

Employment Law—Scope of *Faragher-Ellerth* Affirmative Defense to Vicarious Liability Not Defined by Employer’s Own Sexual-Harassment Policy—*Chaloult v. Interstate Brands Corp.*, 540 F.3d 64 (1st Cir. 2008)

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee on the basis of sex.¹ In non-tangible employment actions, an employer is vicariously liable for a supervisor’s unlawful sexual harassment unless the employer can establish the *Faragher-Ellerth* affirmative defense: that it acted reasonably to prevent and correct harassment and that the employee did not act reasonably to avoid harm.² In *Chaloult v. Interstate Brands Corp.*,³ the United States Court of Appeals for the First Circuit considered whether a lateral supervisor’s knowledge of sexual harassment is vicariously attributable to an employer when the employer’s sexual-harassment policy requires all supervisors to report any known misconduct.⁴ The court refused to extend Title VII liability to an employer simply because it voluntarily adopted a sexual-harassment policy requiring all supervisors to report sexual harassment.⁵

The plaintiff, Bonnie Chaloult, worked for Interstate Brands Corporation (Interstate) from 1999 until she resigned in August 2005.⁶ On August 4, 2005, Chaloult submitted a resignation letter, explaining that she felt uncomfortable

1. 42 U.S.C. § 2000e-2(a)(1) (2006) (establishing unlawful employment practices under Title VII). The Equal Employment Opportunities statute expressly prohibits employment discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” *Id.*

2. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (creating affirmative defense to vicarious liability in non-tangible employment actions). A tangible employment action occurs when a supervisor’s harassment results in discharge, demotion, or unwanted resignation. *Id.* at 808. When an employer makes no tangible employment action, it is subject to vicarious liability when supervisors with immediate or higher authority over the employee commit unlawful sexual harassment. *Id.* at 807. An employer evades liability if it can establish an affirmative defense that it acted reasonably and that the employee acted unreasonably under the circumstances. *Id.*; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (articulating affirmative defense to vicarious liability); Michael D. Zabowsky, Comment, *Employment Law-Employer Vicariously Liable for Supervisor’s Sexual Harassment-Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), 33 SUFFOLK U. L. REV. 193, 197-98 (1999) (outlining two-part affirmative defense to vicarious liability in non-tangible employment actions); see also *infra* notes 30-31 and accompanying text (discussing *Faragher-Ellerth* affirmative defense to vicarious liability).

3. 540 F.3d 64 (1st Cir. 2008).

4. *Id.* at 76 (stating issue under consideration).

5. *Id.* (summarizing court’s holding).

6. *Id.* at 66 (discussing Chaloult’s employment history with Interstate). Chaloult began at an entry-level position, and in September 2004, she secured a position as bread supervisor. *Id.* In her supervisor position, Chaloult moved among departments but returned to production and worked the night shift from 10:00 P.M. to 8:00 A.M. *Id.*

working for her immediate supervisor, Kevin Francoeur, because he asked her inappropriate personal questions and demanded information.⁷ The letter did not specifically allege that Francoeur sexually harassed her.⁸ Upon receipt of this letter, Interstate's department manager promptly discussed the letter with a human resources manager and met with Chaloult to discuss the allegations.⁹ At the meeting, Chaloult alleged that Francoeur inappropriately asked her co-worker, Jim Anderson, whether he and Chaloult had a sexual relationship.¹⁰ The department manager interviewed all parties involved and, after concluding that Chaloult misinterpreted Francoeur's remark, warned Francoeur against using general profanities in the workplace.¹¹

More than a year after her resignation, Chaloult filed a complaint against Interstate in the Federal District Court for the District of Maine for hostile-work-environment sexual harassment in violation of Title VII and the Maine Human Rights Act.¹² Chaloult alleged that from February to August 2005, Francoeur sexually harassed her by commenting about her breasts, making a sexual proposition to her, discussing his personal sexual relations, and making other inappropriate remarks.¹³ According to Chaloult, Anderson—a fellow supervisor who also reported directly to Francoeur—was aware of much of the harassment.¹⁴ Although Interstate's sexual-harassment policy placed an affirmative duty on all employees with the title of supervisor to report harassment, neither Chaloult nor Anderson reported the incidents to management.¹⁵

7. 540 F.3d at 67 (setting forth content of Chaloult's resignation letter).

