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## NOTES

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# A MODEST PROPOSAL: THE “REASONABLE VICTIM” STANDARD AND ALASKA EMPLOYERS’ AFFIRMATIVE DEFENSE TO VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

*This Note examines the Alaska Supreme Court’s nascent interpretation of Alaska’s anti-discrimination statute in sexual harassment cases. The Note begins by analyzing the history of sexual harassment case law in Alaska. The Note then discusses the benefits of applying the “reasonable victim” standard in the Alaska Supreme Court’s determinations of the offensiveness of an employer’s conduct by analyzing relevant law review articles, federal sexual harassment decisions, and a comparison of three recent Alaska Supreme Court decisions. The Note next discusses the importance of allowing Alaska employers an affirmative defense to vicarious liability for the sexual harassment perpetrated by their employees. The author concludes that the Alaska Supreme Court should adopt a “reasonable victim” standard for determinations of the offensiveness of an employer’s conduct and allow employers an affirmative defense to sexual harassment claims.*

### I. INTRODUCTION

Most state courts have extensive case law that guides their interpretation of state anti-discrimination statutes in sexual harassment cases. By contrast, the Alaska Supreme Court began its interpretation of what conduct constitutes sexual harassment under

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Alaska Statutes section 18.80.220(a)<sup>1</sup> only in 1996 with *French v. Jadon, Inc.*<sup>2</sup> In *French*, the supreme court noted that it would not decide whether to adopt the “reasonable victim” standard, but in a footnote discussing this issue, the court cited sources that mostly adopted some kind of individualized standard for reasonableness determinations.<sup>3</sup> In order to fulfill the Alaska Supreme Court’s goal of shaping the future of Alaska sexual harassment law, this Note proposes that the Alaska Supreme Court adopt the “reasonable victim” standard in determinations of the offensiveness of an employer’s conduct. The “reasonable victim” standard would improve upon the existing “reasonable person” standard by including the victim’s gender in the analysis. Male victims of sexual harassment would be assessed under a “reasonable male” standard, while female victims would be assessed under a “reasonable woman” standard. Second, this Note proposes that the Alaska Supreme Court allow Alaska employers to assert a two-pronged affirmative defense to vicarious liability for the sexual harassment claims of their employees. A similar defense was adopted by the United States Supreme Court in *Burlington Industries v. Ellerth*<sup>4</sup> and *Faragher v. City of Boca Raton*.<sup>5</sup> These two proposals would allow the Alaska Supreme Court to adhere more closely to the Alaska Legislature’s goal by giving a “broader interpretation”<sup>6</sup> to Alaska Statutes section 18.80.220 than its federal counterpart Title VII,<sup>7</sup> in furthering the goal of the state of Alaska to eradicate sexual harassment from the workplace. The incorporation of the “reasonable victim” standard and an affirmative defense for Alaska employers would also help to prevent harm to female victims of sexual har-

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1. See ALASKA STAT. § 18.80.220(a) (LEXIS 1998). The statute makes it unlawful for

(1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person’s race, religion, color, or national origin, or because of the person’s age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood.

*Id.*

2. 911 P.2d 20 (Alaska 1996).

3. See *id.* at 28-29 n.10 (citing numerous federal decisions and law review articles discussing the adoption of the “reasonable victim” standard).

4. 524 U.S. 742, 765 (1998).

5. 524 U.S. 775, 807-08 (1998).

6. See *infra* note 82 and accompanying text.

7. See *infra* note 30 and accompanying text.

assment and, at the same time, afford more protection for Alaska employers from costly litigation.

Because this proposal applies only to Alaska employers and Alaska state courts, for the purposes of the discussion of whether the Alaska Supreme Court should allow employers to state an affirmative defense to vicarious liability for the sexual harassment claims of their employees, this Note refers to employers and employees as defined in Alaska Statutes section 18.80.300.<sup>8</sup> The Alaska Supreme Court has determined that Alaska's anti-discrimination statute, Alaska Statutes section 18.80.220, is "modeled on' the federal law, thus making federal case law relevant."<sup>9</sup> Therefore, in setting forth this proposal, this Note makes liberal use of federal case law as well as law review articles interpreting Title VII for sexual harassment claims.

This Note proceeds in four parts. Part I briefly traces the historical development of sexual harassment law under Title VII of the Civil Rights Act of 1964.<sup>10</sup> Part II analyzes the beginning of sexual harassment case law in the Alaska Supreme Court by discussing the court's decisions in *French v. Jadon, Inc.*,<sup>11</sup> *VECO, Inc. v. Rosebrock*<sup>12</sup> and *Norcon, Inc. v. Kotowski*.<sup>13</sup> Part III analyzes the benefits of applying the "reasonable victim" standard in the Alaska Supreme Court's determinations of the offensiveness of an employer's conduct. This analysis is done through a discussion of relevant law review articles, federal sexual harassment decisions,<sup>14</sup> and an analysis of the Alaska Supreme Court's decisions in *French*,

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8. See ALASKA STAT. § 18.80.300 (LEXIS 1998). The statute defines "employer" as

a person, including the state and a political subdivision of the state, who has one or more employees in the state but does not include a club that is exclusively social, or a fraternal, charitable, educational, or religious association or corporation, if the club, association, or corporation is not organized for private profit.

*Id.* § 18.80.300(4). The statute defines "employee" as "an individual employed by an employer but does not include an individual employed in the domestic service of any person." *Id.* § 18.80.300(3). These definitions will be applied by the Alaska Supreme Court.

9. *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585 (Alaska 1979).

10. 42 U.S.C. § 2000e (1994).

11. 911 P.2d 20 (Alaska 1996).

12. 970 P.2d 906 (Alaska 1999).

13. 971 P.2d 158 (Alaska 1999).

14. These cases include *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); and *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143 (E.D. Cal. 1998).

