# THE PROTECTION ILLUSION: SEXUAL HARASSMENT POLICIES AND LOW-WAGE WORKERS

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> "To be heard as complaining is not to be heard. To hear someone as complaining is an effective way of dismissing someone. You do not have to listen to the content of what she is saying if she is *just* complaining . . . ."–Sara Ahmed, *Complaint*![1]

ABSTRACT

This Article reveals how workplace sexual harassment policies may appear legally compliant but actually create significant barriers to reporting. The non-reporting of harassment eviscerates the protections the policies are supposed to provide employees by creating a loophole for employers to escape liability. A critical review of these policies under procedural and testimonial injustice frameworks uncovers that they are (1) inaccessible due to the extensive use of legal jargon that make them difficult to understand, (2) overly complex and procedurally burdensome due to duties to gather evidence and short reporting timelines, and (3) biased against the credibility of people who report sexual harassment by requiring "good faith" reports. For employees with jobs in low-wage industries, such as restaurant and retail—where workers are predominantly women, people of color, or immigrants—the policies compound the barriers to reporting.

This Article adds a missing ingredient to a rich area of scholarship by analyzing reporting protocols and procedures to demonstrate how the policies themselves impede, rather than facilitate, the reporting of sexual harassment—highlighting how the challenges are even greater for workers in low-wage industries. This Article calls for courts to conduct more rigorous reviews of workplace harassment policies—rather than accepting them at face value—before granting employers an affirmative de-

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1. SARA AHMED, COMPLAINT! 1 (2021).

fense when their employees do not avail themselves of reporting policies. It also proposes mechanisms to incentivize employers to create policies that will encourage employees to report harassment and develop practices that will give employees a voice in the process.

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## INTRODUCTION

Decades after workplace sexual harassment became unlawful, and despite anti-sexual harassment protocols, trainings, and social movements, workplace sexual harassment remains rampant.[2] Depending on

2. It is important to note that it is challenging to estimate the number of people who are sexually harassed each year. The U.S. Equal Employment Opportunity Commission found that between FY 2018 and FY 2021, there were 27,291 charges pertaining to sexual harassment. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES 1 (2022); *see also* 42 U.S.C. § 2000e-2(a)(1) (2006); Rosalie Berger Levinson, *Parsing the Meaning of*

how sexual harassment is defined, anywhere from 25% to 85% of women have experienced workplace sexual harassment.[3] Yet, only three out of four people ever tell a co-worker, and almost 90% of people who experience workplace sexual harassment never file a legal action.[4] Women who work in low-wage jobs are more likely to experience workplace sexual harassment, but they are also less likely to report it than women in higher-earning jobs.[5] Women of color are even less likely to report sexual harassment if they work in a low-wage job.[6] Factors such as fear of job loss or retaliation, language and literacy barriers, embarrassment, lack of understanding of the reporting process, fear of social isolation, and cultural beliefs and norms prevent low-wage workers, especially women, from reporting the harassment.[7]

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*"Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 637 (2003) (discussing the tendency of the lower courts to dismiss claims of disparate treatment and retaliation based on a lack of demonstrable harm is in direct conflict with the purpose of Title VII); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 84 (2005) (examining rights at work in a grievance procedure and concluding that "women complain about only the most serious or most troubling forms of sexual conduct").

3. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016); *see* Jocelyn Frye, *Not Just the Rich and Famous*, CTR. FOR AM. PROGRESS (Nov. 20, 2017), https://www.americanprogress.org/article/not-just-rich-famous/; Luz S. Marín, Milagros Barreto, Mirna Montano, Jodi Sugerman-Brozan, Marcy Goldstein-Gelb, & Laura Punnett, *Workplace Sexual Harassment and Vulnerabilities Among Low-Wage Hispanic Women*, 5 OCCUPATIONAL HEALTH SCI. 391, 392 (2021).

4. FELDBLUM & LIPNIC, *supra* note 3, at 8, 16.

5. Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1255 (2006) (noting that both low-income women of color and high-income white women are less likely to report sexual harassment because they believe it is common workplace behavior); *see also* Chloe Grace Hart, *The Penalties for Self-Reporting Sexual Harassment*, 33 GENDER & SOC'Y 534, 547, 553 (2019) (workers who report sexual harassment at work are more likely to face bias in the workplace afterwards); Kristy D'Angelo-Corker, *Time to Panic! The Need for State Laws Mandating Panic Buttons and Anti-Sexual Harassment Policies to Protect Vulnerable Employees in the Hotel Industry*, 44 SEATTLE U. L. REV. 229, 231 (2021) (noting that between 25% and 80% of women experience sexual harassment in their lifetime, most of whom are service workers who work alone); Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality and the Movement*, 62 B.C. L. REV. 1797, 1801 (2021) ("[T]he workforce areas with the highest number of charges include food services, accommodation, retail, health care, and social assistance—each of which have seen the highest number of claims filed by Black women.").

6. *See* Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, *in* THE SAGE HANDBOOK OF ORG. BEHAV.: VOLUME I - MICRO APPROACHES 469, 486 (Julian Barling & Cary L. Cooper eds., 2008) (citing S. Arzu Wasti & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment*, 83 J. PERSONALITY & SOC. PSYCH. 394, 402 (2002)); Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law*, 126 YALE L.J.F. 503, 507 (2017) ("[T]he lowest wages in our economy are earned in marked disproportion by women, Blacks, and Lati[no]s."); Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality and Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 48 (2019) ("[W]omen of color are more likely to be targeted for sexual harassment due to racial stereotyping and . . . women of color may be less inclined to report sexual harassment because they are used to discriminatory behavior in the workplace . . . .").

7. Workplace sexual harassment is prevalent and impacts all workers regardless of race, ethnicity, gender, or socioeconomic status. This Article focuses on the experiences of women of

Courts have historically awarded employers an affirmative defense when employees do not follow the reporting protocols—often with little to no discussion about the reasonableness or effectiveness of the policies.[8] This defense, known as the *Faragher–Ellerth* affirmative defense, has not only created a loophole that allows employers to escape liability[9] but also incentivized employers to create policies that appear to comply with workplace anti-discrimination laws but have the opposite effect of

color who work in low-wage jobs because they are over-represented in low-wage jobs, face the largest power-imbalances, and have the fewest workplace protections. *See* Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 124 (2001) ("[T]he fear for their jobs, for their families (and their reactions), of embarrassment, and of not being believed are not fears of mere 'unpleasantness.' They are [influenced] by the impact of harassment on those who report harassment[—]impacts that result in lost jobs and discord at home."); Elizabeth Kristen, Blanca Banuelos, & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 181 (2015) ("Low-wage workers also face cultural and language barriers to pursuing justice for workplace harassment. Victims fear that if they report the violence—particularly sexual assault—they will be humiliated in their community."); Gordon B. Dahl & Matthew M. Knepper, *Why Is Workplace Sexual Harassment Underreported? The Value of Outside Options Amid the Threat of Retaliation* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29248, 2021) (noting the fear of retaliatory firing does play a role in whether an individual chooses to pursue a complaint); *see also* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1330 (2012) (reviewing the prevalence of discrimination and how the narrow view of discrimination negatively impacts litigants); SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 78–83 (2017) (surveying the various ways in which the phrase "super-personnel department" is used to believe the employer's stated reason, even when the evidence suggests the reason is untrue, the employer did not follow its posted qualifications, or the employer did not follow its own policies).

8. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 902–06 (2008) (describing the challenges and lack of protection against retaliation that employees face when filing Title VII discrimination claims); *see also* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 160, 186–87 (2021) (stating the *Faragher–Ellerth* defense provides "immunity to employers with anti-harassment policies and reactive procedures"); Diane Y. Byun, *Reexamining Reasonableness: Modernizing the* Ellerth/Faragher *Defense*, 28 UCLA J. GENDER & L. 371, 371–72 (2021) (proposing "a comprehensive interdisciplinary approach with real-world impact—to prevent sexual harassment, rather than to correct—which carries the added benefit of mitigating employer liability"); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 61, 62, 207 (2016); Mary Pilgram & Joann Keyton, *Evaluation of Sexual Harassment Training Instructional Strategies*, 2 NASPA J. ABOUT WOMEN HIGHER EDUC. 222, 232 (2009) (finding that training participants emerged more confused about what constituted sexual harassment than before they started); Elizabeth C. Potter, *When Women's Silence is Reasonable: Reforming the* Faragher/Ellerth *Defense in the #MeToo Era*, 85 BROOK. L. REV. 603, 609–10 (2020) (explaining that the first prong of the *Faragher–Ellerth* defense is meant to incentivize employers to create policies for reporting harassment); Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 198 (2004) [hereinafter Lawton, *Empirical Vacuum*] (arguing that "in *Ellerth* and *Faragher*, the Court created a reward system which ties an employer's liability to its efforts to reduce the incidence of workplace harassment"); Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 820, 823 (2005) [hereinafter Lawton, *Bad Apple*] (concluding the burden of reporting sexual harassment falls on the victim, and if the victim fails to report the behavior, the employer may not be liable for the sexual harassment); Zev J. Eigen, David S. Sherwyn, & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 117–18 (2014) (stating the affirmative defense "encourages employers to design their harassment reporting policies and practices to be good enough to meet the minimum standard of reasonableness but not so good that they encourage prompt reporting of harassment"); L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 712 (2007) (there is a general mistrust of women who "complain" about sexual misconduct).

9. Cunningham-Parmeter, *supra* note 8, at 159–60, 186–87.

creating barriers to reporting.[10] Instead of discouraging sexual harassment, the policies deter reporting, and employers then use the non-reporting (that they fostered) to escape liability. The policies have become de facto shields for employer liability that only symbolically protect workers.[11]

This Article takes a deep dive into the personnel policies of low-wage employers to identify how the barriers woven within the reporting protocols and procedures make them ineffective and unreasonable tools.[12] By digging deep into the protocols and procedures, this Article uncovers a new reason why marginalized workers in low-wage industries do not report sexual harassment: the policies.[13] Silence should trigger a deeper inquiry into the barriers to reporting—not the end of a claim. The impact of the *Faragher–Ellerth* defense on sexual harassment claims has been the subject of foundational theoretical and empirical legal scholarship that has chronicled the development of symbolic personnel policies, criticized the effectiveness of workplace policies to prevent sexual harassment, and questioned the deference that courts give employers regarding the reasonableness of these policies.[14]

A key ingredient missing from this body of scholarship is a careful analysis of the policies themselves. This Article makes a unique addition to this literature by focusing squarely on the text and nature of sexual harassment policies—specifically, protocols and procedures utilized by

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10. *See* sources cited *supra* note 8.
11. *See infra* Part II; *see also* sources cited *supra* note 8.
12. *See infra* Part II.
13. *See infra* Part II.
14. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 963, 975 (1999); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 162–63, 165 (2001) [hereinafter Bisom-Rapp, *Fixing Watches with Sledgehammers*]; Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 44–45 (2001); *see also* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 3–4 (2009) (noting that the meaning of equal opportunity was developed based on practices implemented by corporate personnel experts, not the courts); Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIO. 1203, 1230 (2007) (observing that as workplace sexual harassment case law developed, employers increasingly adopted reporting protocols and procedures); EDELMAN, *supra* note 8, at 3 (arguing that organizations create policies that "promise equal opportunity" but act as symbolic compliance and "mask discrimination and help to perpetuate inequality"); Lauren B. Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court (explaining that courts will give deference to "symbolic structures," i.e., side with the employer who demonstrates the "mere presence" of a policy, "regardless of whether the policy is actually effective"); Hernández, *supra* note 5, at 1269; Lawton, *Empirical Vacuum*, *supra* note 8, at 199; Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065 (2003) (examining workplace policies to demonstrate the widespread use of the "sexual model" definition of workplace harassment, which focuses on sexual conduct rather than the non-sexual forms of sex discrimination).

the low-wage employers.[15] It is built around a first-of-its-kind study that examines the content of sexual harassment policies from low-wage industries.[16] Studying the policies themselves, using procedural and testimonial injustice frameworks, unveils a new layer of unfairness in sexual harassment law. The policies give the illusion of protecting workers, encouraging reporting, attempting to eliminate harassment, and creating better working environments. Instead, they are stacked against victims of harassment. The protocols and procedures are incomprehensible, difficult to navigate, and support credibility biases against people who report sexual harassment. These barriers make it even more challenging for vulnerable workers in low-wage jobs to report harassment, allowing employers to escape liability through the *Faragher–Ellerth* defense.

This Article focuses on personnel policies in low-wage industries such as restaurants, food service, hospitality, and retail.[17] Unsurprisingly, these industries also have the highest rates of sexual harassment.[18] Employers in these sectors pay low hourly wages, assign workers to mostly part-time or variable schedules, and provide few, if any, benefits such as health insurance or retirement plans. Employees also often have little to no chance for career advancement.[19] The majority of service industry workers tend to be women, people of color, immigrants, youth, or individuals with an education level at or below a high school degree.[20] Fo-

15. *See* Geoff Mason & Wiemer Salverda, *Low Pay, Working Conditions, and Living Standards*, *in* LOW-WAGE WORK IN THE WEALTHY WORLD 35 (Jérôme Gautié & John Schmitt eds., 2010) (defining a low-wage worker as one who makes "less than two-thirds of the gross hourly median wage"); David R. Howell & Arne L. Kalleberg, *Declining Job Quality in the United States: Explanations and Evidence*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS., Sept. 2019, at 11 (defining the "decent-wage" threshold as "two-thirds of the mean [hourly] wage for full-time prime-age workers" ($17.50) and the "poverty-wage" threshold as "two-thirds of the median [hourly] wage for full-time workers" ($13.33), using 2017 data); PAMELA LOPREST, GREGORY ACS, CAROLINE RATCLIFFE, & KATIE VINOPAL, U.S. DEP'T OF HEALTH & HUM. SERVS., WHO ARE LOW WAGE WORKERS? 1 (2009) [hereinafter WHO ARE LOW WAGE WORKERS?] (examining the size and characteristics of the low-wage workforce).

16. *See* Schultz, *supra* note 14, at 2065 (examining workplace policies to identify a focus on sexual conduct).

17. *See* WHO ARE LOW WAGE WORKERS?, *supra* note 15, at 1, 3, 4; *see also* REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 7 (2014), https://onlabor.org/wp-content/uploads/2016/04/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

18. *See* Frye, *supra* note 3 (noting food service, hospitality, retail, manufacturing, and health/social care made up approximately 51% of sexual harassment charges filed from fiscal years 2005-2015 in which an industry designation was reported); AMANDA ROSSIE, JASMINE TUCKER, & KAYLA PATRICK, NAT'L WOMEN'S L. CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 16 (2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf ("[S]ervice industries, such as hotels, hospitality, restaurants, and retail, with high numbers of low-wage jobs, and where workers depend on tips or commissions to supplement their wages, are examples of sectors with a heightened risk of harassment not only from supervisors and coworkers, but also from customers.").

19. *See* Sherley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 650–51 (2022) (discussing how Black and Brown workers continue to be disproportionately impacted by poor working conditions).

20. BETH BROCKLAND & TANYA LADHA, FIN. HEALTH NETWORK, FINANCIAL HEALTH OF WORKERS IN LOW-WAGE JOBS 20 (2022), https://finhealthnetwork.org/research/financial-health-of-

cusing on low-wage employers gives us a glimpse into the protocols that our most vulnerable workers have to follow to report sexual harassment.

On the surface, an affirmative defense based on the existence of a workplace policy seems fair: If an employer has protocols for reporting sexual harassment, employees should follow them. By reviewing the policies (something few, if any, courts seem to do) and applying a critical lens to the procedures and protocols, this Article uncovers that the policies give only the appearance of compliance but actually create hurdles to reporting and foster biases against those who report, especially for workers in low-wage jobs.[21]

Part I of this Article provides a brief overview of how personnel policies operate within the context of sexual harassment law. Part II focuses on the study of the actual policies. This Part describes how these policies (1) are inaccessible—by running the policies through "readability" programs, this Article highlights how the use of legal jargon decreases the ability to comprehend the policies, (2) are procedurally burdensome by requiring specific forms of reporting and short reporting deadlines, and (3) are biased against the credibility of the target. Part II also provides some context as to how anti-discrimination and anti-harassment policies became symbols of compliance instead of effective preventative tools. Part III offers solutions to improve the effectiveness of policies by arguing that courts should rigorously review the policies rather than accept them at face value. Scrutinizing workplace policies will incentivize employers to create policies that support the reporting of

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workers-in-low-wage-jobs/ ("[O]nly one-third of workers in low-wage jobs (33%) report receiving health insurance coverage through their employers, and among those who do not, more than half (52%) say that they are not eligible for insurance from their employers."); KEN-HOU LIN, CAROLINA ARAGÃO, & J. ADAM COBB, UNIV. OF TEX. POPULATION RSCH. CTR., WOMEN, MINORITIES, AND NON-UNION WORKERS CONTINUE TO DOMINATE LOW-WAGE MARKETS, AND EXPERIENCE JOB INSECURITY AND LIMITED UPWARD MOBILITY 2 (2020), https://repositories.lib.utexas.edu/bitstreams/b8d43d20-1b10-45c2-8096-54c8bdc229dd/download; D. Augustus Anderson, *A Profile of the Retail Workforce*, U.S. CENSUS BUREAU (Sept. 8, 2020), https://www.census.gov/library/stories/2020/09/profile-of-the-retail-workforce.html (noting that retail workers tend to be "[y]oung, less educated women earning low wages" and "[m]inorities are overrepresented in retail work but non-Hispanic Whites still make up the majority (60%) of the retail workforce"); *see* JENNIFER HERARD, KEVIN MILLER, JANE HENRICI, & BARBARA GAULT, INST. FOR WOMEN'S POL'Y RSCH., LOW LITERACY MEANS LOWER EARNINGS, ESPECIALLY FOR WOMEN 1 (2012), https://iwpr.org/wp-content/uploads/2020/11/C392.pdf ("[W]omen need higher levels of literacy than men to earn wages that are comparable with men's."); JOHN SCHMITT & JANELLE JONES, CTR. FOR ECON. & POL'Y RSCH., SLOW PROGRESS FOR FAST-FOOD WORKERS 1–2 (2013), https://www.cepr.net/documents/publications/fast-food-workers-2013-08.pdf (reporting that, based on data collected from 2010 to 2012, between 52% and 56% of fast-food workers are women and only 6% of fast-food workers have a college degree).

21. *See* Williams, *supra* note 5, at 1799, 1864 (arguing that the current Title VII framework is not intersectional and thus often excludes women of color); Sánchez Ocasio & Gertner, *supra* note 6, at 519 (exploring the importance and power of centering the voices of low-wage women of color workers in the common-good unionism movement); Cantalupo, *supra* note 6, at 80 (we need an intersectional lens and Social Justice Feminist strategies to understand why women of color students are sexually harassed at disproportionately high rates); *see also* Cruz, *supra* note 19, at 637, 656.

harassment and include employee voices in developing these protocols and procedures.