8. *Id.* (noting lack of accusation regarding Francoeur).

9. *Id.* at 68 (explaining Interstate's response to resignation letter).

10. *Id.* at 67 (discussing meeting between Chaloult and department manager regarding resignation letter). *Id.* Chaloult was not present when this conversation between Francoeur and Anderson occurred, but claimed that Anderson told her about the conversation the following day. *Id.*

11. 540 F.3d at 68-69. The department manager met with both Francoeur and Anderson separately. *Id.* Francoeur claimed that when Chaloult and Anderson did not answer his radio calls, he asked Anderson, "Are you and Bonnie fucking with me, screwing with me?" *Id.* at 68. In his meeting, Anderson described the conversation just as Francoeur explained. *Id.* On September 1, 2005, Interstate gave Francoeur a letter warning him against profanity and reminding him of the company's harassment policy. *Id.* at 69.

12. *Chaloult v. Interstate Brands Corp.*, 508 F. Supp. 2d 103, 104 (D. Me. 2007) (stating cause of action in original district court action), *aff'd*, 540 F.3d 64 (1st Cir. 2008).

13. *Chaloult v. Interstate Brands Corp.*, 508 F. Supp. 2d 103, 105-06 (D. Me. 2007) (detailing Chaloult's specific sexual-harassment allegations against Francoeur), *aff'd*, 540 F.3d 64 (1st Cir. 2008).

14. 540 F.3d at 72 (asserting Anderson had knowledge of specific harassment incidents). Chaloult maintained that Anderson was present when Francoeur made a comment about the distance between her nipples, when Francoeur asked Chaloult sexually explicit questions about female motorcycle riders, and when Francoeur solicited sex from Chaloult. *Id.* at 70, 72.

15. *Chaloult v. Interstate Brands Corp.*, 508 F. Supp. 2d 103, 106 (D. Me. 2007) (outlining Interstate's sexual-harassment policy), *aff'd*, 540 F.3d 64 (1st Cir. 2008). Interstate's sexual-harassment policy prohibits harassing conduct and requires all supervisors to be on alert for any harassment. *Id.* The policy places an affirmative duty on all supervisors to report, prevent, and eliminate any harassment. *Id.* Chaloult failed to report any incidents of harassment to anyone at the company with authority higher than or equal to Francoeur until she resigned. *Id.* at 107. Anderson claimed that he did not consider the incidents to be sexual harassment.

Chaloult argued that as a matter of law, Anderson's knowledge of the harassment was attributable to Interstate under its own sexual-harassment policy because Anderson was a supervisor within the meaning of the policy.¹⁶ Chaloult claimed that Anderson, who held the title of supervisor, had knowledge of the harassment and failed to fulfill his obligation under the policy to report the harassment to management.¹⁷ As a result of this attributed knowledge, Chaloult asserted that Interstate could not establish the *Faragher-Ellerth* affirmative defense because Anderson, who acted as Interstate's agent, failed to take proper corrective measures to eliminate the harassment.¹⁸ Interstate moved for summary judgment on grounds that it established the *Faragher-Ellerth* affirmative defense to vicarious liability.¹⁹ The district court agreed and granted summary judgment in favor of Interstate, finding that Anderson's failure to report the harassment did not create any issue of material fact as to whether Interstate acted reasonably to prevent and correct the sexual harassment.²⁰ On appeal, the First Circuit affirmed, holding that Interstate's sexual-harassment policy, requiring that all supervisors report any harassment, would not increase its liability under Title VII.²¹

Title VII of the Civil Rights Act of 1964 prohibits gender-based employment discrimination.²² While Title VII's language appears to limit its protection to economic or tangible discrimination, the Supreme Court interpreted Title VII's protection to extend to sexual harassment in the workplace, including hostile-work-environment sexual harassment.²³ Actionable hostile-work-environment sexual harassment requires a showing that the sexual harassment is so severe

540 F.3d at 72.

16. 540 F.3d at 74-75 (discussing Chaloult's argument on appeal).