*VECO*, and *Norcon*. Finally, Part IV recommends allowing Alaska employers an affirmative defense to vicarious liability for the sexual harassment claims of their employees. This recommendation is based on the affirmative defense set forth by the United States Supreme Court in *Ellerth* and *Faragher* and the Equal Employment Opportunity Commission's ("EEOC") past and revised positions on employer liability.

## II. TITLE VII

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>15</sup> The primary purpose of the Civil Rights Act was the "elimination and remediation of race-based employment decisions."<sup>16</sup> As a result, "sex" was not a protected class in the original bill. In fact, only two days prior to the House of Representatives' vote on the bill, Representative Howard W. Smith, a southern Democrat, proposed that the bill be amended to add "sex" as one of the protected classes in order to defeat the bill.<sup>17</sup> Although "humorous debate, later enshrined as 'Ladies Day in the House'" surrounded the amendment, it survived debate and was incorporated into the Civil Rights Act passed by Congress.<sup>18</sup> However, as a consequence of the amendment's last minute addition, "[v]irtually no legislative history provides guidance to courts interpreting the prohibition of sex discrimination."<sup>19</sup> Because of the lack of legislative history defining sex as a protected class, "difficulty arose in interpreting the extent to which the Act protected women against sexual harassment."<sup>20</sup> Determining the contours of sex discrimination has largely been left to the federal courts, guided by instruction from the Supreme Court and the EEOC.

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15. 42 U.S.C. § 2000e-2(a)-(a)(1) (1994).

16. ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 275 (6th ed. 1999).

17. See 110 CONG. REC. 2,577-2,584 (1964) (statement of Rep. Smith).

18. Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW & INEQ. J.* 163, 163 (1991).

19. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991).

20. Deborah B. Goldberg, *The Road to Equality: The Application of the Reasonable Woman Standard in Sexual Harassment Cases*, 2 *CARDOZO WOMEN'S L. J.* 195, 196 (1995).

## III. ALASKA SUPREME COURT PRECEDENT

In 1996, in *French v. Jadon, Inc.*,<sup>21</sup> the Alaska Supreme Court decided its first case defining sexual harassment in the employment context. Appellant Shelly French brought a sexual harassment suit against her former employer Jadon, Inc., owner of Chilkoot Charlie's, a popular nightclub in Anchorage.<sup>22</sup> French alleged she was wrongfully terminated because she refused to date her supervisor's brother and that her employer's conduct "in 'requiring' her to 'engage in unethical and illegal activities,' constituted sex discrimination" under Alaska Statutes section 18.80.220(a)(1) and (4).<sup>23</sup> In its discussion, the court defined quid pro quo sexual harassment as "when an employer conditions employment benefits on sexual favors."<sup>24</sup> The court held that the superior court did not err in granting Jadon's summary judgment motion seeking dismissal of French's quid pro quo sexual harassment claim.<sup>25</sup> In its discussion of French's hostile work environment claim, the court noted that a hostile work environment is created by "[c]onduct which unreasonably interferes with work performance [that] can alter a condition of employment and create an abusive working environment."<sup>26</sup> The court held that French failed to articulate clearly her hostile work environment claim.<sup>27</sup> Accordingly, the court affirmed the superior court's grant of summary judgment.<sup>28</sup> The court declined to decide whether to adopt a "reasonable woman" or a "reasonable victim" standard for determinations of employee sexual harassment claims.<sup>29</sup> The court also noted that Title VII was the "federal counterpart" to Alaska Statutes section 18.80.220.<sup>30</sup> The court noted, however, that it will "consider federal precedent for guidance" when deciding anti-discrimination cases.<sup>31</sup>

In 1999, the Alaska Supreme Court decided two cases dealing with sexual harassment in the employment context: *VECO, Inc. v.*

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21. 911 P.2d 20 (Alaska 1996).

22. *See id.* at 23.

23. *See id.* at 26-27.

24. *Id.* (citing *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991)).

25. *See id.* at 27.

26. *Id.* at 28 (quoting *Ellison*, 924 F.2d at 877).

27. *See id.* at 29 n.11.

28. *See id.* at 29.

29. *See id.* at 28 n.10. The court cited to numerous federal sexual harassment decisions, some of which applied the "reasonable person" standard and others which applied the "reasonable woman" standard.

30. *See id.* at 28.

31. *Id.*

*Rosebrock*<sup>32</sup> and *Norcon, Inc. v. Kotowski*.<sup>33</sup> The court held that Alaska employers could be held vicariously liable for their employees' sexual harassment claims under Alaska Statutes section 18.80.220(a).<sup>34</sup> Although the cases, particularly *VECO*,<sup>35</sup> clarified a great deal about employer liability for sexual harassment claims in the workplace, the court has yet to decide whether Alaska employers will be able to claim an affirmative defense to vicarious liability for the sexual harassment claims of their employees.

In *VECO*, appellee Constance Rosebrock brought a hostile work environment claim against her employer VECO under Alaska Statutes section 18.80.220.<sup>36</sup> Rosebrock alleged that while she was employed by VECO, her supervisor Rick Rorick "sexually propositioned her on several occasions" and "made several explicit comments about the size of her breasts."<sup>37</sup> Rosebrock also testified that VECO employee Bill Dropps sexually assaulted her.<sup>38</sup> In its analysis, the Alaska Supreme Court reaffirmed its holding in *French* by dividing sexual harassment claims into the two categories traditionally used by federal courts: quid pro quo sexual harassment and hostile work environment claims.<sup>39</sup> The court defined quid pro quo sexual harassment as "when an employer 'conditions

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32. 970 P.2d 906 (Alaska 1999).

33. 971 P.2d 158 (Alaska 1999).

