

Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005

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The U.S. Supreme Court issued its Oncale, Faragher, and Ellerth decisions in 1998. Predictions were offered almost immediately thereafter regarding the effect of these decisions on subsequent sexual harassment cases. The consensus view among legal scholars was that these decisions would make it much more difficult for plaintiffs to prevail by raising new questions about whether harassment was “because of . . . sex” and by making available an affirmative defense to liability. Drawing on a data set comprised of 581 federal appeals court decisions issued between 1993 and 2005, this article offers an empirical assessment of the extent to which analyses and outcomes of sexual harassment cases changed after 1998. The Supreme Court decisions were indeed not helpful to plaintiffs, but the changes were relatively small and the most dire predictions not realized. This article aims to demonstrate the utility of a systematic, comparative approach to documenting change—or lack thereof—in the law.

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I.

INTRODUCTION

In the fall of 2007, long suffering New York Knicks fans saw their team lose both on the court and in court. The sordid details of a harassment claim against team president and coach Isaiah Thomas and the apparent indifference of higher-ups at Madison Square Garden provided yet another example of the persistence of sexual harassment as a central workplace problem and source of legal claims.¹ While the number of sexual

1. Richard Sandomir, *Jury Finds Knicks and Coach Harassed a Former Executive*, N.Y. TIMES, Oct. 3, 2007, at A1.

harassment charges filed with the EEOC has declined somewhat from the levels seen between 1995 and 2001,² the pace of charge filing and litigation of harassment claims remains brisk.

Harassment cases are inherently difficult to decide. The Supreme Court has attempted to guide lower courts in this endeavor.³ In 1998, the Court issued decisions that sought to resolve important questions in sexual harassment law in the *Oncale*, *Faragher*, and *Ellerth* cases.⁴ This article addresses the question of how, if at all, federal appeals court decisions in sexual harassment cases changed following these Supreme Court decisions. This is an empirical question. These cases have been widely discussed and dissected by legal scholars. But amassing convincing evidence on whether and how these Supreme Court decisions have made a difference in the law that is reflected in subsequent appeals court decisions requires an approach that differs from the analyses of selected leading decisions most commonly found in law reviews. It calls for the systematic comparison of a broad swath of court decisions published both before and after the Supreme Court issued its *Oncale*, *Faragher*, and *Ellerth* decisions in 1998, as well as comparison of cases decided during the same period of time but utilizing different standards for attributing liability to employers. This systematic, comparative approach yields evidence that reinforces some of the conclusions of legal scholars who have considered these cases, but also questions or qualifies other claims made in the legal literature.

The findings presented in this paper generally support the view that these ostensible employee victories shaped sexual harassment law in ways that have made it more difficult for plaintiffs to prevail on their claims. At the very least, these decisions have not been helpful to plaintiffs' cause. Courts now scrutinize more closely whether the requisite discriminatory motivation is present and this inquiry has more often resulted in rulings for defendant employers—but only under certain fact patterns. Despite prompting courts to analyze liability in a somewhat different manner, the affirmative defense to hostile environment claims based on supervisor or manager conduct has proven to be no more beneficial to plaintiffs than the

2. New charges of sexual harassment were regularly in excess of 15,000 per year from FY 1995 through FY 2001. New charges tailed off in subsequent years, but then rose to 13,867 in FY 2008 (an increase of almost 11% over FY 2007). U.S. EEOC, Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1992–1996; FY 1997–2008, <http://archive.eeoc.gov/stats/harass.html> (last visited Nov. 26, 2009).

3. *E.g.*, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (addressing whether an affirmative defense is available in cases where harassment by a supervisor results in a constructive discharge); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (providing guidance to courts in determining when a hostile environment is sufficiently severe or pervasive to be legally actionable); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (recognizing that hostile environment harassment is discriminatory and violates Title VII of the Civil Rights Act of 1964).

4. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

negligence standard that remains the primary alternative used by the courts to attribute liability to employers. But neither has it been the unmitigated disaster for plaintiffs that some legal scholars have suggested. It is important to not overstate the extent of change in federal appellate case law in sexual harassment cases. Most of the changes that have occurred in the aftermath of these Supreme Court decisions are small in magnitude and relatively subtle. Outcomes and analyses in these cases have not been as uniformly favorable to either plaintiffs or defendants as is suggested in many critiques of these decisions.

Part II of this paper reviews the 1998 Supreme Court cases and subsequent legal commentary; Part III describes the methodology of this study; Part IV reports overall findings; Part V outlines findings specifically related to the “because of . . . sex” element; Part VI discusses findings specifically related to the liability element and affirmative defense; Part VII considers patterns of citation to these Supreme Court cases; and Part VIII offers conclusions regarding the effects of these Supreme Court decisions on the law.

II.

REVIEW OF 1998 SUPREME COURT DECISIONS AND COMMENTS OF LEGAL SCHOLARS

The *Oncale*, *Faragher*, and *Ellerth* cases have been extensively discussed and analyzed.⁵ The capsule descriptions of these familiar cases that follow are accompanied by a sampling of subsequent legal commentary. The primary aim of this section is to identify potential changes in lower court decisions resulting from these decisions and to gauge the extent to which legal scholars agree on the ways in which the law has been altered.

A. *Oncale v. Sundowner Offshore Services*

In *Oncale*, a male oil platform worker was subjected to “sex-related, humiliating actions” by male co-workers and supervisors, including physical assaults and threats of rape.⁶ The district court granted summary judgment to the employer on the employee’s sexual harassment claim and

5. E.g., David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002); L. Camille Hebert, *Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001); Clare Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42 (2007); B. Glenn George, *If You’re Not Part of the Solution, You’re Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J. L. & FEMINISM 133 (2001); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004).

6. 523 U.S. at 77.

the Fifth Circuit affirmed.⁷ Both courts based their decisions on *Garcia v. Elf Atochem North America*,⁸ in which the Fifth Circuit held that same-sex harassment is not gender discrimination and hence, is not actionable under Title VII. Other courts had taken different approaches in same-sex harassment cases.⁹ On appeal in *Oncale*, the Supreme Court reversed and remanded, holding that there is “no justification . . . for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”¹⁰ Instead, “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹ The court suggested three “evidentiary routes” by which plaintiffs in same-sex harassment cases might establish discriminatory intent.¹² They could show that the “harasser was homosexual” and presumably motivated by sexual desire; that the sex-specific and derogatory character of the harassment make it clear that the harasser is motivated by general hostility toward persons of the same sex in the workplace; or that there is direct comparative evidence showing that the harasser treated men and women differently in a mixed-sex workplace.¹³ A significant portion of this brief decision is devoted to reassuring those who might be concerned that allowing same-sex harassment claims would convert Title VII into “a general civility code for the American workplace.”¹⁴ The Court stated that “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.”¹⁵ The issue is whether persons of one sex are subjected to different and inferior working conditions than persons of another sex.¹⁶

7. *Oncale v. Sundowner Offshore Serv.*, 1995 U.S. Dist. LEXIS 4119, 2 (E.D. La.), *aff’d*, 83 F. 3d 118, 119-20 (5th Cir. 1996).

8. 28 F.3d 446, 451-52 (5th Cir. 1994).

9. *E.g.*, *Wrightson v. Pizza Hut of Am., Inc.*, 99 F. 3d 138 (4th Cir. 1996) (same-sex harassment actionable if the harasser is homosexual); *Quick v. Donaldson Co.*, 90 F. 3d 1372 (8th Cir. 1996) (same-sex harassment actionable); *Doe v. City of Bellville, Ill.*, 119 F. 3d 563 (7th Cir. 1997) (same-sex harassment actionable on the broad grounds that harassment with explicit sexual overtones subjects the victim to “harassment that is inseparable from her gender” and alternatively, under a sex-stereotyping theory), *vacated and remanded*, 118 S. Ct. 1183 (1998); *King v. M.R. Brown*, 911 F. Supp. 161, 167-68 (E.D. Pa. 1995) (same-sex harassment actionable); *Benekritis v. Johnson*, 882 F. Supp. 521, 525-26 (D. SC 1995) (same-sex harassment not actionable).

10. *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 79 (1998).

11. *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)).

12. *Id.* at 80-81.

13. *Id.*

14. *Id.* at 81.

15. *Id.* at 80.

16. *Id.*

The Court's decision in *Oncale* thus focused attention on the discriminatory motive that must be shown if a harassment claim is to succeed. Justice Thomas's terse concurring opinion lent a fitting coda to the decision: "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'"¹⁷ While this had always been required of plaintiffs, the question was whether the emphasis placed on this element of a sexual harassment claim in the *Oncale* decision would alter the analyses and outcomes of subsequent lower court decisions.

The *Oncale* decision was unanimous and reinstated the plaintiff's claim.¹⁸ Press accounts of the decision generally hailed it as a victory for plaintiffs.¹⁹ Certainly, it invalidated the Fifth Circuit's rejection of all same-sex harassment claims. Under *Oncale*'s multiple evidentiary routes approach, courts that had previously limited recognition of same-sex harassment to cases in which the harasser was gay or lesbian and assumed to be driven by sexual desire to harass a victim of the same sex would have to broaden their views of discriminatory motivation.²⁰

Catherine T. Lanctot, writing in the immediate aftermath of the *Oncale* decision, acknowledged the debate already brewing over the intentions of the decision's author, Justice Scalia, and the case's effects on sexual harassment law.²¹ Was the *Oncale* decision actually a clever ploy intended to limit sexual harassment claims generally?²² However, Lanctot concluded that *Oncale*'s "holding represents a significant step forward in sexual harassment jurisprudence," one that "broadened the scope of liability for sexual harassment."²³ Similarly, in 2005, Frederick Lewis and Whitney Fogerty reviewed appellate decisions in same-sex harassment cases since *Oncale*.²⁴ In these cases, including rulings involving gay and transgendered persons relying on a sex-stereotyping theory,²⁵ the authors discerned a significant broadening of the meaning of the statutory phrase "because of

17. *Id.* at 82.

18. *Id.*

19. *E.g.*, Linda Greenhouse, *High Court Widens Workplace Claims in Sex Harassment*, N.Y. TIMES, March 5, 1998, at A1.

20. *See, e.g.*, *Wrightson*, 99 F.3d at 143.

21. Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL RTS. J. 913 (1999).

22. *Id.* at 914.

23. *Id.* at 941.

24. *See* Frederick J. Lewis & Whitney K. Fogerty, *An Exemplar of Unintended Consequences: The Expanding View of "Sex" Protections in Post-Oncale Title VII Cases*, 36 U. MEM. L. REV. 145 (2005).

25. *See e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (discussing sex-stereotyping without explicitly referring to the plaintiff as homosexual, though it could be inferred).

. . . sex.”²⁶

However, the bulk of legal commentary has been decidedly critical of the *Oncale* decision. Ramona Paetzold, writing shortly after the decision was issued, stated her belief that “*Oncale* will foster deleterious effects on same-sex harassment cases.”²⁷ She explained: “Almost as quickly as the Court gave, . . . the justices began to carve away aspects of what ‘because of . . . sex’ might mean, thereby leaving the possibility of same-sex plaintiffs succeeding in sexual harassment cases remote.”²⁸ Paetzold characterized the *Oncale* decision as potentially devastating for Title VII sexual harassment law.²⁹

A number of legal scholars have reviewed the accumulating same-sex harassment case law since *Oncale* to assess the actual effects of the decision. L. Camille Hebert concluded that “[t]hese patterns of lower court cases applying the Supreme Court’s decision in *Oncale* suggest that it will be difficult for most plaintiffs to prevail on claims of same-sex sexual harassment, in spite of the Court’s holding that such claims are cognizable under Title VII.”³⁰ Hebert found evidence in the case law that judges have difficulty conceiving of motives for heterosexual men sexually harassing other heterosexual men and resist concluding that the choice of sexual means to harass other men shows that the conduct is because of sex.³¹ David Schwartz observed that *Oncale* encouraged inquiry into the sexual orientation of the alleged harasser in same-sex cases and “embraced a sexual desire theory of causation that can be turned against gays and lesbians.”³² Claire Diefenbach undertook a thorough review of same-sex harassment decisions from 1998 through 2006³³ and found that courts in post-*Oncale* cases largely confined themselves to the three evidentiary routes offered by the Court, with the question of whether the harasser is homosexual or otherwise acting on sexual desire being the predominant issue.³⁴ She noted that the theory of sex-stereotyping, successfully relied upon in only a handful of cases, was the primary alternative means of establishing discriminatory motivation utilized in same-sex harassment

26. Lewis & Fogerty, *supra* note 24, at 182.

27. Ramona L. Paetzold, *Same-Sex Sexual Harassment, Revisited: The Aftermath of Oncale v. Sundowner Offshore Services, Inc.*, 3 EMPL. RTS & EMPLOY. POL’Y J. 251, 252 (1999).

28. *Id.* at 252, 254.

29. *Id.* at 267.

30. Hebert, *supra* note 5 at 463.

31. *Id.* at 458-64.

32. Schwartz, *supra* note 5 at 1702.

33. Diefenbach, *supra* note 5 at 42-43. Although Diefenbach intended to include “every relevant federal case dating from the *Oncale* decision in 1998 through 2006,” *id.* at 43, the cases were selectively drawn upon to illustrate different legal analyses. No attempt was made to quantify the prevalence of different types of cases or case outcomes.

34. *Id.* at 92.

cases.³⁵ Disentangling sex-stereotyping from animus based on sexual orientation is critical if plaintiffs are to prevail under this theory.³⁶

Significantly, critics have also expressed concerns about the potential impact of *Oncale* on the manner in which different-sex³⁷ harassment cases are decided. Paetzold opined that “because of more general language in *Oncale* about the nature of sexual harassment cases, I envision a negative aftermath for the more traditional different-sex cases as well.”³⁸ Hebert warned that *Oncale*, “by refocusing on the question of whether sexually harassing conduct is based on sex, threatens much of the progress made in the past three decades”³⁹

At least two aspects of the *Oncale* decision portend problems for plaintiffs in different-sex harassment cases. First, the Court’s statement that “[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations,”⁴⁰ could be read to imply that words and conduct with sexual content from which discriminatory motivation had been readily inferred might no longer be sufficient.⁴¹ Schwartz maintained that an implicit “sex per se rule,” under which “sexual conduct in the workplace is always, without more, ‘because of . . . sex,’” generally held sway prior to *Oncale*.⁴² Characterizing *Oncale* as “a decision that looks worse and worse on each successive reading,” Schwartz pointed to the loss of this presumption that conduct that is sexual in nature meets the discriminatory motivation requirement as a key consequence of the decision.⁴³

The second major cause for concern was that the Court’s assumption that “explicit or implicit proposals of sexual activity” are typical of different-sex harassment cases might mean that claims based on other types of facts would now be more readily rejected.⁴⁴ Hebert concluded:

A review of the opposite-sex harassment cases decided after *Oncale* reveals that the lower courts have indeed refocused their attention on the “because of . . . sex” requirement in the context of opposite-sex harassment cases. And, in spite of the Court’s suggestion in *Oncale* that the inference of

35. *Id.* at 81-89.

36. *Id.* at 92.

37. Paetzold’s rationale for using this term rather than “opposite-sex” harassment is persuasive. Paetzold, *supra* note 27, at 252 n.7. The latter term suggests that gender is limited to two, diametrically opposed, possibilities.

38. *Id.* at 252.

39. Hebert, *supra* note 30, at 440.

40. *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 80 (1998).

41. Hebert, *supra* note 30, at 464.

42. Schwartz, *supra* note 32, at 1705.

43. *Id.* at 1736-37.

44. Hebert, *supra* note 30, at 465.

discrimination should be ‘easy to draw in most male-female sexual harassment situations,’ the lower courts have failed to draw that inference in a large number of cases.⁴⁵

Andrea Kirshenbaum concurred that “the Supreme Court’s *Oncale* opinion has articulated a new, more constrained interpretive paradigm for analyzing the ‘because of . . . sex’ language in Title VII.”⁴⁶ Supreme Court cases prior to *Oncale* allude to the “because of . . . sex” requirement, but “do not dwell on the causal requirement created by this phrase.”⁴⁷

The treatment of cases that do not entail explicit or implicit proposals of sexual activity is important because harassment frequently consists not of sexual advances, but rather “sex-based acts of denigration, exclusion, isolation, work sabotage, and other micro-level interactions designed to undermine a woman’s perceived competence.”⁴⁸ Vicki Schultz has regularly pointed to the problem of non-sexual conduct that is used to harass and adversely affect the performance of women in sex-segregated jobs and workplaces.⁴⁹ Yet, courts have tended to either dismiss outright cases challenging primarily non-sexual conduct, or, more commonly, to disaggregate the sexual and non-sexual conduct. The latter is then either treated as a separate disparate treatment claim or given less weight in deciding whether conditions are sufficiently severe or pervasive to constitute a hostile environment.⁵⁰ While there is reason for concern that this tendency might become more pronounced with *Oncale*’s emphasis on discriminatory motive, Schultz discerned “some recent signs of potential change,” as some courts “explicitly rejected disaggregation and reiterated that nonsexual forms of sex-based harassment can constitute hostile work environment harassment.”⁵¹ But

[O]ld habits die hard. . . . [S]ome courts of appeals still require sexual conduct as an element of a hostile work environment claim, and many judges continue to privilege sexual forms of harassment at the expense of nonsexual forms in deciding whether the complained-of conduct satisfies the causation and severity elements of hostile work environment harassment under Title VII.⁵²

45. *Id.* at 480 (quoting *Oncale*, 523 U.S. at 80).

46. Andrea Meryl Kirshenbaum, “Because of . . . Sex”: Rethinking the Protections Afforded Under Title VII in the Post-*Oncale* World, 69 ALB. L. REV. 139, 142 (2005).

47. *Id.* at 147.

48. Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 3, 20 (2006).

49. *E.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

50. *Id.* at 11-16.

51. *Id.* at 17.

52. *Id.* at 18.

It would be creating a straw man to suggest that there is a raging controversy among legal scholars as to whether the *Oncale* decision has been good for plaintiffs. But legitimate questions remain as to just how detrimental the decision has been and in what ways it has hindered plaintiffs. Is it true that the “because of . . . sex” requirement had been largely assumed away prior to *Oncale*? Has this requirement figured more prominently in post-*Oncale* cases? Have win rates for plaintiffs declined for cases in which the discriminatory motive of the harasser is a central issue? Have the effects of the *Oncale* decision been largely confined to same-sex harassment cases or has the impact been felt more broadly? Are courts treating cases that do not involve explicit sexual conduct differently now? These are questions to which legal scholars have offered sometimes conflicting, but more often imprecise, answers. The empirical analysis set out in this article aims to provide more certain answers.