## I. THE ROLE OF PERSONNEL POLICIES IN SEXUAL HARASSMENT LAW

Before looking at the personnel policies themselves, it is important to understand the role they play in sexual harassment cases. Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful for employers[22] to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[23]

The term "sexual harassment" does not exist in Title VII.[24] Claims for sexual harassment have developed under the broader category of discrimination based on "sex."[25] The concept of sexual harassment developed during the 1970s with many of its principles stemming from feminist scholar Catharine MacKinnon's book, *Sexual Harassment of Working Women: A Case of Sex Discrimination.*[26]

In 1986, in *Meritor Savings Bank v. Vinson*,[27] the United States Supreme Court formally recognized sexual harassment as discrimination based on sex.[28] The Court criticized the bank for failing to have a policy that specifically denounced sexual harassment and for requiring employees to file complaints of discrimination with their supervisors—leaving them no alternatives if the supervisor was the harasser.[29] While it did not provide guidelines on the development of model policies, the Court hinted that employers might avoid liability if their "procedures were better calculated to encourage victims of harassment to come forward."[30]

Over a decade later, the Court issued two landmark opinions, *Faragher v. City of Boca Raton*[31] and *Burlington Industries v. Ellerth*,[32] that

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22. Title VII only applies to employers with fifteen or more employees and agents of such employers. 42 U.S.C. § 2000e(b) (defining the term "employer").

23. *Id.* § 2000e-2(a)(1) (describing unlawful employer practices).

24. *See id.* § 2000e(a)–(n) (definitions section for Title VII).

25. 29 C.F.R. § 1604.11(a) (1980) (explaining the elements of a sexual harassment claim).

26. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (offering the first major attempt to understand sexual harassment as a pervasive social problem and to present a legal argument that it is discrimination based on sex); *see* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (holding that a supervisor's termination of an employee after she refused his sexual advances constituted sex discrimination); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that an employer could be found liable for a supervisor's sexual harassment).

27. 477 U.S. 57 (1986).

28. *Id.* at 64, 66 (concluding that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the bases of sex" and 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").

29. *Id.* at 72–73.

30. *Id.* at 73.

31. 524 U.S. 775 (1998).

32. 524 U.S. 742 (1998).

established an affirmative defense for employers in supervisor harassment cases without a tangible employment action, i.e., when the employee quits.[33] Under the *Faragher–Ellerth* affirmative defense, when a plaintiff accuses a supervisor of sexual harassment and there are no tangible employment actions (such as a firing or a demotion), the employer may assert an affirmative defense if "(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[34]

In *Ellerth*, the Court noted that if employers made efforts to create "antiharassment policies and effective grievance mechanisms" they would support "Congress' intention to promote conciliation rather than litigation in the Title VII context . . . ."[35] The existence of the policies "could encourage employees to report harassing conduct before it becomes severe or pervasive, [and thus] it would also serve Title VII's deterrent purpose."[36] Unfortunately, the Court did not provide guidance as to what constitutes an effective policy. The Court, in *Faragher*, noted some baseline requirements: The policies need to be disseminated to the employees, employers need to respond to the complaints, and procedures must provide for an avenue to report the conduct to someone other than the employee's supervisor.[37] It did not, however, define what terms or protocols would make a policy effective or how to evaluate the effectiveness of policies.[38]

The *Faragher* and *Ellerth* opinions and the cases following them created what Anne Lawton coined as "file cabinet compliance," whereby courts require little more than "the develop[ment] and distribut[ion] [of] nicely worded harassment policies and procedures."[39] Lower courts liberally grant employers the *Faragher–Ellerth* affirmative defense if they can demonstrate that they had and distributed policies and the employee did not follow them, without requiring evidence that the policies were effective or reasonable.[40] The mere existence of reporting protocols establishes that the employer exercised reasonable care in preventing and

33. *Id.* at 748, 765; *Faragher*, 524 U.S. at 777–78 (tangible employment action requires a significant change in employment status, "such as discharge, demotion, or undesirable reassignment").

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

35. *Id.* at 764.

36. *Id.*

37. *Faragher*, 524 U.S. at 808.

38. *Id.* at 808–09.

39. Lawton, *Empirical Vacuum*, *supra* note 8, at 198.

40. *Id.* at 260–61; Byun, *supra* note 8, at 385 ("The federal judiciary's current interpretation of what qualifies as reasonable in the first prong of the *Ellerth/Faragher* defense is inadequate. It incentivizes employers to focus on symbolic compliance and avoidance of liability, rather than genuinely provide effective prevention and correction of sexual harassment.").

correcting misbehavior, thereby allowing the employer an affirmative defense.[41]

In theory, the *Faragher–Ellerth* defense makes sense for both employers and employees. It should encourage employers to create protocols and procedures to protect employees, help identify problematic supervisors, and provide employees with a roadmap for reporting misconduct. Unfortunately, Title VII does not require that employers establish personnel policies, nor does it provide criteria for what would make reasonable or effective policies, and courts have provided little guidance, simply accepting an employer's illusion of compliance.[42]

### *A. Personnel Experts Overpromised*

In the 1960s, personnel experts and human resource professionals filled the void (left by Title VII and the courts) by developing and marketing equal opportunity policies, procedures, and protocols that allowed those being regulated to create the rules that they had to follow.[43] To sell these policies (and their services), personnel experts emphasized the risk of litigation that could result for companies without Equal Employment Opportunity (EEO) policies.[44] Human resource professionals created a powerful niche where they became experts in how to protect employers from discrimination and harassment claims.[45] They created policies that

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41. Cunningham-Parmeter, *supra* note 8, at 212 (describing the impact of the assumption that employers draft and implement effective workplace reporting policies).

42. *See* 42 U.S.C. § 2000e; *see also* Byun, *supra* note 8, at 384–85, (suggesting the currently accepted complaint processes are archaic and ineffective and that "courts should no longer accept [certain] complaint mechanisms like hotlines as a sole reporting mechanism"); Jessica K. Fink, *Backdating #MeToo*, 45 CARDOZO L. REV. 899, 920 (2024) (noting that while the "cornerstone of [the *Faragher–Ellerth* defense] is reasonableness . . . many courts' notions of reasonableness seem to lag behind those of society at large, in various ways" (alteration in original)); Potter, *supra* note 8, at 610 (explaining that the first prong of the *Faragher-Ellerth* defense is meant to incentivize employers to create policies for reporting harassment); Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 77–78 (1999) (evaluating higher education institutions' implementation of sexual harassment reporting policies); Lawton*, Empirical Vacuum*, *supra* note 8, at 207–08 (noting the lack of guidance on the meaning of effective policies and identifying a gap in empirical evidence on the subject); David Sherwyn, Michael Heise, & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1266 (2001) (finding that "employer-related factors heavily influence the courts' construction of both prongs" of the affirmative defense); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 86 (2006) (arguing that courts' failure to consider workplace power dynamics when evaluating the effectiveness of reporting policies undermines policy objectives); Lawton, *Bad Apple*, *supra* note 8, at 821–22 (criticizing the Court's sexual harassment jurisprudence for focusing on individual actors at the expense of recognizing organizational contributions to the problem of workplace harassment).

43. *See* DOBBIN, *supra* note 14, at 5 (referring to Lauren Edelman's "endogenous" theory, where "[t]hose being regulated helped to establish the terms of [their] compliance"); EDELMAN, *supra* note 8; *see also* Dobbin & Kelly, *supra* note 14, at 1203.

44. *See* EDELMAN, *supra* note 8, at 89–96; *see also* DOBBIN, *supra* note 14, at 1–13, 190–219.

45. *See* EDELMAN, *supra* note 8, at 82–83; *see also* DOBBIN, *supra* note 14, at 1–13, 190–219.

followed workers' rights social movements and were, at first, ahead of what courts (and the public) deemed illegal at the time.[46]

As EEO policies became common in workplaces, courts (including the Supreme Court) equated their existence with legal compliance without proof that policies prevented harassment.[47] By 1997, 96% of employers had sexual harassment reporting policies.[48] The policies shielded employers from liability.[49] Courts began to see the existence or absence of these policies as critical evidence of legal compliance; companies with these policies would never *deliberately* discriminate.[50] This effect reached its pinnacle in *Faragher–Ellerth* where the Supreme Court ratified this exact approach, and solidified the purpose of the policies: to protect employers from harassment claims, not to facilitate the reporting of claims.[51]

### *B. The EEOC Encouraged the Use of Policies*

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing workplace discrimination claims, played a key role in the development of personnel policies. It issued its first set of Guidelines on Sexual Harassment in 1980, over fifteen years after the enactment of Title VII and the creation of the EEOC, and before the Supreme Court formally recognized harassment as a form of discrimination.[52] The initial guidelines advised employers that prevention was "the best tool" for eliminating sexual harassment.[53] While the guidelines did not explicitly instruct employers to create anti-harassment policies, they suggested that employers proactively express their "strong disapproval" of sexual harassment, inform employees of their right to report it

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46. *See* DOBBIN, *supra* note 14, at 8–13, 190–219.

47. *See* EDELMAN, *supra* note 8, at 12 (explaining the theory of "legal endogeneity"); *see also* TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 1 (2017) (demonstrating "the rise of organizational innocence in the courts' understanding of employment discrimination and the corresponding narrowing of employer liability").

48. GREEN, *supra* note 47, at 39 (citing DOBBIN, *supra* note 14, at 213).

49. *See* DOBBIN, *supra* note 14, at 201–19; *see also* Bisom-Rapp, *Fixing Watches with Sledgehammers*, *supra* note 14, at 162–65 (questioning whether sexual harassment trainings were an effective solution).

50. *See* EDELMAN, *supra* note 8, at 13; GREEN, *supra* note 47, at 36 (noting that "[t]he diversity management movement sends an express signal that organizations care about diversity itself" and that diversity management efforts send a signal of "organizational innocence" with regards to workplace discrimination).

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

52. 29 C.F.R. § 1604.11 (1980) (explaining the elements of a sexual harassment claim); *see also* EDELMAN, *supra* note 8, at 208–13 (Edelman's study demonstrates that the EEOC started heavily advising employers to implement sexual harassment policies after the *Meritor*, *Faragher*, and *Ellerth* decisions, but her study also demonstrated that the EEOC was influenced by human resource professionals in the power of EEO policies); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–64 (1986).

53. § 1604.11(e) ("Prevention is the best tool for the elimination of sexual harassment.").

and the procedures for doing so, and develop consequences for the misconduct.[54]

Although the EEOC sexual harassment guidelines have been updated over the years,[55] its jargon-filled definition of sexual harassment from 1980 accounts for many of the incomprehensible policies that exist today.[56] The 1980 EEOC definition of sexual harassment is restated almost verbatim throughout the policies examined in this Article.[57] Employers have copied the EEOC's language to give the appearance of compliance. This EEOC language perpetuates the existence of jargon-filled and outdated 1980's broad notions of harassment that focused on sexual misconduct rather than today's understanding that harassment can also be a subtle, wide range of acts that are not purely sexual and that intersect with other forms of discrimination, such as race, gender, or ethnicity.[58] Employers are more concerned with giving the appearance of complying with EEO standards (to assure themselves an affirmative defense) than drafting policies that workers can understand and follow.[59] In 1999, the EEOC issued another Enforcement Harassment Guidance, following the creation of the *Faragher–Ellerth* defense, where it confirmed that the

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54. *Id.*

55. *See, e.g.*, 29 C.F.R. pt. 1604 (1987); 29 C.F.R. pt. 1604 (1990); 29 C.F.R. pt. 1604 (1994); 29 C.F.R. pt. 1604 (1999); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1987-8, CM-615 HARASSMENT (1987) [hereinafter 1987 EEOC Compliance Manual]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1990-8, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990) [hereinafter 1990 EEOC Sexual Harassment Policy Guidance]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1990-5, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990) [hereinafter 1990 EEOC Sexual Favoritism Policy Guidance]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1994-5, ENFORCEMENT GUIDANCE ON HARRIS V. FORKLIFT SYS. INC. (1994) [hereinafter 1994 EEOC Enforcement Guidance]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1999-2, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999) [hereinafter 1999 EEOC Enforcement Guidance].

56. § 1604.11; *see* Schultz, *supra* note 14, at 2095 (discussing widespread employer adoption of the exact language of the EEOC's 1980 Guidelines, which focused on prohibited sexual conduct rather than generalizing harassment in non-sexual terms); DOBBIN, *supra* note 14, at 196 (noting that the EEOC borrowed Catherine MacKinnon's definition of a hostile work environment to develop its definition of sexual harassment); *see also infra* Section II.B.2.a.i.

57. The 1980 EEOC guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a); *see infra* Section II.B.2.a.i.

58. *See* § 1604.11(a) (adopting a sexual conduct-based definition of harassment based on sex); Schultz, *supra* note 14, at 2095; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2024-1, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (2024) [hereinafter 2024 EEOC Guidance] (reflecting a modern understanding of harassment in declaring that "[h]arassment based on sex under Title VII also includes non-sexual conduct based on sex, such as sex-based epithets[,] sexist comments[,] . . . or facially sex-neutral offensive conduct motivated by sex"); *see also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 481 (2018); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 143–44 (2014).

59. *See infra* Sections II.B.2, III.C.3.

defense applied to all protected categories of discrimination and encouraged employers to establish anti-harassment policies and reporting procedures for all prohibited harassment.[60] The 1999 Guidance also suggested that policies should be "written in a way that will be understood by all employees" and provide a "clear explanation of prohibited conduct" and "[a]ssurance" of "protect[ion] against retaliation."[61]

In 2024, over twenty-five years after *Faragher–Ellerth* and about ten years after declaring the need to improve anti-harassment trainings and protocols,[62] the EEOC issued the first updates to its Enforcement Guidance since 1999.[63] It provides best practices for anti-harassment policies and states that the *Faragher–Ellerth* affirmative defense analysis "typically begins by identifying the policies and practices an employer has instituted to prevent harassment and to respond to complaints of harassment."[64] While the 2024 guidance confirms that federal law does not specify that an employer must have reporting policies or what should be in the policies, it does provide a list of factors that would indicate that the harassment policy is "effective."[65] According to the guidance, an effective policy

> defines what conduct is prohibited; . . . is comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English; . . . offers multiple avenues for reporting . . . [including] to . . . someone other than their harassers; . . . [and] explains the employer's complaint process, including the process's anti-retaliation and confidentiality protections.[66]

The 2024 EEOC Guidance goes a step further than previous guidance to incentivize creating worker-friendly policies by advising that policies should be comprehensible, especially for employees who might face barriers to comprehension.[67]

## II. DIVING INTO THE WORKPLACE POLICIES

This Section dives into actual workplace protocols and procedures to demonstrate how sexual harassment policies create barriers to reporting, especially for vulnerable individuals who work in low-wage industries.

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60. 1999 EEOC Enforcement Guidance, *supra* note 55.
61. *Id.*
62. *See* sources cited *supra* note 2; *see also* sources cited *supra* notes 3 & 6.
63. 2024 EEOC Guidance, *supra* note 58.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

### *A. Methodology*

First, a note about the methodology and selection process for the policies discussed in this Article. I reviewed over fifty policies from companies that employ large numbers of low-wage workers.[68] The policies ran the gamut from broad global codes of conduct that apply to thousands of employees to employee handbooks from small local restaurants.[69] The employers included national corporations and parent companies of nationally recognized franchises to smaller regional companies

68. The following is a list of the policies I reviewed for this Article: BRAVO FOODS, LLC, EMPLOYEE HANDBOOK (2020) (Taco Bell); B & G FOOD ENTERS., EMPLOYEE HANDBOOK (2017) [hereinafter B & G (2017)] (Taco Bell); B & G FOOD ENTERS., EMPLOYEE HANDBOOK (2022) [hereinafter B & G (2022)] (Taco Bell); PEPE OSAKA'S FISHTACO TEQUILA BAR & GRILL, EMPLOYEE HANDBOOK (2019); DESERT DE ORO FOODS, INC., EMPLOYMENT POLICY HANDBOOK & OPERATIONS MANUAL (2022) (Taco Bell, Kentucky Fried Chicken, Whataburger, Long John Silvers, and Pizza Hut); TIPS EAST LLC, EMPLOYEE HANDBOOK (2020) (Domino's); YUM! BRANDS, INC, GLOBAL CODE OF CONDUCT (2024) (KFC, Pizza Hut, Taco Bell, and The Habit); FREELAND GRP. RESTS., PIZZA HUT REGULATIONS & POLICY MANUAL (2022); FEDEX, CODE OF CONDUCT (2025); BAUER FOOD LLC, EMPLOYEE HANDBOOK (2017) (McDonald's); MCWORTH MGMT. CO., EMPLOYMENT MANUAL (2016) (McDonald's); THE WENDY'S CO., CODE OF BUSINESS CONDUCT & ETHICS (2017); M PIZZA, INC., TEAM MEMBER HANDBOOK (2024) (Domino's); JONES PETROLEUM CO., EMPLOYEE HANDBOOK (2016) [hereinafter JONES PETROLEUM CO. (2016)] (Convenience Stores, Inc., Piggly Wiggly, and Freshway Market); JONES PETROLEUM CO., EMPLOYEE HANDBOOK (2019) [hereinafter JONES PETROLEUM CO. (2019)] (Convenience Stores, Inc., Piggly Wiggly, Freshway Market, Dunkin' Donuts, Little Caesars Pizza, Subway, Dairy Queen, and Burger King); CHICK-FIL-A, TEAM MEMBER HANDBOOK (2022) [hereinafter CHICK-FIL-A BEECHWOOD] (Beechwood, Barnett Shoals, and Downtown Athens franchises); CHICK-FIL-A, TEAM MEMBER HANDBOOK (2017) (Renaissance Village and Research Triangle franchises); CHICK-FIL-A, TEAM MEMBER POLICY HANDBOOK (2024) (Englewood and Hackensack franchises); THE KROGER CO., POLICY ON BUSINESS ETHICS (2025); THE HOME DEPOT, BUSINESS CODE OF CONDUCT AND ETHICS (2024); UNITEDHEALTH GRP., CODE OF CONDUCT (2023); LOWE'S, CODE OF BUSINESS CONDUCT AND ETHICS (2023); GLENCOE MGMT., EMPLOYEE HANDBOOK (2021) (Burger King); WHOLE FOODS MKT., CODE OF BUSINESS CONDUCT (2022); CEC THEATRES, EMPLOYEE HANDBOOK (2009); HOTEL SHERATON, EMPLOYEE HANDBOOK (2022); THE INN AT NEW HYDE PARK, EMPLOYEE HANDBOOK (2019); BLOOMIN' BRANDS, INC., CODE OF CONDUCT (last visited Jan. 10, 2025) (Outback Steakhouse, Carrabba's Italian Grill, Bonefish Grill, Fleming's Prime Steakhouse, and Aussie Grill); DINE BRANDS GLOB., INC., GLOBAL CODE OF CONDUCT (2022) (Applebee's and IHOP); STARBUCKS, STANDARDS OF BUSINESS CONDUCT (2021); HILTON WORLDWIDE, CODE OF CONDUCT (2015); DARDEN, CODE OF CONDUCT (2018) (Longhorn Steakhouse, Cheddar's Scratch Kitchen, and Olive Garden); ARBY'S REST. GRP., CODE OF BUSINESS CONDUCT AND ETHICS (2008); CARGILL, CARGILL'S CODE OF CONDUCT (2024); MARRIOTT INT'L, INC., BUSINESS CONDUCT GUIDE (2013); TYSON FOODS, INC., CODE OF CONDUCT (2006); PILGRIM'S PRIDE CORP., CODE OF CONDUCT & ETHICS (2023); WALMART, INC., INTEGRITY BUILDS TRUST: OUR CODE OF CONDUCT, https://perma.cc/QQC5-NZ4S (last visited Jan. 10, 2025); JO-ANN STORES, INC., CODE OF BUSINESS CONDUCT AND ETHICS, https://perma.cc/DNG8-NUS9 (last visited Jan. 21, 2025); SERVPRO, TEAM NICHOLSON EMPLOYEE HANDBOOK, https://perma.cc/RMH4-2D9M (last visited Jan. 21, 2025); ROTTINGHAUS CO., TEAM MEMBER EMPLOYEE HANDBOOK (2013) (Subway); KOHL'S, CODE OF ETHICS (2024); UNITED PARCEL SERV. OF AM., CODE OF BUSINESS CONDUCT (2011); HORMEL FOODS, CODE OF ETHICAL BUSINESS CONDUCT, https://perma.cc/XJ5B-D37P (last visited May 18, 2025); DOLLAR TREE, INTEGRITY MATTERS: OUR CODE OF CONDUCT (2024) (Dollar Tree and Family Dollar); DOLLAR GEN., SERVING OTHERS: DOLLAR GENERAL'S CODE OF BUSINESS CONDUCT AND ETHICS (2022); BRTX, LLC, SEASONAL TEAM MEMBER HANDBOOK (2024) (Big Rivers Waterpark & Adventures); CLASSIC FOODS, INC., EMPLOYEE HANDBOOK (2024) (Wendy's Idaho).

