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

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

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AVOIDING HARM OTHERWISE

Abstract

This article concerns the concepts of employee harm and harm avoidance within the liability framework for hostile work environment sexual harassment by a supervisor. Whether an employer is liable for supervisor sexual harassment depends in part on whether or not the employee avoids her harm or mitigates her damages resulting from the sexual harassment. Despite the law’s interest in employee’s harm avoidance, courts have failed to fully explore the vast array of harms resulting from sexual harassment and the variety of ways in which an employee avoids these multiple harms. This article reframes the legal discussion of an employee’s actions in response to sexual harassment from one that almost exclusively focuses on whether the employee failed to report the sexual harassment. To assist in the reconceptualization, this article explores women employees’ responses to sexual harassment: the ways in which they are harmed by sexual harassment, beyond the act of sexual harassment itself; and the ways in which they avoid that harm, beyond simply reporting the sexual harassment. There are at least two benefits from this reframing. First, a more inclusive depiction of women employees’ injuries from and responses to sexual harassment would far better inform sexual harassment liability determinations. As a result, the determinations can fulfill the legislative intent of Title VII of the Civil Rights Act of 1964 to encourage and reinforce employees’ efforts to “avoid harm.” Second, through this process, there is an opportunity to reveal the existing reality that highlights women’s partial agency but often is obscured with the dominant picture of a sexual harassment victim as “suffering in silence.”
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INTRODUCTION

This article examines how concepts of “harm” and “avoidance of harm” should inform the liability framework for supervisor sexual harassment in employment under Title VII of the Civil Rights Act of 1964. Under this liability scheme, once a plaintiff proves that she was subjected to sexual harassment by her supervisor that did not involve a tangible employment action, an employer will be vicariously liable unless the employer satisfies a two-part affirmative defense. The employer must prove both (a) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (hereafter the “employer-focused prong”) and (b) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (hereafter the “employee-focused prong”).

2Faragher, 524 U.S. at 808 (“tangible employment action” includes a “discharge, demotion, or undesirable reassignment”); Ellerth, 524 U.S. at 761 (“tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”); Pennsylvania State Police v. Suders, 542 U.S. 129, 144, 124 S. Ct. 2342, 2353 (2004) (citing Ellerth, 524 U.S. at 761) (tangible employment action “‘constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”).
3Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
4Faragher, 524 U.S. at 807 (emphasis added); Ellerth, 524 U.S. at 765 (emphasis added); Suders, 542 S. Ct. at 152 (“the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard”). Many insightful articles have been written regarding the affirmative defense to employer liability for sexual harassment. See e.g. Heather S. Murr, The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness, 39 U.C. Davis L. Rev. 529, 605-634 (2006) (arguing for contextualized fact finding regarding whether the individual employee unreasonably failed to avoid harm if she decided to submit to the sexual harassment given her credible fear of retaliation that could result in career or financial harm); Anne Lawton, Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense, 13 COLUMBIA J. GENDER & L. 197, 266 (2004) (affirmative defense is flawed because it assumes that victims of sexual harassment report the harassment and that policies and sexual harassment policies and procedures deter sexual harassment; in addition, the lower courts have failed to properly interpret the affirmative defense’s requirement that employers’ policies and procedures be effective in deterring sexual harassment); Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law, 26 Harv. Women’s L.J. 3 (2003) [hereinafter Grossman, Culture of Compliance] (using social science and other research to critique the legal and extra legal discourse that trumpets policies, complaint mechanisms, and investigations as effective deterrence and corrective mechanisms for sexual harassment); Martha S. West, Preventing Sexual Harassment: The Federal Courts’ Wake Up Call for Women, 68 BROOKLYN L. REV. 457 (2002) (arguing that federal courts need to require significant action by employers to show effectiveness of sexual harassment policies); John H. Marks, Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of a Dubious Summary Judgment Safe Harbor for Employers Whose Supervisory
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The Supreme Court stated that in proving the employer-focused prong, the employer could show whether or not the employer promulgated a sexual harassment policy with a complaint procedure.\(^5\) The Court stated that such a showing would be relevant, though not dispositive, to satisfying the employer-focused prong. Regarding the employee-focused prong, the Court stated that “a demonstration of [plaintiff’s unreasonable failure to use any employer-provided complaint mechanism] will