B. Faragher v. City of Boca Raton/Burlington Industries v. Ellerth

In *Faragher*, the Supreme Court considered a case in which two supervisors created a hostile work environment for female lifeguards.⁵³ The Eleventh Circuit had found the employer not liable on the grounds that the supervisors were not acting within the scope of their employment when they harassed the lifeguards, their agency relationship with the city did not facilitate the harassment, and the city was not negligent because it lacked actual or constructive knowledge of the harassment.⁵⁴ The Supreme Court reversed and remanded.⁵⁵ In so doing, it announced a new rule for determining whether employers are liable for hostile environment harassment perpetrated by supervisors and managers. Drawing on the principle of agency law that holds employers liable for actions taken outside the scope of employment when those actions are aided by the authority conferred on agents, the Court held that employers are vicariously liable for hostile environments created by supervisors “with immediate (or successively higher) authority over” plaintiff employees.⁵⁶ However, provided that no tangible employment action is taken, employers have the opportunity to raise an affirmative defense.⁵⁷ The Court laid out a two prong test by which an employer can avoid liability or damages by proving that (1) reasonable care was exercised to “prevent and correct promptly any sexually harassing behavior,” and (2) the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by

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

54. *Id.* at 784.

55. *Id.* at 810.

56. *Id.* at 807.

57. *Id.*

the employer or to avoid harm otherwise.”⁵⁸ In the case at hand, the Court determined that the city failed to meet the first prong of the affirmative defense; the city could not show that it had taken reasonable care to prevent and promptly correct harassment. This was because the city had failed to disseminate its harassment policy to beach personnel, it ignored the conduct of its supervisors, and it maintained a defective policy that did not provide employees with an alternative to the futile gesture of reporting harassment to an offending supervisor.⁵⁹

The availability of the affirmative defense is premised on the absence of a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, decided on the same day as *Faragher*, considered the question of whether an employer should be vicariously liable for the unfulfilled threats of a supervisor to deny tangible employment benefits to an employee who refused to submit to his sexual advances.⁶⁰ The trial court had used a negligence standard in deciding liability and granted summary judgment to the employer.⁶¹ The Seventh Circuit reversed, albeit without achieving consensus on the appropriate liability standard.⁶² The Supreme Court affirmed, but again used the occasion to spell out the contours of the affirmative defense.⁶³ The Court rejected the relevance of the labels “quid pro quo” or “hostile environment” to the determination of vicarious liability.⁶⁴ Instead, the issue is whether a tangible employment action has been taken: “[w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation.”⁶⁵ Thus, if an employee’s submission to or rejection of an advance or other harassment results in “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,” the employer is vicariously liable without resort to the affirmative defense.⁶⁶ In this case, since the unfulfilled threats did not result in a tangible employment action, the employer was entitled on remand to raise the affirmative defense to liability for any hostile environment created by its supervisor.⁶⁷

58. *Id.*

59. *Id.* at 808-09.

60. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 746-47 (1998).

61. *Id.* at 749.

62. *Id.* at 749-50.

63. *Id.* at 765-66.

64. *Id.* at 753-54.

65. *Id.* at 761-62.

66. *Id.* at 761.

67. *Id.* at 766.

As with *Oncale*, the Court ruled (albeit, not unanimously) in favor of the plaintiffs in *Faragher* and *Ellerth*.⁶⁸ On its face, vicarious liability subject to an affirmative defense—which the employer bears the burden of establishing—is more favorable to plaintiffs than a negligence standard in which the plaintiff employee bears the burden of showing that the employer knew or should have known of harassment and failed to take immediate and appropriate action to stop it. Indeed, *Faragher* itself illustrated how the new liability standard could result in a finding of employer liability when the opposite conclusion had been reached under a negligence standard. While there was considerable variation and a few courts had previously found strict liability in all cases of supervisor harassment, most employed the same negligence standard used in co-worker harassment cases.⁶⁹ In an early analysis of the likely impact of the affirmative defense, Louis DiLorenzo and Laura Harshbarger suggested that it could be a substantial asset to plaintiffs.⁷⁰ They saw *Faragher* and *Ellerth* as expanding the scope of employer liability by eliminating the necessity of plaintiffs proving employer negligence; allowing liability to be found absent the employer's actual or constructive knowledge of harassment; and negating the distinction that some courts had drawn between higher-level and mid-level supervisors for purposes of imposing vicarious liability.⁷¹ More recently, William R. Amlong, an attorney who represented Beth Ann Faragher before the Supreme Court, wrote that despite concerns “that the affirmative-defense exception would swallow the rule of vicarious liability . . . circuit courts uniformly have signaled that the ‘*Faragher defense*’ inquiry is rigorous.”⁷² He concluded that “seven years after the Court decided *Faragher*, the ‘*Faragher defense*’ continues to evolve. While district courts appeared initially to fall prey to a form-over-substance approach, courts of appeals have rejected lip service and legerdemain.”⁷³

Most legal scholars respectfully disagree. A basic criticism of the affirmative defense is that courts have been unduly impressed by symbols of compliance (e.g., harassment policies and reporting procedures used to demonstrate reasonable care to prevent harassment) that might have little to

68. *Id.* at 766; *Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

69. See Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 *FORDHAM L. REV.* 1517, 1542 (1999); 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, 1414 (2002).

70. Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After Ellerth and Faragher*, 6 *DUKE J. GENDER L. & POL'Y* 3 (1999).

71. *Id.* at 15-16.

72. William R. Amlong, *Faragher v. City of Boca Raton: A Seven-Year Retrospective*, 80 *FLA. BAR J.* 45 (2006).

73. *Id.*

do with whether employees are subjected to harassment.⁷⁴ Susan Bisom-Rapp has argued that “[w]ithout paying much attention to program details, judges increasingly treat sexual harassment training as evidence that the employer acted reasonably to remedy harassment or to maintain a discrimination-free work environment and thus conclude the employer should not be held vicariously liable for the actions of its supervisors.”⁷⁵ B. Glenn George observed that the affirmative defense was being applied to cases—unlike *Faragher* and *Ellerth*—in which the plaintiff employee *had* reported harassment and where a literal application of the affirmative defense’s two prongs would preclude finding for the employer (because there was no unreasonable failure to mitigate on the employee’s part).⁷⁶ Nevertheless, courts often justified ruling for the employer by either ignoring the second prong or finding the plaintiff’s report of harassment to be unduly delayed.⁷⁷ Nor did the fact that the defendant bears the burden of proof in establishing the affirmative defense seem to influence whether summary judgment would be granted to employers.⁷⁸ Interestingly, George suggested that despite differences in terminology, the results produced by the vicarious liability subject to the affirmative defense and negligence standards would often be the same.⁷⁹ George also stressed the importance of the employer’s response to harassment that has been reported (the correction aspect of prong one of the affirmative defense). George concluded that:

Using the affirmative defense on liability has proven an effective shield to bypass consideration of the harassment itself and avoid trial altogether. Even with modest evidence of past prevention efforts, employers are often granted summary judgment on the liability issue.⁸⁰

Citing a summary dismissal rate in excess of fifty percent, John Marks labeled the affirmative defense “a dubious summary judgment safe harbor for employers.”⁸¹ In Marks’s view, the defense required little more of employers than creation of a harassment complaint procedure.⁸² The primary means by which courts created this safe harbor were a disjunctive

74. 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 (2003).

75. Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 4 (2001).

76. George, *supra* note 5 at 134.

77. *Id.* at 145-47.

78. *Id.* at 156.

79. *Id.* at 135.

80. B. Glenn George, *Theory and Practice: Employer Liability for Sexual Harassment*, 13 WM. & MARY J. WOMEN & L. 727, 728 (2007).

81. Marks, *supra* note 69, at 1404-05.

82. *Id.* at 1405.

reading of the dual prongs of the affirmative defense and a strong tendency to find that plaintiffs' reports were unreasonably delayed.⁸³ The latter served as the basis for absolving the employer of all liability, rather than prompting an inquiry into the portion of damages that could reasonably have been avoided by the plaintiff.⁸⁴ David Sherwyn, Michael Heise, and Zev Eigen conducted a statistical and content analysis of seventy-two cases decided between June 1998 and January 2000 in which employers both asserted the affirmative defense and moved for summary judgment.⁸⁵ First, and most basically, they found that employers prevailed in a majority (53%) of these early affirmative defense cases.⁸⁶ Using logistic regression models with three dependent variables—satisfaction of prong one, satisfaction of prong two, and the holding in the case—the authors found that only the existence of a “good policy”⁸⁷ and evidence of a “good response”⁸⁸ by the employer to the allegation of harassment had a statistically significant effect on whether *either* prong was satisfied and on the outcome of the case.⁸⁹ Of the two variables, it was the existence of a good policy that was the most consistently telling factor.⁹⁰ Information about the employee's actions, including whether the employee failed to report harassment, reported in a timely manner, or provided a full report, was not systematically related to any of the outcomes examined—including satisfaction of the second prong!⁹¹ However, while the employee's actions were not generally determinative, failure to report harassment was always fatal to the employee's case if the employer had a “good policy.”⁹² Sherwyn, Heise, and Eigen summed up their findings by stating that “courts are prepared to conclude that a good policy constitutes ‘reasonable care’ and that employers can prevail regardless of whether plaintiffs reported harassment.”⁹³

83. *Id.* at 1404.

84. *Id.* at 1405.

85. 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 (2001).

86. *Id.* at 1288.

87. The “good policy” variable was coded as present in cases where the employer articulated an anti-harassment policy, the policy was disseminated, it provided for alternative reporting mechanisms, and the policy contained “no other defects.” *See id.* at 1278-80.

88. The “good response” variable was coded as present in cases where “a court deemed an employer to have responded properly to an allegation.” The authors say that this typically involved the employer discharging the harasser. *See id.* at 1278.

89. *Id.* at 1285-86.

90. *Id.* at 1283-88.

91. *Id.* at 1285-87.

92. *Id.* at 1286.

93. *Id.* at 1289.

Anne Lawton undertook a systematic analysis of 200 federal district and appeals court cases in which the affirmative defense was invoked.⁹⁴ Lawton's conclusions amount to a ringing, multi-count indictment of the affirmative defense: courts have often seized upon the liability element to decide supervisor harassment cases on summary judgment;⁹⁵ the employer's burden under the first prong of the affirmative defense has been reduced to a demonstration of the existence of an anti-harassment policy and grievance procedure without any further need to show the effectiveness of that policy;⁹⁶ the prevention and correction aspects of the first prong are often conflated by the courts;⁹⁷ the burden of showing reasonable care to prevent and promptly correct any harassment has been effectively shifted to plaintiffs who must demonstrate that an ineffective policy resulted in failure to prevent harm;⁹⁸ employers have sometimes been allowed to define what constitutes adequate employee notice under prong two of the affirmative defense, avoiding liability by restricting the actors authorized to receive harassment complaints and the methods for communicating them;⁹⁹ and any failure to report harassment or delay in doing so is automatically regarded as an unreasonable failure by the plaintiff to avoid harm by utilizing the employer's procedures, without serious consideration of potential retaliation or other obstacles to reporting.¹⁰⁰ All of this has led the courts to focus on a type of "file cabinet compliance" that has failed to alter employers' incentives to seriously address supervisor harassment.¹⁰¹

The bulk of the legal commentary on the affirmative defense articulated in the *Faragher* and *Ellerth* cases concurs in deeming it disadvantageous to plaintiffs. However, there are assumptions and points of disagreement that are amenable to empirical investigation. Is the liability element being relied on to address more cases now than prior to when the affirmative defense became available in 1998? Relative to other sexual harassment cases, are affirmative defense cases disproportionately decided on summary judgment? How do the outcomes in cases where the affirmative defense is raised compare to contemporary cases decided under a negligence standard? To the outcomes in pre-1998 cases involving supervisor harassment? Is the affirmative defense being given a disjunctive reading? Is the existence of a harassment policy with an accessible

94. Lawton, *supra* note 5.

95. *Id.* at 214.

96. *Id.* at 214-15.

97. *Id.* at 217-18.

98. *Id.* at 239.

99. *Id.* at 215.

100. *Id.* See also Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 604-05 (2007).

101. Lawton, *supra* note 94, at 198, 210.

complaint procedure the key to avoiding liability or is the employer's response to harassment more important?

III.

METHODOLOGY FOR THIS STUDY

The question of whether federal appeals courts decided sexual harassment cases differently following the Supreme Court's decisions in 1998 is an empirical one. Our understanding of whether and how the law has changed can be enhanced by a social science research approach that examines "the sweep of cases,"¹⁰² both prior to and following the Supreme Court's decisions. The findings presented in this paper are based on a data set in which the observations are federal appeals court decisions in sexual harassment cases. Each case was read closely by the author¹⁰³ and coded for a large number of variables that capture fact patterns, legal issues raised, and outcomes. Although the variables and coding differ somewhat, the methodology for this study is similar to that used by Ann Juliano and Stewart Schwab in their analysis of sexual harassment cases from 1986-1995.¹⁰⁴ These authors described their approach by writing that "we have forgone the ability to examine the nuances of particular cases and doctrinal debates among judges. However, we have gained perspective on the bulk of the issues and fact patterns with which federal judges wrestle."¹⁰⁵

Legal researchers most often focus intently on a relatively limited number of recent cases addressing a particular legal issue of interest. This allows the range of judicial approaches to be captured and for "leading" cases to be dissected in great detail. As the perceptive analyses of the *Oncale* and *Faragher/ Ellerth* decisions sampled *supra* illustrate, a great deal can be learned from this endeavor. But by emphasizing the most intriguing, controversial, or well-explicated cases, more routine cases—which there are usually many—are overlooked. More importantly, focusing on only those cases that address the particular issue of interest makes

102. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 554 (2001).

103. Certainly, it would have been preferable to utilize multiple coders, with a procedure to reconcile discrepancies between coders. Alas, colleagues or talented graduate assistants able to take on a job this size at this time were not available to me. Beyond my personal assurance that the data were coded as diligently and objectively as possible, I would be glad to make an electronic copy of the data set available to any readers who would like to make their own judgments about the accuracy of the data. Contact the author at walshdj@muohio.edu for a copy of the SPSS data set and definitions of variables.

104. Juliano & Schwab, *supra* note 101. Besides the earlier time frame for Juliano and Schwab's study, the most important difference is that the present study examines the specific elements of sexual harassment claims and the fact patterns and outcomes associated with each of these elements. This closer look is necessary to address questions about the effects of the Supreme Court decisions on subsequent cases analyzing the "because of . . . sex" and liability elements.

105. *Id.* at 553.

generalizing about the prevalence of such cases problematic, since information on a broader set of cases is needed to make that judgment (i.e., statements about how common a particular type of case is can only be made with respect to some larger universe of cases). There is also no clear basis for statements about how such cases differ from earlier cases or from cases that do not raise the same issue. To examine change in the law, it is necessary to consider both earlier cases and those in which the characteristic of interest is absent (e.g., cases decided according to a negligence standard, rather than the affirmative defense). It might turn out that the features attributed to a particular type of case are not so very different from these other types of cases.

Thus, a systematic, quantitative, and broadly comparative approach is used in this article in the hope of providing insights not readily available through other methods of legal research, but at the considerable expense of a loss of richness, nuance, and close attention to context. Individual cases are cited and discussed in this paper, but primarily for purposes of illustration. The heart of the analysis is the systematic, quantitative evidence presented.

This study considers all federal appeals court decisions in sexual harassment cases that could be accessed through LEXIS, were decided between 1993-1997 and 1999-2005, and that met other criteria specified *infra*. This time frame was chosen to allow for systematic comparison of decisions prior to and following the three Supreme Court decisions in 1998. Cases from 1998 itself were excluded because the overlap in decision dates (i.e., the Supreme Court decisions were either pending or had only very recently been issued) would have made it difficult to definitively label cases as pre- or post-decision. The study is limited to federal appeals court cases because these are particularly authoritative and tend to elaborate more fully on the factual and legal issues presented by cases than do district court decisions.¹⁰⁶

Cases were selected in the following manner. For each year of the study, a LEXIS search was conducted using very general search terms.¹⁰⁷ In total, 2,853 cases were identified through this very broad search. These cases were then manually screened for inclusion in the study. The number of cases in the study (581) is much smaller than the total from the LEXIS search because only cases addressing the substance or merits of sexual harassment claims, including the attribution of liability to the employer, were selected. Many cases were rejected because they mentioned sexual harassment, but actually dealt with claims other than harassment.¹⁰⁸

106. Juliano & Schwab, *supra* note 101, at 573.

107. The search terms used were "harassment AND sex! AND employ!".

108. *E.g.*, wrongful termination claims brought by employees accused of engaging in harassment; retaliation; infliction of emotional distress.

However, cases discussing one or more of these other claims *in addition to* the substance of a harassment claim—which is probably the norm in harassment cases—were included.¹⁰⁹ Cases dealing with harassment on grounds other than sex were excluded, unless sexual harassment was also alleged.¹¹⁰ Importantly, cases dealing solely with issues of procedure or standing (e.g., timeliness of the claim, employer or employee status, trial procedure, specific evidence allowed or disallowed) were excluded. Likewise, cases in which the issue was the amount or type of damages awarded, and not whether the employer was liable at all, were excluded. The data set includes only cases alleging harassment in employment.¹¹¹ A final category of excluded cases were those in which a decision was reached on the merits of the claim, but the opinion was so lacking in any statement of the facts or legal rationale that there would have been effectively nothing but the bare case outcomes to code.

A. Variables

The following information was gleaned from each case:¹¹² *year* in which the case was decided; *circuit court* deciding the case; *procedural posture* of the case;¹¹³ *outcome* of the case (on the sexual harassment claim(s) only);¹¹⁴ *type of harassment case*;¹¹⁵ treatment of the *Oncale* and *Faragher/ Ellerth* cases;¹¹⁶ *sex* of the plaintiff(s) and alleged harasser(s); whether, in addition to harassment, the plaintiff alleged *retaliation* and the *outcome of any retaliation claim*; and the *position* of the alleged harasser relative to the plaintiff.¹¹⁷

109. But the coding of the case outcome and analysis is based only on the portion of the decision dealing with the sexual harassment claim.

110. *E.g.*, the plaintiff alleged both racial and sexual harassment.

111. Thus, cases involving allegations of harassment by the likes of students, prisoners, and asylum seekers were excluded. Use of *employ!* as a search time presumably lessened, but did not entirely eliminate, the number of non-employment cases.