69. *See, e.g.*, DOLLAR TREE, *supra* note 68, at 6, 10 (two major dollar store chains with subsidiaries around the world); PEPE OSAKA'S FISHTACO TEQUILA BAR & GRILL, *supra* note 68, at 3, 19 (restaurant with a single location in Winter Park, Colorado).

and "family-owned" businesses.[70] I found the policies through basic internet searches via Google. I used search terms such as "employee handbooks," "personnel policies," "harassment policies," and "sexual harassment policies" of commonly known low-wage employers, such as McDonald's or Walmart. I only reviewed employee handbooks and policies that were publicly available on the internet. I also analyzed the language of the policies using a "readability" program that assessed the academic grade level required to understand the policies.[71]

This sampling of policies provides a glimpse of themes, protocols, and expectations that impact the reporting of sexual harassment for low-wage workers. Although this is not a traditional empirical study with a randomized sample, the list of employers examined in this Article captures a wide cross section of low-wage employers.[72] Further, having read and cross-referenced these policies with each other, the similarity in the language of the text and barriers to reporting is remarkable.[73] The striking similarities lead me to believe that the policies are emblematic of an industry standard that has created "boilerplate" clauses in employee handbooks and personnel policies that result in barriers to reporting.

### *B. The Policies*

The *Faragher–Ellerth* defense is especially problematic when one looks at the actual language of the policies. The Supreme Court thought encouraging employers to create policies and develop structures for reporting harassment would help prevent and deter it.[74] Employers' self-interest, however, has resulted in policies that complicate the reporting process and create barriers to reporting sexual harassment, which lets employers off the hook for the misconduct without having to prevent or deter the behavior—they just prevent the reporting of it.[75] This Section applies a procedural justice[76] and testimonial injustice[77] framework to the

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70. *See, e.g.*, DOLLAR TREE, *supra* note 68, at 6, 10; PEPE OSAKA'S FISHTACO TEQUILA BAR & GRILL, *supra* note 68, at 3, 19.

71. I scanned the sexual harassment definitions from the policies through the "Gunning Fog Index," a readability index that scores writing based on the length of the sentences and the number of complex (uncommon multisyllable) words in the sentences. *See* Brian Scott, *The Gunning Fog Index (or FOG) Readability Formula*, READABILITY FORMULAS (Feb. 8, 2025), https://readabilityformulas.com/the-gunnings-fog-index-or-fog-readability-formula/; *see also* discussion *infra* Section II.B.2.a.i (describing results of readability analysis).

72. The companies whose policies I reviewed include fast-food and sit-down dining restaurants, grocery and retail stores, hotels, hardware stores, agricultural product processing, delivery services providers, a healthcare provider, a restoration services provider, a movie theater chain, and a water park. *See* sources cited *supra* note 68.

73. *See* discussion *infra* Sections II.B.2.a.i, II.B.2.b.

74. Potter, *supra* note 8, at 609–10.

75. *See* discussion *infra* Section II.B.2.b.

76. *See* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) (explaining that perceptions of justice depend on the fairness of the process and procedures); *see also* ELIZABETH UMPHRESS, CHERYL COOKY, MELISSA KWON, FIONA LEE, & THADDEUS POTTER, NAT'L ACADS. SCIS., ENG'G, & MED., APPLYING PROCEDURAL JUSTICE TO SEXUAL HARASSMENT POLICIES, PROCESSES, AND

sexual harassment policies to identify how the procedures and protocols unfairly burden, disadvantage, and discredit the reporting party.

1. Procedural and Testimonial Injustice Frameworks

This Article evaluates the fairness of reporting protocols and procedures by applying some of the principles of procedural injustice to the policies.[78] It looks at the "ethicality" or potential stress, burden, or suffering that may fall on the target who tries to comply with the reporting policies and whether the protocols and procedures appear to respect and care for the target's well-being and dignity.[79] It asks whether the policies reflect impartiality or impose unfair bias, stereotypes, or prejudices that may influence the reporting process. It looks at whether the policies give the target of harassment a voice or control over how, when, and to whom they report the misconduct.[80] Employees who believe that workplace policies are unjust will not follow them.[81] Doubts about whether the reporting will make a difference, concerns about retaliation, lack of confidence in the investigation process, burdensome protocols, and fears that

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PRACTICES 2, 4 (Elizabeth Umphress & Jeena M. Thomas eds., 2022); William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631, 631–33 (1981). While general principles of procedural justice evaluate the interests of all interested parties, this Article focuses on the injustices faced by the target of harassment when reporting the misconduct.

77. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1 (2007) ("Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word[.]").

78. General principles of procedural injustice assess the ethicality, voice, control and representation, bias suppression or impartiality, consistency, accuracy, and correctability within protocols and procedures. *See* Tyler, *supra* note 76, at 104–06; UMPHRESS, COOKY, KWON, LEE, & POTTER, *supra* note 76, at 5; Denise M. Jepsen & John Rodwell, *Female Perceptions of Organizational Justice*, 19 GENDER, WORK & ORG. 723, 723 (2012) (examining women's conceptualization of organizational justice variables that were important for forming "attitudes [about] job satisfaction, organizational commitment[,] and turnover intentions").

79. *See* Tyler*, supra* note 76, at 113, 129 (measuring ethicality based on authorities' politeness and concern for the individual's rights); *see also* Steven E. Abraham & Paula B. Voos, *Procedural and Distributive Justice in Sexual Harassment Arbitrations: Evolution of Decisions in the Union Context*, 26 ADVANCES INDUS. & LAB. RELS. 99, 103 (2021) (defining procedural justice to include "interactional justice," which considers "whether people involved in the justice procedure are treated with politeness, respect, and dignity"); UMPHRESS, COOKY, KWON, LEE, & POTTER, *supra* note 76, at 6–7.

80. *See* Tyler, *supra* note 76, at 111; Abraham & Voos, *supra* note 79, at 102; UMPHRESS, COOKY, KWON, LEE, & POTTER, *supra* note 76, at 9–10, 13–14.

81. *See* Laurie A. Rudman, Eugene Borgida, & Barbara A. Robertson, *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOC. PSYCH. 519, 534 (1995) (finding that "procedural justice, rather than gender socialization, was a superior explicator of the reliably low reporting rate"); *see also* Jerald Greenberg, *A Taxonomy of Organizational Justice Theories*, 12 ACAD. MGMT. REV. 9, 15 (1987); Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1963 (2020) (citing Andrea M. Butler & Greg A. Chung-Yan, *The Influence of Sexual Harassment Frequency and Perceptions of Organizational Justice on Victim Responses to Sexual Harassment*, 20 EUR. J. WORK & ORG. PSYCH. 729, 750–51 (2011)); Cristina Rubino, Derek R. Avery, Patrick F. McKay, Brenda L. Moore, David C. Wilson, Marinus S. Van Driel, L. Alan Witt, & Daniel P. McDonald, *And Justice for All: How Organizational Justice Climate Deters Sexual Harassment*, 71 PERSONNEL PSYCH. 519, 523 (2018).

the employer may discredit or disbelieve their story may deter a person from reporting.[82]

This Article also applies the principles of testimonial injustice to help identify how the protocols and procedures may discount or discredit the target's story.[83] It asks, do the policies unfairly question the target's capacity as a "knower" who can report the misconduct that happened to them.[84] Do the protocols appear to support or facilitate the ability to report harassment?[85] Do the protocols provide multiple avenues to reporting that allow the target to openly communicate their experience?[86] Does the policy create a chilling effect that unfairly silences the reporting of harassment?[87] Do the policies promote "transparency and truthfulness" where the target feels safe to openly report misconduct and is assured that the employer will trust that the target is telling the truth?[88] A testimonial injustice framework considers whether the policies suggest that the target might be reporting falsely or maliciously, or if they must take extra steps to establish credibility rather than having their account accepted at face value.[89] For vulnerable low-wage workers, power dynamics, language barriers, and lack of trust in the system may already cause an employee to question whether the employer will believe them.[90] The fear may be compounded if the policies themselves imply that if their stories are discredited they will be the ones facing discipline.[91]

Using procedural and testimonial injustice frameworks, one can hypothesize why, in practice, some protocols might create procedural and testimonial barriers that deter individuals from reporting workplace sexual harassment, especially for workers in low-wage industries.

2. Decoding the Policies

The following Sections examine three common barriers to reporting: (1) the use of legal jargon (and limited public access to the policies); (2) burdensome protocols on when and how to report; and (3) biases against the credibility of the person reporting. When viewed from a procedural injustice or testimonial injustice lens, these procedures and pro-

82. *See* Rudman, Borgida, & Robertson, *supra* note 81, at 527–28; Byun, *supra* note 8, at 382 (arguing a failure to report is reasonable where the employee believed "(1) using the complaint mechanism entailed a risk of retaliation; (2) there were unnecessary obstacles to reporting a complaint; or (3) the complaint mechanism would not be effective in remedying the actionable harm").

83. *See* FRICKER, *supra* note 77, at 17, 21–22, 27.

84. *See id.* at 20.

85. *See* Havi Carel & Ian James Kidd, *Institutional Opacity, Epistemic Vulnerability, and Institutional Testimonial Justice*, 29 INT'L. J. PHIL. STUDS. 473, 478 (2021).

86. *See id.* at 490–91.

87. *See id.* at 483, 485.

88. *See id.* at 480.

89. *See generally* FRICKER, *supra* note 77, at 17–29 (identifying credibility deficits and possible effects).

90. *See* discussion *infra* Section II.B.2.

91. *See* discussion *infra* Section II.B.2.c.

tocols create a chilling effect on reporting sexual harassment. Each Section focuses on excerpts from actual employee handbooks to illustrate how policies can complicate the reporting process, impose unfair burdens, or create bias against targets of harassment.[92] Most of the handbooks contained at least one of these three themes.[93] Some handbooks were riddled with barriers to reporting.[94]

a. Accessibility Issues

This Section identifies procedures, protocols, and practices that make the policies inaccessible: literally and figuratively. Policies commonly use complex legal terms and phrases that make the protocols and procedures challenging to understand, especially for workers with low levels of education.[95] Some of the policies were only accessible to employees through password-protected employee websites or portals. The password-protected websites literally made the policies inaccessible to employees who have limited access or ability to navigate the internet and to any non-employee or member of the public who might want to assist an employee or have access to the company's policy.[96]

i. The Use of Legal Jargon

> *For an anti-harassment policy to be effective, . . . the policy [should be] comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English.*[97]

Over half of the policies I reviewed used highly technical legal terms of art or legal jargon to define sexual harassment.[98] It is unreasonable to

92. *See* discussion *infra* Section II.B.2.

93. *See, e.g.*, JONES PETROLEUM CO. (2016), *supra* note 68, at 2–3 (defining sexual harassment using legal jargon, requiring employees to immediately notify a Benefits Administrator of violations by mail or phone with additional refiling requirements if the response is unsatisfactory, and threatening discipline for false accusations); TIPS EAST LLC, *supra* note 68, at 10, 12 (requiring employees to report incidents immediately to a supervisor or manager and limiting anti-retaliation protections to "good faith reporting").

94. *See* THE KROGER CO., *supra* note 68, at 24–25 (defining a reporting process that includes telling the harasser to stop in front of a witness, writing a detailed statement, providing a detailed report to a designated person or a help line, and continuing to participate in the investigation).

95. *See* discussion *infra* Section II.B.2.a.i.

96. *See* discussion *infra* Section II.B.2.a.ii; *see also* Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 18 TENN. L. REV. 347, 387–88 (2019) (discussing technological barriers faced by low-wage workers).

97. 2024 EEOC Guidance, *supra* note 58, § IV.C.2.b.i.

98. A term of art is "[a] word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Term of Art*, BLACK'S LAW DICTIONARY (12th ed. 2024). Many policies used legal terms of art such as "explicit[] or implicit[] term . . . of employment," "condition of employment," "basis for an employment decision," "severe and pervasive," and "unreasonably interfering with . . . work performance." *See, e.g.*, DESERT DE ORO FOODS, INC., *supra* note 68, at 5; M PIZZA, INC., *supra* note 68, at 29; THE WENDY'S CO., *supra* note 68, at 5; BRAVO FOODS, LLC, *supra* note 68, at 24; B & G (2017), *supra* note 68, at 21; FREELAND GRP. RESTS., *supra* note 68, at 4; MCWORTH MGMT. CO., *supra* note 68, at 18.

expect that the average low-wage worker will be able to decipher the meanings and nuances of legal terms of art.[99] Consider that the average American reads at or below an eighth-grade (i.e., twelve- to fourteen-year-old) reading level.[100] Some words and phrases carry legal significance and consequences beyond the everyday meaning. The use of legal jargon is particularly problematic in personnel policies for low-wage workers who may have low literacy skills, limited English proficiency, and lack access to legal professionals to help them understand the legal consequences of the policies.

Below is an excerpt of the "Equal Employment Opportunity Policy" from Convenience Stores, Inc.'s employee handbook, under the topic of "Sexual or Other Unlawful Harassment." Convenience Stores, Inc. is a subsidiary of Jones Petroleum Company and a wholesale distributor and retailer.[101] Jones Petroleum's portfolio includes convenience stores, gas stations, and fast food franchises such as Piggly Wiggly, Hardee's, Burger King, Dunkin', and Ace Hardware.[102]

> Unwelcome sexual advances, requests for sexual favors, and other physical, verbal, or visual conduct based on a protected class constitute harassment when (1) submission to the conduct is an explicit or implicit term or condition of employment; (2) submission to or rejection of the conduct is used as the basis for an employment decision; or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[103]

This language almost mirrors the jargon-filled 1980 EEOC definition of sexual harassment.[104] Using an EEOC definition may give the appearance of compliance, but because it is packed with legal jargon, it is un-

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99. *See* JONATHAN ROTHWELL, BARBARA BUSH FOUND. FOR FAM. LITERACY, ASSESSING THE ECONOMIC GAINS OF ERADICATING ILLITERACY NATIONALLY AND REGIONALLY IN THE UNITED STATES 3 (2020) (identifying a strong correlation between income and literacy level).

100. *See Illiteracy by the Numbers*, THE LITERACY PROJECT FOUND., https://literacyproj.org/ (last visited Aug. 29, 2025) (stating that "50% of adults cannot read a book written at an eighth-grade level); *see also* NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., ADULT LITERACY IN THE UNITED STATES 1–2 (2019) (summarizing the number of U.S. adults with low English literacy and how literacy levels differ by nationality and race/ethnicity); NAT'L CTR. FOR EDUC. STAT., U.S. DEPT OF EDUC., SKILLS OF U.S. UNEMPLOYED, YOUNG, AND OLDER ADULTS IN SHARPER FOCUS: RESULTS FROM THE PROGRAM FOR THE INTERNATIONAL ASSESSMENT OF ADULT COMPETENCIES (PIAAC) 2012/2014 5 (2016) (identifying that 18% of U.S. adults between sixteen and sixty-five years old performed at Level 1 or below).

101. "Jones Petroleum Company is a versatile full-line fuel wholesale distributor and retailer, encompassing a diverse portfolio of businesses such as Piggly Wiggly supermarkets, Marathon and Valero convenience stores, and shopping centers." *About Us*, JONES PETROLEUM CO., https://jonespetroleum.com/index.php/about (last visited Sept. 15, 2024); *see* JONES PETROLEUM CO. (2016), *supra* note 68.

102. *Job Opportunities*, JONES PETROLEUM CO., https://recruiting.paylocity.com/recruiting/jobs/All/6b7a15ac-0ec1-427b-bda6-aaf98330740d/Jones-Petroleum-Co (last visited Sept. 15, 2025) (displaying a list of Jones Petroleum-owned companies).

103. JONES PETROLEUM CO. (2016), *supra* note 68, at 2.

104. *See* 29 C.F.R. § 1604.11 (1980).

likely to shed any light on whether a person experienced sexual harassment.[105] This handbook's anti-harassment and reporting protocols also contained multiple examples of burdensome requirements and biases against the person reporting harassment.[106]

When scanned through the Gunning Fog Index, a widely used readability formula, this handbook's definition of sexual harassment requires a grade level of 28 (for comparison, a high school senior would read at grade 12). The reading level scored as "very difficult," requiring a college degree.[107] Seven out of eight popular readability formulas found that the 1980 policy would require a college degree to understand it.[108] Readability formulas provide a baseline level of comprehension depending on the length of the sentence and the difficulty of the words.[109] The average "Fog" score for the sexual harassment policies reviewed in this Article was a grade level of 24.77, which the formula calculates as "extremely difficult" to read or requiring a college degree.[110]

The definition of "sexual harassment" used in the Convenience Stores, Inc.'s handbook is typical of the language used in many of the policies that I reviewed and mirrored the 1980 EEOC definition.[111]

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105. *See* Sandra Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2064 (2016) (reporting conduct that does not rise to the level of sexual harassment creates additional problems for the employee because they may not be protected on Title VII's Retaliation clauses).