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Personnel Commit Hostile Environment Workplace Harassment, 38 HOUS. L. REV. 1401 (2002) (explaining that lower courts have failed to properly implement the affirmative defense); Linda Hamilton Krieger, Employer Liability for Sexual Harassment – Normative, Descriptive, and Doctrinal Interactions: A Reply to Professor’s Beiner and Bison-Rapp, 24 U. ARK LITTLE ROCK L. REV. 169, 198 (2001) (describing the affirmative defense as a legal standard created to change victim responses to sexual harassment and prevent discrimination in the workplace that is flawed because it is based on a “faulty descriptive account of how people and organizations actually behave”); Theresa M. Beiner, Using Evidence of Women’s Stories in Sexual Harassment Cases, 24 U. ARK. LITTLE ROCK L. REV. 117, 131-141 (2001) [hereinafter Beiner, Women’s Stories] (discussing how the affirmative defense and its interpretation by lower courts does not properly reflect the reality of how sexual harassment operates in the workplace); David Sherwyn, Michael Heise and 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, 69 FORDHAM L. REV. 1265, 1266-67, 1289-1303 (2001) (proposing a new standard that focuses only on employer’s behavior and not on employee’s because the current affirmative defense gives incentives to employers to be only reasonable enough in preventing and correcting sexual harassment to meet the standard, but not enough to actually facilitate employees’ complaints and early reporting of sexual harassment); Theresa M. Beiner, Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment, 7 WM. & MARY J. WOMEN & L. 273, 291-339 (2001) [hereinafter Beiner, Sex, Science and Social Knowledge] (discussing the disconnect between the law and the actual operation of sexual harassment in the workplace, and recommending that changes in the court’s assessment, including evaluation of the entire workplace culture and the award of punitive damages); Michael Taylor, Let’s Talk About Sex: A Clarification of Employer Liability for Supervisor Sexual Harassment Under Title VII, 27 OHIO N.U.L. REV. 607 (2001) (proposing solutions to lack of clarity in affirmative defense’s definition of supervisor and the interpretation of the affirmative defense); Joanna L. Grossman, The First Bite is Free: Employer Liability for Sexual Harassment, 61 U. PITT. L. REV. 671 (2000) [hereinafter Grossman, The First Bite] (affirmative defense’s creation of employer’s “safe harbor” to liability unless employer’s own conduct is deficient limits employees’ compensation for actionable sexual harassment); Michael C. Harper, Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth, 36 SAN DIEGO L. REV. 41, 80-81 (1999) (using a cost-benefit analysis to analyze how the affirmative defense would resolve remaining questions about employer liability); Louis P. DiLorenzo & Laura H. Harshbarger, Employer Liability for Supervisor Harassment After Ellerth and Faragher, 6 DUKE J. GENDER L. & POL’Y 3, 13-15 (1999) (arguing that the affirmative defense inappropriately emphasizes the effect of the harassment as opposed to the harassment itself for liability determinations). As seen in these articles, many legal scholars have already provided very informative descriptions and critiques of the affirmative defense and its interpretation by the courts. Accordingly, this article seeks to build upon that body of scholarship and explore a different area of the affirmative defense. Specifically, this article explores the full meaning and use of the affirmative defense as it relates to sexually harassed employees’ harm and avoidance of harm.

\(^5\)Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
normally suffice to satisfy the employer’s burden under the second element of the defense.6 However, as discussed throughout this article, if the employee avoided harm otherwise, the employer should not be able to meet its burden.

Subsequent liability case doctrine for supervisor hostile work environment sexual harassment has evolved to require, almost without exception, that employees report sexual harassment promptly and appropriately through the designated employer-mandated channels. If the employee fails to appropriately report her harasser, in most instances, she will be barred from holding the employer liable for the sexual harassment to which she was subjected. Yet this requirement is in tension with the reality of women workers’ lives. The vast majority of women employees do not report sexual harassment, and if they do report it, most do so after a period of time has elapsed or complain to persons that may not be included in the employer’s proscribed procedures for complaining.

Aspects of this tension between the doctrine and women employees’ reality have been discussed thoughtfully by commentators.7 Even the Supreme Court in creating the footprint for the lower courts’ case law recognized the incongruence. In crafting the affirmative defense to liability for supervisor sexual harassment in 1998, the Supreme Court noted that a requirement that employees show how they avoided the harm of sexual harassment by formally reporting the sexual harassment to their employer stood in contrast to the reality that the vast majority of women employees do not complain for various reasons. In response, the Supreme Court articulated that a reporting requirement would hopefully change women employees’ behavior in mitigating this harm.8 But since 1998, studies show that reporting behavior has decreased not increased in frequency despite the requirement. The Armed Forces

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6Id.
7Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 374 (2004) (stating that “[t]here is a considerable gulf between the legal expectations of courts and the actual behavior of employees” since the vast majority of women employees do not report sexual harassment and yet this is what the law, as interpreted at its narrowest, requires); Beiner, *Women’s Stories*, supra note 4 at 117 (“The legal standards the United States Supreme Court has developed concerning sexual harassment law do not always reflect the reality of how sexual harassment operates in the workplace.”); Grossman, *The First Bite*, supra note 4, at 677 (asserting that existing legal doctrine unfairly penalizes the majority of employees who fail to use formal complaint mechanisms, thereby undermining the legal system’s ability to compensate employees and pursue gender equality in the workplace).
8See Ellerth, 524 U.S. at 764 (stating that limiting employer liability in order to encourage employees to report the offensive conduct before it becomes pervasive fulfills Title VII’s deterrent rationale). But see Chamallas, supra note 7, at 377 (“Despite the incentive provided by legal reporting requirements, these patterns are unlikely to change because the social science evidence on lack of reporting has been so consistent and the pressures not to report are still present in the workplace. Thus, when a court regards a victim’s failure to report as presumptively unreasonable, it is making a judgment that applies to a large majority of sexual harassment victims.”)
2002 Sexual Harassment Survey showed a decrease of reporting by women. 9 This survey showed that fewer women reported sexual harassment in 2002 than in 1995. 10 The 2004 Sexual Harassment Survey of Reserve Component Members showed that 67% of women and 78% of men who were subjected to sexually harassing behavior did not report it. 11 The decision to not report was made by these large percentages of employees despite the fact that 85-90% of them reported that they had received the policies setting out the employer’s complaint procedures. 12

Yet simply because women employees often do not officially complain about the sexual harassment to which they are subjected does not equate to a wholesale failure by women employees to respond in any way or otherwise fail to avoid harm. Too often this flawed logic is articulated in cases and studies of the workplace. 13 For instance, in Jones v. District of Columbia the Court correctly identified that the affirmative defense to liability in part focuses on whether the plaintiff “avoid[ed] suffering harm by taking some action.” 14 Nonetheless, despite this accurate assertion of the rule, the court failed to actually analyze the “avoid harm otherwise” component. Therefore, the court failed to analyze whether the plaintiff avoided harm when, in response to a sexual advance, the plaintiff screamed, causing another employee to intervene and stop the advances. 15 The court also failed to analyze whether the plaintiff avoided harm when she told the harasser to stop. 16 This decision demonstrates the pervasive gap between what employees do when they are sexually harassed and what they are credited with doing. The gap seems to result in part from the expectations of suitable responses by the observer or judge of the action. If the expectation is that an employee must respond to sexual harassment by filing a complaint, then all other actions – including those attempts to stop the harassment or mitigate other harms from being sexually harassed – become nonactions or invisible.