112. Only variables directly pertinent to the present study are noted here.

113. The procedural posture of a case was coded as 1) review of a grant of summary judgment or other disposition prior to a trial; 2) review of a bench trial; 3) review of a jury trial; or 4) review of judgment as a matter of law or other disposition of the case during or following a trial.

114. Outcomes were coded as 1) lower court decision favoring the employer is affirmed; 2) lower court decision favoring the employee is reversed; 3) lower court decision favoring the employee is affirmed; or 4) lower court decision favoring the employer is reversed.

115. Type of harassment case was coded as 1) tangible employment action—or “quid pro quo”—only; 2) hostile environment only; or 3) both tangible employment action and hostile environment alleged).

116. Treatment of *Oncale* and *Faragher/ Ellerth* was coded as 1) not mentioned; 2) cited but not discussed at length; or 3) cited and discussed at length.

117. The position of the alleged harasser was coded as 1) client, customer, or other third party; 2) subordinate; 3) co-worker at the same organizational level; 4) supervisor or manager at a higher level of authority; 5) owner or top officer; or 6) mixture of these (in cases involving multiple harassers).

The foregoing information is essential, but does not go nearly far enough in getting at the specific legal issues presented by these cases and the ways in which they were decided. With some variation,¹¹⁸ courts generally require plaintiffs in sexual harassment cases to establish each of the following elements:

1. The plaintiff was subjected to harassment because of his or her sex.
2. The harassment resulted in a tangible employment action or was sufficiently severe or pervasive to alter working conditions and create a hostile environment.
3. The harassment was unwelcome.
4. There is a basis for attributing liability to the employer.

It is important to get at the *treatment* that each element of a sexual harassment claim receives in a case. In this study, a distinction is drawn between non-substantive treatment of an element and substantive treatment.¹¹⁹ An *element-specific outcome* for each of the four main elements of a sexual harassment claim is also coded for each case.¹²⁰ These

118. Courts sometimes add an initial requirement that the plaintiff establish membership in a protected class. See, e.g., *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1122 (D.C. Cir. 2002); *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1199 (11th Cir. 2001); *Beard v. S. Flying J, Inc.*, 266 F.3d 792, 797 (8th Cir. 2001). This requirement is superfluous when it comes to sexual harassment claims, since both males and females can bring harassment cases. Courts also sometimes combine these elements. For example, the Second Circuit has stated that plaintiffs in hostile environment cases must show “(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer.” *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221 (2d Cir. 2004) (quoting *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir. 2003)). This formulation combines the “because of . . . sex” and severity requirements (by specifying *discriminatory* intimidation), but does not explicitly incorporate the issue of unwelcomeness.

119. Non-substantive treatment of an element refers to 1) no mention at all; 2) pro forma mention; or 3) a brief discussion of three sentences or less. Substantive treatment of an element refers to 1) a discussion more than three sentences in length; or 2) the outcome of the case hinges on the particular element. Any specific number of sentences chosen to distinguish between substantive and non-substantive treatment of issues will be somewhat arbitrary. However, the “more-than-three-sentences” criterion does a reasonably good job in practice of separating cursory mentions and bald conclusions from more elaborate discussions and rationales. To get to four sentences, a court generally needs to go beyond stating the mere existence of an element and whether that element was satisfied to broach the specifics of how it decided an element in the context of the case facts. The more-than-three-sentences criterion for substantive treatment also has the virtue of being quite objective. The notion that a case “hinges on” the resolution of a particular element is certainly a more subjective judgment. In this study, cases were deemed to hinge on a particular element when (1) the court reached a definitive decision regarding that element (i.e., a particular outcome was not simply accepted “arguendo”), (2) the discussion of the element was lengthier and more detailed than the discussion(s) of other elements, and (3) the decision made for this element was critical to the outcome of the case. I leaned toward designating cases as hinging on a single element, if any, but there were a number of cases in which more than one element received extensive and relatively equal discussion. In these instances, the case was deemed to hinge on more than a single element.

120. Element-specific outcomes are coded as 1) not satisfied; 2) satisfied; 3) indeterminate or unclear; or 4) not addressed.

element-specific outcomes—in particular, those for the “because of . . . sex” and liability elements—are the primary focus of this paper.

Harassment cases are fact-intensive. Information about the behaviors of both harassers and plaintiffs, the policies of employers and their reactions to reports of harassment, and the organizational and industry context in which harassment occurs is all potentially relevant. The facts of these cases are important in both framing the issues to be decided (i.e., which specific elements must be addressed) and in deciding those issues. Yet, case decisions provide very selective, highly filtered pictures of the “facts.” Omissions are especially difficult to interpret. If a court does not mention that an employer has a harassment policy, does that mean that the employer did not have a policy or is it more likely that the court simply chose not to mention this fact because it was not directly relevant to its rationale in deciding the case? Perhaps the safest assumption in this regard is that those facts that are mentioned are facts that the court deems most relevant to making and/or justifying its decision. And the facts that are most relevant are circumstances that raise questions about whether the plaintiff is able to satisfy one or more particular elements of the claim. Since the plaintiff bears the burden of proof and failure to establish even one of these elements requires the court to rule for the employer, courts will typically focus on the weakest link(s) in the plaintiff’s case. For example, it is not necessary to consider at length, if at all, whether the harassment was sufficiently severe or pervasive, if there are facts that preclude attributing liability to the employer in any event. Thus, while the facts outlined in these appellate decisions are highly selective accounts that reflect only dimly what transpired in these workplaces, they still provide valuable insight into how issues were framed and decided.

Fact patterns especially relevant to the “because of . . . sex” element are whether (1) there was an *equal opportunity harasser*; (2) the case entailed *same-sex harassment*; (3) there was evidence of some sort of *personal animus* providing a motive for harassment other than the plaintiff’s sex; (4) the harassing words or actions were *not explicitly sexual* in nature; (5) the harassment consisted largely of *sexually-charged surroundings* to which persons of both sexes were exposed; and (6) in the context of tangible employment action claims, there was evidence that a *neutral motive*, rather than the plaintiff’s reaction to a sexual advance, accounted for the employment decision. Fact patterns especially relevant to the liability element, both generally and in the specific context of the affirmative defense, include whether (1) the employer had an *anti-harassment policy* in place; (2) the employer *promptly investigated* the harassment complaint; (3) the employer *took strong action* by transferring, terminating, suspending, or otherwise formally disciplining the harasser; (4) the *harassment ceased* following the employer’s intervention; (5) the plaintiff *failed to report* the harassment prior to the filing of a charge; (6)

the plaintiff *delayed in reporting* harassment; (7) any report made by the plaintiff was to individuals other than those authorized to receive such reports under the employer's procedures or the plaintiff otherwise *failed to follow the established complaint procedure*; (8) the plaintiff withheld information or otherwise *failed to cooperate in the investigation*; and (9) the plaintiff *refused to accept a remedy* proffered by the employer. Post-1998 cases were also coded according to whether the *affirmative defense was raised* and whether the defendant successfully established this defense.

B. Analytical Methods

The findings presented in this paper consist of various comparisons between time periods and types of cases. Given the questions that motivate this paper, many of the comparisons are between outcomes or modes of analysis for cases before and after 1998. This is intended to capture changes in the law following issuance of the Supreme Court decisions in 1998. Comparisons between cases in which the affirmative defense was raised and those in which it was not are also of great interest in investigating the effects of the affirmative defense. Most of these comparisons are presented in the form of contingency tables. For example, the columns of table 1, *infra*, distinguish cases according to whether they were decided before or after 1998 and the rows according to their procedural posture on appeal. While different numbers of cases were decided in the two time periods, changes in the procedural posture of cases over time can be discerned by reading down the columns and comparing the *percentages* of cases in each time period that were reviews of summary judgment, jury trials, and so forth.

There are a number of methods for determining the statistical significance of findings. A chi-square test is widely used to assess the statistical significance of differences across multiple categories in contingency tables of the sort presented in this paper.¹²¹ The essential logic of this test is that "expected" cell totals (the number of cases falling into each distinct row/column combination) are compared to observed cell totals. Expectations are based on the idea that if there is really no difference between groups or populations, the number of cases in a given cell should be equal to the proportion of cases accounted for by the column variable multiplied by the total number of cases accounted for by the row variable.¹²² The larger the differences between expected and observed cell totals—squared, divided by the expected cell frequency, and summed

121. JOHN H. MUELLER ET AL., STATISTICAL REASONING IN SOCIOLOGY 480-87 (3d ed. 1977).

122. *Id.* at 483. As an example, in table 1, *infra*, the expected value for the left, upper-most cell (pre-1998 cases in which summary judgment was granted by the trial court) would be $166/581 = .286 \times 433 = 123.7$.

across all of the cells in the table—the larger the chi-square statistic and the *smaller* the p-value associated with that statistic.¹²³ Conventionally, a p-value of .05 or less is treated as evidence of statistical significance.¹²⁴ It indicates that the chance of concluding that there is a difference on the variable of interest (e.g., case outcomes before and after 1998) when there is no true difference (i.e., the observed difference is a function of chance variation or measurement error) is no more than five in one hundred. However, a limit to the usefulness of the chi-square test is that it is accurate only when expected cell values are relatively large. If expected cell values are less than 5, a chi-square test is generally not appropriate.¹²⁵ Even though the total number of cases on which this study is based is reasonably large, analyses of sub-groups in this study sometimes run up against the minimum expected cell value limitation and this is so noted.

The t-test and logistic regression are also used in this analysis. The t-test is used to determine the statistical significance of differences in the means or proportions of some variable across two groups.¹²⁶ As with the chi-square test, the t-test results in a value that corresponds to the probability that a difference in means or proportions as large as that observed would exist if the true difference between the two groups was zero.¹²⁷ As with any other regression analysis, the basic purpose of logistic regression is to determine which variables, among a number of partially overlapping independent variables, best account for some dependent variable.¹²⁸ Logistic regression is especially appropriate when the outcomes of interest are dichotomous (e.g., the plaintiff won or lost).¹²⁹

C. *Generalizing from Study Findings*

The purpose of statistical inference is to assess whether conclusions drawn from a sample of observations can be generalized to a larger, underlying population from which that sample was drawn. The cases considered in this study are intended to be the full set of cases that meet the criteria for inclusion, outlined *supra*, rather than a sample of those cases. Certainly, this study encompasses a substantial number of cases decided over a twelve year period and these cases are of interest in their own right.

123. Converting the chi-square statistic to a p-value also requires consideration of the number of “degrees of freedom” in a table. In general, the number of degrees of freedom in a table will be equal to the number of rows in the table minus one, times the number of columns in the table minus one. *Id.* at 484-86. Thus, table 1, *infra*, has $(4-1) \times (2-1) = 3$ degrees of freedom.

124. GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 65 (7th ed. 1980).

125. MUELLER ET AL, *supra* note 120 at 487.

126. *Id.* at 430-31.

127. *Id.* at 431.

128. SCOTT MENARD, APPLIED LOGISTIC REGRESSION ANALYSIS (1995).

129. *Id.* at 5-14.

However, the cases accessible through LEXIS are not all of the cases heard and decided by federal appeals courts because not all decisions are published, substantive, and available through LEXIS.¹³⁰ Absent a finding that observed differences are statistically significant, there are no grounds for generalizing beyond the 581 cases considered in this study. A number of the tables in this paper hint at possible changes over time or differences across case types, but the differences are not of sufficient magnitude and consistency to be statistically significant. Such evidence is at best limited to the particular cases included in this study and any broader generalization should be avoided.

IV. OVERALL FINDINGS

The first set of findings presented pertains to the ways in which this entire set of federal appeals court sexual harassment cases were analyzed and decided, comparing their relative procedural posture, outcomes, types of harassment dealt with, elements of harassment claims analyzed, and the outcomes associated with treatment of each of these elements. Subsequent sections deal with sub-sets of cases that focus on the “because of . . . sex” and liability elements of harassment claims.

A. Procedural Posture of Cases

Do the data from this study support the view¹³¹ that courts have become increasingly likely to dispose of sexual harassment cases via summary judgment? Because this study deals with federal appeals court decisions only, it is not possible to directly assess the propensity of federal district courts to issue summary judgments. However, it is possible to determine whether summary judgments are now more common among cases taken to the appellate level. Table 1 compares the procedural posture of cases on appeal before and after 1998. Procedural postures include reviewing grants of summary judgment or related, pre-trial dispositions, trials, and other actions such as judgments notwithstanding a verdict. The increased use over time of summary judgment in sexual harassment cases taken to the appellate level—virtually always on behalf of the employer—is

130. See, e.g., Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals?*, 54 VAND. L. REV. 71 (2001); Adam Liptak, *Federal Appeals Court Decisions May Go Public*, N.Y. TIMES, December 25, 2002, at A21. “Unpublished” decisions issued after September 2001 are available in the Federal Appendix. Non-substantive decisions, announcing an outcome without offering any reasoning for the decisions, are still issued in sizeable numbers.

131. See, e.g., George, *supra* note 80, at 728; Lawton, *supra* note 5, at 213-14; Marks, *supra* note 68, at 1404; Paetzold, *supra* note 26, at 267.

TABLE 1 Procedural Posture of Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-1997 and 1999-2005

Procedural Posture of Case n (%)	Pre-1998	Post-1998	Total
Review Grant of Summary Judgment	107 (64.5)	326 (78.6)	433 (74.5)
Review Bench Trial	25 (15.1)	10 (2.4)	35 (6.0)
Review Jury Trial	22 (13.3)	60 (14.5)	82 (14.1)
Review Other Action	12 (7.2)	19 (4.6)	31 (5.3)
Total	166 (100.0)	415 (100.0)	581 (100.0)

chi-square = 36.345, 3 df (p < .001)

clearly evident. Prior to 1998, appeals courts were called on to review grants of summary judgment in 64.5% of cases in this study. Between 1999 and 2005, fully 78.6% of the cases in this study entailed reviews of summary judgment. However, table 1 also makes clear that while the increase in summary judgment has come at the expense of trials, the decline in trials over the two time periods is almost entirely a function of fewer *bench trials* being held: while *jury trials* actually comprised a slightly larger percentage of cases (14.5%) in the post-1998 period than they did previously (13.3%), bench trials fell from 15.1% of cases prior to 1998 to a mere 2.4% of cases following 1998. Much of this difference may be attributable to cases that arose prior to the Civil Rights Act of 1991¹³² still being within the system in the early part of the pre-1998 period. The right to a jury trial that this law conferred on plaintiffs did not apply retroactively.¹³³ Consistent with this interpretation, it was only in 1993 and 1994 that the percentage of bench trials exceeded the percentage of jury trials, and did so by wide margins.¹³⁴ Plaintiffs in post-1998 cases were given the opportunity to go to trial less frequently, but when they had the chance, usually opted for a jury trial. These differences in the procedural posture of cases before and after 1998 are striking and statistically significant. They support the view of legal scholars that federal courts have become more inclined to dismiss cases based only on papers filed.

132. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

133. *Landgraf v. USI Film Products*, 511 U.S. 244, 286 (1994).

134. For both 1993 and 1994, 37.5% of cases in this data set involved bench trials. This compares to 6.3% of 1993 cases and 12.5% of 1994 cases that involved jury trials.

B. Case Outcomes

TABLE 2 Outcome of Sexual Harassment Cases, Federal Appeals Court Decisions, 1993-1997 and 1999-2005

Case Outcome n (%)	Pre-1998	Post-1998	Total
Affirmed Decision for Employer	106 (63.9)	260 (62.7)	366 (63.0)
Reversed Decision for Employee	8 (4.8)	13 (3.1)	21 (3.6)
Affirmed Decision for Employee	19 (11.4)	49 (11.8)	68 (11.7)
Reversed Decision for Employer	33 (19.9)	93 (22.4)	126 (21.7)
Total	166 (100.)	415 (100.0)	518 (100.0)

chi-square = 1.324, 3 df (p = .723)

Table 2 compares case outcomes at the appellate level across the two periods of time. Appeals courts were slightly more likely to rule in favor of plaintiffs (i.e., to either affirm a lower court decision for the employee or to reverse a decision in favor of the employer) in post-1998 sexual harassment cases. Decisions went plaintiffs' way in 34.2% of post-1998 cases, compared to 31.3% of pre-1998 cases. However, this difference in case outcomes is statistically insignificant. Given the growth over time in the use of summary judgment, a concomitant increase in the rate of reversal might reasonably have been expected, since decisions reached without benefit of an intensive factual inquiry ought to be given less deference on appeal than determinations made following a trial.¹³⁵ Viewed in this light, the relative stability in outcomes is more striking. It should also be noted that the plaintiff win rate for the post-1998 period is lower than the 39% appellate-level win rate in sexual harassment cases for the 1986-1995 period reported by Juliano and Schwab.¹³⁶

Examination of case outcomes is just a starting point for this analysis. Bare case outcomes can conceal significant changes in the ways in which cases were analyzed and decided. Still, the fundamental stability in case outcomes over time sheds doubt on any claims that the Supreme Court's 1998 decisions produced a sea-change in sexual harassment litigation.

135. George, *supra* note 5, at 172, questions the apparently widespread practice of granting summary judgment to employers asserting the affirmative defense, despite their facing the "double hurdle" of "carrying the burden of persuasion on the issue and arguing under a reasonableness standard." This suggests that appellate courts would often have grounds on which to reverse grants of summary judgment.

136. See, *supra* note 101, at 594 (Appendix A).

C. *Types of Harassment Cases*

Harassment cases come in two main varieties: tangible employment actions and hostile work environments. Plaintiffs sometimes allege that they were subjected to both types of harassment. The distinction between these types of harassment turns on the manner in which the employment opportunities of plaintiffs are affected. In tangible employment action cases, the effect on employment status is explicit, for example termination, and based on the plaintiff's rejection of, or submission to, harassment. In contrast, a hostile environment constructively limits employment opportunity by imposing inferior working conditions and making it harder to perform well and remain on a job. Distinguishing between case types has taken on added significance following the *Faragher* and *Ellerth* decisions, as the type of harassment determines the manner in which liability can be attributed to employers. Thus, it is reasonable to briefly investigate the extent to which any differences in case outcomes and analyses before and after 1998 might be due to changes in the distribution of case types. Table 3 presents information on the prevalence of these case types and the outcomes associated with each.

The vast majority of harassment cases involve hostile environment claims only. The broad conclusion from table 3 is that there was little, if any, change in case types and associated outcomes between the two periods. Certainly, none of the differences are statistically significant. Plaintiffs were somewhat more likely to combine both types of harassment claim in post-1998 cases. If this shift represents an alteration of plaintiffs' legal strategy, rather than a change in the underlying nature of the harassment being challenged, it would be consistent with the notion that the affirmative defense is problematic for plaintiffs and that vicarious liability without recourse to the defense is seen by plaintiffs as decidedly advantageous. Any change in outcomes associated with the different harassment case types was even more minimal. Plaintiffs were slightly more successful in cases from the post-1998 period that involved a hostile environment claim only.