106. *See* JONES PETROLEUM CO. (2016), *supra* note 68, at 2–3 (establishing a complaint procedure requiring employees to immediately report harassment first to a Benefits Administrator by mail or phone and then to refile the complaint with additional individuals if the response is unsatisfactory and threatening reporting employees with disciplinary action if their report is deemed false).

107. *See Gunning Fog Index*, CHARACTER CALCULATOR, https://charactercalculator.com/gunning-fog-index/ (last visited Sept. 15, 2025).

108. This 1980's version of the definition of sexual harassment was so common throughout the policies I reviewed for this Article that I ran the language through all eight of the "popular" readability formulas on readabilityformulas.com: the Automated Readability Index, the Gunning Fog Index, the Flesch Reading Ease Formula, the Flesch-Kincaid Grade Level, the Coleman-Liau Index, the SMOG Index, the Linsear Write (Original and Grade Level), and the FORCAST Readability Formula. *Readability Scoring System Plus*, READABILITY FORMULAS, https://readabilityformulas.com/readability-scoring-system.php (last visited Sept. 15, 2025) (allowing individuals to enter text into textbox, select all eight popular formulas on the left, and click "Calculate Text Readability"). The Flesch Reading Ease found this language to be very difficult to read, requiring a professional education. Flesch does not score results based on college levels, but the text scored at the most complex levels of the scale. *Id.*

109. *See, e.g.*, Scott, *supra* note 71 (explaining that the Gunning Fog Index calculates a grade level understanding necessary for comprehension based on sentence length and word difficulty); *see also* Eunsoo Cho, Philip Capin, Greg Roberts, Garrett J. Roberts, & Sharon Vaughn, *Examining Sources and Mechanisms of Reading Comprehension Difficulties: Comparing English Learners and Non-English Learners Within the Simple View of Reading*, 111 J. EDUC. PSYCH. 982 (2019) (noting reading comprehension for an individual reader is more complex and requires an understanding of rhetorical and cultural nuances and context clues).

110. The highest scoring policy on the Gunning Fog Index was a 2017 Taco Bell policy, B & G (2017), *supra* note 68, which scored a grade level of 31.6. The lowest scoring policy was from FedEx Code of Conduct, FEDEX, *supra* note 68, which scored a grade level of 15.7, meaning it still requires some college education to understand.

111. *See, e.g.*, THE KROGER CO., *supra* note 68, at 23; ARBY'S REST. GRP., *supra* note 68, at 4 ("Guidelines issued by the Equal Employment Opportunity Commission define sexual harassment as

Kroger is a national food and drug store located in approximately thirty-three states, primarily throughout the South and West. Kroger's Policy on Business Ethics is part of the company's Environmental, Social & Governance (ESG) policies and is the business operation guide for "the Kroger family of companies in the U.S. and worldwide."[112] The ESG policies apply to all Kroger associates (the everyday grocery store workers) and its board members.[113] An excerpt of Kroger's "Policy Concerning Sexual Harassment and Other Forms of Harassment" defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct if (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[114]

Like the definition used by Convenience Stores, Inc., Kroger's policy also mirrors the 1980 EEOC definition.[115] Use of outdated, hard-to-read EEOC jargon is common practice throughout personnel policies. How can someone report harassment if they are unsure if the company will consider what happened to them to be harassment? Kroger tries to fix this problem by providing a few examples of what might be considered sexual harassment.[116] The list includes

> conditioning promotion, demotion, performance evaluations and the like upon submission to sexual favors; touching that is unwanted, uninvited, or offensive; displaying sexually suggestive or explicit material, pictures[,] or cartoons; relating sexually suggestive or explicit stories or "jokes"; and making sexually suggestive or explicit gestures.[117]

Unfortunately for Kroger employees, the list of examples is equally filled with jargon and leaves a lot of room for interpretation.

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including . . . ."); B & G (2022), *supra* note 68, at 32–33; DINE BRANDS GLOB., INC., *supra* note 68, at 4; BLOOMIN' BRANDS, INC., *supra* note 68, at 21; 29 C.F.R. § 1604.11 (1980).

112. *Statements & Policies: Quick Reference*, THE KROGER CO., https://www.thekrogerco.com/statements-policies/ (last visited Sept. 15, 2025).

113. *See* THE KROGER CO., *supra* note 68, at 2; *Kroger Invites Prospective Associates to Discover a Career*, THE KROGER CO. (Apr. 17, 2024), https://ir.kroger.com/news/news-details/2024/Kroger-Invites-Prospective-Associates-to-Discover-a-Career/default.aspx (associate positions are posted as salaried and hourly "cashiers, baggers[,] deli bakery clerks[,] . . . pharmacy technicians, Kroger delivery drivers and many more").

114. THE KROGER CO., *supra* note 68, at 23 (defining "sexual harassment").

115. *See* 29 C.F.R. § 1604.11 (1980); JONES PETROLEUM CO. (2016), *supra* note 68, at 2.

116. THE KROGER CO., *supra* note 68, at 23.

117. *Id.*

Some policies, like the employee handbook from Arby's, a national fast food restaurant, introduce its sexual harassment policy by stating that their policy's definition comes directly from the EEOC.[118] While a company may feel good, and even appear like it is trying to do the right thing, by affirming that their policy is modeled after the EEOC, it is not helpful for workers when the EEOC language is filled with incomprehensible jargon.[119]

The use of jargon and incomprehensible language can have negative legal impacts. If the employee doesn't follow the protocols or ignores them because they do not understand the text, the employer may be able to claim a *Faragher–Ellerth* defense based on the employee's failure to follow the policy.[120] The employee may not be legally protected against retaliation if they report too early or report conduct that does not give rise to a cause of action because they did not understand the policy.[121] Employees may not receive Title VII anti-retaliation protections if they report conduct that is not unlawful sexual harassment.[122]

It is notable, but unsurprising, that I did not find *Faragher–Ellerth*-related cases that discussed the impact of the legal jargon on the employee's ability to understand the policies that they are supposed to follow. Courts seemingly accept the jargon-filled definitions created by human resource experts, especially if they refer to the EEOC.[123] These policies demonstrate a general disregard for an employee's ability to understand the procedures and protocols.

ii. Policies were Password Protected

Some policies were protected behind employee portals that required passwords. Employers like Walmart, Lowes, Five Guys, Popeyes, and Hilton had password-protected websites that prevented public access to the personnel policies.[124] While there is a legitimate business reason for keeping operational strategies (such as how to maintain customer man-

118. ARBY'S REST. GRP., *supra* note 68, at 4.

119. *See* 2024 EEOC Guidelines, *supra* note 58, § IV.C.2.b.i (noting that effective policies must be "comprehensible to workers"); David P. Twomey, *Sexual Harassment Law After* Oncale*,* Ellerth*,* Faragher *and* Kolstad*: What's an Employer to Do?*, 33 BUS. L. REV. 149, 150–163 (2000) (describing the history and creation of EEOC policies, which includes a history of how courts have interpreted sexual harassment policies); Natalie S. Neals, *Flirting with the Law: An Analysis of the* Ellerth/Faragher *Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MARQ. L. REV. 167, 182 (2013) (noting how some courts selectively choose to drop the second prong of the *Faragher–Ellerth* defense test, which leads to inconsistent outcomes).

120. Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

121. Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 53 (2018).

122. *See* Sperino, *supra* note 105; Brake, *supra* note 58, at 118; Porter, *supra* note 121, at 53.

123. *See* discussion *infra* Section II.C.1; Schultz, *supra* note 14, at 2064.

124. Codes of Ethics or Corporate Environmental, Social, and Governance (ESG) statements were publicly available online, but the employee handbooks, manuals, and policies, including the sexual harassment policies could only be assessed through password-protected employee websites.

agement systems) and other proprietary information (like formulas and business development protocols) confidential, there is also a strong public policy argument for making anti-discrimination and anti-harassment policies open and available to the public.[125] It can be challenging for some workers, especially low-wage workers, to have consistent access to quality Wi-Fi services or devices that can navigate employee website portals.[126] By keeping the policies behind password-protected portals, these companies also keep the public from reviewing their policies, creating additional hurdles for employees to access and share the policies if they need help to report harassment.

b. Procedurally Burdensome

Many of the policies I reviewed contained procedures and protocols that were not only difficult and burdensome to follow, but some of the requirements created a risk that employees would suffer additional emotional distress or force them to decide between keeping their job and ending the discrimination. The following Section examines policies that create undue pressures and burdens on employees who report harassment and examples of cases where courts blindly defer to the policies, making even the slightest divergence from the protocols a reason for granting the *Faragher–Ellerth* defense.

i. Duty to Report Immediately

Most of the policies that I reviewed imposed a duty to report the harassment to the employer immediately or promptly.[127] There are many reasons why timely reporting an incident of sexual harassment is important. A company cannot correct harassment quickly or keep it from escalating if it is unaware of the misconduct. Early notice can also prevent the destruction of evidence. There are also, however, many reasons why a person may delay reporting sexual harassment.[128] In fact, it is common for employees to delay reporting sexual harassment.[129] Employees often fear retaliation for reporting harassment, especially if the harasser is a supervisor or has some authority over their working conditions, which is when the *Faragher–Ellerth* defense applies.[130]

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125. *See infra* Section III.C.1.

126. *See* Cruz, *supra* note 96, at 387.

127. *See, e.g.*, M PIZZA, INC., *supra* note 68, at 29; TIPS EAST LLC, *supra* note 68, at 10; B & G (2022), *supra* note 68, at 33; DINE BRANDS GLOB., INC., *supra* note 68, at 14; DESERT DE ORO FOODS, INC., *supra* note 68, at 5; PEPE OSAKA'S FISHTACO TEQUILA BAR & GRILL, *supra* note 68, at 5; BRAVO FOODS, LLC, *supra* note 68, at 22; CHICK-FIL-A BEECHWOOD, *supra* note 68, at 28.

128. *See* Louise F. Fitzgerald, Suzanne Swan, & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 118–21 (1995) (exploring internal and external responses to sexual harassment, including avoidance, denial, and self-blame, all of which can delay reporting).

129. *Id.*; *see also* GREEN, *supra* note 47, at 59–64.

130. Deborah Ware Balogh, Mary E. Kite, Kerri L. Pickel, Deniz Canel, & James Schroeder, *The Effects of Delayed Report and Motive for Reporting on Perceptions of Sexual Harassment*, 48

The excerpt below is from B & G Food Enterprises, LLC's Employee Handbook. B & G Food is a subsidiary corporation of Yum! Brands Inc. (Yum!) that manages Taco Bell, KFC, and Pizza Hut franchises.[131] The protocol for reporting harassment requires that "[a]ny employee who feels he or she has been subjected to any type or degree of harassment is to *immediately* report the incident to the Manager, VP, Senior Staff, Human Resources Department, or the Owner at (985) 384-3333."[132]

Convenience Stores, Inc.'s "Employee Complaint Procedure" instructs employees to report within twenty-four hours and in writing! In part the policy reads: "If you feel that you have experienced or witnessed (1) harassment, . . . you are to notify *immediately* (preferably in writing *within 24 hours*) the Benefits Administrator. The address and telephone number for the Benefits Administrator is P.O. Box 933, Jackson, Georgia 30233—(770) 775-2386, ext. 107."[133]

Recall that Convenience Stores, Inc.'s businesses are gas stations and mini-marts. Consider the feasibility of a gas station attendant writing a detailed sexual harassment report and mailing that report (after finding a post office or mailbox) to a P.O. Box within twenty-four hours.[134] Most attorneys would ask for additional time to meet the demands of this policy. How can we expect a low-wage worker to comply in twenty-four hours? Writing a statement is challenging on its own. It requires time to formally gather thoughts, a relatively high level of reading and writing comprehension to tell a persuasive story, notes or memory of specific incidents to document time, locations, and witnesses, and confidence that the employer will take the report seriously.

Desert de Oro Foods, Inc., a corporation that owns and operates Taco Bell, Kentucky Fried Chicken, Whataburger, Long John Silvers, and Pizza Hut franchises in nine states throughout the United States, mentions the importance of reporting harassment immediately or in a timely manner three times in their protocols for reporting harassment.[135] Desert de Oro Foods's repeated messaging about immediate reporting would likely discourage any employee from reporting at all if they needed more time to process the situation, discuss it with their family, find alternative work, or any other reasonable explanation that an employee could have for hesitating to report their supervisor for sexual harassment.

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SEX ROLES 337, 339 (2003) (discussing how a fear of retaliation discourages employees from reporting sexual harassment, especially when the harasser holds power).

131. B & G (2017), *supra* note 68, at 2.

132. *Id.* at 21 (emphasis added).

133. JONES PETROLEUM CO. (2019), *supra* note 68, at 4 (emphasis added).

134. *See* Drew Desilver & Katherine Schaeffer, *The State of the U.S. Postal Service in 8 Charts*, PEW RSCH. CTR. (May 14, 2020), https://www.pewresearch.org/short-reads/2020/05/14/the-state-of-the-u-s-postal-service-in-8-charts/ (noting that "[t]he total number of Postal Service facilities has fallen 9.3% over the past two decades").

135. DESERT DE ORO FOODS, INC., *supra* note 68, at 2, 5–6.

Employees may also delay reporting because they hope that the misconduct was an isolated incident.[136] They may think the incident is not serious (i.e., severe and pervasive) enough to report.[137] Employees who might have a difficult time finding another job due to immigration status, literacy skills, education levels, or criminal records may also delay reporting harassment.[138] Employees who need a particular job due to the flexibility of hours, timing of shifts, or proximity to home due to childcare or other family needs may delay reporting harassment.[139] Some employees may simply delay reporting because they want to gather more information to bolster their credibility or to comply with reporting requirements, especially if the policies ask the employee to provide witnesses, evidence, written reports, or warn of discipline for reports the employer believes were made in bad faith.[140]

Tanya Katerí Hernández's groundbreaking 2006 empirical study on racial disparities in reporting sexual harassment found that women of color and white women differ in their use of internal workplace reporting protocols to report harassment.[141] Despite significantly higher instances of sexual harassment, women of color were "more than ten times *less likely* than [w]hite women to report an incident of sexual harassment to a supervisor."[142] The study noted that factors such as racial stereotypes, language barriers, and fragile socio-economic status as head of households make women of color more vulnerable targets of sexual harassment and less likely to use internal reporting procedures.[143]

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136. *See* Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html.

137. *See id.*

138. *See* Marín, Barreto, Montano, Sugerman-Brozan, Goldstein-Gelb, & Punnett, *supra* note 3, at 393 (citations omitted) ("Women with irregular, contingent, or precarious employment contracts are . . . more vulnerable to experiencing workplace sexual harassment. Non-unionized low-income workers are more likely to face sexual harassment at the workplace."); U.S. DEP'T OF EDUC., *supra* note 100.

139. Heather McLaughlin, Christopher Uggen, & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 333 (2017) (finding that "sexual harassment increases financial stress, largely by precipitating job change, and can significantly alter women's career attainment").

140. *See* discussion *infra* Section II.B.2.c.

141. Hernández, *supra* note 5, at 1255 (empirical study finding that race impacts the likelihood of filing an internal report about workplace sexual harassment).

142. *Id.* (emphasis added) at 1256; *see also* Jann H. Adams, *Sexual Harassment and Black Women: A Historical Perspective*, *in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 213, 220–21 (William O'Donohue ed., 1997) (discussing the unique obstacles Black women face when addressing sexual harassment claims); Audrey J. Murrell, *Sexual Harassment and Women of Color: Issues, Challenges, and Future Directions*, *in* 5 SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 51, 51 (Margaret S. Stockdale ed., 1996) (arguing that "future models of sexual harassment for women of color should conceptualize sexual harassment for women of color not only as a form of sex discrimination but also as a form of race discrimination in the workplace").

143. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 823 (1993) (noting coworkers urged victim not to report for fear of setting back Latina community-wide efforts to advance conditions overall).

Reporting sexual harassment can be an emotionally charged process.[144] Individuals often experience feelings of embarrassment, guilt, fear, anger, and uncertainty about the outcome prior to reporting the incident.[145] Requiring employees to report the incident immediately strips the employee of time they might need to protect themselves, inform their family of the situation, gather evidence, or secure witnesses. They might need time to save money or start interviewing for a new position in case they lose their job.

The "duty" to report the harassment immediately (especially when required to provide evidence, witnesses, and detailed statements for an employer to take the allegations seriously) can retraumatize the individual by forcing them to recount the incidents in detail before they are ready to do so.[146] Supervisors and human resource directors are rarely trained in "trauma-centered" interviewing skills that help employees feel safe, support the storytelling process, allow them to tell their story without judgement or dismissal, and explain the importance of providing details promptly.[147] Lastly, employees who delay reporting may fear that they have missed a reporting window or might be reprimanded if they are not able to tell the stories for weeks or months after the incident. Harassment may occur over an extended period. The target may not immediately realize that they are being harassed. The full character of the harassment may not be apparent immediately.[148]

Courts do not sympathize with delays in reporting harassment.[149] They will grant the *Faragher–Ellerth* defense when an employer had a

144. BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 88 (2014).

145. Fitzgerald, Swan, & Fischer, s*upra* note 128, at 117–22.

146. Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 293 (2020) (stating women who have to retell their stories of sexual harassment can experience re-traumatization because people doubt their credibility); *see also supra* notes 143–44 and accompanying text.

147. *See* Patrick Risan, Rebecca Milne, & Per-Einar Binder, *Trauma Narratives: Recommendations for Investigative Interviewing*, PSYCHIATRY, PSYCH. & L. 678, 684–85 (2020) (discussing how to best build and maintain rapport with a survivor of sexual harassment); *see also* Byun, *supra* note 8, at 391–92 ("Due to the contentious nature of litigation, employers may feel reluctant to incorporate a trauma-informed approach as they may feel it will hinder obtaining objective evidence to assess the situation.").

148. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002) (allowing claims for hostile work environment even if one act of harassment is outside the statute of limitations). Hostile work environments involve repeated conduct, which an employee may not identify immediately.

