>291</sup> courts will inaccurately construct women employees, such as Lena, as nonactors and make incorrect liability determinations.

*B. “Avoid Harm Otherwise” Analysis Present, but Limited*

Unlike the above-discussed cases, there are other cases in which courts actually have analyzed the “avoid harm otherwise” component or at least based its liability decision in part on actual harm avoidance. In those cases, however, the courts have too narrowly construed “harm” and “avoidance of harm.”<sup>292</sup> As a result, the courts fail to address comprehensively an employee’s mitigation of all of her damages resulting from sexual harassment. Such a failure is usually due

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288. *Id.* at 1286; *see also, e.g.*, *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1292 (11th Cir. 2003) (stating that employee avoids harm by filing complaint). *See also supra* note 28-29 and accompanying text for a discussion of employees’ typical responses to sexual harassment.

289. *See supra* Part III.B.2 for a discussion of externally focused harm avoidance mechanisms.

290. *Id.*

291. *See supra* Part III.B.4 for a discussion of Lena’s harm avoidance responses.

292. *See Walton*, 347 F.3d at 1289-91 (concluding that plaintiff’s fear of retaliation was not sufficient justification for her failure to report and “avoid harm otherwise”); *Mays v. City Sch. Bd.*, 5 F. App’x 181, 182 n.2 (4th Cir. 2001) (noting that plaintiff’s claim failed because, *inter alia*, she did not avoid contact with alleged harasser after supervisor instructed her to do so); *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (holding that plaintiff failed to “avoid harm otherwise” when she failed to avoid harasser, despite her formal complaint); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (considering only corrective mechanisms designed to stop sexual harassment in “avoid harm otherwise” analysis); *Cromer-Kendall v. District of Columbia*, 326 F. Supp. 2d 50, 64 (D.D.C. 2004) (holding that plaintiff defeated affirmative defense by reporting harassment, and thus defendant failed to show that plaintiff did not “avoid harm otherwise”); *Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 702 (S.D. Tex. 2003) (holding that “avoid harm otherwise” component does not require plaintiff to vacate her job position that subjects her to daily contact with harasser); *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*8 (N.D. Tex. Aug. 14, 2001) (defining “avoid harm otherwise” as requiring employee to provide notice of sexual harassment to employer); *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1178 (N.D. Iowa 2000) (finding “avoid harm otherwise” to be jury question where woman complained about sexual harassment to friend, who was also manager in company); *Green v. Servicemaster Co.*, 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999) (denying employer’s summary judgment motion due to factual dispute as to whether plaintiff’s complaint to union steward was attempt to “avoid harm otherwise”).

to the courts’ lack of consideration of the broad range of harms and harm avoidance behaviors rather than a rejection of their relevance to the liability determination under the affirmative defense. For instance, in *Speaks v. City of Lakeland*,<sup>293</sup> the court found that the plaintiff failed to use the employer’s complaint procedure.<sup>294</sup> Therefore, the court found that “[m]ost, if not all, of the harm to Plaintiff could have been avoided by Plaintiff simply reporting [her supervisor] at the beginning of the harassment.”<sup>295</sup> The court did not explore whether certain harms, such as employment, emotional, or psychological harms, were mitigated by the plaintiff’s decision to not report. In addition, the court did not discuss whether the plaintiff took other actions in order to decrease the harassment itself. Rather, because the plaintiff did not report the harassment, the court granted summary judgment to the employer because the “[p]laintiff did not exercise reasonable care to avoid sexual harassment by [the supervisor] or otherwise avoid harm.”<sup>296</sup> Unfortunately, the *Speaks* court is not alone in merely providing lip service to the “avoid harm otherwise” component of the affirmative defense and thereby failing to analyze fully all the harms and harm avoidance actions taken by the employee.

Regarding the concept of “harm,” courts have almost uniformly failed to pay attention to the diversity of harms suffered by victims of sexual harassment. To the extent that courts are looking to whether a plaintiff mitigated “harm,” the majority of courts have employed an inappropriately narrow construction to include the acts of sexual harassment only.<sup>297</sup> In a couple of cases, courts have acknowledged that one of the harms resulting from sexual harassment is ongoing contact with the harassing supervisor.<sup>298</sup> Several courts have also recognized that psychological trauma is a harm resulting from sexual harassment.<sup>299</sup> One case even cited to plaintiff’s lack of employment as a harm.<sup>300</sup> Yet on the rare

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293. 315 F. Supp. 2d 1217 (M.D. Fla. 2004).

294. *Speaks*, 315 F. Supp. 2d at 1229.

295. *Id.*

296. *Id.*

297. *See, e.g.,* *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (equating “harm” to sexual harassment); *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (failing to define “harm” explicitly but implicitly equating “harm” to sexual harassment); *Duhé v. U.S. Postal Serv.*, No. Civ.A. 03-746, 2004 WL 439890, at \*16 (E.D. La. Mar. 9, 2004) (equating harm to actionable hostile work environment); *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*8 (N.D. Tex. Aug. 14, 2001) (equating “harm” to sexual harassment); *Green v. Servicemaster Co.*, 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999) (reading “harm” as synonymous with sexual harassment).

298. *Cf. Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 702 (S.D. Tex. 2003) (recognizing implicitly harm that results from continued contact with supervisor but finding that employee need not leave job to “avoid harm”).