34. See *VECO*, 970 P.2d at 915-17; *Norcon*, 971 P.2d at 165-66. Alaska Statutes section 18.80.220(a) makes it unlawful for an employer to discharge or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood.

ALASKA STAT. § 18.80.220(a) (LEXIS 1998).

35. The *Norcon* opinion includes a very limited analysis of sexual harassment law. The majority of the case is dedicated to Kotowski's intentional infliction of emotional distress claims, her negligent infliction of emotional distress claims, the possible preemption of her claims by the Labor Management Relationship Act, and analysis of her punitive and compensatory damages. See 971 P.2d at 165-66, 171-72, 177-78.

36. See 970 P.2d at 908-10.

37. *Id.* at 909.

38. See *id.*

39. See *id.* at 910. In *Burlington Indus. v. Ellerth*, the Supreme Court held that "[quid pro quo] and 'hostile work environment' do not appear in the statutory text [of Title VII]. The terms appeared first in the academic literature." 524 U.S. 742, 752 (1998) (citing CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32-47 (1979)).

employment benefits on sexual favors . . . [by relying] upon his or her authority ‘to extort sexual consideration from an employee.’”<sup>40</sup> Using the Supreme Court’s definition in the *Ellerth* case, the court defined hostile work environment to include “‘unfulfilled threats’ or ‘offensive conduct in general.’”<sup>41</sup> Again, the court declined to decide whether or not to adopt the “reasonable woman” standard for determination of the severity and pervasiveness of an employer’s conduct and instead used the “reasonable person” standard.<sup>42</sup>

The court proceeded to outline the development of sexual harassment law by utilizing the Restatement (Second) of Agency’s definition of “scope of employment”<sup>43</sup> and the U.S. Supreme Court’s interpretation of Title VII<sup>44</sup> in some of the Supreme Court’s most important employment discrimination decisions.<sup>45</sup> The court held VECO vicariously liable for Rosebrock’s hostile work environment claim regardless of whether VECO “knew or should have known about the harassment.”<sup>46</sup>

In *Norcon*, appellee Mary Kotowski sued her employer Norcon for sexual harassment, intentional infliction of emotional distress, and negligent infliction of emotional distress.<sup>47</sup> Kotowski al-

40. *VECO*, 970 P.2d at 910 (quoting *French v. Jadon, Inc.*, 911 P.2d 20, 26 (Alaska 1996) (quoting *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771, 777 (D. Nev. 1992)).

41. *Id.* at 910 (quoting *Ellerth*, 524 U.S. at 753).

42. *See id.* at 915 n.21; *see supra* note 29 and accompanying text.

43. *See VECO*, 970 P.2d at 910 n.7 (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)). The Restatement defines “scope of employment” as (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228. Title VII’s definition of “employer” includes “any agent of such [employer];” thus common law agency principles apply. *See infra* note 142.

44. 42 U.S.C. § 2000e-2(a)(1) (1994).

45. *See VECO*, 970 P.2d at 912-21. These decisions include *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

46. 970 P.2d at 914.

47. *See* 971 P.2d 158, 161 (Alaska 1999).

leged that while working for Norcon, foreman Mike Posehn kissed her on the lips, squeezed her buttocks, and once, while dressed only in his underwear, invited her to spend the night with him.<sup>48</sup> The superior court instructed the jury on hostile work environment sexual harassment and asked them to find whether Kotowski proved the following:

(1) that she was subjected to sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and to create an abusive working environment, and (4) that she suffered damages as a result of the sexual harassment.<sup>49</sup>

The jury was also instructed on quid pro quo sexual harassment and asked to find whether Kotowski proved

(1) that she was subjected to sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) that this conduct was unwelcome; and (3) either (a) that submission to such conduct was made either explicitly or implicitly, a term or condition of her employment, *or* (b) that her submission or rejection of such conduct was used as the basis for an employment decision or decisions affecting her employment; and (4) that she suffered damages as a result of the sexual harassment.<sup>50</sup>

Norcon challenged the jury instructions on appeal; the supreme court held that they were not erroneous and were properly given to the jury.<sup>51</sup> The court also affirmed that it recognized a private right of action under Alaska Statutes section 18.80.220.<sup>52</sup> Finally, the court held that Alaska Statutes section 18.80.220 confers upon employees the right to a non-discriminatory workplace that "could not be waived by any contrary contractual provision."<sup>53</sup>

#### IV. THE "REASONABLE VICTIM" STANDARD

##### A. Federal Case Law

The United States Supreme Court issued its first major ruling on sexual harassment in 1986 in *Meritor Savings Bank v. Vinson*.<sup>54</sup>

48. *See id.* at 161-62.

49. *Id.* at 171.

50. *Id.*

51. *See id.*

52. *See id.* at 165 n.4 (citing *Ratcliff v. Security Nat'l Bank*, 670 P.2d 1139, 1142 (Alaska 1983)).

53. *Id.* at 165.

54. 477 U.S. 57 (1986).

In that case, Mechelle Vinson brought a hostile work environment sexual harassment claim against her employer, Meritor Savings Bank, for the sexually harassing behavior of Meritor's vice president, Sidney Taylor.<sup>55</sup> Vinson alleged that she submitted to Taylor's "repeated demands upon her for sexual favors, usually at the [bank] branch, both during and after business hours [and] . . . estimated that over the next several years she had intercourse with him some 40 or 50 times" because she feared losing her job.<sup>56</sup>

The Court found Meritor liable and in reaching this determination recognized for the first time the "hostile environment theory" of sexual harassment.<sup>57</sup> The Court held that the district court's inquiry as to whether Vinson's conduct was "voluntary" was erroneous and that the proper inquiry should have been whether or not the alleged harassing conduct was "unwelcome."<sup>58</sup> The Court also emphasized that the "language of Title VII is not limited to 'economic' or 'tangible' discrimination."<sup>59</sup> The Court held that conduct that has the "purpose or effect of unreasonably interfering with an individual's work performance" creates a hostile working environment.<sup>60</sup> The Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."<sup>61</sup>