TABLE 3 Incidence and Outcome by Sexual Harassment Case Type, Federal Appeals Court Decisions, 1993-1997 and 1999-2005

Type of Harassment Claimed, Incidence ^a and Outcomes ^{b,c,d} n (%)	Pre-1998 (N=166)	Post-1998 (N=415)	Total (N=581)
Tangible Employment Action (or “quid pro quo”) Only	6 (3.6)	8 (1.9)	14 (2.4)
Outcome Favored Employer	3 (50.0)	4 (50.0)	7 (50.0)
Outcome Favored Employee	3 (50.0)	4 (50.0)	7 (50.0)
Hostile Environment Only	137 (82.5)	329 (79.3)	466 (80.2)
Outcome Favored Employer	96 (70.1)	219 (66.6)	315 (67.6)
Outcome Favored Employee	41 (29.9)	110 (33.4)	151 (32.4)
Both Types of Harassment	23 (13.9)	78 (18.8)	101 (17.4)
Outcome Favored Employer	15 (65.2)	51 (65.4)	66 (65.3)
Outcome Favored Employee	8 (34.8)	27 (34.6)	35 (34.7)

^a chi-square = 3.221, 2 df (p=.200) (incidence of case types by period)

^b Number of cells with expected frequencies of less than 5 precludes a valid test for the outcome of tangible employment action only cases by period

^c chi-square = .543, 1 df (p=.461) (outcome of hostile environment only cases by period)

^d chi-square = .000, 1 df (p=.988) (outcome of cases alleging both types of harassment by period)

D. Elements of Harassment Claims

Gaining further insight into changes in the manner in which sexual harassment cases are being analyzed and decided requires attending to the specific elements of harassment claims. As outlined *supra*, courts require that plaintiffs show the harasser’s discriminatory motivation (i.e., that the harassment was “because of . . . sex”); that the harassment resulted in a tangible employment action or was “severe or pervasive” enough to constitute a hostile environment; that the harassment was “unwelcome;” and that a “basis exists for attributing liability” to the employer.¹³⁷ Courts are unlikely to give full or equal attention to all of these elements in each decision. When finding in favor of defendants, it is sufficient to identify a single element that is not satisfied. In ruling for plaintiffs, judges are more likely to explicitly consider multiple elements since the plaintiff has the

137. See, e.g., *Hartsell v. Duplex Products*, 123 F.3d 766, 772 (4th Cir. 1997); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999); *Kriescher v. Fox Hills Golf Resort & Conference Ctr., FHR, Inc.*, 384 F.3d 912, 915 (7th Cir. 2004); *Hesse v. Avis*, 394 F.3d 624, 629 (8th Cir. 2005).

burden of establishing all of them. In the cases studied, judges gave substantive treatment to an average of 1.4 elements. The number of elements substantively treated was identical across the two time periods. However, an average of 1.29 elements were treated substantively in cases decided for the employer, compared to 1.68 in cases with outcomes favoring the employee.¹³⁸ Thus, there is empirical support for the notion that appeals courts ruling for plaintiffs are likely to engage in broader discussions of whether the elements of a sexual harassment claim are satisfied, although there is still a strong tendency to focus on the one or two elements most in question.

TABLE 4 Treatment Given the Elements of Sexual Harassment Claims in Federal Appeals Court Decisions, 1993-1997 and 1999-2005

Element/ Period n (%)	No Mention	Pro Forma Mention	Brief Mention	Lengthy Discussion	Case Hinges On Element	Total
<u>Because of . . . Sex^a</u>						
Pre-1998	71 (42.8)	35 (21.1)	17 (10.2)	18 (10.8)	25 (15.1)	166 (100.0)
Post-1998	154 (37.1)	88 (21.2)	49 (11.8)	44 (10.6)	80 (19.3)	415 (100.0)
<u>Sufficiently Severe or Pervasive^b</u>						
Pre-1998	31 (18.7)	25 (15.1)	15 (9.0)	31 (18.7)	64 (38.6)	166 (100.0)
Post-1998	60 (14.5)	54 (13.0)	60 (14.5)	83 (20.0)	158 (38.1)	415 (100.0)
<u>Unwelcome^c</u>						
Pre-1998	97 (58.4)	51 (30.7)	11 (6.6)	3 (1.8)	4 (2.4)	166 (100.0)
Post-1998	255 (61.4)	126 (30.4)	17 (4.1)	8 (1.9)	9 (2.2)	415 (100.0)
<u>Basis for Attributing Liability^d</u>						
Pre-1998	45 (27.1)	16 (9.6)	15 (9.0)	15 (9.0)	75 (45.2)	166 (100.0)
Post-1998	117 (28.2)	65 (15.7)	26 (6.3)	44 (10.6)	163 (39.3)	415 (100.0)

^a chi-square = 2.412, 4 df (p=.661)
^b chi-square = 4.525, 4 df (p=.340)
^c Number of cells with expected frequencies of less than 5 precludes a valid test.
^d chi-square = 5.722, 4 df (p=.221)

138. This difference between the mean number of elements given substantive treatment in cases won by the defendant and cases won by the plaintiff is statistically significant: $t = -6.193$, 579 df ($p < .001$).

Table 4 provides an overview of the treatment given each of the four elements of sexual harassment claims in these cases. For both time periods, judges were most likely to give substantive treatment to the “severe or pervasive” element in deciding cases. This was followed closely by consideration of whether there was a “basis for attributing liability” to the employer. These two elements received substantive treatment in at least fifty percent of cases in both periods. In contrast, the “unwelcome” element was rarely a major topic of discussion. There are no statistically significant differences in the treatment of these elements across the two periods. However, consistent with the view of most legal scholars that have addressed this issue,¹³⁹ table 4 suggests greater judicial scrutiny of the “because of . . . sex” element after 1998. It is noteworthy that the increased attention to this element in post-1998 cases is seen in the strongest form of substantive treatment—cases “hinging on” this element. Furthermore, a smaller percentage (37.1%) of cases in the post-1998 period completely neglected the “because of . . . sex” element than in the earlier period (42.8%). Thus, table 4 provides mild support for the view that the *Oncale* decision focused the attention of courts on this element and prompted questions about the discriminatory motivation for harassment in cases where this might previously have been taken for granted. But these data also make clear that it is an overstatement to speak of a “sex per se” rule¹⁴⁰ existing before *Oncale*. Even prior to 1998, the “because of . . . sex” element received substantive treatment in over a quarter of cases (25.9%) and more than merely pro forma mention in over a third of cases (36.1%). Meeting the “because of . . . sex” requirement was more than a mere formality in the years leading up to the *Oncale* decision. Instead, in light of the small percentage of cases in both periods that gave substantive treatment to the question of whether harassment was “unwelcome,” it would be more apt to speak of an “unwelcome per se” rule.¹⁴¹

139. See, e.g., Hebert, *supra* note 30, at 448-49; Kirshenbaum, *supra* note 46, at 142; Schwartz, *supra* note 32, at 1701.

140. Schwartz, *supra* note 32, at 1700.

141. There are probably several reasons for the relative neglect of the “unwelcome” element. Certainly, to the extent that there are other grounds on which to rule, this element presents judges with a relatively unpalatable option, one that smacks of blaming the victim for the conduct to which she or he has been subjected. There are also opportunities for courts to conflate the unwelcome requirement with other elements. For example, delays by plaintiffs in complaining about harassment can be construed as evidence that the conduct in question was welcome, but can also be treated as unreasonable failure to use employers’ preventive and corrective measures under the affirmative defense. See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001). Likewise, courts have tended since *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993) (“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”), to consider the subjective perspective of the plaintiff as part of the severe or pervasive inquiry, muddying the distinction between these two elements. See, e.g., *Mosher v. Dollar Tree Stores*, 240 F.3d 662, 668 (7th Cir. 2001); *Coker v. Ball Janitor Service*, 2000 U.S. App. LEXIS 5031, at 14-18 (10th Cir.).

A more surprising finding contained in table 4 is that the proportion of cases involving substantive treatment of the liability issue *declined* in the post-1998 period. The change is again not large or statistically significant. But it is notable that a smaller percentage of post-1998 cases (39.3%) hinged on the “basis for attributing liability” element than did pre-1998 cases (45.2%). Overall, the liability element received substantive treatment in 54.2% of pre-1998 cases, compared to 49.9% of post-1998 cases. Thus, while liability continues to be a central issue in deciding sexual harassment cases, there is no evidence that reliance on this element increased following the *Faragher* and *Ellerth* decisions. The findings for the “severe or pervasive” and “basis for attributing liability” elements, when viewed together, do not support the notion that creation of the affirmative defense prompted courts to turn to the liability issue as a ready means of disposing of cases without having to undertake the messy job of examining whether harassment actually occurred.¹⁴²

E. Element-Specific Outcomes

While table 4 focused on the treatment given each of the elements of a sexual harassment claim, table 5 examines the outcomes associated with each element. When a court pays attention to a particular element in deciding a case, how likely is it that the court will conclude that the particular element was satisfied by the plaintiff? The broad implication of critiques of the Supreme Court’s decisions is that plaintiffs have had more difficulty since 1998 prevailing on the “because of . . . sex” and “basis for attributing liability” elements.

Viewed over the entire study period, plaintiffs had the most difficulty convincing courts on the “because of . . . sex” element and the least difficulty establishing that the conduct in question was “unwelcome.” Furthermore, plaintiffs encountered greater difficulty establishing the “because of . . . sex” element in post-1998 cases than previously, although none of the differences between time periods are statistically significant. Plaintiffs were unable to prove the discriminatory motive behind harassment in 62.1% of post-1998 cases that gave substantive treatment to this issue, compared to 53.5% of pre-1998 cases. This is consistent with the bar having been raised for plaintiffs on the “because of . . . sex” element. In contrast, table 5 shows that plaintiffs fared better on the liability issue following 1998. Plaintiffs failed to establish the “basis for attributing

142. This finding is contrary to George’s argument that “[e]ven with modest evidence of past prevention efforts, employers are often granted summary judgment on the liability issue, thereby mooting any debate on what constitutes sexual harassment within the meaning of the statute.” George, *supra* note 79, at 728. See also Lawton, *supra* note 5, at 214 (“The fact that some courts jump right to the question of liability demonstrates that it is relatively easy for the employer to win on the affirmative defense on summary judgment . . .”).

TABLE 5 Element-Specific Outcomes in Sexual Harassment Cases, Federal Appeals Court Decisions, 1993-1997 and 1999-2005*

Element/Element-Specific Outcome n (%)	Pre-1998	Post-1998	Total
Because of . . . Sex ^a	43 (100.0)	124 (100.0)	167 (100.0)
Element Not Satisfied	23 (53.5)	77 (62.1)	100 (59.9)
Element Satisfied	16 (37.2)	42 (33.9)	58 (34.7)
Inconclusive	4 (9.3)	5 (4.0)	9 (5.4)
Sufficiently Severe or Pervasive ^b	95 (99.9)	241 (100.0)	336 (100.0)
Element Not Satisfied	50 (52.6)	136 (56.4)	186 (55.4)
Element Satisfied	35 (36.8)	92 (38.2)	127 (37.8)
Inconclusive	10 (10.5)	13 (5.4)	23 (6.8)
Unwelcome ^c	7 (100.0)	17 (100.0)	24 (100.0)
Element Not Satisfied	4 (57.1)	6 (35.3)	10 (41.7)
Element Satisfied	3 (42.9)	8 (47.1)	11 (45.8)
Inconclusive	0 (0.0)	3 (17.6)	3 (12.5)
Basis for Attributing Liability ^d	90 (100.0)	207 (100.0)	297 (100.0)
Element Not Satisfied	56 (62.2)	114 (55.1)	170 (57.2)
Element Satisfied	32 (35.6)	80 (38.6)	112 (37.7)
Inconclusive	2 (2.2)	13 (6.3)	15 (5.1)

* Figures based only on cases in which the specified element received “substantive treatment” (i.e., “lengthy discussion” or “case hinged on this element”).

^a chi-square = 2.143, 2 df (p = .342)

^b chi-square = 2.832, 2 df (p = .243)

^c Number of cells with expected frequencies of less than 5 precludes a valid test

^d chi-square = 2.764 2 df (p = .251)

liability” element in 55.1% of post-1998 cases in which this element received substantive treatment, but that marked an improvement over the 62.2% of pre-1998 cases in which plaintiffs failed to pin liability on their employers. Liability element outcomes were very similar to those for the “severe or pervasive” element in the post-1998 period. That plaintiffs experienced greater success on the liability issue in post-1998 cases—or, at least, fared no worse—does not fit neatly with the notion that the affirmative defense has been disastrous for plaintiffs. However, we should reserve judgment on this point until the outcomes of affirmative defense cases in particular are examined, since by no means do all cases focusing on the liability element involve the affirmative defense.

V.

FINDINGS FOR THE “BECAUSE OF . . . SEX” ELEMENT

From the foregoing, there is evidence that the “because of . . . sex” element assumed somewhat greater prominence in post-1998 cases and became more of a stumbling block for plaintiffs. In *Oncale v. Sundowner Offshore Services*, one of the Supreme Court decisions suspected of having altered the legal landscape, the element of “because of . . . sex” was raised under the circumstances of same-sex harassment, but this is not the only fact pattern that can prompt close examination of the harasser’s motives.

Table 6 compares element-specific outcomes for different fact patterns raising the “because of . . . sex” issue, both before and after 1998.¹⁴³ There appear to be some differences in outcomes across the two time periods, but the nature of those differences varies by fact pattern. Plaintiffs encountered greater difficulty showing discriminatory motivation in post-1998 cases featuring equal opportunity harassers, same-sex harassers, and harassers with some type of personal animus toward the plaintiff. On the other hand, plaintiffs fared slightly better or no worse in cases where a substantial portion of the harassment was not explicitly sexual in nature, the harassment involved sexually-charged surroundings, or a credible neutral motive was advanced for a tangible employment action taken against the plaintiff.

A. Equal Opportunity Harasser

The “equal opportunity” harasser poses a problem for proving the discriminatory motive behind harassment. If the harasser bothers persons of both sexes, is the plaintiff being subjected to harassment because of his or her sex? *Steiner v. Showboat Operating Co.* is an influential pre-1998 case recognizing the conceptual difficulties created by the equal opportunity harasser.¹⁴⁴ However, *Steiner* also shows that plaintiffs can overcome the obstacle created by this fact pattern. Confronted with the situation of a supervisor who was abusive to both male and female casino employees, the court relied on the fact that the supervisor’s use of “sexual epithets, offensive references to women’s bodies and sexual conduct” rendered his abuse of women different from that of male employees.¹⁴⁵ “[H]is abuse of men in no way related to their gender, [while] his abuse of female employees, especially Steiner, centered on the fact that they were females.

143. These fact patterns are not mutually exclusive. Thus, the percentages of cases in which they appear add up to considerably more than 100 percent. Additionally, the coding of fact patterns was such that if the relevant fact was mentioned by the court, the case was coded as incorporating that fact pattern, regardless of whether it was a central focus of the court’s decision.

144. 25 F.3d 1459 (9th Cir. 1994).

145. *Id.* at 1463.

TABLE 6 Fact Patterns by Outcomes on the “Because of . . . Sex” Issue in Sexual Harassment Cases, Federal Appeals Court Decisions, 1993-1997 and 1999-2005.*

Fact Pattern Incidence/Element-Specific Outcome n (%)	Pre-1998 (n = 43)	Post-1998 (n = 124)	Total (N = 167)
Equal Opportunity Harasser	5 (11.6)	29 (23.3)	34 (20.4)
Element Not Satisfied	2 (40.0)	18 (62.1)	20 (58.8)
Element Satisfied	3 (60.0)	9 (31.0)	12 (35.3)
Inconclusive	0 (0.0)	2 (6.9)	2 (5.9)
Same-Sex Harassment	10 (23.3)	32 (25.8)	42 (25.1)
Element Not Satisfied	5 (50.0)	24 (75.0)	29 (69.0)
Element Satisfied	4 (40.0)	8 (25.0)	12 (28.6)
Inconclusive	1 (10.0)	0 (0.0)	1 (2.4)
Evidence of Personal Animus	11 (25.6)	37 (29.8)	48 (28.7)
Element Not Satisfied	6 (54.5)	27 (73.0)	33 (68.8)
Element Satisfied	4 (36.4)	8 (21.6)	12 (25.0)
Inconclusive	1 (9.1)	2 (5.4)	3 (6.3)
Words/Actions Not Explicitly Sexual	12 (27.9)	51 (41.1)	63 (37.7)
Element Not Satisfied	7 (58.3)	31 (60.8)	38 (60.3)
Element Satisfied	3 (25.0)	17 (33.3)	20 (31.7)
Inconclusive	2 (16.7)	3 (5.9)	5 (7.9)
Sexually-Charged Surroundings	6 (14.0)	9 (7.2)	15 (9.0)
Element Not Satisfied	3 (50.0)	3 (33.3)	6 (40.0)
Element Satisfied	2 (33.3)	5 (55.6)	7 (46.7)
Inconclusive	1 (16.7)	1 (11.1)	2 (13.3)
Evidence of a Neutral Motive (Tangible Employment Action Cases Only)**	6 (23.1)	22 (26.8)	28 (25.9)
Element Not Satisfied	6 (100.0)	17 (77.3)	23 (82.1)
Element Satisfied	0 (0.0)	4 (18.2)	4 (14.3)
Inconclusive	0 (0.0)	1 (4.5)	1 (3.6)

* Figures based only on cases in which the “because of . . . sex” element received “substantive treatment” (i.e., “lengthy discussion” or “case hinged on this element”).

** N = 108 (pre-1998 = 26, post-1998 = 82)

Chi-square test results are not reported due to the presence of numerous cells with low expected frequencies.

It is one thing to call a woman ‘worthless,’ and another to call her a ‘worthless broad.’¹⁴⁶ While plaintiffs sometimes prevail in cases featuring equal opportunity harassers,¹⁴⁷ many do not.¹⁴⁸ Table 6 shows that equal opportunity harassment was either more common following 1998 or more likely to attract judicial attention. The latter seems more probable. The existence of this fact pattern was decidedly less favorable to plaintiffs in post-1998 cases. Plaintiffs failed to show that harassment was “because of . . . sex” in a clear majority (62.1%) of post-1998 cases in which that element received substantive treatment, compared to 40% of equal opportunity harasser cases in the pre-1998 period.