299. *See Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1289-91 (11th Cir. 2003) (recognizing that severe sexual harassment “can be particularly traumatic”); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003) (recognizing that reporting sexual harassment is scary, uncomfortable, and painful); *see also Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (citing *Walton* and *Reed* for proposition that reporting sexual harassment can be extremely unpleasant).

300. *Mueller v. McGrath Lexus of Chi.*, No. 02 C0021, 2003 WL 21688230, at \*9 (N.D. Ill. July 17,

occasions when the courts have recognized broader harms, the courts usually fail to credit the plaintiff with having attempted to balance her harms by taking action that might decrease some harms while not affecting or increasing other harms. This failure is especially true if the plaintiff has chosen an action that may decrease her emotional harm but results in her failure to report the sexual harassment.<sup>301</sup>

Similarly, on the all too rare occasions when the courts have actually paid attention to the “avoid harm otherwise” component of the affirmative defense, they have also too narrowly determined which actions to credit as harm avoiding.<sup>302</sup> Such limitations are most likely due to the fact that the majority of courts, as discussed above, have analyzed only a limited universe of harms to be avoided.<sup>303</sup>

To the extent that “avoiding harm” has been discussed, most courts have acknowledged only a plaintiff’s reporting of the sexual harassment to her employer pursuant to the official policy against sexual harassment as “avoiding harm.”<sup>304</sup> At times, the courts have recognized other reporting actions as

2003).

301. *Walton*, 347 F.3d at 1290 (holding that even though reporting sexual harassment can be traumatic, employer will not be held liable because plaintiff’s failure to report precluded employer from being able to correct sexual harassment); *Reed*, 333 F.3d at 35 (noting that employee’s “painful effort” of reporting sexual harassment is necessary to impose liability on employer); see also *Brown*, 184 F.3d at 390-91, 397 (finding that plaintiff failed to avoid harm even though she reported harassment because plaintiff, in order to protect her employment, did not avoid harasser); Chamallas, *supra* note 13, at 384-85 (discussing courts’ tendency to undervalue emotional harm by not seeing it as related to economic harm and also job-related injury).

302. It should be noted that many courts explicitly or implicitly have recognized that the employer cannot satisfy the employee-focused prong if the employee had availed herself of either the employer-provided preventive or corrective mechanisms or avoided harm otherwise. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (holding that either employer complaint or union complaint can satisfy employee-focused prong). Such a decision is logical because the affirmative defense language clearly requires the employer to prove that plaintiff both failed to use the complaint mechanism and to avoid harm otherwise. There is one case, however, that held that an employer satisfied the employee-focused prong because the employee had only availed herself of the policy and had not avoided harm otherwise. *Brown*, 184 F.3d at 397 (holding that “or” in employee-focused prong requires employer to prove only one of two components in prong; therefore, despite fact that plaintiff had complained pursuant to policy, because she socialized with her supervisor and was sexually harassed again by him, she had failed to avoid harm and no liability would attach). Another case decided that whether a plaintiff “avoided harm otherwise” is only relevant to the liability determination under the affirmative defense if it justified the employee’s failure to report the sexual harassment. *Williams v. Multnomah Educ. Serv. Dist.*, No. CIV. 97-1197-ST, 1999 WL 454633, at \*10 (D. Or. Apr. 14, 1999). The *Brown* and *Williams* cases are rightly outliers given the animating policy behind the affirmative defense of avoiding harm.

303. See *supra* Part III.A for a discussion of the broad range of harms that can result from sexual harassment.

304. See, e.g., *Duhé v. U.S. Postal Serv.*, No. Civ.A. 03-746, 2004 WL 439890, at \*16 (E.D. La. Mar. 9, 2004) (“If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.”). As noted *infra* Part V.B, equating the reporting of sexual harassment with avoidance of harm is ironic considering that social science research has shown that employer policies, complainant reporting, and employer investigations do not necessarily reduce sexual harassment. Grossman,

“avoiding harm otherwise” if they provided some form of notice to the employer.<sup>305</sup> For instance, a few courts have found that even though plaintiff’s reporting did not technically comply with the employer’s policy because plaintiff complained to a manager not identified in the employer’s sexual harassment policy, plaintiff’s actions “avoided harm otherwise” because they notified the employer of the harassment.<sup>306</sup> Despite interpreting victims’ actions favorably, this interpretation inappropriately limits the “avoid harm otherwise” component. As the Supreme Court designed the employee-focused prong to increase harm avoidance, all forms of harm avoidance, not just notifying the employer, should be analyzed.<sup>307</sup>

Other courts have correctly analyzed the “avoiding harm otherwise” component by recognizing any action that is aimed at avoiding harm. For instance, courts have recognized that grieving the sexual harassment to one’s union can constitute “avoiding harm otherwise” because it is a corrective mechanism aimed at avoiding the harm of harassment.<sup>308</sup> Some courts also have acknowledged, on occasion, plaintiff’s actions to avoid the harassing supervisor himself as relevant to the “avoid harm otherwise” component.<sup>309</sup> One court identified that whether a plaintiff stayed in or quit her job was relevant to “avoiding harm otherwise.”<sup>310</sup> Nevertheless, the courts’ analyses are incomplete because they primarily recognize harm avoidance actions only for their effect on sexual harassment and not on any other harms.

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*Culture of Compliance*, *supra* note 6, at 3.