In the U.S. Supreme Court's second decision, *Harris v. Forklift Systems, Inc.*,<sup>62</sup> petitioner Teresa Harris brought an "abusive work environment" claim against her employer Forklift Systems.<sup>63</sup> Harris alleged that during her employment, Forklift's president Charles Hardy "often made her the target of unwanted sexual innuendos" and told her, among other things, she was "a dumb ass woman," and that she and Hardy should "go to the Holiday Inn to negotiate Harris' raise."<sup>64</sup> The Court admitted that the test used to measure the offensiveness of an employer's conduct "is not, and by its nature cannot be, a mathematically precise test."<sup>65</sup> In order to aid its

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55. *See id.* at 59-60.

56. *Id.*

57. *See id.* at 66 (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

58. *See id.* at 68 (citing 29 C.F.R. § 1604.11(a) (1985)).

59. *Id.* at 64.

60. *Id.* at 65. The Court adopted the definition of hostile work environment sexual harassment given by the EEOC in its 1980 guidelines on discrimination based on sex. *See* 29 C.F.R. § 1604.11 (1980).

61. *Meritor*, 477 U.S. at 66.

62. 510 U.S. 17 (1993).

63. *Id.* at 19.

64. *Id.*

65. *Id.* at 22.

determination, the Court stated it would look at all the circumstances surrounding the conduct, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>66</sup>

The Court held that Title VII is violated when the workplace environment “would reasonably be perceived, and is perceived, as hostile or abusive.”<sup>67</sup> The Court held that Title VII was not limited to economic or tangible discrimination, but that the phrase “terms, conditions, or privileges of employment” within the language of Title VII “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”<sup>68</sup> The Court held that the district court erred in solely analyzing whether “the conduct ‘seriously affect[ed] plaintiff’s psychological well-being’ or led her to ‘suffe[r] injury.’”<sup>69</sup> In reversing, the Court found the district court’s erroneous standards might have wrongly influenced its decision and thus remanded the case for further proceedings.<sup>70</sup>

The Supreme Court has left many of the details of a determination of sexual harassment to the lower courts. Although the Court has applied the “reasonable person” standard in most of its sexual harassment decisions, in *Oncala v. Sundowner Offshore Services*<sup>71</sup> the Court applied a standard that “judged [plaintiffs] from the perspective of a reasonable person in the plaintiff’s position.”<sup>72</sup> However, the Court has not formally acknowledged the “reasonable victim” standard as the standard lower courts should use for sexual harassment determinations. Some, including Justice Thomas in his dissenting opinions in both *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, find it problematic that the Court has left this to the lower courts.<sup>73</sup> Unlike the Supreme Court, the Ninth Circuit in *Ellison v. Brady* decided to adopt the “reasonable victim” standard, instead of the default “reasonable person” standard in their sexual harassment determinations.<sup>74</sup>

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66. *Id.* at 23.

67. *Id.* at 22.

68. *Id.* at 21 (quoting *Meritor*, 477 U.S. at 64).

69. *Id.* at 22.

70. *See id.* at 23.

71. 523 U.S. 75 (1998) (holding that same-sex harassment is actionable under Title VII).

72. *Id.* at 81.

73. *See infra* note 155 and accompanying text.

74. *See Ellison v. Brady*, 924 F.2d 872, 873 (9th Cir. 1991).

In *Ellison*, plaintiff Kerry Ellison brought a hostile environment sexual harassment claim against her employer under Title VII.<sup>75</sup> Ellison alleged that, during her employment with the IRS, her co-worker Sterling Gray repeatedly pestered her for lunch and wrote her letters, including statements telling Ellison that he “cried over [her]” and he knew she was “worth knowing with or without sex.”<sup>76</sup> The Ninth Circuit applied the “reasonable woman” standard and held that a “female plaintiff states a prima facie case of hostile work environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.”<sup>77</sup> However, the court noted that the “reasonable man” standard would be applied if the plaintiff were a male.<sup>78</sup> The court reasoned it was necessary to use a relative, bifurcated standard because of the difference in sensibilities between the sexes.<sup>79</sup> The court held that the “sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women”; however, “[t]he reasonable woman standard does not establish a higher level of protection for women than [for] men.”<sup>80</sup>

#### B. The Alaska Supreme Court

One of the most notable segments of the Alaska Supreme Court’s opinion in *VECO, Inc. v. Rosebrock*<sup>81</sup> is the court’s assertion that Alaska Statutes section 18.80.220 “is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination.”<sup>82</sup> Similarly, in *Faragher*, the U.S. Supreme Court held Title VII’s “‘primary objective,’ like that of any statute meant to influence primary conduct, is not to provide redress but

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75. *See id.* at 873.

76. *Id.* at 874.

77. *Id.* at 879.

78. *See id.* at 879 n.11.

79. *See id.* at 879.

80. *Id.*

81. 970 P.2d 906 (Alaska 1999).