17. *Id.* at 75 (arguing Anderson was supervisor under Interstate's policy and therefore should have reported harassment to management).

18. *Id.* (highlighting Chaloult's argument alleging Anderson's knowledge must be imputed on Interstate).

19. *Chaloult v. Interstate Brands Corp.*, 508 F. Supp. 2d 103, 104 (D. Me. 2007) (stating Interstate's arguments for summary judgment), *aff'd*, 540 F.3d 64 (1st Cir. 2008). In addition to asserting the *Faragher-Ellerth* affirmative defense, Interstate also argued that the harassment was not severe or pervasive enough to establish an actionable hostile-work-environment claim. *Id.*

20. *Chaloult v. Interstate Brands Corp.*, 508 F. Supp. 2d 103, 108 (D. Me. 2007), *aff'd*, 540 F.3d 64 (1st Cir. 2008). The district court reasoned that Anderson's knowledge of the harassment had no bearing on whether or not Interstate acted reasonably to prevent or correct the harassment. *Id.* According to the district court, Interstate established the affirmative defense because it reasonably lacked knowledge of the harassment and Chaloult unreasonably failed to report any misconduct. *Id.*

21. 540 F.3d at 76-77 (setting forth court's holding).

22. *See supra* note 1 and accompanying text (outlining gender-based discriminatory employment practices).

23. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (explaining broad scope of Title VII protection). While Title VII only specifically describes unlawful economic or tangible sex discrimination, its protection extends beyond these specific employment actions. *Id.*; *see also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing hostile-work-environment sexual harassment within Title VII's protection); David B. Oppenheimer, *Employer Liability for Sexual Harassment by Supervisors*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 272, 277-78 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (maintaining sexual harassment in workplace constitutes violation of Title VII).

and pervasive that it renders an employee's work environment both subjectively and objectively hostile or abusive.²⁴ In addition to Title VII, an employee may be able to seek protection under his or her state antidiscrimination statute.²⁵ The terms of state antidiscrimination statutes vary from state to state, however, many are modeled after Title VII.²⁶

Courts impose vicarious liability on employers for hostile-work-environment sexual harassment committed by supervisory employees regardless of whether the employer knew of the harassment.²⁷ Imposing vicarious liability in this context is based on the aided-by-agency relation doctrine, which provides that supervisors, as opposed to low-level employees, are more prone to misconduct because of the special authority employers delegate to them.²⁸ In companion

24. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (requiring objectively and subjectively offensive work environment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (articulating actionable hostile-work-environment sexual-harassment claim). Conduct is objectively offensive if it would offend a reasonable person and is subjectively offensive if it actually offends the victim of the harassment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). The Court listed factors to consider when determining whether a claim is actionable, including the regularity of the harassment, its gravity, whether it is merely offensive as opposed to humiliating or threatening, and whether it negatively affects the victim's work performance. *Id.* at 23; see also *Havercombe v. Dep't of Educ.*, 250 F.3d 1, 6 (1st Cir. 2001) (determining repeated acts required to amount to hostile environment); *E.E.O.C. v. Horizons Hotel Corp.*, 831 F. Supp. 10, 14 (D.P.R. 1993) (setting forth prima facie case for hostile-environment sexual harassment). To succeed in such a claim the victim must prove that she is a member of a protected class, that she suffered redundant sexual harassment, that the harassment was based on the victim's sex, that the harassment was so severe and/or pervasive that it created an abusive or hostile environment, and that the employer is vicariously liable. *Id.* See generally Robert Michael Ey, *Cause of Action Under Civil Rights Act of 1964 [42 USC §§ 2000e et seq.] for Hostile Env't*, 7 CAUSES OF ACTION 2D 1, § 6 (2008) (outlining general elements of hostile-environment sexual harassment).