149. *See* Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1309–11 (N.D. Ala. 2018) (granting summary judgment to employer because employee waited four months to report); Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 626, 631 (7th Cir. 2019) (affirming grant of summary judgment to employer because employee waited four months to report); Pinkerton v. Colo. Dep't of Transp., 563 F.3d 1052, 1055, 1063 (10th Cir. 2009) (affirming grant of summary judgment to employer because employee waited two months to report); Taylor v. Solis, 571 F.3d 1313, 1316, 1319–20 (D.C. Cir. 2009) (affirming grant of summary judgment to employer because employee waited five or six months to report); Simmons v. Mobile Infirmary Med. Ctr., 391 F. Supp. 2d 1124, 1127, 1134 (S.D. Ala. 2005) (granting summary judgment to employer because employee delayed reporting for ten months after the initial "objectionable conduct"); Terry v. Laurel Oaks Behav. Health Ctr., 1 F. Supp. 3d 1250, 1275–76 (M.D. Ala. 2014) (granting summary judgement to em-

reporting policy in place and the employee failed to report the harassment immediately or promptly.[150] Courts have regularly granted employers summary judgment due to the plaintiff's delays (as short as a few weeks) in reporting the harassment to their employer.[151] Policies with immediate reporting deadlines make it easy for the courts to blame the failure to strictly adhere to an employer's reporting procedures and protocols when granting the *Faragher–Ellerth* defense.[152]

To overcome the deference to the employer's policy, plaintiffs have to identify a specific and objective fear of retaliation or other significant reasons for delaying the report—a generalized fear of retaliation for reporting their supervisor is not enough.[153] Otherwise, courts tend to find that employees are unreasonable or act in defiance of employer protocols when they do not report harassment immediately and routinely grant employers summary judgment due to the delayed reporting.[154]

For example, in *Baldwin v. Blue Cross/Blue Shield of Alabama*,[155] the Eleventh Circuit found that by delaying her report of sexual harassment, Baldwin unreasonably failed to avail herself of the reporting protocols because "[a]n employee must comply with the reporting rules and

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ployer because employee waited six months to report); Szwalla v. Time Warner Cable, LLC, 135 F. Supp. 3d 34, 47–48 (N.D.N.Y. 2015) (granting summary judgment to employer because employee waited eleven months to report); Macias v. Sw. Cheese Co., 181 F. Supp. 3d 883, 885, 894–96 (D.N.M. 2016) (granting partial summary judgment to employer because employer met the basic *Faragher–Ellerth* test, employer had a policy, and employee waited five months to report); Henderson v. Waffle House, Inc., No. 1:05-CV-115, 2006 WL 8431902, at *7 (N.D. Ga. Aug. 2, 2006) (granting summary judgment to employer in part because employee waited "until after her termination and well after the alleged harassment had taken place" to report it); Uragami v. Home Depot USA, Inc., No. 1:03-CV-00070, 2005 WL 2177232, at *7 (D. Utah Sept. 2, 2005) (granting summary judgment to employer because employee waited six months to report).

150. *See Williams*, 286 F. Supp. 3d at 1309–11; *Hunt*, 931 F.3d at 630–31; *Pinkerton*, 563 F.3d at 1062–63; *Taylor*, 571 F.3d at 1316, 1318–20; *Simmons*, 391 F. Supp. 2d at 1134; *Terry*, 1 F. Supp. 3d at 1270, 1274–76; *Szwalla*, 135 F. Supp. 3d at 44–48; *Macias*, 181 F. Supp. 3d at 894, 896; *Henderson*, 2006 WL 8431902, at *6–7; *Uragami*, 2005 WL 2177232, at *5–7.

151. *Williams*, 286 F. Supp. 3d at 1309–11; *Hunt*, 931 F.3d at 626, 631; *Pinkerton*, 563 F.3d at 1055, 1063; *Taylor*, 571 F.3d at 1318, 1320; *Simmons*, 391 F. Supp. 2d at 1127, 1134; *Terry*, 1 F. Supp. 3d at 1275–76; *Szwalla*, 135 F. Supp. 3d at 47–48; *Macias*, 181 F. Supp. 3d at 885, 894–96; *Henderson*, 2006 WL 8431902, at *7; *Uragami*, 2005 WL 2177232, at *7.

152. Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998).

153. *See, e.g.*, Barbounis v. Middle E. F., No. 2:19-cv-05030, 2021 U.S. Dist. LEXIS 215851, at *8–10 (E.D. Pa. May 28, 2021) (holding that a jury could find the employee's failure to report the harassment to be objectively reasonable because the employee had been warned against reporting and other employees who made reports had been fired, so the employer was not entitled to the defense).

154. *Williams*, 286 F. Supp. 3d at 1310–11; *Hunt*, 931 F.3d at 631; *Pinkerton*, 563 F.3d at 1063–64; *Taylor*, 571 F.3d at 1318–19; *Simmons*, 391 F. Supp. 2d at 1134; *Terry*, 1 F. Supp. 3d at 1275–76; *Szwalla*, 135 F. Supp. 3d at 47–48; *Macias*, 181 F. Supp. 3d at 892–93, 896; *Henderson*, 2006 WL 8431902, at *7; *Uragami*, 2005 WL 2177232, at *7. *But see* Minarsky v. Susquehanna Cnty., 895 F.3d 303, 317 (3rd Cir. 2018) (holding that whether Minarsky acted reasonably by failing to report her supervisor's conduct was a question of fact for the jury and therefore could not be decided as a matter of law).

155. 480 F.3d 1287 (11th Cir. 2007).

procedures her employer has established."[156] Baldwin waited approximately three and a half months to report the sexual harassment, fearing termination and a negative impact on her career.[157] The Blue Cross/Blue Shield policy, however, required employees to report incidents "immediately."[158]

The court noted that the *Faragher–Ellerth* defense requires employees to make a choice between losing their job and damaging their career or ending sexual harassment if the plaintiff wants to hold the employer vicariously liable.[159] The court's requirement that protocols be strictly followed compounds the issue of having to report harassment before an employee is ready to do so. It places them in a lose–lose situation. If they report immediately, they risk losing their job, ending their career, or reporting before they have a claim or protection against retaliation.[160] If they delay reporting to try to keep their job, a court will likely grant their employer the *Faragher–Ellerth* defense, ending the employee's sexual harassment claim.[161]

ii. Duty to Strictly Follow Protocols

In addition to unreasonable reporting timelines, many employers impose burdensome requirements on how a report should be made.[162] The *Faragher–Ellerth* defense places the burden on employers to take reasonable steps to prevent and respond to sexual harassment.[163] The policies, however, flip the burden of the investigation onto the employee by making them identify witnesses and develop a detailed narrative of the harassment. The protocols from a Kroger handbook, for example, place significant burdens on an employee who chooses to report harassment. Below is an excerpt of the reporting requirements:

> 1) Firmly and clearly tell the person who is harassing you that his or her behavior is unwelcome and should stop at once. If possible, take a witness to this discussion. Write a statement about the incident and

156. *Id.* at 1306–07. While some language from the sexual harassment policy was included in the court opinion, *id.* at 1295, an official copy of the policy was not included in a list of publicly available exhibits from the trial. The failure to include the full policies in their filings archive reflects both the carelessness of the courts and the secretive nature of sexual harassment policies.

157. *Id.* at 1307.

158. *Id.* at 1295.

159. *See id.* at 1307.

160. *See* sources cited *supra* notes 8 and 42.

161. *See* cases cited *supra* note 149.

162. The procedural barriers included requirements to report to direct supervisors in at least eighteen policies, *see, e.g.*, HILTON WORLDWIDE, *supra* note 68, at 7; M PIZZA, INC., *supra* note 68, at 29; TYSON FOODS, INC., *supra* note 68, § 2-2, which courts have explicitly rejected, *see* Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998); requirements to report in writing in at least sixteen policies, *see, e.g.*, DESERT DE ORO FOODS, INC., *supra* note 68, at 5; THE KROGER CO., *supra* note 68, at 24; HOTEL SHERATON, *supra* note 68, at 27; and multistep processes, *see, e.g.*, JONES PETROLEUM CO. (2019), *supra* note 68, at 4; THE KROGER CO, *supra* note 67, at 24; HOTEL SHERATON, *supra* note 68, at 27.

163. *See Faragher*, 524 U.S. at 807; Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

> what you did to stop it, including dates, times and places. This statement will be helpful if the harassment continues and the company needs to investigate. If you are uncomfortable with telling the person who is harassing you to stop, then proceed to the reporting procedure below.
>
> 2) Report the incident to your immediate supervisor, another member of management, any person in the Human Resources Department, the President, General Manager, Distribution Manager, or call the Kroger Help Line at 1-800-689-4609 or use the website (www.Ethicspoint.com) for the submission of concerns. Your report should be as specific as possible, including the name of the person who is harassing you, a description of the conduct and the effect that conduct is having on your working conditions and work performance, and the names of any witnesses who could assist in the investigation.[164]

This policy is riddled with procedural and testimonial injustice barriers. It is unlikely that targets of workplace sexual harassment feel comfortable forcibly rejecting sexual advances from a supervisor due to fears of retaliation created by power imbalances, genderized workplaces, and isolation.[165] It is also incredibly difficult to get current employees to serve as witnesses for workplace disputes or claims.[166] Current employees are often not willing to risk their own job to report misconduct by a supervisor.[167] The policy dangerously advises that the preferred first step for a victim of sexual harassment is to confront their harasser, presumably in-person and at work, with a witness.[168] The policy suggests that the employee bears the responsibility for ending the harassment. Confronting the harasser places the target of the sexual harassment in danger of physical, emotional, and financial harm. Who is going to confront their supervisor–harasser in person, and what witness is going to agree to document the conversation? This is a grocery store policy. Where will the confrontation happen? At the checkout line? In the storage room?

The reporting requirements of this policy may cause an employee to delay filing the report or not report it at all.[169] By asking the employee to explain what they did to stop the harassment, the employer places the employee in a position to question whether the employee did something wrong or if the employer will reprimand the employee for somehow not stopping the harassment. Requiring that the target explain their actions to

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164. THE KROGER CO., *supra* note 68, at 24.

165. Claudia Benavides-Espinoza & George B. Cunningham, *Bystanders' Reactions to Sexual Harassment*, 63 SEX ROLES 201, 201 (2010) (citing a fear of retaliation as a major barrier to reporting for many survivors of sexual harassment).

166. *See* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 975 (2007).

167. Benavides-Espinoza & Cunningham, *supra* note 165, at 210.

168. THE KROGER CO., *supra* note 68, at 24–25.

169. 2024 EEOC Guidance, *supra* note 58.

mitigate the harassment, before investigating, places undue pressure on the target of the harassment to rid themselves of blame and wrongdoing when they were the one harassed.[170]

Convenience Stores, Inc.'s reporting policy also requires that the employee notify the employer immediately, preferably in writing, within twenty-four hours of the incident.[171] Their reporting process, however, goes a step further by placing the duty to keep the investigation active on the employee. This is obviously contrary to the intent of the *Faragher–Ellerth* defense, which was meant to assist employees, not make them internal investigators.[172] The company advises the employee to continue to refile their report up the company's chain of command if they do not receive a prompt response or are not satisfied with the response.[173]

Again, how likely is a cashier, overnight stock person, or gas station attendant to have the time or ability to write a detailed report within twenty-four hours? How many low-wage workers have the time or luxury to go to a postal service, during business hours, because the employer requires receipt by certified mail to ensure that the company investigates the matter? Requiring employees to continue to refile their complaint, via certified mail, until the company responds shifts burden of investigating and responding to sexual harassment on the employee.[174] The lack of critical review of these policies allows employers to implement these outrageous policies that courts blindly accept as reasonable, even when the procedures unreasonably shift the burden onto the employees.[175]

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170. Epstein, *supra* note 146, at 324–25 (discussing the idea of institutional gaslighting, which highlights the potential for self-doubt when survivors have to report the perpetrator); Hilkje C. Hänel, *#MeToo and Testimonial Injustice: An Investigation of Moral and Conceptual Knowledge*, 48 PHIL. & SOC. CRITICISM 833 (2021) ("It is only when we experience the moral rupture between our feeling of suffering and what we are conditioned to feel . . . that we can start to see the suffering [from sexual violence] as an injury, as morally problematic despite the dominant moral framework.").

171. *See* JONES PETROLEUM CO. (2016), *supra* note 68, at 3.

172. *See id.*; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998) (stating that employers can guard against misconduct from supervisors better than employees); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that the burden of proof is on the employer).

173. JONES PETROLEUM CO. (2016), *supra* note 68, at 3.

174. *See* Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1302 (11th Cir. 2000) (quoting Williamson v. City of Houston, 148 F.3d 462, 467 (5th Cir. 1998) (stating that "an employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law"); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2d Cir. 1998) (rejecting the argument that an anti-harassment policy can create "an affirmative duty [for the plaintiff] to bring her allegations to the company's attention in more than one way when she believes the company's response to her harassment claim is inadequate . . . . When a plaintiff reports harassing misconduct in accordance with company policy, she is under no duty to report it a second time before the company is charged with knowledge of it"); *see also Faragher*, 524 U.S. at 807 (holding that proof of the employer's policy is not always needed but there is a need for a suitable stated policy); *Ellerth*, 524 U.S. at 765 (holding that the burden of proof is on the employer).

175. *See supra* Section II.B; *see also Faragher*, 524 U.S. at 807 (holding that as a matter of law a widespread policy is not necessary); *Ellerth*, 524 U.S. at 765 (holding that the burden of proof is on the employer).

A policy for reporting sexual harassment at Wendy's locations in Idaho was written more like a law school final exam question than a system set up to help fast-food employees report sexual harassment. The policy requires anyone who believed they were being sexually harassed to "[p]romptly and politely confront the harasser" and request that they "cease . . . immediately."[176] If that does not work, the target should report to their manager.[177] If they cannot report to the manager (maybe because the manager was the one harassing the target), then the policy requires the employee to email a report to the corporate office.[178] If that does not resolve the problem, the policy requires the employee to physically go to the corporate office.[179] Just in case the procedures do not deter a person from reporting, the policy sends the reader on a wild goose chase to comply with all of the reporting requirements. The sexual harassment policy, which directs the employee to physically report the harassment to the corporate office, is on page eight, but the address to the corporate office is not listed until page nineteen, under a separate section of the handbook.[180] How many employees, especially fast-food workers, have the time and the wherewithal to file a harassment complaint, in person, at corporate headquarters?

Most fast-food workers only have a high school diploma or equivalent.[181] Even if an employee was able to gather names or dates about the incidents, the employer's complex definition does not guide an employee to understand what "constitutes" harassment. To make matters worse, the policy warns that if the employer believes that there wasn't enough evidence to support the harassment claim, the target may be the one terminated.[182]

Given these procedures, it would be very reasonable for any employee to decide that they do not have the time or cannot gather enough information to risk being disciplined (or terminated) if their employer does not believe them, especially a fast-food worker. Caselaw is not on

176. CLASSIC FOODS, INC., *supra* note 68, at 8. This policy states that conduct constitutes sexual harassment when "[t]he harassment complained of is based upon sex, and . . . the charged sexual harassment had the effect of unreasonably interfering with the employee's work performance and creating an intimidating, hostile or offensive working environment that seriously affected the psychological well-being of the employee." *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 8, 19.

181. *See Fast Food and Counter Workers*, DATA U.S.A., https://datausa.io/profile/soc/fast-food-and-counter-workers (last visited Aug. 25, 2025) (finding that most fast-food workers do not have a four-year college degree). The Wendy's Idaho policy, however, requires a college degree to be able to comprehend it. *Readability Scoring System Plus*, READABILITY FORMULAS, https://readabilityformulas.com/readability-scoring-system.php (last visited Sept. 15, 2025) (enter text from Wendy's Idaho Sexual Harassment Policy, select "Gunning Fog Index" from popular formulas list on the left side, click "Calculate Text Reliability").

182. *See* CLASSIC FOODS, INC., *supra* note 68, at 8 ("Any employee found to be making unsubstantiated reports of sexual harassment may also be subject to the above disciplinary measures."); *see also* discussion *infra* Section II.B.2.c.

the employee's side. If an employee decides to report the sexual harassment but takes a few weeks to gather information, a court would still likely grant the *Faragher–Ellerth* defense.[183]

To underscore the problem with these burdensome and incomprehensible policies, if the employee did not understand the policy and reported conduct that is not unlawful, they might lose the Title VII protections against retaliation.[184] Retaliation based on complaints filed with a government agency is reviewed under Title VII's participation clause.[185] Retaliation based on informal complaints made directly to employers through internal workplace procedures is reviewed under Title VII's opposition clause.[186] The participation clause offers a broader scope of protection against retaliation.[187] The opposition clause limits protections to employees who have a "reasonable belief" that the conduct they are reporting is unlawful harassment or discrimination and who clearly indicate that they are reporting unlawful discrimination.[188] The participation clause protects against retaliation even if the allegation of discrimination is unsuccessful, and it does not require a reasonable or good faith belief that unlawful discrimination occurred.[189] This creates a problem for employees who internally report workplace harassment if the policies are so incomprehensible or cumbersome that they cannot form a reasonable belief that conduct they are experiencing is unlawful discrimination.[190]

In *Madray v. Publix Supermarkets, Inc.*,[191] the Eleventh Circuit affirmed the district court's finding that Publix met the first prong of the *Faragher–Ellerth* defense by promulgating "an effective sexual harassment policy with appropriate complaint procedures, disseminated this information to its employees, and made a good-faith effort to enforce the policy."[192] The court decided that the plaintiffs did not meet the second prong of the test because they unreasonably failed to follow the employer's reporting procedures by reporting the sexual harassment to mid-level managers who were not authorized under the policy to receive the re-

183. *See* cases cited *supra* note 149 (demonstrating courts do not tolerate delays in reporting harassment).

184. *See* Brake, *supra* note 58, at 152–53; Sperino, *supra* note 105, at 2078.

185. 42 U.S.C. § 2000e-3(a) (employers cannot discriminate against employees who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII); Brake, *supra* note 58, at 135.

186. 42 U.S.C. § 2000e-3(a) (stating employers cannot discriminate against employees who oppose workplace practices that are unlawful under Title VII); Brake, *supra* note 58, at 135.

187. Brake, *supra* note 58, at 135 n.125.

188. *Id.* at 135–36; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2016-5, QUESTIONS AND ANSWERS: ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (2016) [hereinafter 2016 EEOC RETALIATION GUIDANCE].

189. *See* Brake, *supra* note 58, at 158, 165–66; 2016 EEOC RETALIATION GUIDANCE, *supra* note 188.

190. *See* Brake, *supra* note 58, at 136–44 (exploring courts' failure to consider an employee's adherence to their employer's workplace harassment policy as part of the reasonable belief analysis).

191. 208 F.3d 1290 (11th Cir. 2000).

192. *Id.* at 1302.

ports.[193] The court found it particularly egregious that the plaintiffs chose not to report to the individual designated in the policy because the employees admitted that they knew that the policy designated specific individuals to receive reports of harassment.[194]

There are many reasonable reasons why an employee would prefer to report harassment informally rather than risk the retaliation, ridicule, and other issues that could result from filing an official complaint or reporting the issue to upper management.[195] In *Madray*, the plaintiffs hoped the harassment would end by informally reporting the incidents to mid-level managers who were already aware of the supervisor's misbehavior.[196] Despite reporting the harassment to three mid-level managers (with the first report as many as six months before an authorized manager got notice of the issue), the court found that Publix did not have notice of the harassment because plaintiffs "unreasonably" failed to report to someone who was listed in the policy.[197] Given Publix's Open Door Policy, which encourages employees to raise concerns to "anyone in management," and the general understanding that even mid-level managers have a duty to respond to reports of employee misbehavior—which is what the plaintiffs hoped would happen—the policy creates procedural hurdles by restricting who could receive reports of harassment.[198] The court's strict reading of the policy's protocols legalized the procedural injustice by granting summary judgment to Publix.[199]

Courts will grant employers the *Faragher–Ellerth* defense if employees fail to strictly follow the employer reporting policies and protocols, even if the deviation is just a matter of semantics.[200] In *Cooper v. CLP Corporation*,[201] the Eleventh Circuit granted McDonald's the *Faragher–Ellerth* defense because Cooper did not report the harassment to the right person.[202] The McDonald's policy required employees to report harassment to their "store manager or the CLP Corporation Human Resources Director."[203] Cooper acknowledged that he knew the policy stat-

193. *See id.* The policy directed employees to report to "the Store Manager, District Manager, or Divisional Manager" and to "go to the next highest level of management, to the top level if necessary." *Id.* at 1300, 1302.