82. *Id.* at 912-13 (quoting *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585 (Alaska 1979)); *see also* BELTON & AVERY, *supra* note 16, at 275. Frequently, state anti-discrimination statutes will “extend discrimination protection to categories not covered under federal laws; for example, some states and municipalities prohibit discrimination in employment because of marital status, sexual orientation, or physical appearance.” *Id.* at 35.

to avoid harm.”<sup>83</sup> Courts should analyze the offensiveness of an employer’s conduct in such a manner as to maximize the avoidance of harm for those employees who bring valid sexual harassment claims against their employers. Alaska Statutes section 18.80.220, like Title VII, would better protect Alaska employers from harmful and undeserved sexual harassment claims and litigation if Alaska employers were allowed to claim an affirmative defense to vicarious liability for sexual harassment claims where they have performed reasonably under the circumstances. Keeping this in mind, how will this affect the Alaska Supreme Court’s analysis when it is presented with a case in which a woman brings a sexual harassment claim against an employer who in turn asserts an affirmative defense to vicarious liability for sexual harassment? What should the court’s “broader interpretation” of Alaska Statutes section 18.80.220 encompass?<sup>84</sup>

At least one court<sup>85</sup> has suggested that when analyzing the severity and pervasiveness of an employer’s allegedly harassing conduct, courts should utilize a relative, “reasonable victim” standard similar to the one used in *Ellison v. Brady*,<sup>86</sup> which takes the victim’s gender into account. Presumably, this would achieve the twin goals of a broader interpretation of Alaska Statutes section 18.80.220 and avoiding further harm to litigants. The fact that the Alaska Supreme Court has yet to consider this issue demonstrates the court’s opportunity to improve the future of Alaska anti-discrimination case law by applying the “reasonable victim” standard in determinations of the offensiveness of an employer’s conduct. By using the “reasonable victim” standard for victims of sexual harassment, the court, unlike those applying the male-biased “reasonable person” standard, will be using truly impartial analyses instead of “systematically ignor[ing] the experiences of women.”<sup>87</sup>

In her article on the application of the “reasonable woman” standard in sexual harassment cases, Deborah Goldberg asserts that although the “reasonable person” standard is meant to be gender-neutral, “we live in a male-oriented society and the standard tends to lean towards the male point of view. . . . [thus] ignor[ing] the perspective of a woman in a crime most often pe-

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83. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

84. *See VECO*, 970 P.2d at 912-13.

85. *See Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987).

86. 924 F.2d 872, 878-79 (9th Cir. 1991).

87. Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 798 (1994) (citing *Ellison*, 924 F.2d at 879).

trated against women.”<sup>88</sup> For this reason, this Note proposes that the Alaska Supreme Court apply the “reasonable victim” standard in their determinations of reasonableness in sexual harassment cases.

The Ninth Circuit’s decision to use gender-conscious reasonableness standards in sexual harassment cases is one the Alaska Supreme Court should follow in determining the severity and pervasiveness of an employer’s conduct. By simply replacing the word “person” with the word “victim” in the elements for “hostile work environment” and “quid pro quo” sexual harassment claims, the instructions thus lose much of their gender bias and conform to the goal enunciated in *VECO*: a broader reading of Alaska Statutes section 18.80.220.<sup>89</sup> Therefore, to borrow the jury instructions from *Norcon*, the proper inquiry in hostile work environment determinations would be whether a reasonable victim would find the alleged conduct unwelcome and severe or pervasive enough to create a hostile work environment.<sup>90</sup> In quid pro quo sexual harassment determinations, the inquiry would turn on whether a reasonable victim would find the alleged sexual advances and/or requests unwelcome.<sup>91</sup>

The “reasonable victim” standard for female victims of sexual harassment would “addre[ss] directly the perceived harm of sexual harassment, redefining what is acceptable in the workplace from the perspective of the oppressed rather than of the oppressor.”<sup>92</sup> According to the EEOC Compliance Manual, courts should focus on the perspective of the victim and not “stereotyped notions of acceptable behavior.”<sup>93</sup> Doesn’t this suggest that courts should use a standard as close to the victim’s (rather than society’s) perspective as possible? As noted by the Ninth Circuit in *Ellison*, male victims of sexual harassment would be judged under the “reasonable man” standard.<sup>94</sup> In the case of female complainants, however, the “reasonable woman” standard would be applied instead, since the “reasonable person” standard enforces a fictitious “normative assessment of what is acceptable workplace behavior.”<sup>95</sup> In a pro-

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88. Goldberg, *supra* note 20, at 200.

89. See *VECO*, 970 P.2d at 912-13; text accompanying note 82.

90. See *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 171 (Alaska 1999).

91. See *id.*

92. KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 510 (2d ed. 1998).

93. EEOC COMPLIANCE MANUAL (CCH) § 615, ¶ 3115 at 3243 (1999).

94. See 924 F.2d at 879 n.11.

95. Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1184 (1995).

posal for the implementation of her “rational woman” test, Gillian Hadfield notes that the “rational woman” test is “focused on women because it is women’s responses to a practice that only they must endure that defines the practice as discriminatory.”<sup>96</sup>

In order to make a proper determination in a sexual harassment case whether an employer’s conduct is unwelcome, the rational woman’s perspective (or the rational man’s perspective when the victim is a man) is the only fair perspective from which to measure a defendant employer’s conduct.<sup>97</sup> The court in *Ellison* aptly notes “[c]onduct that many men consider unobjectionable may offend many women.”<sup>98</sup> For most women it can be argued that sexual harassment in the workplace “is as familiar as an intrusive neighbor at the back door.”<sup>99</sup> If the Alaska Supreme Court does not evaluate the employer’s conduct using a “reasonable victim” standard, will it be abiding by its promise in *VECO* to “further the goal of eradication of discrimination”?<sup>100</sup> If the court chooses, as others before it have, to apply the “reasonable person” standard to all sexual harassment plaintiffs regardless of their sex, the court will be imposing society’s narrow, male-dominated perspective onto female sexual harassment victims.

## V. EMPLOYERS’ AFFIRMATIVE DEFENSE TO VICARIOUS LIABILITY

### A. Federal Case Law

In *Meritor Savings Bank v. Vinson*,<sup>101</sup> the U.S. Supreme Court did not address employers’ affirmative defense to vicarious liability in great detail, except to state that it rejected the view that “the mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee’s] failure to invoke that procedure, [should] insulate [an employer] from liability.”<sup>102</sup> The Court went on to point out the inadequacies of Meritor’s policy against discrimination, including the policy’s failure to address sexual harassment in particular and the requirement that employees

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96. *Id.* at 1185.