305. See *Fields v. Ill. Dep’t of Corr.*, No. 03-cv-4222-JPG, 2006 WL 2645200, at \*15 (S.D. Ill. Sept. 12, 2006) (finding that employee’s technical compliance with policy that permitted reports to EEOC or employer still constituted unreasonable failure to make use of policy in way that would provide employer with notice); *EEOC v. V & J Foods, Inc.*, No. 05-C-194, 2006 WL 3203713, at \*7-8 (E.D. Wis. Nov. 3, 2006), *rev’d*, 507 F.3d 575 (7th Cir. 2007) (requiring employee to provide notice to employer to meet employee affirmative defense). But see *infra* Part V.B for a discussion and critique of the notice requirement.

306. See, e.g., *Taylor v. United Reg’l Health Care Sys., Inc.*, No. CIV. A. 700CV145-R, 2001 WL 1012803, at \*8 (N.D. Tex. Aug. 14, 2001) (applying test where actions to “avoid harm” entail notifying management of harassment, including notifying managers outside of formal complaint mechanism); *Cherry v. Menard*, 101 F. Supp. 2d 1160, 1178 (N.D. Iowa 2000) (concluding that actions to “avoid harm” may include complaining to manager not identified in formal complaint mechanism, even if manager is friend).

307. See *supra* Part I for a discussion of the Supreme Court’s employee-focused prong as articulated in *Faragher* and *Ellerth*.

308. See, e.g., *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999) (holding that actions to “avoid harm” include filing union grievance); *Green v. Servicemaster Co.*, 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999) (finding that filing union grievance can be avoiding harm otherwise).

309. E.g., *Brown v. Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (concluding that plaintiff failed to “avoid harm” because she socialized with supervisor); *Rodriguez v. City of Houston*, 250 F. Supp. 2d 691, 702 (S.D. Tex. 2003) (holding that plaintiff need not vacate her job position that subjects her to daily contact with harasser in order to “avoid harm” effectively).

310. *Mueller v. McGrath Lexus of Chi.*, No. 02 C 0021, 2003 WL 21688230, at \*9 (N.D. Ill. July 17, 2003) (holding that plaintiff’s quitting of her job despite fact that sexual harassment had ceased was failure to avoid harm).

A good example of the courts' general failure to analyze fully all harms when analyzing harm avoidance acts is *Walton v. Johnson & Johnson Services, Inc.*<sup>311</sup> In *Walton*, the court correctly identified that there were multiple, relevant harms resulting from the sexual harassment.<sup>312</sup> Specifically, the court recognized that the sexual harassment was one harm and the psychological trauma was another.<sup>313</sup> Nonetheless, the court only credited as "harm avoidance" actions taken by the plaintiff those actions it determined would have eradicated the sexual harassment.<sup>314</sup> As a result, the court dismissed the relevance of plaintiff's psychological trauma being exacerbated as a result of reporting the harassment.<sup>315</sup> This court's narrowing of harm avoidance, though inappropriate, is not surprising given the multitude of court decisions that fail to properly recognize all harms and harm avoidance when making liability determinations.

Courts that either ignore an "avoiding harm" analysis altogether or narrowly construe harm avoidance are incorrectly analyzing the affirmative defense. As discussed earlier, in *Faragher v. City of Boca Raton*<sup>316</sup> and *Ellerth v. Burlington Industries, Inc.*,<sup>317</sup> the Supreme Court's analysis made clear that harm avoidance is the motivating principle for liability determinations for supervisor sexual harassment.<sup>318</sup> Without properly analyzing all of the harms and the ways in which they are avoided, the courts fail to credit employees with their full range of harm avoidance.

#### V. RECONCEPTUALIZING "AVOID HARM OTHERWISE"

This Part explores how the "avoid harm otherwise" component of the affirmative defense should be discussed and analyzed in liability determinations of supervisor sexual harassment cases.

##### A. "Avoiding Harm Otherwise"

In order to determine liability, an employer must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the "employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>319</sup> If the employee utilized the employer's mechanisms, then the employer has failed to meet its burden and liability should attach, regardless of whether she avoided any other harm in any other way. The reason for this

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311. 347 F.3d 1272 (11th Cir. 2003).

312. *Walton*, 347 F.3d at 1290.

313. *Id.* at 1283.

314. *Id.* at 1290.

315. *Id.* at 1290-91.

316. 524 U.S. 775 (1998).

317. 524 U.S. 742 (1998).

318. See *supra* notes 51-85 and accompanying text for a detailed discussion of the *Faragher* and *Ellerth* cases.

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

result is that the employer has supposedly, in part, created the policy to avoid the harm of harassment. Therefore, if the employee avails herself of reporting, she satisfies what the employer thought was necessary to avoid harm.