An interesting example of a post-*Oncale* case dealing with an equal opportunity harasser is *Lack v. Wal-Mart Stores*.¹⁴⁹ In *Lack*, a male clerk was harassed by a male assistant manager who subjected him to crude humor, innuendo, profanity, gestures of a sexual nature, and insults. The harasser’s behavior was objected to by female employees as well, including a woman who was originally a co-plaintiff. The court noted that while the complaints of female employees did not preclude the male employee’s claim, they did “present an imposing obstacle to proving that the harassment was sex-based.”¹⁵⁰ The court was unimpressed with the plaintiff’s attempt to point to several incidents in which the harasser specifically referred to his male anatomy, stating that “[b]oth *Oncale* and *Willis* [a West Virginia case] clearly instruct that it is not enough that the challenged conduct be sex-specific.”¹⁵¹ Not discerning an “earnest sexual solicitation” or other strong evidence of discriminatory intent, the court concluded that the harasser “was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike.”¹⁵²

That there is still room under *Oncale* to establish the discriminatory motivation of an equal opportunity harasser is demonstrated by *EEOC v. National Education Association, Alaska*.¹⁵³ Here, a labor union’s Executive Director was “rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant.”¹⁵⁴ Both male and female employees were screamed at, cursed,

146. *Id.* at 1464.

147. *See, e.g.*, *Thomas v. Town of Hamonton*, 351 F.3d 108 (3d Cir. 2003); *Beard v. S. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001); *Leake v. Ryan’s Family Steakhouse*, 5 Fed. App’x. 228 (4th Cir. 2001).

148. *See, e.g.*, *Hesse v. Avis*, 394 F.3d 624 (8th Cir. 2005); *Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000); *Holman v. Ind.*, 211 F.3d 399 (7th Cir. 2000); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958 (8th Cir. 1999); *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340 (7th Cir. 1999); *Gleason v. Mestrow Fin.*, 118 F.3d 1134 (7th Cir. 1997).

149. 240 F.3d 255 (4th Cir. 2001).

150. *Id.* at 262.

151. *Id.* at 261.

152. *Id.* at 262.

153. 422 F.3d 840 (9th Cir. 2005).

154. *Id.* at 845.

had their personal space violated, and were subjected to threatening physical gestures without provocation.¹⁵⁵ In such a case, “[t]he ultimate question under *Oncale* is whether [the Executive Director’s] behavior affected women more adversely than it affected men.”¹⁵⁶ Citing evidence that incidents involving male employees were less frequent, qualitatively different,¹⁵⁷ and had fewer detrimental effects,¹⁵⁸ the court allowed the case to go to trial.¹⁵⁹ The court also held that lack of sexual interest or a desire to rid the workplace of women (who were the majority of employees) did not preclude a finding that the challenged conduct was “because of . . . sex.” “[T]his case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men.”¹⁶⁰

B. Same-Sex Harassment

As *Oncale* made plain, the “because of . . . sex” element is a central issue in cases where the alleged harasser is the same sex as the plaintiff. Same-sex harassment raises questions about whether the requisite discriminatory intent is present because it does not fit neatly with the assumption that sexual desire provides the underlying motivation for the disparate treatment of harassment plaintiffs. This is particularly true when the harasser is not gay or lesbian. Appellate courts encountered a number of same-sex harassment cases prior to *Oncale*, with varying outcomes.¹⁶¹ However, only the Fifth Circuit had adopted the categorical rule that same-sex harassment could never violate Title VII.¹⁶² Consistent with the prevailing view of legal scholars,¹⁶³ table 6 shows that plaintiffs, if anything, fared worse in same-sex harassment cases following *Oncale* than in earlier cases. Plaintiffs failed to establish the “because of . . . sex” element in 50% of pre-1998 cases involving same-sex harassment and in fully 75% of the post-1998 same-sex cases in this study. Plaintiffs who

155. *Id.* at 843.

156. *Id.* at 845.

157. *E.g.*, less confrontational and more quickly resolved.

158. *E.g.*, females, but not males, felt physically threatened, were reduced to tears, avoided contact with the Director, called the police, and quit.

159. *Id.* at 846.

160. *Id.* at 845.

161. *See, e.g.*, *Johnson v. Hondo, Inc.*, 125 F.3d 408 (7th Cir. 1997) (ruling for defendant); *Montandon v. Farmland Indus.*, 116 F.3d 355 (8th Cir. 1997) (ruling for defendant employers); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (ruling for plaintiff); *Mayo v. Kiwest*, No. 95-2638, 1996 U.S. App. LEXIS 20445 (4th Cir. Aug. 15, 1996) (ruling for defendants); *Quick v. Donaldson Co.*, 90 F.3d 1372 (ruling for plaintiffs).

162. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994).

163. *See, e.g.*, *Diefenbach, supra* note 5; *Hebert, supra* note 5, at 463; *Kirshenbaum, supra* note 45, at 165.

prevailed in the latter period generally did so either by raising questions about the sexual orientation of the harasser or advancing a sex-stereotyping theory.¹⁶⁴

In *LaDay v. Catalyst Technology*,¹⁶⁵ a male reactor technician claimed that he was harassed by his male supervisor. Applying the first evidentiary route identified in *Oncale*—that the harasser is gay or lesbian and motivated by sexual desire to harass persons of the same sex—the court concluded that there was sufficient evidence that the harassment was “because of . . . sex” to survive summary judgment.¹⁶⁶ The court pointed to evidence that the supervisor said he was jealous of the plaintiff’s girlfriend, touched the plaintiff in a sexual manner, and made sexual advances to another male employee as supporting the conclusion that the harasser was motivated by sexual desire.¹⁶⁷ However, the court in *LaDay* also cautioned that “[u]nder *Oncale*, it is sometimes harder to prove that an instance of harassment was motivated by sex discrimination in a same-sex situation than in a circumstance involving alleged opposite-sex harassment.”¹⁶⁸ This observation has been borne out in a number of cases.¹⁶⁹ Despite repeated touching in a sexual manner by his male supervisor, the male plaintiff in *McCown v. St. John’s Health System, Inc.*¹⁷⁰ was unable to satisfy the court that the harassment was discriminatory because there was no evidence that the harasser was gay and motivated by sexual desire, hostile to the presence of males in the workplace, or treated women differently.¹⁷¹

Likewise, in *Davis v. Coastal International Security, Inc.*, the court labeled the conduct in question “a workplace grudge match” rather than harassment stemming from sexual attraction.¹⁷² The court conceded that the actions of two male employees toward their male former supervisor, which included repeated lewd comments and gestures, were “tinged with offensive sexual connotations,” but suggested that they were more likely expressions of animosity than sexual interest and attributed the hostility to disciplinary actions that the plaintiff had taken against the co-workers when

164. See, e.g., *Dick v. Phone Directories*, 397 F.3d 1256 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (Pregerson, J., concurring) (noting that the case was actionable under a gender stereotyping theory, though the majority dubbed the claim “fairly straightforward sexual harassment”); *Shepherd v. Slater Steels*, 168 F.3d 998 (7th Cir. 1999); *Diefenbach*, *supra* note 5, at 92.

165. 302 F.3d 474 (5th Cir. 2002).

166. *Id.* at 476.

167. *Id.* at 480-81.

168. *Id.* at 481.

169. See, e.g., *Pedroza v. Cintas*, 397 F.3d 1063 (8th Cir. 2005); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498 (6th Cir. 2001); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

170. 349 F.3d 540 (8th Cir. 2003).

171. *Id.* at 543-44.

172. 275 F.3d 1119, 1123 (D.C. Cir. 2002).

he was their supervisor.¹⁷³ The plaintiff's attempt to use evidence about the comparative treatment of women was also to no avail.¹⁷⁴ The court held that under *Oncale's* third evidentiary route a plaintiff in a same-sex harassment case must show that the harasser targeted multiple persons of the same sex, and not persons of the other sex.¹⁷⁵ Davis failed to do this, showing only that he was treated "differently than all other members of the Coastal workforce, whether male or female."¹⁷⁶

C. *Personal Animus*

Davis was a same-sex harassment case, but also showed that evidence of the harasser's animus toward the plaintiff based on something other than the plaintiff's sex can be used to defeat a harassment claim.¹⁷⁷ There are many reasons why one person might harass another, with a protected class characteristic being only one of these. Cases involving multiple or competing motives for the harassment are problematic for plaintiffs. Even if facts, such as harassing behavior that is explicitly sexual in nature, support the conclusion that harassment was because of sex, this conclusion is undermined by the suggestion that the harasser was acting on an alternative motive, such as personal dislike or a grudge. Since harassers most often direct their conduct toward particular individuals in the workplace rather than all persons of the plaintiff's sex, the relative ease of dredging up more personal motives for harassment offers a potentially expansive rationale for finding that harassment lacks the requisite discriminatory motive. It is no small matter, then, if *Oncale* has encouraged courts to dispose of cases in this manner. Table 6 shows that there is cause for concern. The presence of facts suggesting personal animus as the motive for harassment is quite unfavorable to plaintiffs. This was especially true for cases that followed *Oncale*. Plaintiffs failed to show that harassment was "because of . . . sex" in 73% of post-1998 cases that presented this fact pattern, compared to 54.5% of cases decided prior to 1998.

Some cases prior to *Oncale* had found that harassment with sexual content was nonetheless not "because of . . . sex" due to evidence of other motives including the plaintiff's unsatisfactory job performance and failure to cooperate with management;¹⁷⁸ the harasser's "fascination with the prurient" and perceptions of favoritism toward the plaintiff,¹⁷⁹ and a prior,

173. *Id.* at 1123-24.

174. *Id.* at 1124.

175. *Id.*

176. *Id.*

177. 275 F.3d at 1123.

178. *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994).

179. *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996).

failed sexual relationship between the harasser and plaintiff.¹⁸⁰ *Brown v. Henderson*¹⁸¹ is an interesting example of a post-*Oncale* case dealing with this issue. In *Brown*, a female postal worker and a male co-worker were subjected to a “low and vicious . . . campaign of rumors and slander” that included the posting of sexually explicit images in the workplace.¹⁸² The court concluded that the harassment

[W]as grounded in workplace dynamics unrelated to her sex and that even these pictures did not reflect an attack on Brown as a woman. Moreover, and crucially, this overwhelming evidence derives substantially from Brown herself, and her own view, clearly expressed, that the harassment was fundamentally the product of a workplace dispute stemming from the union election, and not from her being a woman.¹⁸³

Similarly, in *Rizzo v. Sheahan*,¹⁸⁴ a female investigator in a sheriff’s office was subjected to harassment that included her supervisor repeatedly expressing his desire to have sex with the woman’s 15-year-old daughter. The court conceded the existence of a hostile environment, but concluded that “Rizzo’s claim cannot succeed because she has produced no evidence indicating that [the supervisor’s] offensive behavior towards her was based on her sex.”¹⁸⁵ Instead, the court found that the plaintiff’s statements and those of another investigator supported the conclusion that the harasser was motivated by animosity toward the plaintiff’s husband.¹⁸⁶ In the court’s reading of the facts, harassment of the plaintiff was simply a way to get back at the husband.¹⁸⁷ While the Seventh Circuit characterized Rizzo’s case as a “unique situation” in which the plaintiff herself presented evidence of a motive other than sex,¹⁸⁸ numerous other post-1998 cases were decided on similar grounds.¹⁸⁹

Cases with this fact pattern are not automatically resolved in favor of defendant employers. In *Green v. Administrators of the Tulane*

180. Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996).

181. 257 F.3d 246 (2d Cir. 2001).

182. *Id.* at 249.

183. *Id.* at 256.

184. 266 F.3d 705 (7th Cir. 2001).

185. *Id.* at 712.

186. *Id.* at 712-13.

187. *Id.* at 708.

188. *Id.* at 713.

189. See, e.g., *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663,666 (7th Cir. 2005) (“became target because he could not defend himself”); *Kay v. Independence Blue Cross*, 142 Fed. App’x. 48 (3d Cir. 2005) (perceived sexual orientation of plaintiff); *Mast v. IMCO Recycling of Ohio*, 58 Fed. App’x. 116 (6th Cir. 2003) (anger over plaintiff’s request for time off); *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197 (11th Cir. 2001) (enmity stemming from a failed consensual relationship); *Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000) (personal dislike for plaintiff and her holding the position of union steward); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (sexual orientation of plaintiff).

Educational Fund,¹⁹⁰ the defendant argued that any harassment was the result of personal animosity stemming from a failed romantic relationship. Citing *Oncale*, the court concluded that harassment motivated by the plaintiff's refusal to continue to have a casual sexual relationship with her supervisor was "because of . . . sex."¹⁹¹ Likewise, in *Carter v. Chrysler*, the court decided that the lower court erred in granting a motion for summary judgment, based in part on its conclusion that any harassment stemmed from animosity over the plaintiff having reported the poor job performance of a co-worker, when there was also evidence (e.g., numerous sexual and racial epithets) that the plaintiff's sex or race might have played a role in how she was treated.¹⁹² But, on the whole, evidence of some type of personal animus between the harasser and harassed, particularly when it can be gleaned from plaintiffs' own accounts, has become decidedly disadvantageous to plaintiffs' cases.

D. Words/Actions Not Explicitly Sexual

Many sexual harassment claims are based entirely or largely on conduct not directly linked to sexual activity or even gender. Examples of such conduct include frequent yelling, unduly harsh criticism, embarrassment in front of co-workers or clients, physically threatening acts, pranks, social isolation, denial of support and resources needed to successfully perform a job, and unfavorable job assignments. Such conduct does not fit neatly within prevailing concepts of sexual harassment, but can negatively affect job performance and undermine plaintiffs in the workplace as much or more than explicitly sexual conduct. The Supreme Court's insistence in *Oncale* that it is not whether words "have sexual content or connotations" that matters, but rather whether persons of one sex are "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,"¹⁹³ can be taken to indicate that courts will now be more inclined to look past the absence of sexual words or conduct. On the other hand, closer scrutiny of the "because of . . . sex" element following *Oncale* might prompt courts to reject claims not grounded in the most common, albeit deficient, understanding of the motivation for harassment: the harasser's presumed sexual desire for the plaintiff. This would be consistent with the difficulties encountered by plaintiffs in same-sex harassment cases featuring heterosexual harassers.

190. 284 F.3d 642 (5th Cir. 2002).

191. *Id.* at 656-57.

192. 173 F.3d 693, 701 (8th Cir. 1999).

193. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

Schultz discerned some movement following *Oncale* toward greater judicial acceptance of claims based on non-sexual conduct.¹⁹⁴ Table 6 provides mild support for this view. Plaintiffs were somewhat more successful at proving discriminatory motivation in post-1998 cases based largely on non-sexual conduct (this element was satisfied in 33.3% of such cases) than in pre-1998 cases of the same sort (this element was satisfied in only 25% of such cases). The plaintiff loss rate remained roughly the same, but a smaller percentage of cases resulted in an inconclusive outcome on this element in the later period. Nor does it appear that courts became more likely after *Oncale* to take the alternative tack of attributing less weight to conduct that is not explicitly sexual and thereby deeming harassment to not be sufficiently severe or pervasive. In both time periods, plaintiffs fared worse on the severe or pervasive element when the conduct in question was wholly or largely non-sexual in nature.¹⁹⁵ Courts decided that this element was not satisfied in 66.7% of pre-1998 cases involving non-sexual conduct, compared to 64.9% of comparable post-1998 cases. Overall, then, a larger percentage of post-1998 cases entailed non-sexual conduct, with marginally better outcomes for plaintiffs.

An example of judicial willingness to recognize non-sexual conduct as sexual harassment is found in *Marrero v. Goya of Puerto Rico*.¹⁹⁶ The plaintiff's supervisor altered her work hours, with the knowledge that doing so would exacerbate her hypoglycemia; frequently stood by her desk and stared angrily at her; startled her by pounding on her desk with his fist; criticized her work unfairly; and yelled at her in front of co-workers.¹⁹⁷ The court ruled for the plaintiff, noting that "where a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim."¹⁹⁸ Cases often entail a combination of neutral and more clearly sex-linked conduct. A relatively small amount of explicitly sexual or gender-based conduct can form the basis for a successful hostile environment claim when the discriminatory motive that can be inferred from such conduct is extended to the larger amount of non-sexual conduct.¹⁹⁹

194. Schultz, *supra* note 47, at 17.

195. Out of all of the cases in this study in which the severe or pervasive element received substantive treatment, it was *not* satisfied in 55.4% of cases and satisfied in 37.8% of cases. The outcome was indeterminate in the remaining 6.8% of cases. See table 5 *infra* at .

196. 304 F.3d 7 (1st Cir. 2002).

197. *Id.* at 14-15.

198. *Id.* at 20 (quoting *O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001)).

199. See, e.g., *Chavez v. New Mexico*, 397 F.3d 826, 836-37 (10th Cir. 2005); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 695-96 (7th Cir. 2001); *Raniola v. Bratton*, 243 F.3d 610, 621-22 (2d Cir. 2001); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565-66 (6th Cir. 1999).

While courts generally acknowledge that non-sexual conduct can constitute a hostile environment, plaintiffs still face problems in having the conduct recognized as harassment and given its full weight.²⁰⁰ In *Alfano v. Costello*,²⁰¹ the alleged hostile environment included four “sex-neutral incidents” centering on unwarranted disciplinary actions²⁰² and four incidents with “sexual overtones.” Because the sex-neutral actions were carried out by a lieutenant who was not personally involved with the sex-related incidents and were not otherwise shown to be based on sex, the neutral incidents were dropped from consideration and the remaining sex-related incidents were deemed insufficiently severe or pervasive.²⁰³

Similarly, in *Bryant v. Martinez*,²⁰⁴ the plaintiff was consistently undermined by her boss, including meeting with her staff without her knowledge, excluding the plaintiff from policy meetings, refusing to return her phone calls, responding to her questions during staff meetings in a disparaging manner, embarrassing her in front of subordinates, and failing to respond to requests for guidance. Although the boss once stated to the plaintiff that “in his experience, women, in general, did not do well in management positions,” the court agreed with the trial court’s conclusion that the comment “does not reach the level of egregiousness that creates an inference that the neutral acts were based on gender animus.”²⁰⁵ Rather, the court held that “[a]t most, the comment reflects [the boss’s] opinion that some women he has encountered have not been good managers.”²⁰⁶

E. Sexually-Charged Surroundings

Harassment in the form of sexually-charged surroundings typically features multiple harassers, conduct not directed exclusively at the plaintiff, and both men and women simultaneously subjected to these conditions. If the offensive conduct targets no one in particular and it impinges on both males and females in the workplace, can it be said that persons of one sex are being subjected to inferior conditions of employment because of their sex? In *Ellett v. Big Red Keno*, the court granted summary judgment to the employer even though the plaintiff showed that “he was subjected to a

200. See, e.g., *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000); *Lacy v. Amtrak*, No. 98-1914, 2000 U.S. App. LEXIS 2933 (4th Cir. Feb. 28, 2000); *Hardin v. S.C. Johnson & Son Inc.*, 167 F.3d 340 (7th Cir. 1999); *Hartsell v. Duplex Prods. Inc.*, 123 F.3d 766 (4th Cir. 1997); *Morrison v. Carleton Woolen Mills Inc.*, 108 F.3d 429 (1st Cir. 1997); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531 (10th Cir. 1995).