97. *See id.*

98. 924 F.2d at 878.

99. BELTON & AVERY, *supra* note 16, at 275 (quoting B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 2 (1993)).

100. *VECO*, 970 P.2d at 912-13 (citing *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585 (Alaska 1979)).

101. 477 U.S. 57 (1986).

102. *Id.* at 72.

report their complaints to their supervisor, who in this case was the alleged perpetrator.<sup>103</sup>

After *Meritor*, but prior to the Supreme Court's next sexual harassment decision, Congress overhauled Title VII in the Civil Rights Act of 1991.<sup>104</sup> The Act made additional remedies available to plaintiffs by providing for damages with statutory caps under Title VII, the Americans with Disabilities Act, and the Rehabilitation Act.<sup>105</sup> The Act also overturned and modified a series of U.S. Supreme Court decisions that were issued during the Court's 1988 term, including *Wards Cove Packing Co. v. Atonio*,<sup>106</sup> because they weakened "the scope and effectiveness of federal civil rights legislation."<sup>107</sup> However, the Act did not resolve the issue of employers' affirmative defenses.

In *Burlington Industries v. Ellerth*<sup>108</sup> and *Faragher v. City of Boca Raton*,<sup>109</sup> the U.S. Supreme Court discussed employers' affirmative defense to vicarious liability for the sexual harassment claims of their employees.<sup>110</sup> In *Ellerth*, respondent Kimberly Ellerth sued her former employer, Burlington Industries, as a result of the sexually harassing behavior of her supervisor, Ted Slowik.<sup>111</sup> Ellerth claimed that while employed by Burlington, Slowik's sexually harassing behavior towards her could be "construed as threats to deny her tangible job benefits."<sup>112</sup> The Court held that the real issue was "whether Burlington ha[d] vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence."<sup>113</sup> In its reasoning, the Court applied the Restatement (Second) of Agency's central principle: "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."<sup>114</sup> Burlington was held vicariously liable for Slowik's conduct, but the Court noted Burlington should be allowed to assert an affirmative defense to vicarious liability.<sup>115</sup>

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103. *See id.* at 72-73.

104. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e (1994)).

105. *See* BELTON & AVERY, *supra* note 16, at 33.

106. 490 U.S. 642 (1989).

107. BELTON & AVERY, *supra* note 16, at 33.

108. 524 U.S. 742 (1998).

109. 524 U.S. 775 (1998).

110. *See Ellerth*, 524 U.S. at 764-66; *Faragher*, 524 U.S. at 805-10.

111. *See Ellerth*, 524 U.S. at 749.

112. *Id.* at 747-48.

113. *Id.* at 753.

114. *Id.* at 755-56 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957)).

115. *See id.* at 766.

In *Faragher*, petitioner Beth Ann Faragher, who worked as a lifeguard for the City of Boca Raton, sued her employer for sexual harassment as a result of the conduct of her supervisors, Bill Terry and David Silverman.<sup>116</sup> Faragher alleged she was subjected to their “uninvited and offensive touching [and] . . . lewd remarks.”<sup>117</sup> Although the City had adopted a policy on sexual harassment, the Court held that “it completely failed to disseminate its policy among employees of the Marine Safety Section.”<sup>118</sup>

In both the *Ellerth* and *Faragher* decisions, the Court held that in order for an employer to claim an affirmative defense to vicarious liability for the sexual harassment claims of their employees, it must prove “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>119</sup> The Court in *Ellerth* also held that the defense was adopted “[i]n order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.”<sup>120</sup> Most importantly, the Court held that no affirmative defense would be available if the “supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”<sup>121</sup> Thus, the Court was trying to balance two concerns: (1) the need to curb and hold employers responsible for the growing problem of sexual harassment in the workplace, and (2) the need to make employees proactive in reporting sexually harassing conduct.

The Federal District Court for the Eastern District of California, in *Montero v. AGCO Corp.*,<sup>122</sup> was one of the first federal courts to apply the new rule for an employer’s affirmative defense to vicarious liability. In *Montero*, plaintiff Carrie Ann Montero brought a hostile work environment claim under Title VII against her employer AGCO for the alleged “pattern of offensive and unwanted sexual behavior, both verbal and physical,” that she was subjected to by AGCO employees Glenn Carpenter and Russ

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116. See 524 U.S. at 780.

117. *Id.*

118. *Id.* at 782 (citing *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1560 (S.D. Fla. 1994)).

119. *Id.* at 807; *Ellerth*, 524 U.S. at 765.

120. 524 U.S. at 764.

121. *Id.* at 765.

122. 19 F. Supp. 2d 1143 (E.D. Cal. 1998).

Newmann.<sup>123</sup> The court found that AGCO was not vicariously liable for sexual harassment because AGCO successfully proved “it exercised reasonable care to prevent and correct promptly the sexually harassing behavior,” and Montero “unreasonably failed to take advantage of the preventive and corrective measures provided by AGCO.”<sup>124</sup>

#### B. The Equal Employment Opportunity Commission (“EEOC”)

Congress formed the EEOC to enforce and administer federal anti-discrimination statutes.<sup>125</sup> The EEOC releases guidelines to assist employers in conforming to the various anti-discrimination statutes that the Commission is responsible for enforcing. At first, the EEOC took a strict liability position on employer liability for sexual harassment.<sup>126</sup> The EEOC’s guidelines in part 1604.11(c) of Title 29 of the Code of Federal Regulations held an employer responsible “for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.”<sup>127</sup> Recently however, the EEOC rescinded part 1604.11(c), stating that the section was “no longer valid in light of the Supreme Court’s rulings in *Burlington Industries v. Ellerth* . . . and *Faragher v. City of Boca Raton*.”<sup>128</sup> The Commission also released “Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors” (hereinafter “Enforcement Guidance”) in order to help employers understand the effects of the Supreme Court’s decisions in *Ellerth* and *Faragher*.<sup>129</sup>

In “Enforcement Guidance,” the EEOC analyzes in detail the two prongs of the employers’ affirmative defense to vicarious liability. In its analysis of an employer’s duty to exercise reasonable care, the EEOC first notes that such reasonable care requires employers to “establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps

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123. *Id.* at 1144-45.