On the other hand, assuming that the employee unreasonably failed to use the employer’s process for reporting the sexual harassment, the employer should still be required to show that plaintiff did not avoid harm otherwise. This inquiry should explore all of the harms identified by the case law, social science research, and workplace studies.<sup>320</sup> As stated earlier in this Article, these harms should include the sexual harassment; the stigma of discrimination; the resulting tangible job harm, such as termination or nonpromotion; the resulting intangible job harm, such as an abusive work environment and loss of employment advancement; economic harm; and emotional, psychological, and physical harms. In response to these harms, women who are sexually harassed utilize a wide range of strategies to avoid these harms, such as avoiding the harasser, objecting to the harasser, formally complaining about the sexual harassment, seeking support from friends and family, and ignoring thoughts about the sexual harassment and denying that the harassment occurred.<sup>321</sup> And of course, because one harm avoidance strategy may decrease one type of harm while increasing another, the determination of liability based on “avoid harm otherwise” requires a court to weigh the various strategies employed and their effectiveness in mitigating damages in the aggregate, as required by the avoidable consequences doctrine.<sup>322</sup>

The support for a robust “avoid harm otherwise” analysis is grounded in the rationale for the affirmative defense, the avoidable consequences doctrine, and damages theory. In addition, it is supported by the social science and workplace studies that document employees’ harms from sexual harassment and their coping mechanisms to diminish these harms. And because the courts more often than not have ignored the “avoid harm otherwise” component of the employee-focused prong of the affirmative defense, no body of case law has systematically defined the contours of this component and its role in liability determinations. Any cases that have identified competing harms and strategies of harm avoidance<sup>323</sup> have not thoroughly explored the social science research and the Supreme Court’s reasoning behind the affirmative defense when dismissing the emotional and other harms that can result from making an official sexual harassment complaint. As a result, this area has been underexplored. Employees, employers, lawyers, and courts should begin to analyze all of the harms resulting from sexual harassment and whether the employee has attempted to mitigate them.

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320. See *supra* Part III.A for a listing and discussion of the different types of harms.

321. See *supra* Part III.B for a discussion of harm avoidance mechanisms.

322. See *supra* Part IV.B for a discussion of the analyses used in assessing liability when based on the “avoid harm otherwise” doctrine.

323. *E.g.*, *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003) (identifying competing harms and strategies of harm avoidance).

For instance, in Lena's case, as discussed above, Lena has been subjected to multiple harms and she has taken multiple actions to avoid harm. Lena has suffered the sexual harassment of being touched by Dave on her thighs, lower back, and arms. She has also suffered the intangible job harm of having her complaint about the sexual harassment be discounted by Victor when he made a joke of the sexual harassment. In addition, she is worried about being ostracized at work if she complains to her other coworkers because she thinks they too will not take it seriously. She is also worried about losing her job if she complains further. In addition, Lena is suffering other work harm with direct economic consequences in that she is taking more sick leave than she ever has in the past and she is not volunteering for, and is even turning down, overtime work. Her less frequent attendance and willingness to work overtime may also be causing her supervisors and colleagues to view her as less enthusiastic about her position or even not a team player. She is also suffering lost joy in her work, she feels dread about going to work, and she is on edge. These effects constitute the emotional harms that she is suffering. Finally, she is suffering the physical harms of loss of appetite and difficulty in sleeping.

As stated above, to deal with these harms, Lena has acted in many different ways. She employed externally focused coping mechanisms to avoid harm. She physically avoided Dave by calling in sick, not working overtime, and asking Dave to meet with her in the cubicle. She also avoided conflict by moving her body away from Dave to prevent him from being able to touch her rather than confronting him about his inappropriate touchings. She did complain to Victor, the acting director of the department when Dave was absent. Although he was not the official to whom she was supposed to make an official complaint, he was someone she trusted to reveal the harassment. In addition, Lena sought social support by talking with Karen about her treatment by Dave and its impact on Lena's health and attitude toward work. Lena also reattributed what Dave did to her as accidental or just informality.

As discussed above, the research shows that Lena's harm avoidance mechanisms might be effective in diminishing various harms but might increase other harms.<sup>324</sup> Looking at just one of her behaviors, her avoidance of Dave, the number of questions that need to be answered becomes apparent. These questions include: How did the physical moving away from Dave impact the sexual harassment in frequency, manner, and severity? How did it impact her emotional harm, such as her feeling on edge? How did it impact her appetite and sleeping? How, if at all, did it impact her work relationships with coworkers? When she was able to meet with Dave in her cubicle, was she less inclined to take sick leave or more likely to take on overtime work? For each harm avoidance mechanism, similar questions arise that are both fact specific to Lena's situation as well as to the larger research findings of the interaction between harm avoidance actions and harms.

But throughout this process, one thing does become clear. By exploring these questions, we develop a more complex view of Lena. What emerges is a

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324. See *supra* Part III.B.4 for a discussion of Lena's harm avoidance mechanisms.

picture of Lena as an actor, not one who is passive and simply submitting to the sexual harassment. For this reason alone, and despite the many questions remaining, there is value in exploring all of Lena’s harms and harm avoidance actions. By the end of the inquiry, there should be a more reliable understanding of whether liability should attach to the employer because of Lena’s attempts to avoid harm as required under the avoidable consequences doctrine.

*B. “Avoiding Harm Otherwise” Should Not Always Require Notice to the Employer*

The preceding section discussed this Article’s proposal for crediting an employee with her harm avoidance actions in determining liability for supervisor sexual harassment. It is true that, under this harm avoidance proposal, there might be times in which an employer will be held liable despite having no notice of the sexual harassment. Such a result is not problematic, as the liability determination must focus on harm avoidance rather than employer knowledge. A harm avoidance focus comports with the underlying avoidable consequences rationale of the affirmative defense and broader liability framework for supervisor sexual harassment. Accordingly, the focus should be on whether the action taken was reasonably calculated to avoid the harms from sexual harassment. Within this analysis, notice to the employer needs to be examined as to whether it actually avoids harms. As explained below, employer notice does not necessarily avoid all the harms of sexual harassment and therefore cannot, without more, be a prerequisite for attaching liability to the employer.<sup>325</sup>