201. 294 F.3d 365 (2d Cir. 2002).

202. The “sex-neutral” incidents were a memo improperly placed in the plaintiff’s file, formal counseling, informal counseling, and an investigation into the plaintiff.

203. *Id.* at 378-80.

204. 46 Fed. App’x 293, 294-95 (6th Cir. 2002).

205. *Id.* at 297.

206. *Id.*

working environment in which sexual jokes, pornography, office affairs and flirtations, and the display of 'sex toys' were commonplace."²⁰⁷ The court concluded that the plaintiff was

[U]nable to establish sexual harassment based on his gender because the record shows and [the plaintiff] admitted that all employees—male and female—were subject to the same offensive workplace atmosphere. A dually offensive sexual atmosphere in the workplace, no matter how offensive, is not unlawful discrimination unless one gender is treated differently than the other.²⁰⁸

In another case, false rumors of a sexual relationship between a male manager and a female salesperson that were spread by both male and female co-workers were deemed to be not "because of . . . sex."²⁰⁹ The court noted that the female employee was a victim of the rumor-mongering just as much as the male plaintiff, the rumors were spread by both male and female co-workers, and "[s]uch rumors spread, irrespective of the truth, for any number of reasons having nothing to do with gender discrimination."²¹⁰

Cases involving sexually-charged hostile environments and decided, at least partially, on the basis of whether the harassment was deemed to be "because of . . . sex" are relatively uncommon.²¹¹ Due to these small numbers, generalizations are especially hazardous. To the extent that table 6 captures any trend in this regard, it appears that courts were more receptive to such claims in the post-1998 period. Plaintiffs successfully established the "because of . . . sex" element in the majority (55.6%) of the small number of such cases in the post-1998 period, compared to only a third of the even smaller number of cases with this fact pattern decided prior to 1998.

Petrosino v. Bell Atlantic illustrates this receptiveness.²¹² Both co-workers and managers contributed to the hostile environment experienced by Petrosino. In addition to acts directed specifically at her, Petrosino was exposed to rampant sexually explicit graffiti, profanity, crude humor, and "sexually demeaning conversations."²¹³ The court stated that

The fact that much of the offensive material was not directed specifically at Petrosino—indeed, her male co-workers would likely have traded sexual insults every morning and defaced terminal boxes with sexual graffiti

207. No. 98-3046, 2000 U.S. App. LEXIS 17583, at 2 (8th Cir. July 21, 2000).

208. *Id.* at 2-3.

209. *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996).

210. *Id.* at 517.

211. *See, e.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210 (2d Cir. 2004); *Kriescher v. Fox Hills Golf Resort & Conference Ctr., FHR, Inc.*, 384 F.3d 912 (7th Cir. 2004); *Ocheltree v. Scollon Prods. Inc.*, 335 F.3d 325 (4th Cir. 2003); *Tumbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000).

212. 385 F.3d 210 (2d Cir. 2004).

213. *Id.* at 214-15.

regardless of Petrosino's presence in the I&R department—does not, as a matter of law, preclude a jury from finding that the conduct subjected Petrosino to a hostile environment based on her sex.²¹⁴

While both males and females were subjected to the same abusive environment, men were not ridiculed as a group and were often touted for their sexual exploits.²¹⁵ In contrast, “the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men.”²¹⁶ In reaching this conclusion, the court explicitly endorsed the reasoning of the Fourth Circuit in *Ocheltree v. Scollon Products*.²¹⁷ The plaintiff in *Ocheltree*, once again the lone female in a male-dominated workplace, experienced a continuous stream of sexual banter, crude humor, pornography, sexual insults and gestures, and discussion of sexual exploits and preferences.²¹⁸ In an *en banc* decision, the court found sufficient evidence of a discriminatory motive in the evident enjoyment of the males in watching the reactions of the only woman in the workplace to their antics, shop talk that specifically demeaned women by portraying wives and girlfriends as sexual objects, and the deleterious effect on the plaintiff.²¹⁹ The harassment was sufficiently sex-specific and derogatory “to make it clear that [the harassers] [were] motivated by general hostility to the presence of [a] woman in their workplace.”²²⁰

F. Evidence of a Neutral Motive For a Tangible Employment Action

The “because of . . . sex” requirement is not limited to hostile environment cases. For harassment resulting in a tangible employment action to be proven, a plaintiff must demonstrate that they were subjected to a sexual advance and that the employer made a significant change in their employment status based on the plaintiff's submission to or rejection of that sexual advance.²²¹ A question considered by the courts in a number of sexual harassment cases, both before and after 1998, was whether a tangible

214. *Id.* at 222.

215. *Id.*

216. *Id.*

217. 335 F.3d 325 (4th Cir. 2003).

218. *Id.* at 328-29.

219. *Id.* at 332.

220. *Id.* at 333 (quoting with slight modification *Oncale's* second “evidentiary route,” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)).

221. *See, e.g.*, *Bryant v. Sch. Bd. of Miami Dade County*, 142 Fed. App'x. 382 (11th Cir. 2005); *Angeloni v. Diocese of Scranton*, 135 Fed. App'x. 510 (3d Cir. 2005); *Williams v. Spartan Commc'ns.*, No. 99-1566, 2000 U.S. App. LEXIS 5776 (4th Cir. Mar. 30, 2000). Cases like these that deal with whether a tangible employment action occurred are distinguishable from those that focus on the motive for the action. The former are coded in this study as addressing the “severe or pervasive” element of a harassment claim, while the latter are coded as addressing the “because of . . . sex” element.

employment action was based on some motive other than the plaintiff's response to an advance.²²² Table 6 suggests that plaintiffs fared slightly better in cases presenting this issue when those cases were decided after 1998.

In *Frederick v. Sprint/United Management Co.*, the appeals court rejected the lower court's reasoning that the consequences of refusing a sexual advance must be made explicit by the harasser to be actionable, but nonetheless found for the employer because the plaintiff failed to "establish any causal link between the adverse 'tangible employment action' she suffered and the alleged harassment."²²³ Even if the plaintiff's view that she was qualified for the promotional position was accepted, the employer was able to show that she was denied promotion because of a history of attendance problems and management's judgment that she needed further development.²²⁴ In *Matvia v. Bald Head Island Management*,²²⁵ the plaintiff alleged that she was able to obtain employment benefits—including a raise, promotion, and positive performance appraisals—only by virtue of acquiescing to her supervisor's advances. The court agreed that a tangible employment action claim could be based on the coerced exchange of employment benefits for submission to harassment, but concluded that the plaintiff had failed to show that this was the reason for the benefits she received.²²⁶ Instead, the plaintiff's own testimony showed that her promotion and raise were well-deserved.²²⁷ The plaintiff had assumed additional job responsibilities, a co-worker who was not being harassed also received the raise and promotion, and the evaluations labeling her performance as "satisfactory" were consistent with her actual performance.²²⁸ A variation on this theme occurs when courts conclude that discriminatory motivation is not present because, even if a sexual advance occurred and the supervisor would like to have punished the plaintiff for

222. See, e.g., *Walton v. Johnson & Johnson Servs.*, 347 F.3d 1272 (11th Cir. 2003); *Murray v. Chi. Transit Auth.*, 252 F.3d 880 (7th Cir. 2001); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167 (9th Cir. 2001); *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49 (1st Cir. 2000); *Silva v. Runyon*, No. 98-16503, 2000 U.S. App. LEXIS 8202 (9th Cir. Apr. 21, 2000); *Ellis v. Director, CIA*, No. 98-2481, 1999 U.S. App. LEXIS 21638 (4th Cir. Sept. 10, 1999); *Gastineau v. Home Depot USA Inc.*, No. CA 94-16831, 1996 U.S. App. LEXIS 1665 (9th Cir. Jan. 9, 1996); *Garmon v. Cont'l. Co.*, No. 92-6139, 1993 U.S. App. LEXIS 18084 (6th Cir. July 8, 1993).

223. 246 F.3d 1305, 1312 (11th Cir. 2001).

224. *Id.*

225. 259 F.3d 261 (4th Cir. 2001).

226. *Id.* at 267.

227. *Id.*

228. *Id.*

rejecting it, the supervisor did not decide upon or influence the tangible employment action taken.²²⁹

VI.

FINDINGS FOR THE “BASIS FOR ATTRIBUTING LIABILITY” ELEMENT

It is necessary to examine cases that give substantive treatment to the “basis for attributing liability” element in order to assess the effects of the *Faragher* and *Ellerth* decisions. The following sections deal with the propensity of courts to grant summary judgment to employers despite their burden of having to prove the affirmative defense, the outcomes of cases in which the affirmative defense was raised, and, at greatest length, the mode of analysis employed in affirmative defense cases. Are courts disproportionately resorting to summary judgment to dispose of affirmative defense cases? Just how badly are plaintiffs faring in affirmative defense cases? Is one or the other “prong” being effectively written out of the affirmative defense? Have courts been motivated to look for and find evidence of reporting delay or other failure to avoid harm in affirmative defense cases? What fact patterns best predict the outcome of affirmative defense cases?

A. Summary Judgment and the Affirmative Defense

TABLE 7 Procedural Posture of Case by Whether the Affirmative Defense was Raised, Federal Appeals Court Decisions in Sexual Harassment Cases, 1999-2005

Procedural Posture Of Case on Appeal n (%)	Affirmative Defense Not Raised (N=314)	Affirmative Defense Raised (N=101)	Total (N=415)
Review Grant of Summary Judgment	252 (80.3)	74 (73.3)	326 (78.6)
Review Bench Trial	7 (2.2)	3 (3.0)	10 (2.4)
Review Jury Trial	42 (13.4)	18 (17.8)	60 (14.5)
Review Other Action	13 (4.1)	6 (5.9)	19 (4.6)

Chi-square test results are not reported due to the presence of cells with low expected frequencies.

229. See, e.g., *Moayedi v. Compaq Computer Corp.*, 98 Fed. App'x. 335 (5th Cir. 2004); *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34 (1st Cir. 2003); *Reed v. Delta Air Lines Inc.*, No. 93-5031, 1994 U.S. App. LEXIS 3485 (6th Cir. Feb. 24, 1994).

Legal scholars have criticized the propensity of courts to resolve cases involving the affirmative defense via summary judgment, rather than at trial.²³⁰ Table 7 shows the relationship between the procedural posture of post-1998 cases and use of the affirmative defense. The bulk of affirmative defense cases (73.3%) reaching federal appeals courts did, in fact, entail reviews of summary judgment. However, it is important to remember that the vast majority of all post-1998 cases in this study had the same procedural posture. Fully 80.3% of post-1998 cases not involving the affirmative defense came to the courts of appeal following grants of summary judgment. Thus, while the impression that summary judgment is frequently used to dispose of affirmative defense cases is well-founded, that is because the courts have increasingly resorted to summary judgment in sexual harassment cases of all kinds. Indeed, cases involving the affirmative defense have, if anything, been less likely to be disposed of via summary judgment than other sexual harassment cases. It is still reasonable to argue that summary judgment for employers, who bear the burden of proving the affirmative defense, should be a rarity, just as it is for plaintiffs.²³¹ But, at least relative to other contemporary sexual harassment cases, the affirmative defense cases in this study are no worse in this regard.

B. *The Affirmative Defense and Outcomes on the Liability Element*

How plaintiffs fare in affirmative defense cases matters a great deal because supervisors and managers are so frequently at the center of sexual harassment cases. A supervisor or manager was the alleged harasser or among a group of harassers in approximately two-thirds of the cases in this study.²³² The Supreme Court crafted the rule of vicarious liability subject to the opportunity to establish an affirmative defense in cases of hostile environment harassment perpetrated by supervisors or managers in recognition of the fact that harassment engaged in by supervisors or managers is likely aided in some fashion by the authority conferred upon those actors as agents.²³³ Thus, employers properly bear the burden of

230. See, e.g., George, *supra* note 79, at 749-50; Marks, *supra* note 69, at 1404.

231. Lawton, *supra* note 5, at 214.

232. It is not possible to provide an exact figure because of the manner in which this information was coded. However, I was able to estimate a percentage based on other information collected. The harasser was coded as a *supervisor or manager* in 49.4% of cases. The harasser was a *top official* in an additional 2.6% of cases. In the 14.5% of cases in which there were multiple harassers of *mixed status*, the mixture virtually always consisted of supervisors and co-workers. Additionally, since the position of the harasser was described relative to that of the plaintiff, there were also an unknown number of cases in which a supervisor or manager was harassed by a *co-worker* at the same organizational level (i.e., another supervisor or manager). This estimate of approximately two-thirds is lower than the 78.1% of appeals court cases involving harassment by supervisors or managers found by Juliano and Schwab, *supra* note 101, at 595, for the 1986-1995 period.

233. Faragher v. City of Boca Raton, 524 U.S. 775, 802-04 (1998).

showing that they should nonetheless not be held liable due to their efforts to prevent and promptly correct harassment and plaintiffs' unreasonable failure to avoid harm. The rule was clearly intended to be distinct from the negligence standard for attributing liability. The implication was that the affirmative defense would be a more exacting standard, under which employers would have greater difficulty avoiding liability. Yet, legal scholars widely regard the availability of the affirmative defense as a boon to employers.²³⁴

TABLE 8 Liability Element Outcome By Whether the Affirmative Defense was Raised, Federal Appeals Court Decisions in Sexual Harassment Cases, 1999-2005*

Element-Specific Outcome n (%)	(a) Post-1998 Affirmative Defense Not Raised	(b) Post-1998 Affirmative Defense Raised	(c) Pre-1998 No Affirmative Defense Available, Supervisor/Manager Harasser Only	Total
Element Not Satisfied	58 (53.2)	56 (57.1)	25 (58.1)	139 (55.6)
Element Satisfied	42 (38.5)	38 (38.8)	17 (39.5)	97 (38.8)
Inconclusive	9 (8.3)	4 (4.1)	1 (2.3)	14 (5.6)
Total	109 (100.0)	98 (100.0)	43 (100.0)	250 (100.0)

* Figures based only on cases in which the liability element received "substantive treatment" (i.e., "lengthy discussion" or "case hinged on this element").

chi-square = 1.578, 2 df (p=.454) (element-specific outcome by whether the affirmative defense was raised, post-1998 cases). Chi-square test results are not reported for the pre-/post-1998 comparison due to the presence of cells with low expected frequencies.

Table 8 compares outcomes on the "basis for attributing liability" element²³⁵ for cases in which the affirmative defense was raised with cases in which the affirmative defense was not raised. The latter cases were most often decided under a negligence standard.²³⁶ The first two columns (a and

234. See, e.g., George, *supra* note 79, at 734; Marks, *supra* note 61, at 1404-05; Lawton, *supra* note 5, at 214.

235. To judge how exacting the affirmative defense has been, the most relevant outcomes are again element-specific ones. A plaintiff might have been able to clear the bar of the liability element, only to see his or her case founder on other grounds. It would be misleading to attribute that case outcome to the presence or absence of the affirmative defense.

236. This is not to say that all courts apply the same negligence standard. Some courts set the bar relatively high for an adequate response to harassment that was known or should have been known.

b) in table 8 compare the outcomes of affirmative defense and non-affirmative defense cases, post-1998. These outcomes do not differ to a statistically significant extent. Cases in this data set not involving the affirmative defense were less likely to produce a definite decision. However, the greater certainty under the affirmative defense standard redounded almost entirely to the benefit of employers, as the “basis for attributing liability” element was *not* satisfied by the plaintiff in 57.1% of affirmative defense cases, compared to 53.2% of post-1998 non-affirmative defense cases.

Insofar as the alleged harassers in affirmative defense cases are supervisors or managers, while non-affirmative defense cases typically center on the actions of co-workers, an objection might be raised that the comparison between affirmative defense and non-affirmative defense cases is potentially confounded by differences in the organizational positions of the alleged harassers. Perhaps courts view harassment differently depending on the organizational position of the harasser, regardless of which liability standard is applied. Additionally, if we want to know whether the availability of the affirmative defense has changed anything, a comparison with the outcomes of pre-1998 cases in which the alleged harassers were supervisors or managers is particularly instructive. Columns b and c in table 8 provide this comparison. The percentage of cases in which plaintiffs failed to satisfy the liability element (58.1%) in pre-1998 cases alleging harassment by supervisors or managers is only slightly higher than for affirmative defense cases. For all intents and purposes, the outcomes for plaintiffs alleging harassment by supervisors or managers remained the same over time.

The results reported in table 8 provide no support whatsoever for the notion that the affirmative defense is a more stringent standard, one that makes it easier for plaintiffs to satisfy the liability element. Since it is mainly the earliest commentators on the affirmative defense and perhaps some Supreme Court members who believed otherwise, this conclusion is not remarkable. However, these data also do not support the opposing view that the affirmative defense has been an unmitigated disaster for plaintiffs. Relative to decisions on the liability issue made during the same period of time but not entailing the affirmative defense, and to pre-1998 cases

E.g., *Yamaguchi v. U.S. Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997) (not enough that harassment stopped; harasser must be disciplined). On the other hand, at least one court has held that any response is sufficient so long as it does not “manifest indifference or unreasonableness in light of the facts the employer knew or should have known.” *Lewis v. Zero Breese*, No. 9804119, 1999 U.S. App. LEXIS 29618, at 7 (6th Cir. Nov. 4, 1999). The major alternative to a negligence standard is found in cases brought against public employers under 42 U.S.C. § 1983 (2006). In such cases courts consider whether the public employer had a “custom or policy” of permitting discriminatory harassment as the basis for assigning liability. *See, e.g.*, *Griffin v. City of Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001); *Garrison v. Burke*, 165 F.3d 565 (7th Cir. 1999).

involving supervisor or manager harassers, there is either no difference in outcomes or only a small difference. It is worthwhile here to recall the results presented in tables 4 and 5 *supra*. The affirmative defense, while not helpful to plaintiffs, has not resulted in an overall decline in plaintiffs' ability to satisfy the "basis for attributing liability" element or even a greater inclination on the part of courts to dispose of cases on those grounds.