25. See Elizabeth Jubin Fujiwara & Joyce M. Brown, *Cause of Action for Post-Ellerth/Faragher Title VII Employment Sexual Harassment Claims*, 27 CAUSES OF ACTION 2D 1 § 3 (2008) (discussing alternative causes of action under state antidiscrimination statutes).

26. See, e.g., *Forrest v. Brinker Intern Payroll Co., LP*, 511 F.3d 225, 228 n.1 (1st Cir. 2007) (explaining Maine Human Rights Act applied and interpreted identical to Title VII); *Stafford v. State*, 835 F. Supp. 1136, 1149-50 (W.D. Mo. 1993) (treating claim under Title VII and Missouri civil-rights statute identically); *Island v. Buena Vista Resort*, 103 S.W.3d 671, 675-76 (Ark. 2003) (noting courts look to federal civil-rights law to apply Arkansas Civil Rights Act). But see Fujiwara & Brown, *supra* note 25, § 3 (noting antidiscrimination statutes of Louisiana, California, and Minnesota materially differ from Title VII).

27. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (emphasizing employer vicariously liable for unlawful discrimination committed by supervisors); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (recognizing employer vicariously liable for its supervisors' unlawful sexual harassment). But see *supra* note 2 and accompanying text (emphasizing employer can evade vicarious liability by establishing *Faragher-Ellerth* affirmative defense).

28. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998) (holding Court will follow aided-by-agency relation doctrine when determining vicarious liability). The Court reasoned that supervisors who commit sexual harassment are aided by their agency relationship to the employer. *Id.* at 803; see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998) (reasoning supervisor's misconduct generally aided by authority employer bestows upon them). The Court, however, recognized that in certain circumstances a supervisor's authority has no bearing on proneness to harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998); Francis Achampong, *Employer Liability for Hostile Environment Sexual Harassment by a Supervisor: A Critical Assessment of the Supreme Court's New Vicarious Liability Standard*, 28 SW. U. L. REV. 45, 59-64 (1998) (analyzing vicarious-liability standard under agency theory). See generally RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (demarcating employer liability for employee torts based on

cases *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court carved out a two-part affirmative defense to vicarious liability for actionable hostile-work-environment sexual harassment claims in non-tangible employment actions.²⁹ First, an employer must demonstrate that it reasonably sought to prevent harassment in the workplace and correct any sexual harassment that occurred.³⁰ Second, an employer must show that the alleged victim failed to utilize reasonable complaint procedures or otherwise evade the harassment.³¹ The policy behind the *Faragher- Ellerth* affirmative defense is to avoid harassment by encouraging employers to adopt and promulgate adequate sexual-harassment policies and complaint procedures.³²

The United States Court of Appeals for the Sixth Circuit has considered whether to define the scope of the *Faragher- Ellerth* affirmative defense by an employer's own sexual-harassment policy.³³ In *Clark v. United Postal Service, Inc.*,³⁴ the Sixth Circuit held that when an employer places an affirmative duty on all supervisors to report sexual harassment, the court must then determine

scope of employment and apparent authority).

29. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (creating two-part affirmative defense); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (defining two-part affirmative defense); see also *supra* note 2 and accompanying text (discussing Supreme Court's creation of two-part affirmative defense to vicarious liability in non-tangible employment actions).

30. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (creating first prong of affirmative defense). The Court noted that the existence and circulation of an employer's sexual-harassment policy and complaint procedure, while not dispositive, may affect whether the employer acted reasonably. *Id.* at 807-08; see also *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 456 (6th Cir. 2008) (stating employer generally establishes first prong if it releases and enforces sexual-harassment policy). The Sixth Circuit noted that when considering whether an employer acted reasonably, courts should first determine if the employer has a sexual-harassment policy in place and then investigate its effectiveness to determine whether the employer prevented and corrected harassment. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) (describing inquiry under first prong). An effective sexual-harassment policy should require supervisors to report harassment, ensure that adequate complaint procedures are in place, afford alleged victims an opportunity to complain without putting the alleged harasser on notice, and provide sufficient training for implementation of the policy. See *id.* at 349-50; see also *Graham Penn. "Because I'm the Boss:" Employer Liability for Supervisors' Hostile Environment Sexual Harassment*, 51 FLA. L. REV. 373, 379 (1999) (defining reasonable behavior under first prong).

31. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (stating second prong of affirmative defense); see also *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (holding employee's failure to report harassment generally establishes unreasonableness of employee in avoiding harm); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003) (maintaining embarrassment or fear not reasonable basis for failure to report harassment). But see *Kerri Lynn Stone, Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court Than Those Who Say No . . . And Why They Shouldn't*, 20 YALE J.L. & FEMINISM 25, 53-54 (2008) (criticizing tendency of courts to disregard why female victims fail to report harassment).

32. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (explaining *Faragher- Ellerth* affirmative defense promotes Title VII's goal to encourage employers to prevent harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (echoing *Ellerth* Court's rationale for affirmative defense); see also *Zabowsky supra* note 2, at 199 (asserting *Faragher- Ellerth* affirmative defense offers employer incentive of avoiding liability by preventing and correcting harassment).

33. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005) (considering whether employer's sexual-harassment policy defines scope of Title VII liability).

34. 400 F.3d 341 (6th Cir. 2005).

whether such supervisors, as agents for the employer, exercised reasonable care to correct the harassment.³⁵ Although the supervisors in *Clark* held low-to-mid-level positions with no authority over the victim, the court determined that they were still supervisors for Title VII purposes because the employer voluntarily adopted a policy that made all supervisors its agents.³⁶ Absent the employer's policy, however, the *Clark* court might have determined that low-to-mid-level supervisors, as opposed to supervisors with immediate or higher authority over the victim, do not constitute supervisors within the meaning of Title VII.³⁷

In *Chaloult v. Interstate Brands Corp.*, the First Circuit considered whether an entry-level supervisor's knowledge of sexual harassment is attributable to an employer when its sexual-harassment policy requires all supervisors to report harassment.³⁸ The court reasoned that attributing knowledge to an employer is only appropriate when a supervisor of equal or higher authority than the harasser observed or otherwise had knowledge of the harassment.³⁹ The court emphasized that while Anderson was a supervisor who allegedly had knowledge of the harassment, he was an entry-level supervisor whose position was subordinate to that of the alleged harasser.⁴⁰ The court opined that while Anderson had a duty under the company policy to report any harassment, this duty went beyond that required by the law to justify imposing vicarious liability.⁴¹ The court further reasoned that even if it attributed Anderson's knowledge to Interstate, Interstate's actions were reasonable because Anderson was not on notice of the harassment.⁴² While Anderson admitted that he heard

35. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) (holding employer's sexual-harassment policy and implementation thereof determines scope of Title VII liability).

36. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005). The court reasoned that because the employer itself created a policy that required all supervisors to report harassment, its supervisors' conduct would determine its ability to prove reasonableness under the *Faragher-Ellerth* affirmative defense. *Id.*; see also *Coates v. Sundor Brands, Inc.*, 164 F.2d 1361, 1364 (11th Cir. 1999) (holding supervisor knowledge of harassment imputed employer or agent duty to remediate). According to the Eleventh Circuit, the employer's policy specifically stated when it would be deemed to have sufficient notice of harassment. *Coates v. Sundor Brands, Inc.*, 164 F.2d 1361, 1364 (11th Cir. 1999). Notice given to the employee's own supervisor or to any supervisor with whom the employee felt "comfortable" would then obligate the employer or its agents to promptly and effectively address the problem. *Id.*

37. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 441, 350 (6th Cir. 2005) (indicating who may fall within meaning of supervisor). The court implied that a supervisor with immediate or higher authority over a victim is generally a supervisor within the meaning of Title VII. *Id.* The court, however, reasoned that an employer who requires supervisors of all levels to implement its harassment policy will be bound by the language of its policy for purposes of Title VII liability. *Id.*

38. 540 F.3d at 76 (stating issue under consideration).

39. See *id.* at 75-76 (explaining precedent supports attribution only if equal- or higher-level employee on notice of harassment); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (defining supervisor as one with immediate or successively higher authority over employee).

40. 540 F.3d at 72 (emphasizing Anderson's position as harasser's subordinate).