10Specifically, 30% of the women subjected to sexually harassing behavior reported the behavior in 2002 versus 35% who reported in 1995. Id.
12Id. The Survey included the reasons such persons gave for not reporting the sexual harassment. These reasons included social reprisals, they believed they had taken care of the problem themselves, they did not feel that the it was important enough to report, they felt uncomfortable with reporting, they did not think anything would be done if they reported, and they feared that they would be labeled a troublemaker if they reported. Id.
15Id. at 33, 51.
16Id.
This gap is also evident in conclusions and findings made from workplace studies. For instance, a federal workplace study often categorized employees’ responses to sexual harassment as “inaction.” Specifically, in its report, the Merit Systems Protection Board (MSPB) stated that “the most frequently occurring reaction to sexual harassment is inaction. The single most common response of employees who are targets of sexually harassing behaviors . . . has been, and continues to be, to ignore the behavior or do nothing.”

At the same time, however, the report catalogued a vast range of complex employee responses to sexual harassment, including confronting the harasser, avoiding the harasser, and threatening to tell others about the harassment. Such responses stand in stark contrast to the conclusion that employees largely fail to act, as mentioned above. Subsequent studies showed similarly that employees subject to sexual harassment take many actions in response to sexual harassment. Perhaps highlighting the invisibility of such responses to sexual harassment is the 2002 Armed Forces Survey which gathered data on but then did not publish the broad array of responses taken in response to sexual harassment. Instead, the only responses that the Survey reported and analyzed were employees’ official reports of the harassment. The fact that this information was

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18 Id. at 29-33. Specifically, the report stated that 35% of victims of sexual harassment asked or told the harasser to stop; 28% avoided the harasser; 15% made a joke of it; 12% reported it to a supervisor or other friend; 10% threatened to tell or told others; and 7% went along with the behavior. The report found that 44% of the victims ignored it or did nothing. As discussed by Louise Fitzgerald, “doing nothing” was found by those studies that failed to explore the multiplicity of responses, asked open-ended questions about responses and permitted internal responses to be included in survey responses. Louise F. Fitzgerald et al., Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment, 51 Journal of Social Issues 51(1) 1995: 117-138 (1995) [hereinafter Fitzgerald, Why Didn’t She Just Report Him?].
19 Question 65 of the Armed Forces 2002 Sexual Harassment Survey asked “To what extend did you . . . a. Try to avoid the person(s) who bothered you? B. Try to forget it? C. Tell the person(s) you didn’t like what he or she was doing? D. Stay out of the person’s or persons’ way? E. Tell yourself it was not really important? F. Talk to some of your family about the situation? G. Talk to some of your coworkers about the situation? H. Talk to some of your friends about the situation? I. Talk to a chaplain or counselor about the situation? J. Try to avoid being alone with the person(s)? K. Tell the person(s) to stop? L. Just put up with it? M. Ask the person(s) to leave you alone? N. Blame yourself for what happened? O. Assume the person(s) meant well? P. Pray about it Q Pretend not to notice, hoping the person(s) would leave you alone? R. Do something else in response to the situation?” RACHEL N. LIPARI AND ANITA R. LANCASTER, ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY, supra note 9, App. A, p.12. The results were not included in the survey but Rachel Lipari did provide the underlying raw data to this author. See JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2 (Aug. 2003) (on file with author).
20See supra note 19.
not reported underscores the premise of this article, which is that responses other than reporting are not being discussed in any systematic way – in workplaces, in workplace studies, or in the law. Indeed, the label of “inaction” for any response to sexual harassment that is not officially reporting the sexual harassment can be seen in legal scholarship as well.\footnote{Murr, supra note 4 at 609 (stating that under certain circumstances, inaction, defined as a failure to officially report sexual harassment, may be reasonable).}

This article seeks to bridge this ongoing gap by bringing the reality of employees’ harm avoidance actions into sexual harassment doctrine and theory.\footnote{See generally Beiner, Sex, Science and Social Knowledge, supra note 4 (discussing the inconsistency between the legal requirement that women complain about workplace sexual harassment and the social science research showing women employees rarely complain). See also, Chamallas, supra note 7, at 374 (“In marked contrast to the expectations reflected in the legal doctrine, the social science research on employees’ responses to harassment has consistently found that very few victims pursue complaints through official grievance procedures.”); Grossman, Culture of Compliance, supra note 4, at 27.} The sexual harassment liability legal framework is charged with crediting women employees’ actions to avoid harm and therefore the documented reality of employees’ actions taken to avoid harm needs to be included in this analysis. This gap can only be repaired if employees, employers, lawyers, judges and scholars understand and recognize all of the sexual harassment harms and avoidance mechanisms thereto that need to be accounted for in determining liability.