For many reasons, the assumption that employers who receive reports of sexual harassment then act to stop the harassment is not necessarily true. For instance, there have been many studies that show that rather than decreasing harassment, such reports may instead cause retaliatory adverse treatment of the complainant.<sup>326</sup> In addition, Martha Chamallas has shown that employees who lodge formal complaints of sexual harassment suffer subsequent work-related

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325. Even if there could be agreement that notice to employers about sexual harassment would decrease harassment in the workplace, it is not clear that employer policies laying out complaint mechanisms are, or could ever be, effective on their own in providing employer notice. For instance, Joanna Grossman explains that there is no social science research to support the assumption that requiring victims of harassment to complain pursuant to company antiharassment policies, without also grappling with such things as gender balance in the workplace, organizational power, and treatment of prior complainants, will actually increase the reporting of incidents because the least likely response to harassment is for an employee to complain. Grossman, *Culture of Compliance*, *supra* note 6, at 23, 52-56; *see also* Chamallas, *supra* note 13, at 374 (noting that it is “atypical” for victims to file internal complaint even when incident is grievous enough to ultimately lead to legal action). The fact that an employer policy does not always result in increased formal reporting and thus a deterrence of sexual harassment is not surprising. As David Sherwyn and his coauthors argue, the requirement that employees provide notice to employers in order to attach liability actually provides employers with the incentive to create policies hoping no employee will ever use them. Sherwyn, Heise & Eigen, *supra* note 6, at 1294.

326. Chamallas, *supra* note 13, at 375 (citing two different studies showing that large percentage of employees who complained about sexual harassment—thirty-three percent in one study and sixty-one percent in another—also suffered subsequent retaliation).

harms because they are often viewed as troublemakers and ostracized by coworkers.<sup>327</sup>

Such treatment underscores the reality that it is the workplace's informal organization, not its formal organization of reporting and investigation procedures, that controls the environment and the occurrence of sexual harassment in the workplace.<sup>328</sup> Chamallas explains that the ineffectiveness of formal grievance procedures is due in part to the fact that such procedures are created in order to protect employers from liability, not to seek justice for civil rights violations.<sup>329</sup> Specifically, the procedures:

allow the employer to control the process and assure that compliance does not interfere with the employer's other more pressing interests. The decisionmaker is not neutral in the sense of not being accountable to either side; rather, the person assigned to resolve the dispute is an employee of the potential defendant who has an interest in minimizing the extent of the conflict, saving the image of the employer, and maintaining smooth relationships. His or her main job is to insulate the employer from legal liability, a goal that may not always coincide with cutting down on the incidence of sexual harassment.<sup>330</sup>

Finally, there are other reasons why formal reporting to the employer, and thus notice itself, does not necessarily decrease the incidence of sexual harassment. The formalization of the complaint processing has resulted in many complaint processing officials who may not understand sexual harassment law and how it fits into the broader civil rights policies and laws.<sup>331</sup> As a result, they receive the complaints and try to problem-solve them as "personality clashes" rather than view the complaints as part of a pattern of systemic discrimination.<sup>332</sup> And the way in which these complaints are processed further isolates complaints to individual acts of harassment. This isolation results because it is very common for the employer to require that the harassed employee agree to keep her harassment confidential as part of the processing of her complaint.<sup>333</sup> As a result, the confidentiality obligation limits the employee's opportunity to discuss her harassment with other employees who might be similarly affected and could otherwise come forward to show a larger pattern of harassment.<sup>334</sup> In the end, an isolated incident of harassment is less likely to be eradicated aggressively or

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327. *Id.* at 376.

328. *Id.* at 377-78; *see also* Marshall, *supra* note 178, at 85-86 (noting critics' opinions that internal procedures "are susceptible to the prejudices and power disparities that exist in organizations"). As Chamallas states, "[w]hether an organization discourages or tolerates harassment may have more to do with the personal style and commitments of top managers than the formal policies in the employee handbook." Chamallas, *supra* note 13, at 378.

329. Chamallas, *supra* note 13, at 379.

330. *Id.* (footnotes omitted).

331. *Id.* at 379-80.

332. *Id.* at 379; *see also* Marshall, *supra* note 178, at 86, 115-16 (showing that, ultimately, employees' rights are reinterpreted from civil rights to management interests).

333. *See* Chamallas, *supra* note 13, at 379 (noting that internal grievance procedures often deal with complaints confidentially).

334. *Id.*

disciplined than a pattern of systemic sexual harassment that is impacting the civil rights of numerous female employees. Because of the culture of formal complaint processing, notice itself does not necessarily decrease the incidence of sexual harassment. Accordingly, because there is no definitive correlative relationship between notice and the deterrence of sexual harassment, Theresa Beiner questions whether courts should even credit the employer with a defense to liability when there is a lack of “notice.”<sup>335</sup>

There are numerous examples in case law as well that show that notice by itself does not always eradicate sexual harassment in the workplace. For instance, in *Cerros v. Steel Technologies, Inc.*,<sup>336</sup> despite plaintiff telling the supervisors and the plant manager about the harassment, the company failed to correct the harassment or deter future harassment, thus failing to deter the act of sexual harassment.<sup>337</sup>

As shown above, notice does not necessarily avoid the harm of sexual harassment itself. In addition, notice may not have any impact on the mitigation of the employee’s other harms, such as other employment-related, economic, emotional, psychological, and physical harms.<sup>338</sup> Therefore, notice cannot and should not monopolize the analysis of the “avoid harm otherwise” component of the affirmative defense.