C. *Analysis of Liability under the Affirmative Defense*

1. *The Two Prongs of the Affirmative Defense*

Legal commentary on the affirmative defense has focused less on case outcomes than on the mode of analysis used by courts in deciding these cases. The affirmative defense requires employers to prove that they exercised reasonable care to both prevent and promptly correct any harassment ("prong one") and that the plaintiff failed to avoid harm by taking advantage of these preventive and corrective measures ("prong two"). Legal scholars have questioned whether courts have faithfully adhered to this formulation. One line of criticism is that courts have placed undue weight on the existence of sexual harassment policies, complaint procedures, training, and other formal trappings of legal compliance in determining whether the first prong of the affirmative defense is met.²³⁷ The effectiveness of these preventive mechanisms at actually remedying harassment—the far more telling matter—is simply assumed.²³⁸ A second line of criticism is that courts have given a disjunctive reading to the two prongs of the affirmative defense, ruling for "good" employers when preventive and corrective mechanisms are in place, regardless of any real failings on the part of plaintiffs.²³⁹ A third, and closely related, line of criticism is that courts have scrutinized plaintiffs' behavior more closely and gone out of their way to find evidence of unreasonable failure to utilize employers' preventive and corrective opportunities, thereby permitting employers to satisfy prong two.²⁴⁰ These criticisms are not mutually exclusive and are better viewed as different emphases than sharply contending views regarding how affirmative defense cases are being decided.

237. See, e.g., Bisom-Rapp, *supra* note 74; Lawton, *supra* note 5.

238. Lawton, *supra* note 5, at 207-09.

239. See, e.g., Marks, *supra* note 69, at 1423-28; Sherwyn, Heise & Eigen, *supra* note 84, at 1289.

240. See, e.g., George, *supra* note 5, at 162; Marks, *supra* note 69, at 1428-35.

TABLE 9 Analysis of Liability Element By Period, Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-1997 and 1999-2005*

Prongs**/ Outcome on Liability Element n (%)	Post-1998 Affirmative Defense Not Raised (N=109)	Post-1998 Affirmative Defense Raised (N=98)	Pre-1998 No Affirmative Defense Available (N=90)
Neither Prong	15 (13.8)	4 (4.1)	12 (13.3)
Element Not Satisfied	2 (13.3)	0 (0.0)	3 (25.0)
Element Satisfied	10 (66.7)	4 (100.0)	8 (66.7)
Inconclusive	3 (20.0)	0 (0.0)	1 (8.3)
Prong One Only	56 (51.4)	12 (12.2)	31 (34.4)
Element Not Satisfied	35 (62.5)	2 (16.7)	21 (67.7)
Element Satisfied	19 (33.9)	10 (83.3)	9 (29.0)
Inconclusive	2 (3.6)	0 (0.0)	1 (3.2)
Prong Two Only	4 (3.7)	1 (1.0)	6 (6.6)
Element Not Satisfied	1 (25.0)	0 (0.0)	2 (33.3)
Element Satisfied	1 (25.0)	0 (0.0)	4 (66.7)
Inconclusive	2 (50.0)	1 (100.0)	0 (0.0)
Both Prongs	34 (31.2)	81 (82.6)	41 (45.6)
Element Not Satisfied	20 (58.8)	54 (66.7)	30 (73.2)
Element Satisfied	12 (35.3)	24 (29.6)	11 (26.8)
Inconclusive	2 (5.9)	3 (3.7)	0 (0.0)

* Figures based only on cases in which the liability element received "substantive treatment" (i.e., "lengthy discussion" or "case hinged on this element").

** Indicates whether any facts relating to the exercise of "reasonable care to prevent and promptly correct" harassment (prong one) or the plaintiff's failure to take advantage of any preventive or corrective opportunities (prong two) are mentioned in the decision.

Table 9 compares affirmative defense cases with non-affirmative defense cases, both before and after 1998. Cases are classified according to whether the court cited facts relevant to establishing prong one only, prong two only, both prongs, or neither prong. Facts relevant to prong one include whether the employer had a harassment policy, investigated promptly, took strong action against the harasser, and succeeded in stopping the harassment. Facts relevant to prong two include failure to report harassment prior to filing a charge with the EEOC or other administrative agency, delay in reporting, failure to properly comply with the employer's established complaint procedures, failure to cooperate in the investigation, and refusal of a proffered remedy. It is important to note that the mention of facts relevant to one or the other prong does not necessarily mean the court concluded that particular prong was satisfied and, indeed, in non-affirmative defense cases no such conclusion is required. Additionally, while the "prongs" directly apply only to affirmative defense cases, the facts relevant to a determination of liability are likely to be similar regardless of which standard is being used. Thus, different types of cases can still be usefully compared in terms of whether facts relevant to the different prongs are present.

On the whole, table 9 suggests that the affirmative defense is being applied in a way that is at least superficially faithful to the Supreme Court's formulation. The vast majority (82.6%) of affirmative defense cases cited facts relevant to establishing both prongs of the affirmative defense,²⁴¹ while this was not true of non-affirmative defense cases. Courts ruled on behalf of employers in two-thirds of affirmative defense cases with facts related to both prongs, compared to 58.8% of post-1998 non-affirmative defense cases and fully 73.2% of pre-1998 cases with these fact patterns. While clearly helpful to defendants in affirmative defense cases, the existence of facts relevant to both prongs was not inevitably fatal to plaintiffs.²⁴² In *Williams v. Spartan Communications*, the court stated that

[A]ny anti-harassment policy offered to satisfy the first prong of the Faragher-Ellerth defense must be 'both reasonably designed and reasonably effectual.' Moreover, a prompt response to complaints of harassment made pursuant to a policy banning harassment does not necessarily establish the first prong of the affirmative defense.²⁴³

241. See, e.g., *Collette v. Stein-Mart, Inc.*, 126 Fed. App'x. 678 (6th Cir. 2005); *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261 (4th Cir. 2001); *Hill v. Am. Gen. Fin.*, 218 F.3d 639 (7th Cir. 2000); *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000).

242. See, e.g., *Mota v. Univ. of Tex. Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305 (11th Cir. 2001); *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000).

243. No. 99-1566, 2000 U.S. App. LEXIS 5776, at 6 (4th Cir. Mar. 30, 2000) (internal citation omitted).

Taking an unusually close look at the adequacy of the employer's preventive and corrective efforts, the court in *Williams* proceeded to catalogue a list of deficiencies including failure to provide training on harassment and the harassment policy, the active participation of senior managers in creating a sexually-charged workplace, failure to respond to employee complaints about foul language and sexist jokes, and failure to protect employees reporting harassment from retaliation.²⁴⁴ While careful to say that an employer might still prevail under these facts, the court reversed the grant of summary judgment.

In the few affirmative defense cases in which the facts addressed neither prong²⁴⁵ or the second prong only,²⁴⁶ plaintiffs almost always prevailed. On the other hand, in two well-known cases involving the first prong only, courts ruled in favor of the employer. In one of these cases, *McCurdy v. Arkansas State Police*,²⁴⁷ the employer prevailed despite an employee's indisputably prompt complaint. The employee was subjected to some four or five instances of harassment during a single shift, which the court chose to characterize as a "single incident" of harassment, and reported the conduct to an official who came on duty later in the same shift. In framing the issue, the court stated that

Strict adherence to the Supreme Court's two-prong affirmative defense in this case is like trying to fit a square peg into a round hole. We will not tire ourselves with such an exercise. Instead, we critically ask whether Title VII envisions strict employer liability for a supervisor's single incident of sexual harassment when the employer takes swift and effective action to insulate the complaining employee from further harassment the moment the employer learns about the harassing conduct.²⁴⁸

The court answered in the negative, reasoning that

To hold otherwise would make the promise of an affirmative defense in single incident cases not involving a tangible employment action illusory—the pragmatic result would be to hold effective employers . . . strictly liable for all single incidents of supervisor harassment, while allowing other employers an affirmative defense for multiple and ongoing incidents of supervisor harassment.²⁴⁹

244. *Id.* at 6-8.

245. *See, e.g.,* *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7 (1st Cir. 2002); *EEOC v. R&R Ventures*, 244 F.3d 334 (4th Cir. 2001); *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000).

246. *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (reversing and remanding this early post-1998 case to allow for analysis of liability in light of *Faragher* and *Ellerth*, without commenting on the likely outcome).

247. 375 F.3d 762 (8th Cir. 2004).

248. *Id.* at 771.

249. *Id.* at 772.

Cases like these²⁵⁰ are intriguing, but only a small number of affirmative defense cases (12.2%) rested solely on prong one facts and most of these (83.3%) were resolved in favor of the plaintiffs.²⁵¹ In contrast, a much larger percentage of non-affirmative defense cases considered facts related to establishing the first prong only and decided for the employer on that basis. However, there are other ways to “fit the square peg into a round hole” and rule for “responsible” employers without directly contesting the two prong framework.

2. *A Closer Look at Liability-Related Fact Patterns*

Table 10 delves further into the affirmative defense by examining the presence or absence of specific fact patterns. Table 10 compares the proportion of affirmative defense and non-affirmative defenses cases in which fact patterns relevant to deciding the liability element are present. A t-test is used to determine whether these differences in proportions are statistically significant. On average, courts cited more fact patterns related to both the first and second prongs in affirmative defense cases than in non-affirmative defense cases. Even though the existence of a harassment policy is a basic fact that also appeared in the majority of non-affirmative defense cases, it was virtually *de rigueur* in affirmative defense cases. Affirmative defense cases were also somewhat more likely to focus on the remedy provided and to note that the employer had taken “strong action” against the harasser. Other fact patterns related to the correction of harassment were only slightly more likely to be mentioned in affirmative defense cases and the differences are not statistically significant. The differences between facts discussed in affirmative defense and non-affirmative defense cases are most pronounced with respect to prong two. Delay in reporting harassment and failure to fully cooperate with investigations were more likely, to a statistically significant extent, to be found in affirmative defense cases than in non-affirmative defense cases. Other indicators of failure to utilize preventive and corrective measures, including not reporting prior to filing a charge, non-compliance with

250. *See also* *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999) (two prong analysis “does not control” in a case involving “incipient hostile environment corrected by prompt remedial action”); *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 806 (5th Cir. 1999) (Weiner, J., specially concurring) (two prong analysis applies, but the harassment was not sufficiently severe or pervasive). Since neither rationale enjoyed majority support, the case did not establish precedent for the Fifth Circuit. Other decisions do not present this fact pattern, but evince sympathy for the view that the affirmative defense should be available to employers in such cases. *See, e.g.*, *Watkins v. Prof'l Sec. Bureau*, No. 98-2555 1999 U.S. App. LEXIS 29841, at 21 n.16 (4th Cir. Nov. 15, 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999).

251. *See, e.g.*, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580 (9th Cir. 2000); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95 (3d Cir. 1999); *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999).

TABLE 10 Fact Patterns Relevant to the Liability Element By Whether the Affirmative Defense was Raised, Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-1997 and 1999-2005*

Fact Patterns (proportion of cases mentioning)	No Affirmative Defense Raised (N=199)**	Affirmative Defense Raised (N=98)	t (df= 295)	Significance Level (p-value)
<u>Prong One</u>				
Harassment Policy Exists	.56	.93	-6.835	<.001
Prompt Investigation	.53	.59	-0.963	.337
Strong Action Taken	.33	.45	-2.065	.040
Harrassment Stopped After Action Taken	.31	.32	-0.171	.864
<u>Prong Two</u>				
Failure to Report	.07	.13	-1.936	.054
Delayed Report	.20	.53	-6.110	<.001
Failure to Comply With Procedure	.11	.18	-1.739	.083
Failure to Cooperate in Investigation	.08	.18	-2.650	.008
Remedy Offered and Refused	.04	.08	-1.722	.086
<u>Mean Number Of Fact Patterns</u>				
Prong One (max. = 4)	1.73	2.28	-3.561	<.001
Prong Two(max. = 5)	.4	1.11	-7.639	<.001
* Figures based only on cases in which the liability element received "substantive treatment" (i.e., "lengthy discussion" or "case hinged on this element").				
** Includes both pre-1998 cases decided before the affirmative defense was devised and post-1998 cases in which it was not available.				

complaint procedures, and refusal of proffered remedies, were all more likely to be mentioned in affirmative defense cases, with the differences approaching statistical significance.

The difference between the proportion of cases mentioning an undue delay in reporting for affirmative defense and non-affirmative defense cases

is particularly striking. Over half of the affirmative defense cases (53%) referred to the plaintiff's delay in reporting, while far fewer non-affirmative defense cases (20%) noted any such failure on the part of the plaintiff. Even though this fact pattern is relevant under both the negligence standard (i.e., to determine whether and when the employer knew or should have known about the harassment) and affirmative defense standard for attributing liability, it was mentioned far less frequently in the former cases. There are two possible explanations: either the facts underlying affirmative defense and non-affirmative defense cases are truly different or the requirements of the affirmative defense give courts a reason to look for and find failure to expeditiously report under circumstances that would otherwise not warrant judicial notice. It is possible that there is, in fact, greater reluctance on the part of plaintiffs to report harassment in affirmative defense cases. The very circumstance to which the affirmative defense applies—hostile environment harassment by a supervisor or other manager with successively higher authority over the employee—renders fear of retaliation and resultant delay in reporting more likely. However, it also seems likely that the need to establish the second prong in order to exculpate responsible employers has prompted courts to search for and find such failures on plaintiffs' part to mitigate harm.

Table 10 showed that there are differences in the facts mentioned in affirmative defense and non-affirmative defense cases. Table 11 examines the connection between these fact patterns and outcomes on the liability element. The logistic regression analysis captures the effect of each fact pattern controlling for (i.e., "holding constant") the other fact patterns on the odds, transformed to their natural logarithm, of a court ruling that the plaintiff had satisfied the "basis for attributing liability" element. Separate models were estimated for affirmative defense and non-affirmative defense cases, permitting comparison across types of cases in terms of which fact patterns most affected liability determinations.

Since all of these fact patterns are favorable to an employer's case, it was expected that any observed relationships would be negative (i.e., the presence of the fact pattern would be associated with a lower plaintiff win rate). Although almost all of the coefficients (i.e., estimates of the effect of each variable on outcomes) are negative, only a few are statistically significant. The absence, in either model, of a significant coefficient for the existence of a policy might, at first glance, be surprising. However, the fact that almost all employers in affirmative defense cases had harassment policies in place almost ensured that the existence of such a policy would not be a good predictor of outcomes. There is simply not enough variation in this fact pattern to account for the much greater variation in outcomes. This should not be taken to mean that the existence of a policy is irrelevant. Whatever the theoretical possibility of an employer prevailing in an

TABLE 11 Effects of Fact Patterns on Basis for Attributing Liability Element Outcomes By Whether the Affirmative Defense was Raised, Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-1997 and 1999-2005*

Fact Patterns	Coefficient	Standard Error	p-value	Effect of Variable on Odds Of Establishing Liability
<u>Policy Exists</u>				
Aff. Def.	-0.66	1.58	.675	Not statistically significant
No Aff. Def.	0.51	0.43	.238	Not statistically significant
<u>Prompt Investigation</u>				
Aff. Def.	-2.37	0.75	.002	Decreases odds by 90.7%
No Aff. Def.	-2.44	0.44	<.001	Decreases odds by 91.3%
<u>Strong Action Taken</u>				
Aff. Def.	-0.06	0.64	.923	Not statistically significant
No Aff. Def.	-0.10	0.46	.826	Not statistically significant
<u>Harassment Stopped</u>				
Aff. Def.	-0.16	0.68	.818	Not statistically significant
No Aff. Def.	-1.51	0.50	.002	Decreases odds by 77.9%
<u>Failure to Report</u>				
Aff. Def.	-3.57	1.18	.003	Decreases odds by 97.2%
No Aff. Def.	-1.41	0.80	.077	Not statistically significant
<u>Delayed Report</u>				
Aff. Def.	-2.19	0.76	.004	Decreases odds by 88.8%
No Aff. Def.	-0.63	0.53	.236	Not statistically significant
<u>Non-Compliance With Procedure</u>				
Aff. Def.	-1.04	0.83	.214	Not statistically significant
No Aff. Def.	-0.68	0.61	.266	Not statistically significant
<u>Non-Cooperation With Investigation</u>				
Aff. Def.	-1.22	0.96	.203	Not statistically significant
No Aff. Def.	-0.89	0.81	.271	Not statistically significant
<u>Refusal of Remedy</u>				
Aff. Def.	-2.58	1.42	.069	Not statistically significant
No Aff. Def.	-0.14	0.99	.891	Not statistically significant

<u>Model</u>	<u>Constant</u>	<u>-2 Log- Likelihood</u>	<u>Chi-Square</u>	<u>N</u>
Aff. Def.	3.82	82.29	44.56 ^a	94
No Aff. Def	1.26	170.80	81.25 ^b	188

* Results of logistic regression analysis. Only cases in which the liability element received “substantive treatment” (i.e., “lengthy discussion” or “case hinged on this element”) and where the outcome was conclusive are included.

^{a, b} 9 df, p-value <.001 for both models

affirmative defense case absent a reasonably well-crafted harassment policy,²⁵² it is unlikely in practice. The existence of a policy is essentially a necessary, but not sufficient, ingredient for avoiding liability under the affirmative defense. It receives less attention under a negligence standard, often arising in the context of determining whether lack of knowledge of harassment can be traced to a defective policy. Other aspects of an employer’s response to reports of harassment appear to be more decisive.

A finding for both affirmative defense and non-affirmative defense cases is that it mattered a great deal whether an employer promptly investigated allegations of harassment. A prompt investigation reduced the odds of the plaintiff prevailing on the liability issue by over 90% for both types of cases. As the Ninth Circuit stated in a co-worker harassment case,

The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. . . . By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace.²⁵³

Likewise, in upholding an employer’s affirmative defense, the court observed that

AT&T responded promptly and effectively: It suspended Valenzuela, the accused harasser, and dispatched two of its E.O. Specialists to conduct an in-depth investigation involving, among other things, interviews with Casiano, Valenzuela, and nine other workers. The conclusions reached by the investigators are well-substantiated by the information they were able to

252. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (“While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”).