124. *Id.* at 1146.

125. *See* 29 C.F.R. § 1601.1 (2000). Among other responsibilities, the EEOC is charged with enforcing Title VII of the Civil Rights Act of 1964.

126. *See id.* § 1604.11(c) (1999).

127. *Id.*

128. Sex Discrimination Guidelines and National Origin Discrimination Guidelines, 64 Fed. Reg. 58,333 (1999) (to be codified at 29 C.F.R. pt. 1604).

129. *See* E.E.O.C. Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, 2 EEOC Compl. Man. (CCH) § 615, ¶ 3116, at 3246-47 (June 18, 1999).

to prevent and correct harassment.”<sup>130</sup> The EEOC also suggests an employer’s policy should contain certain minimum elements:

A clear explanation of prohibited conduct; Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation; A clearly described complaint process that provides accessible avenues of complaint; Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible; A complaint process that provides a prompt, thorough, and impartial investigation; and Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.<sup>131</sup>

The EEOC goes on to examine each of these elements in detail by giving examples of how to question alleged harassers in a sexual harassment investigation<sup>132</sup> as well as suggesting corrective actions.<sup>133</sup>

In its analysis of the second prong of the employers’ affirmative defense—an employee’s duty to exercise reasonable care—the EEOC asserts that the rationale behind this element is that an employee has a duty “to use such means as are reasonable under the circumstances to avoid or minimize the damages” resulting from harassment.<sup>134</sup> One example of an employee’s breach of this duty is the failure to utilize the employer’s complaint procedure.<sup>135</sup> The employee does not have to prove that the employee’s decision not to utilize the policy was reasonable; rather, the burden falls on the employer to prove the employee’s decision was unreasonable.<sup>136</sup> The EEOC warns that plaintiff employees who utilize methods other than the employer’s complaint procedure to avoid harm, e.g., filing a prompt complaint with the EEOC, will prevent the employer from proving the second prong of the affirmative defense.<sup>137</sup>

### C. The Alaska Supreme Court

Although the Alaska Supreme Court did not decide whether to allow employers to claim an affirmative defense to vicarious liability in *VECO*, it did mention the U.S. Supreme Court’s recent decision to adopt an affirmative defense for employers in *Ellerth*

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130. *Id.* at 3254.

131. *Id.* at 3255.

132. *See id.* at 3257-58.

133. *See id.* at 3259-61.

134. *Id.* at 3261 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

135. *See id.* at 3262.

136. *See id.*

137. *See id.* at 3263.

and *Faragher*.<sup>138</sup> The court noted that since both cases were decided after *VECO* had already been briefed and argued, “the issue of the adoption of such a defense was not raised below or on appeal” and the court had “no occasion to consider whether the affirmative defense which [the cases] announce should be adopted as a feature of Alaska anti-discrimination law.”<sup>139</sup> More importantly, the court noted the *Ellerth* and *Faragher* decisions were “in several respects supportive of the views [the court] express[ed] herein as to the liability of an employer for the harassive acts of a supervisor.”<sup>140</sup> Thus, for the analysis of whether the Alaska Supreme Court should adopt the two-pronged affirmative defense set forth by the Supreme Court in *Ellerth* and *Faragher*, this Note will demonstrate the broadness of the Alaska statute for the purposes of interpretation and the furtherance of the Alaska Legislature’s goal of the eradication of discrimination.<sup>141</sup>

A comparison of the definitions of “employer” and “employee” in Title VII, which the Ninth Circuit applied in *Ellison*, with the definitions in Alaska Statutes section 18.80.300, demonstrates many similarities. One main difference, however, is the size of the employer that is included in the definition of “employer” in the respective statutes. Title VII defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”<sup>142</sup> Alaska Statutes section 18.80.300 defines “employer” as “a person, including the state and a political subdivision of the state, who has one or more employees in the state.”<sup>143</sup> Both statutes exclude certain types of employers from being regulated under the statute. Title VII excludes certain governmental agencies and private clubs,<sup>144</sup> and the Alaska Statutes excludes

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138. See *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 914 n.18 (Alaska 1999).

139. *Id.*

140. *Id.*

141. See *supra* note 82 and accompanying text.

142. 42 U.S.C. § 2000e(b) (1994).

143. ALASKA STAT. § 18.80.300(4) (LEXIS 1998).

144. See 42 U.S.C. § 2000e(b). Title VII excludes

(1) [T]he United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service . . . or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

*Id.*

charitable organizations but does not exclude the state as an employer.<sup>145</sup>

Both the Alaska Statutes and Title VII's definitions of "employee" begin with the ambiguous phrase "an individual employed by an employer."<sup>146</sup> The difference between the two statutes is that Title VII excludes employees of the federal government,<sup>147</sup> while the Alaska Statutes only excludes "individual[s] employed in the domestic service of any person."<sup>148</sup> This comparison reveals that the coverage of Alaska's anti-discrimination statute is broader on its face than Title VII.