Below is a discussion of one court’s flawed reasoning that notice to the employer of the harassment automatically translates into the cessation of the harassment and that, therefore, such notice is the only meaningful manner by which an employee can avoid her harms. In this case, by giving notice primacy, the court improperly limited the manner by which an employee could satisfactorily “avoid harm otherwise” because such reasoning ignored other cognizable harms and appropriate manners to mitigate those harms.<sup>339</sup> In *Fields v. Illinois Department of Corrections*,<sup>340</sup> the Illinois Department of Corrections (“IDOC”) had a sexual harassment policy that permitted the targeted employee to report the sexual harassment to the IDOC or to file a complaint with the EEOC.<sup>341</sup> Ms. Gunn, one of the plaintiffs in this case, chose the option that permitted her to file an EEOC complaint rather than file an internal IDOC complaint.<sup>342</sup> The court stated that under the affirmative defense, “[t]he requirement that an employee report sexually harassing conduct arises out of her

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335. Beiner, *Women’s Stories*, *supra* note 6, at 143-44.

336. 398 F.3d 944 (7th Cir. 2005).

337. *Cerros*, 398 F.3d at 953-54.

338. See *supra* notes 325-30 and accompanying text for a discussion of the impact of notice on avoidance of other harms.

339. *Fields v. Ill. Dep’t of Corr.*, No. 03-cv-4222-JPG, 2006 WL 2645200, at \*15 (S.D. Ill. Sept. 12, 2006).

340. No. 03-cv-4222-JPG, 2006 WL 2645200, at \*15 (S.D. Ill. Sept. 12, 2006).

341. *Fields*, 2006 WL 2645200, at \*15. Specifically, the court found that “the policy urged employees to use the internal complaint process to obtain a resolution to sexual harassment complaints, [but] it also allowed an employee to proceed directly to the Illinois Department of Human Rights or the Equal Employment Opportunity.” *Id.* at \*2.

342. *Id.* at \*15.

duty to take reasonable care to avoid harm.”<sup>343</sup> The court continued that “the law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists.”<sup>344</sup> Accordingly, the court determined that in filing a complaint with the EEOC, rather than reporting the harassment to the employer, plaintiff had failed to use the employer-provided measure that would stop the harassment.<sup>345</sup>

The *Fields* court’s reasoning is inconsistent with the plaintiff’s duty to avoid harm.<sup>346</sup> The court failed to identify that although the employer’s burden under the affirmative defense is to attack the sexually harassing behavior, it is the plaintiff’s job to avoid her harms and that avoidance can be done by following the employer’s policy, which in fact the plaintiff did do here, or by other actions. In dismissing Ms. Gunn’s decision to complain to the EEOC rather than the IDOC, the court stated that plaintiff’s “technical compliance” with the IDOC’s policy was irrelevant and instead the “question is whether [Gunn] unreasonably failed to use measures available to her to try to stop the harassment.”<sup>347</sup> The court continued that “[t]he evidence is clear that [Gunn] failed to use those measures—whether they be an internal complaint or an EEOC charge—in a timely manner to attempt to give IDOC notice of the harassment and to give it an opportunity to stop it.”<sup>348</sup> The court’s analysis in effect erased the broad principle of avoiding harm and required instead that the necessary employee actions for attaching liability to the employer were only those that gave the employer enough timely information about the ongoing sexual harassment for the employer to actually stop the harassment.

Beyond inappropriately limiting the range of harm avoidance actions to notice, the court failed to discuss any harms other than sexual harassment or any satisfactory harm avoidance actions other than filing a timely report. For instance, the court did not explore whether the filing of an internal complaint would have exacerbated plaintiff’s emotional or psychological harm. Nor did the

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343. *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *Cerros v. Steel Tech., Inc.*, 398 F.3d 944, 952 (7th Cir. 2005)).

344. *Id.* (quoting *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1038 (7th Cir. 1998) (alteration omitted)).

345. *Fields*, 2006 WL 2645200, at \*15.

346. It should be noted that another case, also in the Seventh Circuit, also narrowly construed harm avoidance. *EEOC v. V & J Foods*, 2006 WL 3203713, at \*7-8 (E.D. Wis. Nov. 3, 2006), *rev’d*, 507 F.3d 575 (7th Cir. 2007). In *V & J Foods*, the court again required that the plaintiff provide the employer with notice in order to satisfy the employee-focused prong of the affirmative defense. *Id.* at \*7. The court based its decision on the fact that the policy rationale to avoid harm is met only if plaintiff provided the employer “with the knowledge and the means to avoid future harassment.” *Id.* at \*8. For reasons discussed in this Part, such an interpretation of how harm is to be avoided is far too narrow. Nevertheless, the Court of Appeals for the Seventh Circuit reversed and remanded on the grounds that burden was on the defendant employer to demonstrate establishment and implementation of “an effective complaint machinery.” *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 580 (7th Cir. 2007).

347. *Fields*, 2006 WL 2645200, at \*15.