253. *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).

ferret out, so the suggested action and the action actually taken by the employer on those recommendations were reasonable.²⁵⁴

Courts took a more pragmatic approach to deciding the issue of liability in non-affirmative defense cases. The effectiveness of the employer's intervention—specifically, whether the harassment stopped after the employer acted—affected the outcome. In non-affirmative defense cases where the harassment ceased, the plaintiff's odds of establishing employer liability were reduced by approximately 78%. Once it was determined that the employer knew or should have known of harassment, it was the promptness and appropriateness of the employer's response—not the comprehensiveness of its policies and procedures—that mattered under a negligence standard. In contrast, the efficacy of the employer's response did not have a statistically significant effect on decisions in affirmative defense cases. This evidence is consistent with the claims of legal scholars that courts are not requiring employers to demonstrate the effectiveness of their preventive and corrective measures.²⁵⁵ Most often, the mere existence of these measures has sufficed.

Facts related to plaintiffs' failure to mitigate harm were not only found more frequently in affirmative defense cases, but also had a profound effect on the outcome of such cases. Outright failure to report prior to filing a charge or delay in reporting both greatly decreased the odds of plaintiffs' prevailing in affirmative defense cases, reducing them by 97.2% and 88.8% respectively. In contrast, these fact patterns did not have statistically significant effects in non-affirmative defense cases and the estimated coefficients were far smaller in any event. Thus, both tables 10 and 11 underscore the particular importance of "prong two" facts in affirmative defense cases.²⁵⁶

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

255. *E.g.*, *Lawton*, *supra* note 5, at 230-35; *Grossman*, *supra* note 73, at 39-49.

256. The findings of the present study in this regard are at odds with the findings of Sherwyn, Heise & Eigen, *supra* note 84. Those authors found that prong two variables did not predict outcomes in affirmative defense cases, or even conclusions as to whether prong two itself was satisfied. *Id.* at 1285. Certainly, their study looked at a different set of affirmative defense cases and operationalized variables in a somewhat different manner than the present study. Additionally, the authors acknowledged difficulties with multicollinearity. *Id.* at 1282-83. This is the problem of *independent variables* being so highly correlated with one another that it becomes difficult to parse out their unique effects on the dependent variable. The extraordinarily large standard errors reported for a number of Sherwyn, Heise & Eigen's variables suggest that multicollinearity might have continued to plague their analysis, making it difficult to assess the statistical significance of variables. The models used in the present study were checked for multicollinearity by the preferred procedure of regressing each independent variable on all of the other independent variables in the model. See MICHAEL S. LEWIS-BECK, *APPLIED REGRESSION: AN INTRODUCTION* 58-60 (1980). The R-squared values thereby obtained were well below the .8 threshold. Lastly, Sherwyn, Heise & Eigen, acknowledge that "[w]hile there is no employee action that significantly affects an employee's ability to prevent summary judgment, employees can almost guarantee a victory for the employer if they fail to report." Sherwyn, Heise & Eigen, *supra* note 84, at 1286. The results of the present study support this qualitative conclusion, but not their quantitative analyses.

3. *Delays in Reporting Harassment and Other Unreasonable Failure to Avoid Harm*

Despite the centrality of reporting delay to affirmative defense cases, the precise duration of that delay is often difficult to discern. Of the 52 affirmative defense cases in which delay in reporting played a role, only 45 provided sufficient information for even a reasonable guess to be made as to the duration of the delay. The distribution of periods of delay is skewed by several cases in which the plaintiffs allegedly waited years before reporting the harassment.²⁵⁷ Under these circumstances, the median (the figure at which half of the cases had briefer delays and half had longer delays) is more informative than the mean. The median delay in the 45 cases referenced *supra* was 6.5 months. The modal (most frequently occurring single figure) delay was 4 months (seven cases involved delays of this length). Delays of 4 months or less sometimes still resulted in findings of unreasonable failure on the part of plaintiffs.²⁵⁸

A striking example of a case in which brief delay in reporting was deemed “unreasonable” is *Conatzer v. Medical Professional Building Services*.²⁵⁹ In *Conatzer*, the plaintiff was subjected to two incidents of physical contact, the first of which occurred on September 28, 2001 and the second on “October 11 or 12.”²⁶⁰ She reported the harassment to her supervisor on October 15, 2001. The court ruled that the plaintiff had unreasonably failed to avail herself of preventive and corrective opportunities because “she waited nearly three weeks after the first incident to register her complaint.”²⁶¹ This conclusion was justified entirely by reference to a (somewhat dubious) set of prong one facts—that the employer had a handbook prohibiting sex discrimination; that the employee’s prior jobs elsewhere taught her that harassment is illegal; that training in the complaint process was provided; and that the policy was posted on bulletin boards that the plaintiff walked by frequently.²⁶² Nowhere did the court explain why three weeks was deemed unreasonable delay. And, of course, she did not wait three weeks. The “delay” was at most 17 days—closer to two weeks than three if the court felt compelled to round. The length of any delay in reporting is determined by when the

257. *E.g.*, *Harper v. City of Jackson Mun. Sch. Dist.*, 149 Fed. App’x. 295 (5th Cir. 2005) (six years); *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004) (two years); *Montero v. AGCO Corp.*, 192 F.3d 856 (9th Cir. 1999) (two years).

258. *E.g.*, *Okruhlik v. Univ. of Ark.*, 395 F.3d 872 (8th Cir. 2005) (not explicitly stated, but approximately four months); *Thompson v. Naphcare, Inc.*, 117 Fed. App’x. 317, 324 (5th Cir. 2004) (“almost two months”); *Savino v. C.P. Hall Co.*, 199 F.3d 925 (7th Cir. 1999) (approximately four months).

259. 95 Fed. App’x. 276 (10th Cir. 2004).

260. *Id.* at 278.

261. *Id.* at 281.

262. *Id.*

clock starts ticking. To its credit, the court in *Conatzer* was explicit, if not persuasive, on this point: *from the minute the very first harassment occurred* (i.e., September 28). Similarly, in *Matvia v. Bald Head Island Management*, the court stated “[t]he only way we can assess whether Matvia ‘failed to take advantage of any preventative or corrective opportunities provided by the employer,’ is to examine Matvia’s actions from the time the unwelcome conduct began.”²⁶³ However, courts have sometimes excused employees who waited until harassment became severe or pervasive before reporting it.²⁶⁴

Courts have not been very receptive in affirmative defense cases to explanations for why an employee might have delayed in reporting harassment or otherwise failed to avoid harm.²⁶⁵ In *Barrett v. Applied Radiant Energy Corp.*,²⁶⁶ for example, the court rejected the plaintiff’s argument that her fear of retaliation and her apprehension that reporting would be futile due to the close relationships between managers in the company justified her failure to report. The court pointed to Title VII’s prohibition against retaliation as grounds for not crediting a “nebulous fear of retaliation” and rejected the claim that reporting harassment “is rendered futile merely because members of the management team happen to be friends.”²⁶⁷ The court went on to make the more general point that “[w]e acknowledge that discussing such matters as sexual harassment with company managers often puts the harassed employee in an awkward and uncomfortable situation. Nevertheless, this ‘inevitable unpleasantness’ cannot excuse an employee from taking advantage of the employer’s complaint procedure.”²⁶⁸ The sentiments expressed in *Barrett* capture the main thrust of what courts have said on this issue, but as always, there are exceptions.²⁶⁹ In *Mota v. University of Texas Houston Health Science*

263. 259 F.3d 261, at 270 (4th Cir. 2001) (internal citation omitted).

264. See, e.g., *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 36-37 (1st Cir. 2003); *Homesley v. Freightliner Corp.*, 61 Fed. App’x 105, 114 (4th Cir. 2003); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

265. See, e.g., *An v. Regents of the Univ. of Cal.*, 94 Fed. Appx. 667, 675 (10th Cir. 2004); *Reese v. Meritor Auto.*, 5 Fed. App’x 239, 244-45 (4th Cir. 2001); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301-02 (11th Cir. 2000); *Leugers v. Pinkerton Sec. & Investigative Servs.*, No. 98-3501, 2000 U.S. App. LEXIS 1831, at 9 (6th Cir. Feb 3, 2000); *Watkins v. Prof’l Sec. Bureau*, No. 98-2555, 1999 U.S. App. LEXIS 29841, at 19-20 (4th Cir. Nov. 15, 1999).

266. 240 F.3d 262 (4th Cir. 2001).

267. *Id.* at 267-68.

268. *Id.* at 268.

269. See, e.g., *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27 (1st Cir. 2003) (failure of 17-year-old employee to report an assault by a much older supervisor could be reasonable in light of trauma, threats of discharge, and claims of influence with the company’s owner); *Hardy v. Univ. of Ill. at Chi.*, 328 F.3d 361, 365 (7th Cir. 2003) (delay of almost three months in making a formal complaint was not necessarily unreasonable given prior reports to a supervisor); *Greene v. Dalton*, 164 F.3d 671 (D.C. Cir. 1999) (employer must show not only a delay in reporting, but also that a reasonable person would have prevented the harassment from becoming severe or pervasive by coming forward sooner).

Center,²⁷⁰ the court upheld a jury verdict despite a delay in reporting of eight to nine months. In doing so, the court alluded to repeated threats of retaliation and other circumstances that might have led the plaintiff to conclude that use of the complaint process would be futile. These circumstances included the harasser's influence at the University and his claims that he would be protected by the University in any suit.

Data from this study support the view that retaliation is, in fact, a real concern for plaintiffs in sexual harassment cases. Retaliation was alleged in nearly half (45.8%) of the cases in this study.²⁷¹ The plaintiff win rate on retaliation claims was 19.9%. This is considerably lower than the overall plaintiff win rate on sexual harassment claims (33.4%) in this study (see table 2 *supra*). Whether this poor showing reflects underlying weaknesses in the retaliation claims or difficulties associated with proving such claims cannot be determined in the context of this study. However, these data on the incidence and outcomes of retaliation claims attached to sexual harassment cases generally support the notion that plaintiffs have legitimate reasons for hesitation in reporting and for being less than sanguine about the prospects for having any retaliation remedied.

VII.

CITATIONS TO THE 1998 SUPREME COURT DECISIONS

Throughout this paper, it has been assumed that the contrast between pre- and post-1998 cases captures, at least in part, the influence of the Supreme Court's decisions in 1998. It is worth taking a final moment to explicitly examine how the *Oncala*, *Faragher*, and *Ellerth* cases have been treated in subsequent appeals court decisions. Without delving into debates about the precise meaning of citations and ways of tracking inter-court influence,²⁷² it would be difficult to attribute changes in case law to the influence of these Supreme Court decisions if they were only rarely mentioned in subsequent cases.²⁷³ Table 12 conveys the treatment given the

270. 261 F.3d 512, 525-26 (5th Cir. 2001).

271. This figure understates the extent of retaliation claims brought because it includes only claims maintained on appeal, and because it excludes retaliation claims pursued on appeal apart from the harassment claims with which they originated.

272. See, e.g., Lawrence M. Friedman et al. *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 J.L. & POL'Y 509 (1985); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

273. It is unlikely that influence existed in the *absence* of any citation, particularly in this set of cases that are not long removed in time from 1998. There is no obvious reason for a court that relied on one of these Supreme Court decisions to not explicitly acknowledge that reliance. On the other hand, the *presence* of a citation is more difficult to interpret. A citation could be just a nod to the higher court or included for the sake of appearances. "Lengthy discussions" might be better indicators of influence. See David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 L. & SOC'Y REV. 337, 357 (1997).

Oncale and *Faragher/Ellerth* decisions in subsequent federal appeals court cases. Figures are shown for all cases, for only those cases in which the “because of . . . sex” or “basis for attributing liability” elements received substantive treatment, and for only those cases whose fact patterns closely match the precedent cases (i.e., same-sex harassment or the affirmative defense).

TABLE 12 Treatment of Supreme Court Decisions in Sexual Harassment Cases, Federal Appeals Court Decisions, 1999-2005

Treatment n(%)	All Post-1998 Cases		Element-Specific Cases*		Fact-Specific Cases**	
	<i>Oncale</i>	<i>Faragher/ Ellerth</i>	<i>Oncale</i>	<i>Faragher/ Ellerth</i>	<i>Oncale</i>	<i>Faragher/ Ellerth</i>
Not Cited	295 (71.1)	168 (40.5)	51 (41.1)	48 (23.2)	3 (9.4)	1 (1.0)
Cited/Brief Discussion	83 (20.0)	140 (33.7)	38 (30.7)	65 (31.4)	7 (21.9)	21 (20.8)
Lengthy Discussion	37 (8.9)	107 (25.8)	35 (28.2)	94 (45.4)	22 (68.8)	79 (78.2)
Total	415 (100.0)	415 (100.0)	124 (100.0)	207 (100.0)	32 (100.1)	101 (100.0)

* For the *Oncale* decision, element-specific cases are those in which the “because of . . . sex” element received substantive treatment. For the *Faragher* and *Ellerth* decisions, element-specific cases are those in which the liability element received substantive treatment.

** For the *Oncale* decision, fact-specific cases are same-sex harassment cases. For the *Faragher* and *Ellerth* decisions, fact-specific cases are affirmative defense cases.

Oncale was cited in 28.9% of the post-1998 cases in this study. Most references to *Oncale* were either only citation or were brief discussions (three sentences or less). Slightly less than 9% of the cases that cited *Oncale* did so in the form of lengthier discussions of the case. Limiting our attention to cases involving substantive treatment of the “because of . . . sex” element, 28.2% featured “lengthy” discussions of the case, 30.6% included briefer treatments, and the remainder did not mention the case. Over two-thirds (68.8%) of same-sex harassment cases—the cases most factually similar to and likely to evoke citation of *Oncale*—included substantive discussions of the case. Thus, whatever influence the *Oncale* decision has had on subsequent cases, the limited extent to which it has been cited and discussed in post-1998 cases dealing with something other than same-sex harassment sounds another cautionary note against attributing enormous influence to the decision.

Even allowing for the fact that they are two cases rather than one, *Faragher* and *Ellerth* were cited much more widely than *Oncale* in post-1998 sexual harassment cases. The cases, individually or jointly (usually the latter), were cited in 59.5% of post-1998 cases in this data set (more than double the percentage of cases citing *Oncale*). Of the decisions citing these cases at all, 43% did so at length. Considering only those cases in which the liability element was treated substantively, 77% of cases cited *Ellerth* and/or *Faragher*, with 45% doing so at length. These decisions were cited in virtually all affirmative defense cases and generally treated at length. While affirmative defense cases were especially apt to include lengthy discussions of *Ellerth* and/or *Faragher*, courts saw fit to also cite and discuss these decisions in numerous cases where the affirmative defense was not at issue. This citation pattern indicates a substantial degree of influence, although any such influence is more clearly seen in the words and analytic approach used by courts, rather than in case outcomes.

VIII. CONCLUSIONS

For all of the discussion and debate attending the Supreme Court's decisions in the *Oncale*, *Faragher*, and *Ellerth* cases, their effect on analyses and outcomes in subsequent federal appeals court cases appears to have been limited. Despite concerns that these decisions re-shaped sexual harassment law in ways highly detrimental to plaintiffs, the difference in plaintiff win rates between cases decided in the 1993-1997 and 1999-2005 periods was not statistically significant. If anything, plaintiffs fared slightly better in the more recent period. However, insofar as the cases considered by appeals courts post-1998 were more likely to have been disposed of via summary judgment at the trial court level, a higher rate of reversals might reasonably have been expected. Some evidence was found of a greater tendency to frame cases in terms of the "because of . . . sex" element and to rule against plaintiffs when doing so, although any changes were not so pronounced as to be statistically significant and generalizable beyond the particular cases included in this study. However, even prior to the *Oncale* decision, courts did not automatically assume that discriminatory motivation was shown by the sexual content of harassing conduct. Generalizations about the courts' treatment of the "because of . . . sex" element need to distinguish between the different fact patterns that raise this issue. There is some evidence that plaintiffs fared worse following the *Oncale* decision in cases involving equal opportunity harassers, same-sex harassment, and evidence of personal animus toward the victim, but not necessarily in cases involving conduct that was not explicitly sexual, sexually-charged surroundings, and neutral motives for tangible employment actions. Another indication of the limited influence of the

Oncala decision is the relatively small number of cases discussing it at length and their concentration among same-sex harassment cases.

Contrary to the view of some legal scholars that, with the advent of the affirmative defense, courts would increasingly focus on the liability issue as a means of resolving cases without delving into the messy facts of hostile environment claims, courts were, if anything, less likely to give substantive treatment to the liability element in post-1998 cases than previously. In contrast, substantive treatment of the severe or pervasive element remained at virtually the same (and relatively high) level. Furthermore, when decisions focused on the liability element, plaintiffs fared slightly better in post-1998 cases, although again not to a statistically significant extent. Most affirmative defense cases were disposed of via summary judgment, but against the backdrop of increasingly widespread use of summary judgments, affirmative defense cases were, if anything, less likely than non-affirmative defense cases to have received this treatment. The evidence on the outcomes of affirmative defense cases supports the view of most legal scholars that this ostensibly more stringent liability standard is not more favorable to plaintiffs. But the evidence does not point to a disaster for plaintiffs. The outcomes in affirmative defense cases between 1999 and 2005 were quite similar to those obtained primarily using a negligence standard, both before and after 1998.

Methods appear to have differed more than outcomes. In analyzing affirmative defense cases, courts generally cited facts related to both prongs of the defense, rather than focusing solely on a single prong. Courts were especially likely to note the existence of a harassment policy and to point to failings on the part of plaintiffs. A prompt investigation and the plaintiff's delay in reporting or failure to report harassment were especially important in determining the outcome of affirmative defense cases. Courts adopted rather stringent - arguably unreasonable - standards for judging whether plaintiffs had failed to take advantage of the available preventive and corrective devices and were generally unsympathetic to claims that fear of retaliation or other impediments justified inaction. The *Ellerth* and/or *Faragher* decisions were cited quite widely and discussed at length in many cases, not limited to those dealing with the affirmative defense. While the appeals courts paid relatively close attention to these two cases, different terminology and modes of analysis under the negligence standard and affirmative defense appear to have produced similar judgments as to whether employers should be held liable for harassment.

Even "small change" in the law of sexual harassment matters to plaintiffs and defendants. Plaintiffs' advocates are rightly critical of the Supreme Court's efforts in these cases. If these decisions were originally hailed as plaintiff "victories," what would clear losses look like? But the broad, comparative analysis presented in this paper shows that it is

important to keep these developments in perspective. The effects of these decisions on appeals court decisions have been far less sweeping than many feared or hoped. Courts continue to muddle through sexual harassment cases, both the prominent and obscure, and to produce decisions only loosely rooted in the Supreme Court's formulations.