Some critics of the *Ellerth/Faragher* affirmative defense argue that one concern with the defense is that "[a]ssuming the employer meets the first element by acting reasonably, an employer still may not meet the second element because it is entirely dependent on the conduct of the harassed employee."<sup>149</sup> One way that the Alaska Supreme Court could circumvent this concern would be to apply a very broad interpretation to the second prong of the affirmative defense. In *Fall v. Indiana University Board of Trustees*,<sup>150</sup> the district court held that it could not say whether the employee's waiting for three months before reporting the incident was reasonable or unreasonable as a matter of law and thus left it for the jury to decide.<sup>151</sup> In a more extreme case, the district court in *Marsicano v. American Society of Safety Engineers*<sup>152</sup> found that, even though Marsicano had "acted reasonably in availing of the formal preventive procedures available to her," since she remained silent when a

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145. See ALASKA STAT. § 18.80.300(4) (LEXIS 1998). Subsection 4 excludes any "club that is exclusively social, or a fraternal, charitable, educational, or religious association or corporation, if the club, association, or corporation is not organized for private profit." *Id.*

146. *Id.* § 18.80.300(3); 42 U.S.C. § 2000e(f).

147. See 42 U.S.C. § 2000e(f). Title VII excludes those individuals who are elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to civil service laws of a State government, governmental agency or political subdivision.

*Id.*

148. ALASKA STAT. § 18.80.300(3).

149. Brian S. Kruse, Note, *Strike One—You're Out! Cautious Employers Lose Under New Sexual Harassment Law: Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998), 78 NEB. L. REV. 444, 464 (1999).

150. 12 F. Supp. 2d 870 (N.D. Ind. 1998).

151. See *id.* at 884.

152. 1998 WL 603128 (N.D. Ill. Sept. 4, 1998).

supervisor inquired of her well-being after several incidences of offending conduct had already occurred, she “unreasonably failed to take advantage of a corrective and, more importantly, a preventive opportunity provided by her employer.”<sup>153</sup> Although these decisions may seem harsh, they are in line with Title VII’s aim of requiring employees to “accept responsibility for alerting their employers to the possibility of harassment.”<sup>154</sup>

In his dissents in *Ellerth* and *Faragher*, Justice Thomas complains that the majority’s affirmative defense “provides shockingly little guidance about how employers can actually avoid vicarious liability.”<sup>155</sup> Justice Thomas argues the majority “leaves the dirty work to the lower courts.”<sup>156</sup> Justice Thomas also argues that employers should be subject to the same standard for sexual harassment and racial discrimination, since both are types of employment discrimination prohibited by Title VII.<sup>157</sup> In his dissent in *Ellerth*, Justice Thomas argues the Court should “restore parallel treatment of employer liability for racial and sexual harassment.”<sup>158</sup> Instead of changing the standard for racial discrimination to conform to the standard set forth by the majority in *Ellerth* and *Faragher*, Justice Thomas suggests that the standard be effectively lowered to hold employers liable “only if the employer is truly at fault.”<sup>159</sup>

The disparity of which Justice Thomas complains in the majority’s affirmative defense can be remedied as nothing prevents a court from “exten[ding] . . . the vicarious liability analysis to other types of harassment.”<sup>160</sup> The Alaska Supreme Court, in determining whether to extend the affirmative defense to Alaska employers, should in no way be persuaded by Justice Thomas’ dissents. Adopting the affirmative defense would help Alaska courts achieve

153. *Id.* at \*7.

154. *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (holding that an employee who “feared unspecified repercussions and an unpleasant outcome” cannot be excused from his failure to follow his employer’s grievance procedure).

155. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 773 (1998) (Thomas, J., dissenting); *accord Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998) (Thomas, J., dissenting).

156. *Ellerth*, 524 U.S. at 773.

157. *See id.* at 774.

158. *Id.*

159. *Id.*

160. William R. Corbett, *Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801, 815-16 n.79 (1999) (citing *Booker v. Budget Rent-a-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (applying the holding in *Ellerth* and *Faragher* to racial harassment)).

their goal of a broader interpretation of Alaska Statutes section 18.80.220.<sup>161</sup> In applying the affirmative defense to Alaska's sexual harassment cases, the Alaska courts will be able to come closer to this goal. This Note does not suggest that the Alaska Supreme Court adopt the affirmative defense without first properly analyzing and perhaps changing the respective prongs to conform to the lofty goals of the state's anti-discrimination policies. In order to make the affirmative defense an effective protection against unnecessary litigation and other harms for employers, it may first have to be edited as the Alaska Supreme Court deems necessary. As William Corbett suggests, the amendment process simply would recognize that the majority in *Ellerth* and *Faragher* did not intend for "vicarious liability analyses [to be] 'one size fits all.'"<sup>162</sup>

## VI. CONCLUSION

In the Alaska Supreme Court's inevitable determinations whether to apply the "reasonable victim" standard and whether to allow Alaska employers to claim the *Ellerth/Faragher* affirmative defense, the court should follow the path of *VECO*: Alaska's anti-discrimination law "is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination."<sup>163</sup> Applying the "reasonable victim" standard not only helps plaintiffs, but also helps the justice system as a whole by defeating societal stereotypes perpetuated by the application of the "reasonable person" standard.

By allowing defendant employers to claim an affirmative defense to the sexual harassment claims of their employees, the court would help protect cautious, law-abiding employers from frivolous claims. The second prong of the defense would require employees to report sexually harassing conduct to their employers promptly, and at the same time, require employers to eliminate harassing conduct in the workplace swiftly or risk discipline in court.

*Kamla Alexander*

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161. See *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 912-13 (Alaska 1999); see also *supra* note 82 and accompanying text.

162. Corbett, *supra* note 160, at 822.

163. *VECO*, 970 P.2d at 912-13 (quoting *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585 (Alaska 1979)); see also *BELTON & AVERY*, *supra* note 16, at 275 (stating that frequently, state anti-discrimination statutes will "extend discrimination protection to categories not covered under federal laws; for example, some states and municipalities prohibit discrimination in employment because of marital status, sexual orientation, or physical appearance").