348. *Id.*

court recognize that Gunn took other forms of harm avoidance actions beyond her policy-permitted complaint to the EEOC. For instance, Gunn told one of her supervisors, Parker, that she was offended by his sexual comments about her anatomy,<sup>349</sup> she indicated to another one of her supervisors, Turner, that she did not appreciate his sexual advances,<sup>350</sup> and she filed an IDOC incident report about Parker’s sexually inappropriate and offensive conduct.<sup>351</sup> In addition, in its calculation that Gunn’s failure to file an internal IDOC complaint was an unreasonable failure to avoid harm, the court failed to acknowledge Gunn’s severe employment-related harms that were created and aggravated by another plaintiff’s IDOC internal complaint of sexual harassment that identified Gunn as a target of sexual harassment.<sup>352</sup> As a result of the other plaintiff’s complaint, IDOC subjected Gunn to scrutiny not suffered by other employees that resulted in numerous disciplinary actions, including reprimands and suspensions.<sup>353</sup>

In sum, the *Fields* court failed to analyze and consider all harms and harm avoidance actions in its liability determination. Although the court’s recognition that avoidance of harm was the animating principle for employer liability is a correct and important one, the court’s failure to analyze all of Gunn’s harm avoidance actions taken to avoid all of the harms resulting from the sexual harassment resulted in a liability determination that was not based on the true avoidance of harm.

Accordingly, avoiding harm cannot always be satisfied by notice. In addition, by focusing exclusively on whether an employee provided notice of the sexual harassment to her employer, courts are failing to acknowledge and analyze all of the harms resulting from sexual harassment and all of the strategies an employee utilizes that are reasonably calculated to avoid these harms. The result is that a liability determination is not being made based on a thorough analysis of the harm avoidance principle.<sup>354</sup>

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349. *Id.* at \*3.

350. *Id.*

351. *Id.* at \*4.

352. *Fields*, 2006 WL 2645200, at \*4-7.

353. *Id.*

354. Theresa Beiner has provided another argument against a liability standard that requires notice. Specifically, Beiner has argued that a liability standard that requires notice to the employer of any sexual harassment would provide more protection to the employer, who is not a victim here, than to the employee, who is the actual victim of sexual harassment. Beiner, *Women’s Stories*, *supra* note 6, at 141-44. Moreover, it would provide absolutely no Title VII remedy to an employee who was in fact sexually harassed and whose workplace was affected. *Id.* at 144. Beiner has stated that supervisor sexual harassment should be considered a cost of business similar to a supervisor’s discriminatory firing of an employee. *Id.* at 145. Accordingly, as no notice is required before liability could attach for a discriminatory firing by a supervisor, no notice should be required before liability could attach for supervisor sexual harassment.

C. *Avoiding Harm Should Be More Important than Conciliation as an Animating Policy Behind the Affirmative Defense*

Similarly, in evaluating an employee's actions under the affirmative defense, it is more appropriate to analyze whether those actions serve to avoid the employee's harms from sexual harassment than whether they promote informal conciliation. It is true that in articulating the affirmative defense, along with the importance of harm avoidance, the Supreme Court noted the importance of Congress's preference for conciliation rather than litigation of Title VII violations.<sup>355</sup> The Court reasoned that having a policy of nonharassment and a mechanism by which an employee could complain would enable the employer to resolve informally an employee's sexual harassment claim.<sup>356</sup> As a result, there would be fewer charges of discrimination filed with the EEOC and less litigation of such complaints in court.<sup>357</sup> Despite the underlying rationale for the affirmative defense, there are several reasons why conciliation is not necessarily promoted by the liability framework and, therefore, whether an employee's actions are analyzed as promoting conciliation should not be the basis for liability attachment.

First, as explained by Chamallas, effective conciliation is not achieved when the conciliation decision makers are not neutral.<sup>358</sup> The type of conciliation that is promoted through the affirmative defense framework is one in which the employer is both a party to the conciliation effort and the decision maker.<sup>359</sup> This structure is flawed because the decision makers are accountable to the employer and, therefore, will tend to make decisions that are not based solely on the best conciliation outcome for both parties.<sup>360</sup> In addition, the employer's conciliation process, as discussed above, is not solely intended to reach an agreement without litigation but also to protect the employer from legal liability.<sup>361</sup> Further, a true conciliation process at its core is intended to provide a speedy remedy to a plaintiff.<sup>362</sup> Yet employer conciliation mechanisms are often constructed to

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355. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

356. *Id.*

357. *See Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004) (noting that linking employer's effective grievance procedures to liability promotes conciliation rather than litigation (citing *Ellerth*, 524 U.S. at 764)). In addition, the Court stated that the affirmative defense promoted conciliation in another way. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998). Specifically, a liability scheme that would find automatic liability for explicit and implicit uses of power by the supervisor would encourage litigation rather than conciliation of all supervisor sexual harassment claims. *Id.* at 805. Accordingly, because the affirmative defense can preclude strict liability for the class of sexual harassment claims that do not result in a tangible employment action without conciliation efforts, the Court would be hindering litigation. *Id.*

358. Chamallas, *supra* note 13, at 379.

359. *Id.*

360. *Id.*

361. *Id.*; *see also Marshall, supra* note 178, at 86 (noting managers' competing duties to shield employer from liability and to redress employee grievances).

362. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 228-29 (1982) (analyzing lower court's holding on premise that conciliation is tool to get remedy to plaintiff quickly because litigation is so slow).

ensure the dismissal of plaintiffs' claims by only minimally complying with the employer-focused prong of the affirmative defense, thus ensuring that the complaint mechanisms are not truly effective in getting the employees to complain pursuant to them.<sup>363</sup> It is precisely because of these flaws that employer-run conciliation is not effective. In fact, under Title VII and previous Supreme Court cases, the conciliation goal that is envisioned is one that would occur through a neutral entity, such as the EEOC, not the employer.<sup>364</sup> Therefore, under the affirmative defense, it does not make sense to prioritize conciliation mechanisms that are operating solely to protect employers from liability over harm avoidance mechanisms.