Specifically, this article focuses on women employees’ responses to sexual harassment: the ways in which they are harmed by the sexual harassment, beyond the act of sexual harassment itself; the ways in which they respond to those harms, beyond simply reporting the sexual harassment; and the effectiveness of those responses in avoiding the multiple harms of sexual harassment. By recognizing these harm avoidance actions, this article hopes to reframe the discussion of employees’ actions in response to sexual harassment from failures to report to complex amalgamations of harms and the effects of employees’ responses thereto in mitigating or otherwise avoiding the damages from their supervisors’ sexual harassment.\footnote{As many commentators have noted, the focus on female employees’ failure to complain about sexual harassment echoes the much critiqued focus on females’ failure to leave their abusers when subjected to domestic violence. Martha R. Mahoney, Gender, Race, and Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings, 65 S. CAL. L. REV. 1283 (1992) (noting that Anita Hill’s failure to leave her job with Clarence Thomas was raised to dispute the truthfulness of her sexual harassment claims, just as battered women’s mere presence in an abusive relationship raises questions about her claims); Kathryn Abrams, Subordination and Agency in Sexual Harassment Law, in DIRECTIONS IN SEXUAL HARASSMENT LAW 113 [hereinafter Abrams, Subordination and Agency] (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Chamallas, supra note 7, at 375 (contending that asking a sexual harassment or domestic violence victim why she did not complain or leave is in fact insinuating that the abuse or harassment either did not occur or was not serious).}
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As stated above, women employees who are sexually harassed experience a wide range of harms and employ a wide range of strategies to avoid the harm. The multiple forms of harms resulting from sexual harassment include the sexual harassment itself, the stigma of discrimination, the resulting tangible job harm, such as a termination or nonpromotion, the resulting intangible job harm, such as an abusive work environment and loss of employment advancement, economic harm, and emotional, psychological and physical harm. In response to these harms, women who are sexually harassed utilize a wide range of strategies to avoid these harms, such as avoiding the harasser, objecting to the harasser, formally complaining

25 Throughout this article I will refer to the sexually harassed employee as female. This decision is in part based on the statistical information showing that women are more frequently sexually harassed in the workplace than men. About 50% of women will be subjected to sexual harassment during their working lives, as opposed to only between 14-17% of men. Deborah Erdos Knapp, et al, Determinants of Target Responses to Sexual Harassment: A Conceptual Framework, 1997, 22 Academy of Management Review No. 3, 687-729, 687 (citing Fitzgerald, L.F. & Shullman, S.L., 1993, Sexual Harassment: A Research Analysis and Agency for the 1990s, Journal of Vocational Behavior, 42:5-27; Gutek, B.A., Sex and the Workplace: Impact of Sexual Behavior and Harassment on Women, Men, and Organizations, 1985, San Francisco: Jossey Bass; Martin, M., Sexual Harassment in the Military: 1988, 1988 Arlington, VA: Defense Manpower Data Center; Mazer, D.B. & Percival, E.F., 1989, Students’ Experience of Sexual Harassment at a Small University, Sex Roles 20:1-22; U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? (1981); U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Government: An Update (1988). In addition, The Armed Forces 2002 Sexual Harassment Survey found that more women than men reported experiencing sexual harassment (24% women vs. 3% men). Rachel N. Lipari and Anita R. Lancaster, Armed Forces 2002 Sexual Harassment Survey, supra note 9, at iv. Specifically, 45% of women and 23% of men reported experiencing “crude/offensive behavior;” 27% of women and 5% of men reported being subjected to “unwanted sexual attention;” 8% of women and 1% of men experienced “sexual coercion;” 3% of women and 1% of men reported experiencing “sexual assault.” Id.

The decision to discuss women employees in this article is also based on the fact that women work at the interstices of various power hierarchies, such as those inherent in supervisor/subordinate and male/female relationships that affect the operation of power in the workplace. Abrams, Subordination and Agency, supra note 24, at 113. See also Faragher, 524 U.S. at 803 (recognizing that the supervisor’s power invests his harassing conduct of a subordinate employee with a particular threatening character).

26 See infra notes 81 to 134 and text accompanying thereto. This paper, as with many other articles discussing sexual harassment, relies upon social science research in discussing the real experiences of women employees who are subjected to sexual harassment. E.g. Beiner, Women’s Stories, supra note 4 at 131-141 (discussing social science and medical science research explaining women employees’ reluctance in reporting sexual harassment to critique the promptness requirement for employees’ reporting under Faragher and Ellerth affirmative defense); and Grossman, First Bite is Free, supra note 4, at 723-729 (discussing social science research regarding victim response to sexual harassment as informing the need for additional employer actions, such as sexual harassment training, and the “reasonableness” of the victim’s response). See also, Holly D. v. California Institute of Technology, 339 F.3d 1158, 1179 n. 24 (citing to Dr. Fitzgerald’s research regarding women employees’ responses to sexual harassment, Ninth Circuit states that “in some cases, a victim’s particular circumstances may render the failure to seek relief through the employer’s available procedures objectively reasonable.”).
about the sexual harassment, seeking support from friends and family, and ignoring thoughts about the sexual harassment and denying that the harassment occurred.

To date most courts and scholars have not recognized the meaning and potential power of the “avoid harm otherwise” component of the affirmative defense.²⁷ In part, this results from the broader discourse’s narrow construction of the concepts of “harm” and “avoid harm” when discussing the affirmative defense to liability.²⁸ In general, judges, lawyers and academics have discussed “harm” as solely synonymous with the act of sexual harassment itself, such as sexual touching or advances.²⁹ They have discussed “avoiding harm” as only an employee’s complaint to the employer about sexual harassment.³⁰ As a result, the discourse by courts, lawyers and scholars

²⁷ THERESA BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 172-73 (NYU Press 2005) [hereinafter, BEINER, GENDER MYTHS] (recommending that the “avoid harm otherwise” language is so vague that it should be eliminated); Taylor, supra note 4, at 655 (limiting the applicability of “avoid harm otherwise” component to small employers or employees who invite the harassment) (citing Faragher, 524 U.S. at 805-08); Harper, supra note 4, at 80-81 (limiting “avoiding harm otherwise” to avoiding harassment only as opposed to other harms). See e.g. Taylor v. United Reg’l Health Care Sys., Inc., 2001 WL 1012803, *8 (N.D. Tex. 2001) (court completely omitting the “avoid harm otherwise” component from the employee-focused prong).