41. *Id.* at 76 n.9 (explaining Anderson's duty under Interstate's policy outside scope of Title VII liability under *Faragher-Ellerth*).

42. *Id.* at 76 (opining Interstate not liable even if court imputed Anderson's knowledge to Interstate).

several of Francoeur's comments to Chaloult, the court emphasized that because Anderson reasonably did not consider the comments to rise to the level of harassment, it could not deem him as having been on notice of harassment.⁴³

The court determined that Interstate took reasonable care to eliminate harassment with respect to the incident detailed in Chaloult's resignation letter, which was indeed the only incident that the company was aware of at the time.⁴⁴ The court emphasized that after receipt of the letter, Interstate took proper action by interviewing all individuals involved and concluding that Chaloult's allegations were inaccurate.⁴⁵ Moreover, the court noted that Chaloult never explicitly alleged sexual harassment in the letter.⁴⁶ The court, in refusing to attribute Anderson's knowledge of the harassment to Interstate, concluded that Interstate acted reasonably to eliminate any harassment and thus established the *Faragher-Ellerth* affirmative defense.⁴⁷

Finally, the court rejected the Sixth Circuit's position that an employer's sexual-harassment policy can define which employees constitute agents of the employer for vicarious liability purposes.⁴⁸ The court contested that the Sixth Circuit's approach would undermine public policy concerns.⁴⁹ According to the First Circuit, the Supreme Court carved out the *Faragher-Ellerth* affirmative defense to encourage employers to avoid liability by adopting adequate sexual-harassment policies and reporting mechanisms.⁵⁰ The court reiterated that following the Sixth Circuit's approach would deter employers from voluntarily adopting such broad protective measures.⁵¹ Furthermore, the court refused to penalize Interstate for its voluntary adoption of a comprehensive and widely disseminated sexual-harassment policy that exceeded its Title VII liability.⁵²

The First Circuit, in refusing to define Title VII liability by an employer's own sexual-harassment policy, disregarded Interstate's voluntary choice to require all supervisors to report and prevent sexual harassment.⁵³ Interstate's sexual-harassment policy explicitly placed a duty on all supervisors—not just

43. *Id.* (noting Anderson did not consider incidents harassment).

44. 540 F.3d at 75 (characterizing Interstate's response to resignation letter as reasonable).

45. *Id.* (highlighting Interstate's reasonable response to resignation letter).

46. *Id.* (indicating resignation letter could reasonably be construed as not involving sexual harassment).

47. *Id.* (concluding Interstate established first prong of *Faragher-Ellerth* affirmative defense).

48. See 540 F.3d at 76 (dismissing Sixth Circuit's divergent approach).

49. See *id.* (arguing Sixth Circuit's approach cuts against public-policy concerns).

50. See *id.* (setting forth rationale behind *Faragher-Ellerth* affirmative defense); see also *supra* note 32 and accompanying text (articulating policy behind *Faragher-Ellerth* affirmative defense to Title VII liability).

51. 540 F.3d at 76 (reasoning Sixth Circuit's approach would discourage employers from broadly protecting employees). The First Circuit cautioned that holding Interstate liable would discourage other employers from implementing broad harassment policies due to fear of potential liability. *Id.*

52. See *id.* at 75-76 (refusing to penalize Interstate for broad policy going beyond what Title VII requires).

53. See *id.* at 77 (Lipez, J., dissenting) (criticizing majority for disregarding language of Interstate's harassment policy).

high-level supervisors—to report any sexual harassment to management.⁵⁴ The majority simply disregarded the language of Interstate’s harassment policy and refused to enforce it as written.⁵⁵

Other circuits have held that an employer’s own harassment policy should determine who acts as its agents for Title VII purposes.⁵⁶ While low-to-mid-level supervisors are generally not supervisors within the meaning of Title VII, employers who willingly impose broad reporting policies should be bound by the explicit language that they adopt.⁵⁷ Although the majority pointed out that imposing liability would deter future employers from adopting broad harassment policies, the majority discounted the fact that under the law Interstate designated all supervisors as implementors of its harassment policy.⁵⁸ Indeed, if the majority believed Interstate’s sexual-harassment policy exceeds the scope of Title VII liability, then Interstate—not the court—should redraft the policy.⁵⁹