194. *See id.* at 1301–02.

195. *See* discussion *supra* Part II.

196. *Madray*, 208 F.3d at 1293.

197. *Id.* at 1293–95, 1300, 1302.

198. *See id.* at 1293–95.

199. *See id.* at 1296, 1302–03.

200. *See* Newbury v. City of Niagara Falls, No. 23-7976-CV, 2025 WL 323340, at *4 (2d Cir. Jan. 29, 2025) (affirming employer entitled to summary judgement because plaintiff reported to someone they believed they had a duty to inform but who was not "authorized" to receive reports under the policy); Hernandez v. Kwiat Eye & Laser Surgery, PLLC, No. 23-7679-CV, 2024 WL 5116365, at *3 (2d Cir. Dec. 16, 2024) (affirming summary judgement for employer where employee reported harassment to the clinical director at her job, who was not the person the employer's policy designated to receive reports).

201. 679 F. App'x 851 (11th Cir. 2017).

202. *Id.* at 854–55.

203. *Id.* at 854.

ed employees should report harassment to their store manager, however, he believed that he complied with the policy by reporting the harassment to the district manager.[204] Despite reporting to a district manager, who presumedly had higher authority than a store manager, the court found that Cooper did not follow McDonald's policy because he did not report the harassment to a company representative listed in the policy.[205] The court doubled down by stating that it was Cooper's problem because "once an employer has promulgated an effective anti-harassment policy and disseminated that policy . . . it is incumbent upon the employees to utilize the procedural mechanisms established by the company."[206]

c."Good Faith" Reporting Requirements

Many of the handbooks that I reviewed assured employees that they would not suffer any retaliation or discipline so long as they reported the sexual harassment in "good faith."[207] Because these policies often warn employees of the consequences of filing false reports, they can also have a chilling effect on workers who experience harassment.[208] If an employee fears their employer may not believe they are filing a report in "good faith," the employee may choose not to report or delay reporting until they can meet the requirements of the protocols to avoid facing discipline themselves.

The Code of Conduct for Darden, the parent company that owns and operates Olive Garden, Longhorn Steakhouse, Bahama Breeze, Seasons 52, Yard House, Cheddar's Scratch Kitchen, Ruth's Chris Steak House, The Capital Grille, Chuy's, and Eddie V's Prime Seafood, mentions "good faith" reporting *four* times under the company's anti-retaliation policy.[209] The following is an excerpt of the policy:

> Retaliation is Prohibited[—]No one is allowed to threaten you or take any action against you for raising questions or reporting concerns. Retaliation against a team member who in *good faith* raises a concern, makes a complaint, or provides information regarding conduct is strictly prohibited. We will not discharge, demote, suspend, threat-

204. *Id.* at 854–55.

205. *Id.*

206. *Id.* at 855 (quoting Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000)).

207. Thirty of the policies included "good faith" clauses, some multiple times. The following are examples of policies with "good faith" reporting clauses: TIPS EAST LLC, *supra* note 68, at 3, 10; THE WENDY'S CO., *supra* note 68, at 4, 6; B & G (2017), *supra* note 68, at 2; B & G (2022), *supra* note 68, at 3; FEDEX, *supra* note 68, at 4, 15, 17; CHICK-FIL-A BEECHWOOD, *supra* note 68, at 28; UNITED PARCEL SERV. OF AM., *supra* note 68, at 2; UNITEDHEALTH GRP., *supra* note 68, at 5; GLENCOE MGMT., INC., *supra* note 68, at 6; HILTON WORLDWIDE, *supra* note 68, at 8.

208. *See* Holly Johnson, *Why Doesn't She Just Report It? Apprehensions and Contradictions for Women Who Report Sexual Violence to the Police*, 29 CANADIAN J. WOMEN & L. 36, 37, 51, 55 (2017) (indicating that women fear reporting sexual assault when authorities warn that the woman will be punished if authorities believe the woman is lying).

209. DARDEN, *supra* note 68, at 3; *Our Brands*, DARDEN, https://www.darden.com (last visited Sept. 20, 2025).

> en, harass, intimidate, coerce, or otherwise retaliate against any team member as a result of his or her making a *good faith* complaint or assisting in the handling or investigation of a *good faith* complaint . . . . if you report the concern in *good faith*, it cannot lead to the loss of your job or other forms of retaliation.[210]

Darden's policy applies to over 2,100 restaurants and approximately 200,000 team members.[211] The need to refer to "good faith" reporting four times in a policy that is distributed to 200,000 employees indicates that the employer has some doubt about the reporting of harassment and warns that one could lose their job if they are not believed.[212]

FedEx's Code of Conduct also mentions "good faith" reporting multiple times, sending a clear warning: There *will* be consequences if FedEx does not believe the employee.[213] A letter from the president and CEO of the company, Raj Subramaniam, notes that the Code "forbids any form of retaliation against you for reporting concerns in good faith."[214] A list of managerial duties provides that managers should "[p]revent retaliation against team members who report concerns in good faith."[215] The protocol for "Report[ing] [C]oncerns" provides, "FedEx prohibits any form of retaliation against a person who reports in good faith any known or suspected misconduct."[216] A "non-retaliation" section reiterates that employees will be protected from retaliation, so long as they report "in good faith."[217]

"Good faith" reporting requirements have a real chilling effect because they threaten discipline if the employer does not believe the employee.[218] Some of the policies blatantly warn that employees who do not

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210. DARDEN, *supra* note 68, at 3 (emphasis added).

211. *About Us*, DARDEN, https://www.darden.com/our-company (last visited Aug. 21, 2025).

212. Statistics on false reporting of workplace harassment are difficult to determine due to reluctant reporting, inconsistent definitions, and the need for thorough investigation. However, studies show that only 2%–10% of sexual assault claims, which may include workplace harassment, derive from false accusations. *See* KIMBERLY A. LONSWAY, JOANNE ARCHAMBAULT, & DAVID LISAK, NAT'L CTR. FOR THE PROSECUTION OF VIOLENCE AGAINST WOMEN, FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULT 2–3 (2009); *see also* NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING 2–3 (2012).

213. *See* FEDEX, *supra* note 68, at 4, 15, 17.

214. *Id.* at 4.

215. *Id.* at 15.

216. *Id.* at 17.

217. *See id.*

218. Torres v. Cent. Ave. Nissan, Inc., No. 18 Civ. 2919, 2021 WL 1227098, at * 7 (S.D.N.Y. Mar. 31, 2021) (denying *Faragher–Ellerth* portion of employer's summary judgment motion in part because the "chilling effect" of the prospect of retaliation for filing a claim determined to be "frivolous" could render the employee's failure to follow the employer's policy reasonable for purposes of the second *Faragher–Ellerth* prong); LONSWAY, ARCHAMBAULT, & LISAK, *supra* note 212, at 1 (discussing the percentage of false reporting and the "complex issues underlying societal beliefs and attitudes" towards the belief the victims false report sexual harassment); Epstein, *supra* note 146, at 289 (explaining gender based discrediting of sexual harassment).

report in "good faith" will be the ones subject to discipline.[219] In a standalone section entitled, "Intentionally False Claims," Convenience Stores, Inc.'s employee handbook states, "We recognize that intentional or malicious false accusations of misconduct can have a serious effect on innocent men and women. Individuals making such false accusations of misconduct will be disciplined in accordance with the nature and extent of his or her false accusation."[220] This policy can be found on the third page of the company handbook, signaling to the employee that the employer takes "false accusations" seriously.[221] This statement is an extreme example of a recurring theme in anti-harassment policies: Despite studies dispelling beliefs that "victims" lie about experiencing sexual harassment,[222] stigma and implicit bias persist against those who report it, suggesting they may be lying or maliciously trying to harm someone by filing a claim.[223]

The "Investigations" protocol of Yum!'s policy, reminds employees that they are "to disclose any relevant information completely and truthfully."[224] An excerpt of the policy reads:

> As an employee of Yum!, you have a duty to report potential violations of this Code. An employee who seeks advice, raises a concern or reports misconduct *in good faith* is doing the right thing. Yum! has policies and procedures in place to prevent retaliation against anyone who, *in good faith*, reports a concern or participates in an investigation, even if the allegation ultimately is not substantiated.
>
> Anyone, regardless of position or tenure, found to have engaged in retaliatory conduct against someone who has raised a compliance or ethics-related concern *in good faith* will be subject to disciplinary action, which may include termination.[225]

Yum!'s "Non-Retaliation Policy" places employees on notice that the company will protect them against retaliation *so long as* they report concerns "in good faith" by mentioning it three times within two paragraphs.[226] The mere existence of "good faith" qualifiers implies that

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219. Sixteen of the policies threatened disciplinary action for false, bad faith, or malicious reports. *See, e.g.*, THE WENDY'S CO., *supra* note 68, at 6; KOHL'S, *supra* note 68, at 6; ARBY'S REST. GRP., *supra* note 68, at 5; WALMART, INC., *supra* note 68, at 11; HOME DEPOT, *supra* note 68, at 2.

220. JONES PETROLEUM CO. (2016), *supra* note 68, at 3.

221. *See id.*

222. *See* LONSWAY, ARCHAMBAULT, & LISAK, *supra* note 212, at 1–4 (criticizing the methodology of a prior study that reported high rates of false reporting and compiling results of more methodologically sound studies to estimate only between 2% and 8% of reports are false).

223. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 1–2 (2017) (describing how the credibility of women reporting sexual assault is questioned at every stage of the criminal process and arguing that this "credibility discounting" should be treated as a form of discrimination).

224. YUM! BRANDS, INC., *supra* note 68, at 5, 32.

225. *Id.* at 33 (emphasis added).

226. *See id.*

workers who report sexual harassment sometimes lie or do so with ill intent.[227] The policies warn workers that false statements or statements not made in good faith could lead to discipline for the reporting party, not the perpetrator.[228]

Good faith requirements create a fear of discipline or termination for the target of the harassment, not the person accused of the misconduct. If an employee fears that their employer may not believe them (because they lack evidence, supporting witnesses, or an immediate report), they may decide not to report the incident or delay doing so until they can substantiate their claim. Such hesitation is understandable, given the reporting challenges described in this Article and the risk that the employer might question the employee's good faith. Procedurally burdensome policies place employees in lose-lose situations where employers can claim the *Faragher–Ellerth* defense if employees do not follow their protocols because the policies are too complex to understand or they wait until they have enough evidence to meet perceived *good faith* standards; or employees may rush to report immediately, due to strict reporting timelines, and lose protections against retaliation because they did not understand the policy and the conduct has not (yet) risen to a level where they can show a "reasonable belief" that they were experiencing unlawful harassment.[229]

Before filing a sexual harassment report, especially one against a supervisor, individuals conduct an informal "self-evaluation" or cost-benefit analysis of the consequences of their reporting.[230] "[T]he first step in deciding to file a grievance [of sexual harassment] is to determine whether one has a tenable case."[231] "[T]he neutrality of the process, the system's ability to protect the complainant's privacy, and the system's ability to protect the complainant from retaliation"[232] weigh into the person's evaluation of whether the employer will believe them.[233]

The likelihood of retaliation is real.[234] The consequences are serious, especially for a single mom who needs a particular shift to work

227. *See* LONSWAY, ARCHAMBAULT, & LISAK, *supra* note 212, at 1–4 (criticizing the methodology of a prior study that reported high rates of false reporting and compiling results of more methodologically sound studies to estimate only between 2% and 8% of reports are false).

228. *See, e.g.*, YUM! BRANDS, INC., *supra* note 68, at 32 ("Employees who interfere with or provide false information in the course of an investigation may be subject to discipline, including termination.").

229. *See* Brake & Grossman, *supra* note 8, at 915–16; Brake, *supra* note 58, at 139.

230. *See* Rudman, Borgida, & Robertson, *supra* note 81, at 536–37 (describing factors individuals consider when deciding whether to report); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36–37 (2005).

231. Rudman, Borgida, & Robertson, *supra* note 81, at 536.

232. *Id.* at 536–37.

233. *Id.*

234. *See* Brake, *supra* note 230, at 38 & n.59 (noting that "[f]ears of retaliation turn out to be well-founded" and compiling sources indicating that reporting discrimination often leads to retaliation); Romella Janene El Kharzazi, Mxolisi Siwatu, & Dexter R. Brooks, *Retaliation - Making it Personal*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/retaliation-making-it-

around daycare availability or an undocumented worker with little options for new employment. For a worker in a low-wage job, the financial burden of being unemployed likely plays into the calculation of whether they report harassment. The average American without a high school degree has less than $10,000 in savings and owes over $100,000 in debt,[235] suggesting many low-wage workers lack the financial safety net necessary to quit a job without finding a new one or having another source of income.

Policies that require "good faith" reporting or that warn of the consequences for failing to report "in good faith" have a chilling effect on reporting.[236] They serve as a public warning: If the employer disbelieves the employee, discredits their report, or questions the lack of corroboration or delay in reporting, the employee, not the harasser, could be the person facing discipline. When an employer includes a "good faith" requirement in its policies, the employer is cautioning employees that if they miscalculate their ability to appear credible, if they are unable to support their report with witnesses or evidence, or if their employer misconstrues their motives for reporting, the cost of reporting could be high.[237]

In *Torres v. Central Avenue Nissan, Inc.*,[238] the court found that an employee's failure to follow the employer's policies could be reasonable because she established a "credible fear of retaliation" in part due to the employer's policy on frivolous complaints.[239] Nissan's reporting policies provided that "[i]f the investigation concludes that the allegation is without merit, the claimant may be subject to discipline for bringing a frivolous complaint."[240] Torres asserted that this policy created a "chilling effect" that deterred her from reporting out of fear that she could face disciplinary action if Nissan concluded that her report was frivolous.[241] Torres also worried because the investigation and frivolousness decision

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personal (last visited Sept. 20, 2025) (noting that retaliation is the most common form of discrimination alleged by federal workers).

235. Liz Knueven & Kit Pulliam, *What's the Average Savings Account Balance? Insights & Trends*, BUS. INSIDER (July 22, 2024, 4:58 PM MT), https://www.businessinsider.com/personal-finance/banking/average-american-savings (showing that the average American without a high school diploma has $9,130 in their savings account); Jennifer Streaks, *Average American Debt: Household Debt Statistics*, BUS. INSIDER (May 16, 2025, 10:30 AM MT), https://www.businessinsider.com/personal-finance/credit-score/average-american-debt (noting that the average American owes $105,056 in debt as of 2024, although an estimated $35,208 of that amount is student loan debt).

236. *See* Byun, *supra* note 8, at 395 ("[A]n organizational climate that fosters the threat of retaliation can deter reports without anyone ever actually retaliating. Explicit or implicit threats of retaliation . . . are sufficient to deter reports.").

237. *See id.* at 395 n.114 (discussing case in which the EEOC found that a manager's accusation that complainant falsified information related to an EEOC report creates a chilling effect where employees may not report incidents).

238. No. 18 Civ. 2919, 2021 WL 1227098 (S.D.N.Y. Mar. 31, 2021).

239. *See id.* at *1, *7.

240. *Id.* at *1 (alteration in original).

241. *Id.* at *7.

would be conducted internally.[242] In this case, the owners of the company, including Torres's harasser, had historically conducted the investigations.[243] The court agreed with Torres and found that her failure to follow Nissan's policies presented a triable issue of fact, as a jury could find that her actions were not unreasonable because the good faith requirement alerted employees they could be disciplined if Nissan did not believe them.[244]

In *Reed v. MBNA Marketing Systems*,[245] just a few years after the creation of the *Faragher–Ellerth* defense, the First Circuit hinted that courts are not immune to biases against employees who report sexual harassment.[246] The court mirrored the sentiment behind good faith clauses (that targets might be lying) by declaring that the second prong of the defense "creates a loophole for *false or overstated claims* of threat by one hoping to reach a sympathetic jury" that might find that the employee was reasonable in failing to report or follow the employer's protocols.[247] This language also reinforces the testimonial injustice that failing to report is unreasonable and the procedural injustice that only those who follow the protocols deserve to bring a harassment claim.

Many of these cases are (fairly or unfairly) described as "he said, she said" cases because there are no witnesses other than the harasser and the victim. Good faith clauses alert the victim that if the employer believes the harasser's story it is the victim who will be punished. There is a strong possibility that the employee's credibility may be questioned because most reports of sexual assault and sexual harassment are deficient in the very things that the reporting policies require: details and evidence.[248] Individuals who report sexual assault or harassment commonly suffer from memory gaps, inconsistencies, and delays in reporting.[249]

Good faith policies feed into the *Faragher–Ellerth* defense because targets may fail to report or delay reporting because they are trying to demonstrate they are acting in good faith. Fear of discipline for falsely or

242. *See id.* at *1, *7; *see also* Tovia Smith, *When It Comes to Sexual Harassment Claims, Whose Side Is HR Really On?*, NPR (Nov. 15, 2017, 5:01 AM ET), https://www.npr.org/2017/11/15/564032999/when-it-comes-to-sexual-harassment-claims-whose-side-is-hr-really-on (discussing how dismissive Human Resources departments can be in response to sexual harassment claims because their role is to protect the company and not individual employees); CARLY MCCANN, DONALD TOMASKOVIC-DEVEY, & M.V. LEE BADGETT, U. MASS. AMHERST CTR. FOR EMP. EQUITY, EMPLOYER'S RESPONSES TO SEXUAL HARASSMENT 6 (2018) ("The problem of sexual harassment is obviously much larger than the incidence of legal charges. In fact, it is striking how rare sexual harassment charges are relative to the experience of unwanted workplace sexual encounters.").

243. *Torres*, 2021 WL 1227098, at *1, *7.

244. *Id.* at *7.

245. 333 F.3d 27 (1st Cir. 2003).

246. *Id.* at 32, 37.

247. *Id.* at 37 (emphasis added).