²⁸ See infra notes 81 and 231. But see Chamallas, supra note 7, at 314 (“I urge recognition of the interrelationship between economic harms on the one hand and psychological harms on the other. Because one type of harm frequently coexists with the other, or tends to produce the other, I believe it is futile and unwise for courts to try to draw sharp lines between economic and other losses. Instead, each should be treated as a legitimate, job-related injury worthy of compensation.”); Murr, supra note 4 at 605-634 (arguing for contextualized fact finding regarding whether the individual employee unreasonably failed to avoid harm if she decided to submit to the sexual harassment given her credible fear of retaliation that could result in career or financial harm).

²⁹ Marks, supra note 4, at 1420-37, 1446 (in aptly critiquing the lower courts’ conversion of the harm-avoidance doctrine to a contributory negligence doctrine, Marks nonetheless equates harm to sexual harassment and harm-avoidance to formal complaints); Grossman, The First Bite, supra note 4, at 707-08 (stating that within the context of the affirmative defense to liability, as opposed to damages, harm must mean the “legal . . . harm” that attaches “when an actionable hostile environment matures” not the subjective harm felt by the employee subjected to any unwelcome sexual touching, gesture or comment regardless of its severity or pervasiveness); DiLorenzo & Harshbarger, supra note 4, at 13-15 (discussing the fact that the affirmative defense inappropriately focuses on the harm plaintiff has sustained not for damages purposes but for liability determinations); Grossman, Culture of Compliance, supra note 4, at 21-22 (discussing the employee-focused prong as requiring prompt complaints of sexual harassment and cooperation with investigations); But see Murr, supra note 4, at 614 (providing a slightly expanded but generalized view of harm to include submitting to the sexual harassment, job detriment resulting from a failure to submit and emotional harm resulting from the sexual harassment).

³⁰ Marks, supra note 4, at 1420-37, 1446 (in aptly critiquing the lower courts’ conversion of the harm-avoidance doctrine to a contributory negligence doctrine, Marks nonetheless equates harm to sexual harassment and harm-avoidance to formal complaints); Grossman, The First Bite, supra note 4, at 707-08 (stating that the only harm a plaintiff could avoid entirely is one where the “hostile environment develops gradually” because then “the plaintiff might have the opportunity to complain before any
often has focused only on what a woman employee did not do, namely failing to file a formal complaint of sexual harassment pursuant to the company’s policy. The employee is perceived as having not responded; the many actions actually taken by the employee to avoid harm are rendered hidden and insignificant.

Instead, the concepts of “harm” and “avoid harm” should reflect and account for the actual experiences and actions taken by women employees subjected to supervisor sexual harassment. The resuscitation of the full meaning of harm and avoidance of harm within women employees’ lives in response to sexual harassment provides the opportunity to correct for the to-date unrealistic discussion in legal discourse and in the workplace about sexual harassment. As such, women’s agency, women’s choices, acts of resistance, self-direction and self-definition within the broader context of systemic oppression through sexual harassment, come into sharper focus.

A more inclusive depiction of women employees’ injuries from and responses to sexual harassment would far better inform liability determinations based on their efforts to “avoid harm.” Through this process, there is an opportunity to reveal the existing reality that highlights women’s agency but often is obscured with the dominant picture of a sexual harassment victim as “suffering in silence.”

Part I of this article discusses the development of the affirmative defense to employer liability for supervisor sexual harassment. Part II of this article relates a legally recognizable harm was done.”); Murr, supra note 4, at 614 (identifying harm avoidance as either submitting to the sexual harassment or reporting the sexual harassment).


32 Beiner, Women’s Stories, supra note 4, at 139 (stating that women’s active response of avoiding the harasser and the harassment are instead seen a “‘doing nothing’ by the court.”).

33 Beiner has also discussed the Court’s failure to reflect the reality of sexual harassment and how it operates in the workplace in discussing other aspects of the affirmative defense. Id. at 117.

34 Id. at 117-18.

35 Abrams, Subordination and Agency, supra note 24, at 112-114.


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

I. AFFIRMATIVE DEFENSE TO SEXUAL HARASSMENT

In 1998, the Supreme Court articulated a specific liability scheme for sexual harassment committed by a supervisor (hereinafter “supervisor sexual harassment”). This articulation provided guiding principles for such liability determinations and created an affirmative defense based upon those principles. The Court articulated this framework in two companion cases, Burlington Indus. v. Ellerth and Faragher v. City of Boca Raton. Specifically, the proof framework required that once a court had determined that a supervisor sexually harassed an employee, the next inquiry was whether liability for the sexual harassment could be imputed to the employer. The Court determined that employers were to be held vicariously liable for supervisor sexual harassment. If the supervisor sexual harassment resulted in a tangible employment action, such as a firing or a demotion, the employer would be automatically liable and was given no affirmative defense to such liability. On the other hand, if the sexual harassment creates a hostile work environment without any tangible employment action, the employer would be vicariously liable subject to “a two-part affirmative defense.” Under the defense, to be free of liability the employer had to prove successfully both parts of the test. Under the first part, the employer must prove “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” (hereafter the “employer-focused

38524 U.S. 742, 118 S. Ct. 2257.
39524 U.S. 775, 118 S. Ct. 2275.
40Ellerth, 524 U.S. at 765; Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir. 1998) (employer presumed to be absolutely liable for supervisory sexual harassment, as opposed to co-worker harassment, for which the employer will only be liable for negligence); McPherson v. City of Waukegan, 379 F.3d 430, 439 (7th Cir. 2004).
41See supra note 2.
42Id.
43Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
44Id.
prong”). Under the second part, the employer must prove “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (hereafter the “employee-focused prong”).

In crafting the entire affirmative defense, the Supreme Court relied upon a number of principles. Below, this section focuses on the harm avoidance doctrine because it is the specific principle that the Court articulated as the basis for the “avoid harm otherwise” component of the employee-focused prong.