The majority erroneously concluded that even if it attributed Anderson’s knowledge to Interstate, Interstate’s actions were reasonable.⁶⁰ The summary-judgment standard requires the court to consider all facts in the light most favorable to Chaloult.⁶¹ Because Chaloult alleged that Anderson witnessed several harassing incidents, the court should have determined that Anderson

54. See *supra* note 15 and accompanying text (indicating Interstate’s harassment policy required supervisors of all levels to report harassment).

55. 540 F.3d at 77-78 (Lipez, J. dissenting) (criticizing majority for not enforcing Interstate’s sexual-harassment policy as written).

56. See *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005) (imposing duty to report on low-level supervisors when policy required all supervisors to report harassment); see also *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999) (asserting employer’s harassment policy determines which employees are responsible for reporting harassment); *supra* notes 35-37 and accompanying text (noting Sixth and Eleventh Circuits determine scope of Title VII liability by employer’s harassment policy). But see 540 F.3d at 76 n.8 (distinguishing *Coates* holding). The majority in *Chaloult* opined that *Coates* was only relevant to the question of whether an employee reported harassment to an employer and not to whether an employer is liable for a supervisor’s knowledge of harassment. *Id.* The dissent noted the majority’s factual distinction, but still interpreted *Coates* to mean that an employer’s own sexual-harassment policy defines which employees are responsible for reporting and responding to harassment. *Id.* at 79 n.13 (Lipez, J., dissenting).

57. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (discussing supervisor as person with immediate or higher authority over employee); see also *supra* note 55 (stipulating harassment policy’s language should determine who acts as agents for Title VII purposes).

58. See *supra* note 51 and accompanying text (asserting imposition of liability will discourage employers from broadly protecting its employees); see also *supra* note 15 and accompanying text (stating Interstate’s harassment policy explicitly designated all supervisors its agents).

59. 540 F.3d at 79 (Lipez, J., dissenting) (opining court should not redraft Interstate’s broad harassment policy); see also *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005) (imputing liability on employer based on terms of policy rather than discounting policy’s language).

60. 540 F.3d at 80-81 (Lipez, J., dissenting) (rejecting majority’s conclusion).

61. *Id.* (highlighting summary-judgment standard); see also FED. R. CIV. P. 56 (setting forth rule for summary judgment). Rule 56(c) expressly provides that summary judgment is only appropriate if “there is no genuine issue as to any material fact and that the movant party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56.

was aware of several incidents that a jury could determine were harassing.⁶² If the majority attributed Anderson's knowledge to Interstate, there is a genuine issue of material fact as to whether Interstate acted reasonably under a correct application of the summary-judgment standard.⁶³ Instead, the majority misapplied the summary-judgment standard and gave dispositive weight to Anderson's subjective opinion as to what constitutes harassment.⁶⁴

In *Chaloult v. Interstate Brands Corp.*, the First Circuit considered whether the scope of Title VII liability should be defined by an employer's own sexual-harassment policy. By refusing to enforce an employer's broad sexual-harassment policy as written, the court ignored an employer's voluntary policy choice requiring all supervisors to report sexual harassment. The court also rejected the Sixth Circuit's treatment of the issue, creating a circuit split that will likely result in protracted and expansive litigation.

Lauren P. Gearty

62. See 540 F.3d at 81 (Lipez, J., dissenting) (opining when facts taken favorably to Chaloult, Anderson had knowledge of alleged harassment); *supra* note 14 and accompanying text (asserting Chaloult claimed Anderson on notice of harassment).

63. 540 F.3d at 81-82 (Lipez, J., dissenting) (concluding majority should not have disposed of case on summary judgment). The dissent emphasized that a reasonable juror could have determined Anderson had knowledge of conduct considered to be harassment. *Id.* at 81.

64. *Id.* at 80-81 (questioning majority's dispositive treatment of Anderson's definition of sexual harassment).