248. Epstein, *supra* note 146, at 296.

249. *Id.* at 325.

maliciously reporting harassment, or the loss of anti-retaliation protections, may deter employees from reporting sexual harassment, especially when (1) they are uncertain whether the conduct they are reporting is unlawful because the company's definition of sexual harassment is written in complex legal terms,[250] (2) they cannot bolster their credibility with witnesses because co-workers do not want to risk their job by speaking up against a supervisor,[251] and (3) they delay reporting to seek guidance, collect evidence, write statements, or plan next steps in case they face retaliation. Unfortunately, and usually unbeknownst to the employee, because policies do not warn employees about the legal consequences of not reporting or reporting too early,[252] their good faith efforts to follow the policies may result in a court granting an employer the *Faragher–Ellerth* defense.[253]

Viewing the protocols through a procedural injustice lens sheds light on whether it is fair to hold employees accountable for not reporting sexual harassment when the protocols themselves create barriers to reporting.[254] Should it matter if the policies were "too complex," if the employee feared that nothing would happen, or, worse yet, if they feared they could lose their job if they were not believed? What if the employee could not comply with the protocols by gathering witnesses, providing detailed reports, or meeting other burdensome reporting requirements?[255] Should an employee lose their sexual harassment claim if they did not immediately report incidents when the reporting process would revictimize them by forcing them to recount traumatic experiences before they were ready?[256] What if the policies force the employee to report before their actions are legally protected?[257] Procedural justice strongly supports the opposite conclusion: If the policies are poorly designed or they will cause more harm than good to the employee, they should not serve as the basis for an affirmative defense.

Using a testimonial injustice lens, one can identify how the policies unfairly require employees to corroborate reports with witnesses, evidence, and documented details to enhance their credibility.[258] Good faith policies may discourage bad actors from using the reporting process to

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250. *See* discussion *supra* Section II.B.2.a.i.

251. Benavides-Espinoza & Cunningham, *supra* note 165; *see also* Potter, *supra* note 8.

252. *See* Brake, *supra* note 58, at 153 ("[E]mployer policies do not come with warnings to employees to wait to complain until they have adequate factual support, nor do they instruct employees on what kind of factual record they should compile before they complain.").

253. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (employers may win an affirmative defense if employees do not follow their policies).

254. *See* UMPHRESS, COOKY, KWON, LEE, & POTTER, *supra* note 76, at 2–4 (defining procedural justice and identifying seven necessary principles to achieving it).

255. *See supra* Section II.B.2.b.

256. *See supra* Section II.B.2.b.i.

257. *See* Porter, *supra* note 121, at 53.

258. *See supra* Section II.B.2.c.

harm innocent individuals, but they also create a chilling effect for well-meaning employees who cannot prove their case or write a detailed and compelling narrative about the harassment.[259] Any delay in reporting is considered a signal that the harassment could not have been *that* bad or that the catalyst for reporting was something other than the harassment.[260] Biases woven into the policies warn the target of the sexual harassment that they may face discipline if the employer does not believe them.[261] This is especially true if the employee delays reporting because they cannot follow the reporting protocols.[262]

Examining the policies through these frameworks demonstrates how the lack of accountability and the deference to employers has allowed the development of unfair and burdensome reporting practices that make it difficult for employees to follow the rules and easy for employers to rid themselves of liability.

### *C. Symbolic Compliance Since Faragher–Ellerth*

This Section illustrates how courts have allowed and even encouraged employers to continue to promulgate these problematic policies.

#### 1. Deference to Employers

The *Faragher–Ellerth* affirmative defense was supposed to support Title VII's objective of deterring workplace sexual harassment.[263] The cases established that employers may assert an affirmative defense if "(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[264] The goal of the first prong of the affirmative defense was to incentivize the creation of reasonable and effective reporting and investigation policies.[265] The second prong of the defense was supposed to incentivize employees to mitigate damages by reporting harassment before it became unlawfully severe and pervasive.[266]

The Court, however, failed to define "reasonableness" either with respect to the employer's duty to prevent and correct sexual harassment or to the employee's duty to avail themselves of the reporting proto-

259. *See supra* Section II.B.2.c.
260. *See supra* Section II.B.2.b.i.
261. *See supra* Section II.B.2.c.
262. *See supra* Section II.B.2.b.
263. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998).
264. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
265. *See Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 806–07.
266. *See Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 806–07.

cols.[267] The lack of guidance left the interpretation of reasonableness (for both prongs of the defense) up to lower courts (who followed the advice of human resource professionals—as described above).[268] Lower courts defined reasonableness on a case-by-case basis, often resulting in summary judgment if the employer had a reporting policy and the employee did not follow it by not reporting the harassment, delaying the reporting, or failing to follow the specific reporting protocols.[269]

The effectiveness of the policies rarely plays a role in the *Faragher–Ellerth* analysis.[270] Courts will grant the defense as long as a policy exists and provides multiple avenues for reporting without further inquiry into whether the policies actually help employees report harassment.[271] Some courts disregard the policies altogether, granting employers the defense even if the reporting protocols are unreasonable so long as the employer investigates and tries to correct the issue.[272] When courts do turn to the second prong of the test—whether the plaintiff unreasonably failed to follow the reporting protocols—anything less than strict compliance with the employer's protocols will likely result in summary judgment for the employer.[273] Cursory reviews and complete disregard

267. Sherwyn, Heise, & Eigen, *supra* note 42, at 1268 (identifying consensus that "the [*Ellerth* and *Faragher*] holdings were ambiguous because neither *Ellerth* nor *Faragher* defined 'reasonable care'").

268. Neals, *supra* note 119, at 180–83.

269. *See supra* Sections II.B.2.b.i, II.B.2.b.ii.

270. *See* Collette v. Stein-Mart, Inc., 126 F. App'x 678, 684–85 (6th Cir. 2005) (reciting provisions of employer's policy and noting employee had acknowledged receiving and understanding the policy before concluding employer acted reasonably to prevent sexual harassment); Vernon v. AlliedBarton Sec. Servs., LLC, No. 3:10-00167, 2013 U.S. Dist. LEXIS 82502, at *4–5, *34–36 (M.D. Tenn. June 12, 2013) (reciting provisions of employer's policy, noting employee had not challenged the policy's adequacy, and concluding over employee's objections that employer had followed the policy); Primm v. Auction Broad. Co., No. 3:10-0629, 2012 U.S. Dist. LEXIS 974, at *24 (M.D. Tenn. Jan. 4, 2012) ("[T]he Court finds that Defendants are entitled to summary judgment because the *raison d'etre* for the Faragher/Ellerth defense is to reward employers who implement and execute an effective sexual harassment policy."); McCurdy v. Ark. State Police, 275 F. Supp. 2d 982, 992 (E.D. Ark. 2003), *aff'd*, 375 F.3d 762 (8th Cir. 2004) (holding that the employer was not liable for the employee's sexual harassment charges in part because the employer had a clearly established sexual harassment policy).

271. *See* discussion *supra* Part I; *see also* discussion *infra* Section III.C.2; *McCurdy*, 275 F. Supp. 2d at 997 (holding that the employer was not liable for the employee's sexual harassment charges because the employer had a clearly established sexual harassment policy); *Collette*, 126 F. App'x at 679; *Vernon*, 2013 U.S. Dist. LEXIS 82502, at *33–38; *Primm*, 2012 U.S. Dist. LEXIS 974, at *24 ("[T]he Court finds that Defendants are entitled to summary judgment because the *raison d'etre* for the Faragher/Ellerth defense is to reward employers who implement and execute an effective sexual harassment policy.").

272. *See* discussion *supra* Section II.B.2.b.

273. Matthew D. Venuti, *Modernizing the Workplace: The Third Circuit Puts the* Faragher-Ellerth *Affirmative Defense in Context*, 64 VILL. L. REV. 535, 537–38 (2019) (exploring how many courts do not consider the surrounding circumstances when assessing whether an employee acted reasonably).

for the policies have created a "loophole" where employers can get away with symbolic policies that do not need to be effective.[274]

Some courts have gone so far as to find that an employer can meet the first prong of the defense even when it failed to prevent the harassment due to ineffective reporting policies, so long as its response to the report of harassment was "reasonable."[275] Deficiencies and even "unreasonable[ness]" in the protocols, which could have created barriers to reporting, do not matter if an employer investigates the report promptly and takes remedial actions against the harasser.[276] "[A] reasonable result" can cure "an unreasonable process."[277]

In *Trahanas v. Northwestern University*,[278] the Seventh Circuit granted Northwestern the *Faragher–Ellerth* defense and completely dismissed the effectiveness of the policies, stating that "[w]hether Trahanas actually read the handbook is 'irrelevant because it is undisputed that [Trahanas] received a copy of the policy and that she was required as a condition of her employment to read and comply with [ ] the policy.'"[279] Courts will impute constructive knowledge of the policies, regardless of their effectiveness or the employee's comprehension of them, so long as the employee acknowledges receiving them.[280]

An employee, however, does not get similar credit for reporting.[281] To the contrary, if an employee does not report the harassment immediately or follow the precise reporting protocols, the burden shifts to the employee to produce "credible" and "substantiate[d]" evidence explaining why they failed to avail themselves of the policies.[282] The employee must mitigate damages by placing the employer on notice immediately.[283] By finding that a reasonable result can cure an unreasonable process, while not crediting that unreasonable processes can create reasona-

274. Cunningham-Parmeter, *supra* note 8, at 155, 158–60; Lawton, *Empirical Vacuum*, *supra* note 8, at 198; Sherwyn, Heise, & Eigen, *supra* note 42, at 1266–67; Carle, *supra* note 42, at 86; Lawton, *Bad Apple*, *supra* note 8, at 825.

275. *See* Baldwin v. Blue Cross/Blue Shield, 480 F.3d 1287, 1303–05 (11th Cir. 2007) (stating that "Title VII is concerned with preventing discrimination, not with perfecting process" and therefore "a reasonable result cures an unreasonable process"); Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1309 (N.D. Ala. 2018).

276. *Baldwin*, 480 F.3d at 1305.

277. *Id.*

278. 64 F.4th 842 (7th Cir. 2023).

279. *Id.* at 854–55 (alteration in original) (quoting Shaw v. AutoZone, Inc., 180 F.3d 806, 811 (7th Cir. 1999)). Northwestern's official sexual harassment policy was not included in a list of publicly available exhibits from the trial. The failure to include the policies in their filings reflects the lack of review for these policies.

280. *See id.* at 854.

281. *See* cases cited *supra* note 149 (demonstrating courts do not tolerate delays in reporting).

282. *See, e.g.*, Terry v. Laurel Oaks Behav. Health Ctr., Inc., 1 F. Supp. 3d 1250, 1275 (M.D. Ala 2014).

283. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 764–65 (1998).

ble delays or barriers to reporting, courts further demonstrate their deference to employers.

2. The #MeToo Movement Dispels *Some* Bias

In 2017, public awareness of the underreporting of sexual harassment exploded when Alyssa Milano used the hashtag #MeToo to end her silence and encourage other women to share their stories of workplace sexual harassment.[284] Less than three months later, the #TimesUp movement shed light on the oppressive experience of sexual harassment and assault women face in the workplace, with an emphasis on vulnerable low-wage women.[285]

Relying on studies related to the #MeToo movement, the Third Circuit in *Minarsky v. Susquehanna County*[286] reversed the district court's decision that the employer satisfied the *Faragher–Ellerth* defense simply because it had a reasonable policy and the plaintiff failed to report the harassment.[287] Minarsky, a part-time secretary, endured almost four years of sexual harassment by her supervisor before reporting him because she needed the income to care for a sick child and feared retaliation.[288]

The district court believed that the policy had to be strictly followed, holding that "failure to report misconduct . . . is unreasonable as a matter of law" because the employer had a reporting policy in place.[289] Although Minarsky testified that the employer had never disciplined the supervisor despite knowing of similar incidents, the court found her concerns of retaliation "unfounded" and ruled that her failure to report was unreasonable.[290] The Third Circuit rejected that view, grounding its re-

284. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, at 10:21 PM). While Alyssa Milano elevated the use of the #MeToo hashtag in 2017, the movement was started by Tarana Burke over ten years earlier, in 2006, to provide resources and safe spaces to sexual assault survivors. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html; Tarana Burke, *History & Inception*, ME TOO., https://metoomvmt.org/get-to-know-us/history-inception/ (last visited Sept. 21, 2025).

285. *See Time's Up Movement (#TimesUp)*, IOWA STATE UNIV. ARCHIVES OF WOMEN'S POL. COMMC'N, https://awpc.cattcenter.iastate.edu/directory/times-up-movement-timesup/ (last visited Sept. 21, 2025); *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM EST), http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/ (discussing how farmworkers and Hollywood actors often share the experience of being sexually harassed).

286. 895 F.3d 303 (3d Cir. 2018).

287. *Id.* at 306, 311–14, 313 n.12; *see also* Potter, *supra* note 8, at 616–17, 619 (discussing how #MeToo campaign impacted the court's application of the *Faragher–Ellerth* defense); Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 422 (2019) (describing how #MeToo may impact sexual harassment law); Carol T. Li, Matthew E.K. Hall, & Veronica Root Martinez, *#MeToo & The Courts: The Impact of Social Movements on Federal Judicial Decision Making*, 81 WASH. & LEE. L. REV. ONLINE 79, 79, 83, 101 (2023) (finding that "the probability of a pro-employee ruling in a district court increased drastically after November 1, 2017").

288. *Minarsky*, 895 F.3d at 306–308, 315.

289. *Id.* at 311.

290. *See id.* at 311–12.

versal in the public's newfound understanding that fear of "serious adverse consequences" can keep victims from reporting.[291]

Susquehanna County's sexual harassment policy had several barriers to reporting within its protocols.[292] Yet both the district court and the court of appeals credited the county for maintaining a written policy, which Minarsky read and signed, without discussing the reasonableness of the protocols.[293] The policy's definition of sexual harassment mirrored the jargon-filled 1980 EEOC definition,[294] and it promised protection against retaliation, so long as reports were made in "good faith."[295] That requirement was particularly problematic in this case: Minarsky already feared her employer would not take her report seriously, and she lacked witnesses who could support her allegations.[296]

While the #MeToo movement helped some courts understand why it might be reasonable for plaintiffs to delay reporting sexual harassment, courts continue to grant summary judgment to employers who demonstrate that they had reporting policies in place and the plaintiff failed to comply with them.[297]

## III. #TIMESUP FOR SYMBOLIC POLICIES

For decades, courts have accepted that sexual harassment policies promulgated by employers are reasonable and effective without carefully examining the policies themselves.[298]

The following Section provides recommendations for removing barriers to reporting and creating policies that encourage and support em-

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291. *See id.* at 313–14, 313 n.12 (crediting the #MeToo movement for raising the public's awareness of the workplace exploitation and power dynamics that keep as many as "three out of four women" from reporting sexual harassment).

292. *See* Exhibit A, Minarsky v. Susquehanna Cnty., No. 3:14-CV-02021, 2017 U.S. Dist. LEXIS 101481 (M.D. Pa. Oct. 14, 2016) [hereinafter Susquehanna County Harassment Policy].

293. *See Minarsky*, 895 F.3d at 308, 311–12; Minarsky v. Susquehanna Cnty., No. 3:14–CV–2021, 2017 U.S. Dist. LEXIS 78209, at *15, *17–18 (M.D. Pa. May 22, 2017), *adopted by*, No. 3:14-CV-2021, 2017 U.S. Dist. LEXIS 101481 (M.D. Pa. June 28, 2017), *vacated*, 895 F.3d 303 (3d Cir. 2018).

294. *See* Susquehanna County Harassment Policy, *supra* note 292, at 2 (using language such as "explicit or implicit condition of employment," "submission to or rejection of . . . as the basis for employment decisions," and "unreasonably interfering with an individual's work performance"); 29 C.F.R. § 1604.11(a) (1980); *see also* discussion *supra* Section II.B.2.a.i.

295. *See* Susquehanna County Harassment Policy, *supra* note 292, at 3.

296. *See Minarsky*, 895 F.3d at 306, 314–16.

297. *See* Li, Hall, & Martinez, *supra* note 287, at 79–80 (noting that although district court rulings became more employee-friendly in the aftermath of the #MeToo movement, circuit court rulings actually grew less employee-friendly); *see also* Potter, *supra* note 8, at 605–06 (arguing for congressional solutions to improve the *Faragher–Ellerth* defense); Natalie Pedersen & Christine Cross, *#MeToo and The Courts: An Analysis of the Movement's Effect on Workplace Sexual Harassment Law*, 53 U. TOL. L. REV. 71, 89 (2021) (arguing courts need to follow the precedent set by *Minarsky*); Rhode, *supra* note 287, at 422 (arguing #MeToo presents opportunities to improve sexual harassment laws and policies); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 245, 274 (2018) (arguing employers need to change their harassment policies as courts begin to require more to grant the *Faragher-Ellerth* defense).

298. *See* discussion *supra* Section II.C.1.

ployees to report sexual harassment by (1) requiring that courts carefully review policies to determine if employers have "exercised reasonable care"[299] to develop protocols and procedures designed to "prevent and correct"[300] sexual harassment, (2) incentivizing employers to create policies that will encourage and assist employees in reporting harassment, and (3) identifying practices that will help create policies that encourage and facilitate the reporting of harassment.

*A. Courts Need to Actually Review the Policies*

The policies described in this Article illustrate how courts' cursory or non-existent review of sexual harassment policies has fostered illusionary compliance rather than protocols genuinely aimed at encouraging and supporting employees to report sexual harassment.[301] A close review of the policies identifies accessibility issues, procedural barriers, and implicit bias that have a chilling effect on reporting.[302] The sample policies in this Article demonstrate that just having a sexual harassment policy does not mean that the procedures and protocols are reasonable or effective.

In creating the *Faragher–Ellerth* affirmative defense, the Supreme Court noted that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[303] The Court also noted that the EEOC had long encouraged employers "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment,"[304] and that those reporting protocols should be "designed to encourage victims of harassment to come forward."[305] Other than requiring the existence and dissemination of a policy with alternative reporting avenues, courts have not identified what constitutes an effective policy.[306]

Time is up for the mere existence of a policy to qualify as an "effective grievance mechanism[]."[307] Cursory reviews of policies have allowed (and encouraged) employers to get away with the use of complicated legal jargon, reporting timelines that potentially retraumatize victims, and fostering biases against those who report harassment.[308] Courts need to establish guidelines for determining whether an employer has

299. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
300. *See id.*
301. Lawton, *Empirical Vacuum*, *supra* note 8, at 198; Sherwyn, Heise, & Eigen, *supra* note 42, at 1266–67.
302. *See supra* Section II.B.2.
303. Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998).
304. *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f) (1997)).
305. *Id.* (quoting 1990 EEOC Sexual Harassment Policy Guidance, *supra* note 55).
306. *See id.* at 807–09; Lawton, *supra* note 42, at 108–09; Lawton, *Empirical Vacuum*, *supra* note 8, at 222; Sherwyn, Heise, & Eigen, *supra* note 42, at 1290.
307. *See Ellerth*, 524 U.S. at 764.
308. *See* discussion *supra* Sections II.B.2.b, II.C.1.

"exercised reasonable care" in creating effective policies for its workforce.[309] The factors should be centered around principles that limit procedural and testimonial injustices by encouraging employers to develop protocols and procedures that are comprehensible, have low evidentiary requirements to initiate an investigation, give employees a voice and control in how and when they report, convey that the employer will trust their reporting or that the value of reporting outweighs any findings of misinformation, allow employees to report without fear of retaliation regardless of the outcome of the investigation, and regularly seek employee input to ensure that the procedures are easy to follow. The goal (going back to the *Faragher* and *Ellerth* Courts) should be to encourage employees to report harassment.[310] Employers can investigate the merits of the claim later.