As stated above, the Court relied upon the avoidable consequences doctrine in creating the affirmative defense in general and the “avoid harm otherwise” component of the employee-focused prong of the affirmative defense in specific. The Court stated that the employer should be permitted to show an affirmative defense to automatic liability that both showed it “had exercised reasonable care to avoid harassment and to eliminate it when it might occur” and that the complaining employee had failed to act with like reasonable care to take advantage of the employer’s safeguards or otherwise to prevent harm that could have been avoided.

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45 Id.
46 Id.
47 The Supreme Court discussed such animating principles as harm avoidance, common law agency, respondeat superior, conciliation and notice in crafting the affirmative defense. I do not discuss the common law agency and respondeat superior principles at length in this article because, in the end, the Court crafted the “avoid harm otherwise” requirement based on harm avoidance principles. Ellerth, 524 U.S. at 763 (developing the affirmative defense based on other principles because the aided in the agency relationship had not developed enough to help clarify further whether automatic liability should attach in supervisor hostile environment sexual harassment cases).
48 See Greene v. Dalton, 164 F.3d 671, 674 (D.C. Cir. 1999) (citing Faragher, 118 S. Ct. at 2292) (“The ‘failure to avail’ standard is not intended to punish the plaintiff merely for being dilatory. Rather it reflects an . . . obvious policy imported from the general theory of damages,’ namely that the victim has a duty to mitigate her damages. . . . ‘If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and . . . no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.’”); Faragher, 524 U.S. at 2292. See also Savino v. C.P. Hall Co., 199 F.3d 925, 935 (7th Cir. 1999) (stating that the second prong incorporates the avoidable consequences doctrine). Murr, supra note 4 at 609-612 (discussing the Supreme Court’s reliance on the avoidable consequences doctrine in crafting the employee-focused prong).
49 This is encompassed in the employer-focused prong.
50 This is encompassed in the first component of employee-focused prong.
51 This is encompassed in the “avoid harm otherwise” or second component of the employee-focused prong.
52 Faragher, 524 U.S. at 806. In addition, the Court stated that “a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.” Id. at 806.
The avoidable consequences doctrine focuses on the mitigation of injuries and damages. One of Title VII’s primary objectives, according to the Court, is to prevent harm. Accordingly, the harm avoidance rationale is a basis for both the employer- and employee-focused prongs of the affirmative defense. Specifically, the Court found that the employer-focused prong which requires the employer to “exercise reasonable care to prevent and correct promptly any sexually harassing behavior” explicitly underscored an employer’s obligation to prevent violations of the statute, identified as acts of sexual harassment, and correct the behavior if violations occur. The Court indicated that reasonable prevention would include an employer having an anti-harassment policy and effective, reasonable procedures by which an employee subjected to sexual harassment could report and resolve the behavior. Reasonable corrective efforts would include an employer taking prompt remedial action to deal with the sexual harassment.

The Court also stated that the employee-prong of the affirmative defense to liability and damages for supervisor sexual harassment was consistent with the policy rationale of harm avoidance by the employee. The defense only credits an employer who takes reasonable care to prevent and correct sexual harassment in the workplace if the employee did not fulfill her equally important “coordinate duty” to avoid or mitigate harm. As one commentator has stated, “the Court’s simple pronouncements [in Faragher and Ellerth] require that employers be held liable . . . for harm that the victimized employee could not have avoided through reasonable

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53See id. at 807 (basing its holding on “the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees”); Ellerth, 524 U.S. at 764 (declaring the Court is bound by precedent that seeks to promote Congress’ goal of “conciliation rather than litigation” in Title VII disputes). See also Marks, supra note 4, at 1439-40 (“the Court sought ‘to accommodate’ a comprehensive range of competing principles and policies: specifically, the panoply of agency principles counseling in favor of vicarious liability when supervisors abuse their power, versus policies of prevention and mitigation furthered by limiting liability when employers exercise forethought and employees fail to pursue reasonable harm-avoidance strategies.”)

54Faragher, 524 U.S. at 805-806; Ellerth, 524 U.S. at 764.

55Faragher, 524 U.S. at 806 (citing to EEOC policy statements that provide employer incentives to prevent sexual harassment through the establishment of complaint procedures).

56Id. at 806-07.

57See Faragher, 524 U.S. at 807 (stating that while proof that an employer had an anti-harassment policy and a complaint procedure is not necessary as a matter of law, the need for such a policy may be addressed when litigating the first prong of the affirmative defense). See also Ellerth, 524 U.S. at 764 (noting Title VII is designed to promote effective grievance mechanisms).

58Faragher, 524 U.S. at 806.

59Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 765. Marks, supra note 4, at 1445-1446. See also McCormick, HANDBOOK ON THE LAW OF DAMAGES at 128 (“[I]t seems more realistic to recognize that denial of recovery for avoidable injury is really a doctrine restricting the limits of liability for the reasons of social and economic policy . . . .”).
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care. As such, the entire defense focuses on not only the employer’s duties to prevent and correct sexual harassment, but an employee’s duty (to be proven by the employer) to avoid harm.61

Regarding the employee-focused prong, the Court provided two ways in which the employee might meet her duty: either she could avail herself of the employer’s preventive or corrective opportunities or she could avoid harm otherwise.62 In Faragher, the Court identified that a sexual harassment “victim has a ‘duty to use such means as are reasonable under the circumstances to avoid or minimize the damages’ that result from violations of the statute.”63 This policy, the Court stated, was imported from the general theory of damages.64 The Court grounded the employee-focused prong in tort law’s “avoidable consequences” doctrine, which governs mitigation of damages by plaintiffs after the harm has occurred.65 This doctrine is distinct from the doctrine of “contributory negligence,” which is a liability concept that discusses plaintiff’s duty to take measures to stop the harm before it occurs.66