Second, as discussed earlier, notice should not be a required element of a harm avoidance action to be credited to an employee.<sup>365</sup> Yet, implicit in the conciliation rationale is the notion that an employee subjected to sexual harassment would need to provide notice to the employer and an opportunity to resolve the complaint prior to any litigation. Conciliation may be a path to harm avoidance, but it is not the only or most effective one.

Finally, it is important to note that despite the conciliation rationale, the affirmative defense does not bar liability in all instances where conciliation with the employer is not attempted. For instance, if the sexual harassment is one severe act of sexual harassment, such as a supervisor raping an employee, then the affirmative defense would not bar liability even though there was no opportunity to provide notice by reporting that rape and conciliate the claim before the sexual harassment had occurred.<sup>366</sup> Accordingly, for the reasons discussed above, conciliation cannot be the primary motivating rationale over harm avoidance in deciding affirmative defense cases when it is merely a pretext

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363. See Chamallas, *supra* note 13, at 379-80 (noting main goal of internal grievance procedures is to shield employers from liability and that private enforcement procedures threaten Title VII by failing to address reality adequately).

364. See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 552 (1982) (Powell, J., dissenting) (noting that EEOC executes Title VII's procedures for conciliation).

365. See *supra* Part V.B for a discussion of the reasoning against an employer notice requirement.

366. See *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999) (noting that affirmative defense, which was “adopted in cases that involved ongoing sexual harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipated sexual harassment”); see also *Watkins v. Prof'l Sec. Bureau, Ltd.*, No. 98-2555, 1999 WL 1032614, at \*4-5 (4th Cir. 1999) (using affirmative defense and finding that employee who waited four months before reporting that her supervisor raped her acted unreasonably according to second prong of affirmative defense, and, moreover, employer satisfied first prong of defense as it did not fail to exercise reasonable care by not anticipating supervisor was potential rapist); *id.* (noting that when employee promptly complains of sexually harassing behavior and employer promptly responds, disciplines the harasser, and stops the harassment, there will be no actionable behavior); *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 804 n.52 (5th Cir. 1999) (Wiener, J., specially concurring) (contending that under *Faragher* and *Ellerth*, when supervisor engages in “sufficiently severe conduct,” e.g., rape, employer may be vicariously liable regardless of timeliness of employer's response or plaintiff's complaint); Marks, *supra* note 6, at 1423-28 (discussing fact that some courts have nonetheless held that employer should be able to defeat liability by merely establishing employer-focused prong without showing that employee complained pursuant to policy under employee-focused prong).

for providing notice.

#### CONCLUSION

As seen in this Article, the concepts of employee harms and harm avoidance are important to the liability framework for hostile work environment sexual harassment by a supervisor. Whether an employer is liable for supervisor sexual harassment depends in part on whether the employee avoids her harm or mitigates her damages resulting from the sexual harassment. Despite the law's interest in employees' harm avoidance, courts have failed to explore fully the vast array of harms resulting from sexual harassment and the variety of ways in which employees avoid these multiple harms.

This Article reframes the legal discussion of employees' actions in response to sexual harassment from one that almost exclusively focuses on whether the employees failed to report the sexual harassment. As discussed above and shown through the story of Lena, a limited view of the affirmative defense, one that merely considers whether the employer had a policy and whether the employee formally complained thereto, constructs women employees as nonactors because they do not complain about being sexually harassed. They appear as "silent sufferers."<sup>367</sup> And no liability attaches.

By resuscitating the "avoid harm otherwise" component of the affirmative defense, through reliance on the avoidable consequences doctrine, Title VII itself, and social science research, women employees' fuller stories are able to be told. They are stories of the employees as active persons, who engage internal and external coping mechanisms in order to avoid discrimination as well as other employment, economic, emotional, psychological, and physical harms. By doing so, their more complete stories can be told and made available for determinations pursuant to the liability framework for supervisor sexual harassment.

As a result, the discourse of women's subordination in the workplace can be balanced with the embracing of women's acts of resistance, choices, self-definition, and self-direction. By recognizing women's agency we are creating the necessary legal "space"<sup>368</sup> between "construction"<sup>369</sup> of oneself to "determination"<sup>370</sup> by oneself. Such a legal space is important for its potential to impact women employees, their employers, and the larger legal discourse in the courts and in scholarship regarding how women who are sexually harassed are

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367. Chamallas, *supra* note 13, at 380 (stating that because of inherent flaws in internal grievance procedures, employees may not come forward to complain and hence, as in 1970s, are silent sufferers); *see also* Krieger, *supra* note 6, at 178-79 (observing that early social science research focused only on externally focused coping mechanisms to sexual harassment and therefore internally focused strategies were considered under the category of "ignoring" or "doing nothing" (citing David E. Terpstra & Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORG. BEHAV. 1, 5 (1989))).

368. Abrams, *supra* note 36, at 113.

369. *Id.*

370. *Id.*

neither passive nor silent sufferers but rather complex actors. These employees act in various ways to avoid the multiple forms of harm resulting from sexual harassment.