This inquiry is very fact specific and should be done on a case-by-case basis because no one policy can be effective for every workplace environment. Courts should require employers to demonstrate the steps that they took to create effective policies for their workforce: Who helped draft the policies? Did the employees have a role? Did they consider the working environment, the workplace culture, or regional practices that might impact reporting? Employers should provide information about their workforce demographics to establish that the policies are written using language that takes into consideration the lowest levels of education, literacy skills, and English language skills.[311] Employers should also state when the policies were created, how often they are updated, and (although not perfect) whether they comply with the most recent versions of the EEOC sexual harassment policy guidance.

Employees should have a voice in identifying what protocols and procedures will encourage them to report sexual harassment.[312] Employers should seek employee feedback at all stages of drafting to let employees identify what procedures and protocols will be most helpful for employees. Employers should check in with employees periodically to ensure that policies continue to be effective. They should also ask for and review employee feedback at the termination of employment to capture issues that the employee was afraid to report while employed. Employee focus groups can provide feedback on comprehension, ease of following the protocols, accessibility of the policies, approachability of the people and forms designated to receive the reports, and to suggest protocols that

309. *See Faragher*, 524 U.S. at 807.

310. *See Ellerth*, 524 U.S. at 764–65; *Faragher*, 524 U.S. at 805–07.

311. *See* PLAIN LANGUAGE ACTION & INFO. NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES i, 1, 36–37, 46 (2011) (providing best practices for clear writing, including taking the audience into account, using simple words, and avoiding jargon).

312. *See* THOMAS A. KOCHAN, MIT INST. FOR WORK & EMP. RSCH., WORKER VOICE, REPRESENTATION, & IMPLICATIONS FOR PUBLIC POLICIES 1–3 (2020) (discussing the importance of centering the voices of workers who are directly impacted when drafting work policies).

will encourage and facilitate reporting. Periodic employee surveys will also gather changes in workforce needs and concerns.

The Fair Food Program (FFP) has discovered the secret to improving employee reporting systems—centering the workers in the strategic planning, creation, implementation, and assessment of workplace policies and protocols.[313] The program embraces the concept of Worker-Driven Social Responsibility, which strives to protect workers' human rights to dignity, safety, fair pay, work free from harassment and labor abuses, and the freedom of association.[314] To maintain a consistent supply of produce, corporations like Burger King, Walmart, McDonald's, and Whole Foods agree to only purchase produce from farms that follow FFP's Code of Conduct.[315]

The success of the farm program involves four key aspects: worker-centered education, complaint resolution, auditing, and market enforcement.[316] Since its inception, the FFP has created a workplace environment and culture where workers feel safe to report sexual harassment, incidents are quickly investigated, harassers are disciplined, and farms that do not improve working conditions face probation or suspension from FFP.[317] Other industries should take note and incorporate workers' voices in the development and maintenance of workplace policies.

While employers may resist a Worker-Driven Social Responsibility model, courts can commit to carefully reviewing reporting policies to ensure that they are tailored to meet the needs of the workforce and that the procedures and protocols do not create the barriers to reporting identified in this Article. Would the average worker at Wendy's understand this policy, have the time to report it when they feel safe to do so, and the ability to comply with it? If the answer is "no," then the policy is ineffective, the employer has not exercised reasonable care, and the defense should fail.

### *B. Creating Incentives for Better Policies*

Employers have little incentive to create policies that are tailored to their workforce or that are reviewed and regularly updated to meet the

313. The FFP (originally the Campaign for Fair Food) was created in 2001 by the Coalition of Immokalee Workers (CIW), a human rights organization created by farmworkers in Florida. *See* FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM 2021, at 4–5, 8, 25, 27 (2021).

314. *See Worker-Driven Social Responsibility*, FAIR FOOD PROGRAM, http://fairfoodprogram.org/worker-driven-social-responsibility/ (last visited Sept. 21, 2025).

315. *See Retail Buyers*, FAIR FOOD PROGRAM, https://fairfoodprogram.org/buyers (last visited Sept. 21, 2025). Ironically, the policies of some of these companies that participate with FFP have barriers to reporting that are analyzed in this Article. *See* sources cited *supra* note 67.

316. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 313, at 11. (noting that the program includes worker-led trainings, multilingual reporting systems, trained investigators, and unannounced interviews of workers).

317. *See id.* at 25; *see also* HUM. RTS. WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 93 (2012).

needs of workforce changes.[318] To the contrary, current incentives push in the opposite direction. Courts grant the affirmative defense without conducting an in-depth inquiry into the steps that the employer took to make the policies comprehensible or to encourage and foster reporting.[319] Employers are better off creating policies that are incomprehensible or hard to follow because if employees follow the policies then employers lose the affirmative defense.[320]

Employers would be more likely to create effective reporting protocols if they know that the policies will be reviewed, scrutinized, and penalized for ineffective or deficient protocols.[321] Title VII, however, does not impose any duties on the creation or maintenance of sexual harassment policies, and employers can avoid liability by providing the court with a basic policy regardless of the effectiveness. This Section explores additional avenues that may provide incentives for employers (and the personnel industry) to create better policies.

Where Title VII and courts have left a void, some states have stepped in to encourage employers to develop workplace policies that encourage the reporting of harassment.[322] California, Connecticut, Washington, D.C., Illinois, Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington require all or some employers to have anti-harassment policies and mandate specific language and protocols.[323]

The EEOC has issued recommendations and updates for drafting policies that encourage workers to report sexual harassment since the 1980s, although some of the EEOC's definitions and recommendations have resulted in policies that reflect vestiges of complex legal jargon and outdated definitions.[324] While federal law does not require employers to have anti-discrimination policies, there are opportunities throughout the EEOC investigation process where the agency could collect, review, and

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318. *See* Lawton, *Empirical Vacuum*, *supra* note 8, at 199; Sherwyn, Heise, & Eigen, *supra* note 42, at 1266–67; Lawton, *Bad Apple*, *supra* note 8, at 846.

319. Lawton, *Bad Apple*, *supra* note 8, at 824–25.

320. *See* Sherwyn, Heise, & Eigen, *supra* note 42, at 1266–67.

321. *See* Ioana Marinescu, Yue Qiu, & Aaron Sojourner, *Wage Inequality and Labor Rights Violations* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28475, 2021) ("The lower-power worker would have both lower wage and more violations of her labor rights. However, workers with less power may be less likely to *report* these violations to enforcement agencies, leading to measurement error in cited violations that's negatively correlated with true violations."); ELYSE SHAW, ARIANE HEGEWISCH, & CYNTHIA HESS, INST. FOR WOMEN'S POL'Y RSCH., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 5 (2018) ("Workplace harassment can result in substantial costs to companies, including legal costs if there are formal charges of harassment, costs related to employee turnover, and costs related to lower productivity from increased absences, lower motivation and commitment, and team disruption.").

322. *See* Ann C. McGinley, *Laboratories of Democracy: State Law as a Partial Solution to Workplace Harassment*, 30 J. GENDER, SOC. POL'Y, & L. 245, 255 (2022) (arguing that because post-Trump federal agencies and Congress are unlikely to protect employee's civil rights or be worker friendly, we should turn to state law to improve civil and workers' rights).

323. *See HR Tip of the Week: 10 Must-Have Policies for 2022*, ADP (Dec. 6, 2021), https://sbshrs.adpinfo.com/blog/10-must-have-policies-for-2022.

324. *See* discussion *supra* Section I.B.

make recommendations about workplace discrimination and harassment policies.[325]

As part of every complaint investigation process, the EEOC recommends, but does not require, that employers submit "applicable practices, policies, or procedures" as part of their position statement.[326] The EEOC should require employers to submit their discrimination and harassment policies as part of the regular investigation process.[327] If employers know they have to submit policies that will be reviewed and assessed (and will eventually become part of a public record), they might be more apt to draft better policies and keep up with EEOC recommendations.

The EEOC should take advantage of the investigatory process to review and recommend changes to EEO policies. Alternatively, the EEOC could require employers to describe how their policies meet the needs of their workforce and the steps they have taken to ensure that employees comprehend the policies. In assessing the effectiveness of the policies, the EEOC should consider the size and industry of the employer, the demographics of its workforce, the discrimination allegations, the readability of the protocols, and any language that might discourage an employee from reporting, such as good faith policies.

To encourage employers to engage in the review process, the agency could find that policies are presumptively reasonable and effective for some period following a positive EEOC review, so long as there are no changes in the laws that impact the policies. The employer's willingness to improve their policies could also help rebut findings that the employer acted in bad faith or knowingly created a hostile working environment.

Likewise, employers that do not update policies following a negative EEOC review should face penalties, appear on a publicly available list of non-compliant employers, and bear a presumption that they willfully designed policies that create reporting challenges for employees.

To assist with public knowledge and access to policies, the EEOC could create a repository of the policies they collect. The EEOC could grade the policies with regards to comprehension, accessibility, and other barriers to reporting. Grading the policies would help create best practices that could replace the 1980 EEOC language that is still found in poli-

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325. *See* 42 U.S.C. § 2000e-8.

326. *See Effective Position Statements*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/effective-position-statements (last visited Aug. 27, 2025).

327. Currently, during an investigation of discrimination charges, the EEOC may request documentation that includes workplace policies, such as anti-discrimination and anti-harassment policies, as part of its Request for Information (RFI). However, there is no formal requirement that employers submit their policies to the EEOC during an investigation. *What You Can Expect After a Charge Is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://eeoc.gov/employers/what-you-can-expect-after-charge-filed (last visited Sept. 21, 2025).

cies. This would encourage the EEOC, employers, and courts to pay more attention to the reporting protocols.

### *C. Eliminating the Barriers*

Sexual harassment reporting policies should be easy to understand and have protocols that support employees throughout the reporting and investigation process[328] They should encourage reporting by allowing employees to choose (1) how they want to report (formally or informally; named or anonymously; in person, in writing, over the phone or a hotline, or via an app or website portal), (2) to whom they want to report, with duties for everyone to report harassment "up" to management or independent investigators, and (3) when they want to report (recognizing the many valid and reasonable reasons for delaying or not reporting).[329]

#### 1. Improving Accessibility

As a matter of public policy, anyone who wants to review workplace harassment policies should be able to do so. The policies set the tone for workplace cultures by informing employees (sometimes misleadingly) of their workplace rights and responsibilities, providing avenues to air grievances and expose misconduct, and establishing rules for maintaining safety and respect at the workplace.[330] Employees should be able to understand the policies, what they prohibit, the duties of reporting, and the consequences of not reporting.[331] If courts allow employers to rid themselves of liability when an employee does not follow their protocols, then the employee must be able to read and understand the required protocols.

Likewise, there is value in making workplace harassment policies available to the public at large.[332] While employers may want to protect portions of the handbook that contain sensitive information (such as how to create passwords, document filing systems, or company procedures for how things are made or created), sexual harassment policies do not contain information that should be kept confidential. Public awareness of the sexual harassment reporting protocols would also foster "bystander" or

328. *See* discussion *supra* Section II.B.2.a.i; Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, 59 HARV. BUS. REV. 76, 77, 92 (1981) (asserting that the 1980 EEOC guidelines are too vague to be easily understood and implemented).

329. *See* sources cited *supra* note 7.

330. *See* discussion *supra* Introduction, Part I.

331. *See* 2024 EEOC Guidance, *supra* note 58 (defining features of an effective anti-harassment policy).

332. *See* Jennifer A. Drobac & Mark Russell, *Unmasking Sexual Harassment: The Empirical Evidence for a New Approach*, 17 N.Y.U. J.L. & BUS. 315, 382 (2021) (arguing corporations should publicly report data regarding workplace sexual harassment).

third-party reporting of harassment, which studies have shown to be an effective way to prevent and correct sexual harassment.[333]

Anyone who wants to help the target employee should be able to easily find what conduct is prohibited, who can receive reports, and how the reports can be made so that anyone who witnesses harassment can report it through the appropriate channels. Prospective employees should also be able to assess if a future employer prioritizes eliminating workplace harassment. Public scrutiny of policies will also increase incentives for employers to maintain updated, worker-friendly policies.

2. Eliminating Strict Reporting Requirements

Victims of sexual harassment often delay reporting or never report at all due to reasonable and valid fears of retaliation, embarrassment, career damage, financial necessity, cultural concerns, or other reasons that require the target of the harassment to plan for the consequences of reporting.[334] Timely notice of sexual harassment is important for the employer to address and try to correct the misconduct.[335] The need to minimize liability should not, however, come at the cost of forcing a person to report a traumatic event before they are ready to do so or before the law will protect them.[336]

Employers should acknowledge within their policies that reporting sexual harassment is a difficult thing to do and encourage employees to report as soon as they are able or ready to do so. Policies should not require immediate reporting or specific deadlines for reporting (i.e., within twenty-four hours) because most people are unable to report sexual harassment immediately.[337] Reporting deadlines create a "Catch-22" situation for employees.[338] If they report immediately, they risk facing retaliation, losing legal protections, and many other valid fears.[339] If they wait to report until they have created a plan or are better able to handle the

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333. *See* Lynn Bowes-Sperry & Anne M. O'Leary-Kelly, *To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers*, 30 ACAD. MGMT. REV. 288, 288, 303–04 (2005) (noting that observer intervention is a more promising method of "controlling sexual harassment" because "most targets [of sexual harassment] do not report their experiences" and noting the importance of encouraging observers to feel a sense of responsibility for reporting).

334. *See* sources cited *supra* note 7.

335. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998).

336. *See* sources cited *supra* note 146.

337. *See* Lindsay M. Orchowski, Lauren Grocott, Katie W. Bogen, Aderonke Ilegbusi, Ananda B. Amstadter, & Nicole R. Nugent, *Barriers to Reporting Sexual Violence: A Qualitative Analysis of #WhyIDidntReport*, 28 VIOLENCE AGAINST WOMEN 3530, 3535–41 (2022) (discussing the various barriers to reporting sexual harassment, many of which prevent immediate reporting); Fitzgerald, Swan, & Fischer, *supra* note 128, at 118–21 (emphasis in original) (identifying various internally and externally focused responses to sexual harassment and noting that "[b]y far the most infrequent response is to seek *institutional/organizational relief*" such as "notifying a supervisor, bringing a formal complaint, [or] filing a lawsuit"); Balogh, Kite, Pickel, Canel, & Schroeder, *supra* note 130, at 345.

338. *See* Brake, *supra* note 230, at 77.

339. *See* sources cited *supra* note 7.

consequences, they risk facing assumptions that the harassment was not that "severe and pervasive" or, worse yet, risk losing their claim if a court finds that the delay in reporting was unreasonable.[340]

Courts routinely find, even after the #MeToo movement has raised awareness, that a vast number of women never report workplace sexual harassment due to the fears discussed above and that delays in reporting are unreasonable, especially when the policies require immediate reporting.[341] Courts tend to accept that reporting deadlines are reasonable without examining if the timelines create barriers to reporting.[342]

At a minimum, policies should warn employees that failure to report harassment or "unreasonable" delays in reporting may negatively impact or even destroy any harassment claims or liability against the employer. They should also warn employees that it is imperative that they understand what conduct constitutes unlawful harassment because, if they report conduct that is not unlawful, they may not be protected against retaliation.[343] A warning about the consequences of not reporting is crucial for low-wage employees because, unlike high-earning employees who can afford attorneys and have a more sophisticated understanding of workplace protocols, low-wage employees may not understand the consequences of failing to report or delaying the reporting until it is too late. Many of the policies stated that employees should report harassment immediately because it helps employers quickly eliminate bad behavior.[344] None of them, however, warned employees that failure to report could have negative legal consequences.[345]

3. Eliminating Stigma and Bias

Although there is only a small risk of false reporting, reports of sexual harassment and sexual assault have historically faced credibility issues.[346] Women's reports of sexual misconduct are often dismissed as exaggerations, displays of oversensitivity, misunderstandings, or untruths.[347] Policies that remind employees to report harassment "in good faith" reinforce these biases against all people who report misconduct.[348] By saying that reports must be made "in good faith," the policies imply that targets may lie or have bad motives for reporting harassment. Policies that warn that reports not made "in good faith" may lead to discipline for the person reporting the misconduct create disincentives to re-

340. *See* Debra S. Katz, *Sexual Harassment Claims and Defenses in Federal and District of Columbia Courts* 43 (2010) (unpublished manuscript).
341. *See* cases cited *supra* note 149.
342. *See* cases cited *supra* note 149.
343. *See* Sperino, *supra* note 105, at 2064.
344. *See* discussion *supra* Section II.B.2.b.i.
345. *See* discussion *supra* Section II.B.2.b.i.
346. *See* sources cited *supra* notes 146 and 212.
347. *See* Epstein, *supra* note 146.
348. *See* discussion *supra* Section II.B.2.c.

porting, especially for employees who may not have proof of the harassment because they work in isolated locations or they cannot convince a co-worker to file a report against a supervisor. If an employee already feels that they will not be believed due to lack of evidence or power imbalances, they will likely be further deterred from reporting if they risk discipline or losing their job because they are not believed.

Policies should simply encourage employees to report, without requiring that the reports be made in good faith. Employers should have a duty to confirm that all reports of harassment will be received and investigated without fear of retaliation.[349] There are many reasons why a report may not be substantiated or the victim may give conflicting information that may appear to be false.[350] A person's inability to substantiate a report—especially when the employee is a low-wage worker who may not have time or capacity to take notes, may not have co-workers willing to risk their jobs to support their report, and are depending on their paycheck to make ends meet—should not mean that the report is made in bad faith.

## CONCLUSION

Sexual harassment reporting policies give the illusion of protecting employees from discrimination and harassment. Under the *Faragher–Ellerth* defense, courts reward employers for the appearance of EEO compliant policies without examining whether the protocols and procedures facilitate and support the reporting of harassment. By reviewing the sexual harassment policies themselves, this Article adds to a rich area of scholarship by identifying barriers to reporting that have become common practice in employee handbooks and manuals. An employee's ability to read and understand the content of the policies, follow the instructions, and feel safe enough to file a report against their supervisor should be the guiding principles of harassment policies, not the appearance of compliance so the employer can avoid liability.

Workplace procedures and protocols play a role in empowering workers to speak up, and encouraging bystanders to step in. If courts are going to hold employees accountable for not following the policies, then they should also hold employers accountable for creating policies that employees cannot follow. By placing the policies on display, this Article highlights the need to carefully scrutinize reporting procedures and protocols to create incentives for employers to develop policies that will encourage and support employees to report sexual harassment.

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349. *See* 2016 EEOC RETALIATION GUIDANCE, *supra* note 188, § V (providing an overview of "promising practices" employers can implement to prevent retaliation in their workplaces).

350. *See* Epstein, *supra* note 146, at 296–97 (describing how PTSD symptoms that often result from workplace sexual harassment lead to inconsistencies in victims' statements).