By justifying the affirmative defense’s focus on the employee’s duty to avoid harm as relating to the avoidable consequence doctrine, as opposed to the contributory negligence doctrine, the Court dictates that employers focus on actions taken by employees after experiencing harm when invoking the affirmative defense

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60 Marks, supra note 4, at 1435.
61 Suders, 542 U.S. at 146 (reiterating that in proving an affirmative defense to liability, the defendant bears the burden of proving that plaintiff could have reduced her loss or avoided harmful consequences). The Court clarified that plaintiff may, but is not required to, make factual allegations showing her acts to avoid or mitigate harm in anticipation of the employer’s affirmative defense. Id. at 152.
62 Faragher, 524 U.S. at 806-07 (“If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.”)
63 Faragher, 524 U.S. at 806 (internal citations omitted); see also Holly D. v. California Institute of Technology, 399 F.3d 1158, 1178 (9th Cir. 2003) (the employee-focused prong of the defense is intended to address victim’s duty to avoid or minimize her damages).
64 Faragher, 524 U.S. at 806-07.
65 Id. (stating the employee’s duty to avoid or mitigate harm reflects policy incorporated from general damages theory); Ellerth, 524 U.S. at 764 (“As we have observed, Title VII borrows from tort law the avoidable consequences doctrine. . . and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.”); Murr, supra note 4 at 535 (stating that the second prong of the affirmative defense is based on the avoidable consequences doctrine and associated with mitigation of damages).
66 McCormick, supra note 59, at 128-29, 129 n.7 (where the plaintiff is negligent prior to defendant’s wrongdoing, then under the doctrine of contributory negligence, plaintiff is barred from any relief; if later after defendant’s wrongdoing, plaintiff does not reasonably avoid damages then under the doctrine of avoidable consequences, plaintiff is entitled to relief but her recovery is limited to any enhancement of damages caused by her subsequent negligence).
to liability determinations in supervisor sexual harassment cases. If an employee’s “damages could reasonably have been mitigated[,] no award against a liable employer should reward a plaintiff for what her own efforts could have avoided” as well. As stated by one commentator, “under [the avoidable consequences] doctrine, the employer’s task is one of causal apportionment. To fully avoid liability, the employer must prove that the plaintiff unreasonably failed to avoid all harm; otherwise, the doctrine of avoidable consequences allows imposition of liability, subject to ‘mitigation’ of damages that the plaintiff unreasonably failed to avoid.” If the employee “could have avoided suffering harm by taking some action that a reasonable person in the plaintiff’s position would likely take,” and if she does not take that action, then the employer should not be liable. Another commentator underscored the importance of analyzing the reasonableness of the harm avoidance actions taken in determining liability. For instance, if the plaintiff submitted to the sexual harassment rather than reported it because she reasonably calculated that she would lessen her job-related harm of possible retaliation and economic harm of lost

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67 Id; Ellerth, 524 U.S. at 764 (citing Ford Motor Co. v. EEOC, 458 U.S. 219, 232, n.15 (1982)) (stating that "the general rule" of avoidable consequences is "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided. C. MCCORMICK, LAW OF DAMAGES 127-158 (1935).") See also Holly D. v. California Inst. of Tech., 339 F.3d 1158, 1178 (9th Cir. 2003) (citing Faragher, 524 U.S. at 806) (the second prong is based upon damages theory that a victim has a duty to avoid or mitigate damages through reasonable means).

It should be noted that the Court is almost but not always consistent in its recitation of the avoidable consequences doctrine. In Faragher, the Court at one point seemingly confuses the avoidable consequences doctrine with the contributory negligence doctrine. Specifically, the Court states that if the employee unreasonably failed to avoid the sexual harassment, liability is barred against the employer. Faragher, 524 U.S. at 807. Although the Court made this statement within its broader discussion of the avoidable consequences doctrine, this reasoning seems grounded in contributory negligence doctrine. As one commentator noted, contributory negligence is “a largely rejected defense from antiquated tort law. . . .” Marks, supra note 4, at 1445. This is because “the defense ‘departed seriously from ideals of accountability and deterrence because it completely relieved the defendant from liability even if he was by far the most negligent actor.’” Id. at 1445 n.248 (citing DAN B. DOBBS, THE LAW OF TORTS 494 (2000)). Accordingly, the contributory negligence defense has been rejected and “largely replaced with various systems of ‘comparative fault’ that generally attempt to apportion accountability based on the relative fault of the parties . . . .” Marks, supra note 4, at 1445 n. 248. Accordingly, given the disfavor of contributory negligence and the fact that the Court only made one isolated reference to the doctrine, it cannot be given much significance here. Rather, because the Court discussed at length the avoidable consequences doctrine it is the animating principle of the “avoid harm otherwise” component.

68 Faragher, 524 U.S. at 807.
69 Marks, supra note 4, at 1420.
70 Murr, supra note 4, at 613-615 (recognizing that economic and job-related harms can result from sexual harassment and that the calculation of avoiding harm by either submitting to the sexual harassment or reporting the sexual harassment has to be evaluated based on which action more reasonably would be effective at avoiding harm)
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wages if fired, then the plaintiff’s harm avoidance actions should be evaluated under a reasonableness standard.72

In crafting the affirmative defense, the Supreme Court rejected Justice Thomas’ concerns raised in his dissenting opinion in Ellerth, that “employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.”73 Indeed, the EEOC’s Enforcement Guidance illustrates the harm-avoidance rationale by stating that the employer will not successfully establish the affirmative defense if the employee made efforts other than utilizing the complaint process in order to avoid harm.74 Some examples provided by the EEOC include “a prompt complaint by the employee to the EEOC or state fair employment practices agency while the harassment is ongoing”75 or “a staffing firm worker who is harassed at the client’s workplace might report the harassment either to the staffing firm or the client, reasonably expecting that either would act to correct the problem . . ..”76 Of course, the EEOC’s Guidance does not portend to provide exhaustive examples of harm avoidance actions by employees or to address directly many of the harms and avoidance mechanisms this paper seeks to identify. Nonetheless, the Guidance is helpful in illustrating that harm avoidance mechanisms other than filing a grievance with the employer should be recognized in liability determinations under the affirmative defense.

One commentator provides the following helpful analogy from the Restatement of Torts in order to explain the avoidable consequences doctrine and what types of harm and harm avoidance mechanisms are included in the analysis.77

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

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72 Id. at 614-15.
73 Marks, supra note 4, at 1440 (citing Ellerth, 524 U.S. at 773 (Thomas, J., dissenting)).
75 Id. (citing Watts v. Kroger Co., 170 F.3d 505, 510 (8th Cir. 1999)).
76 Id. (explaining that both the staffing firm and the client may be responsible for taking corrective action).
77 Murr, supra note 4, at 613-14.
In a second scenario . . . , the same tort victim suffers the same bodily injury but is faced with additional risks relevant to her decision-making process. Although the victim in this second scenario realizes that her injury likely requires prompt expert treatment, seeking such treatment would require traveling ten miles over treacherous ice-covered roads. Due to the hazards of travel, the victim waits until the following day to go to the nearest physician. Because of the delay the victim suffers further injury. Under circumstances such as these where the victim is choosing between two potentially costly or harmful alternatives, harm-avoidance principles dictate that a trier of fact may reasonably conclude that the victim did not act unreasonably in delaying professional treatment. If the trier of fact so concludes, the victim can recover for the additional damages caused by the delay in seeking treatment. What makes the second scenario different from the first are the circumstances facing the victim – two competing alternatives each with a corresponding potential harm – when she is deciding upon the appropriate course of action. The potentially different outcome in the second scenario is driven by a cost-benefit analysis of the two competing alternatives.\(^78\)

In the second example provided above, the victim’s harms include her original bodily injury, the exacerbation of her original bodily injury due to her delayed treatment, and the potential additional harm from a car accident due to the icy conditions. The harm avoidance mechanisms in the second example include expert treatment for the bodily injury, which would mitigate the original injury and avoid the harm of exacerbation to that injury, and not driving on the treacherous ice-covered roads. Accordingly, here the harm avoidance analysis is a cost-benefit analysis of the multiple harms which would be avoided or exacerbated by the potential harm avoidance actions. As seen in this example, seeking expert treatment can reduce or eliminate the bodily injuries but may create a new injury. Therefore, whether or not this action must or should be taken for harm avoidance requires a balancing of the harms and how they might be impacted by the actions. Under the Restatement of Torts, harm avoidance analyses requires an understanding that certain actions may not only decrease specific harms but can also increase other harms. As a result, a determination of whether an individual avoided harm needs to consider the cost-benefit analysis involved in the individual’s decision-making as to her course of action to avoid harm.\(^79\) To make this determination, the fact finder must consider all harms, all harm avoidance mechanisms and all of the varying and multiple effects on harms that will result or do result from the harm avoidance actions. It is this complex analysis that has been missing and that needs to be introduced into the liability determinations.

\(^{78}\)Id. (citing RESTATEMENT (SECOND) OF TORTS § 918 illus. 1 and 10 (1979)) (internal citations omitted).

\(^{79}\) Murr, supra note 4, at 613-14.
Accordingly, applying the avoidable consequences doctrine to sexual harassment cases, a court must consider the employees’ broad range of harms resulting from the sexual harassment and the employees’ attempts and successes at avoiding the harm. In determining whether an employee avoided harm otherwise, a court must consider the cost and benefit of each harm avoidance action available to the employee in its ability to avoid and effectiveness at avoiding all harms from sexual harassment.

In order to provide context to the harm avoidance analysis, the next section provides a brief discussion of a woman employee’s experience with sexual harassment and the harms to which she is subjected and the harm avoidance actions she takes.

II. Lena’s Story

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

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

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

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

As time passes, Lena is upset with the emotional toll and the toll on her work. She talks to Karen, who says that it sounds like Dave is sexually harassing Lena. Karen asks Lena whether the company has a sexual harassment policy and Lena says it does. Lena investigates the policy and learns she can complain to the Director of Human Resources, her supervisor, and her supervisor’s supervisor. Lena doesn’t want to complain to an official at the company. For one thing, she worries that Karen is wrong and this isn’t sexual harassment. After all, Victor didn’t seem alarmed by it. Also, Lena is worried that her co-workers won’t back her up and will make fun of her, as Victor had. And, she worries about how she will be able to do her job after Dave and the others learn that she complained about him. None of them will probably ever speak to her again. Lena doesn’t think that the risk of losing her job is worth reporting the behavior.

III. EMPLOYEES’ HARMs FROM SEXUAl HARASSMENT AND THEIR HARM AVOIDANCE MECHANISM

Using Lena’s story, this section will explore all of the harms to which employees are subjected from sexual harassment and all harm avoidance actions taken in order to better analyze and make liability determinations. If Lena did bring suit, the court most likely would ask the parties to address the question of employer liability early on in the litigation. As stated above, the affirmative defense requires the employer to prove both (a) “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and (b) “that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”80

In determining liability and addressing the employee-focused prong, this article argues that the employer should need to identify Lena’s harms from the sexual

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80 Faragher, 524 U.S. at 807 (emphasis added); Ellerth, 524 U.S. at 765 (emphasis added).
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harassment, Lena’s responses to the various harms, and whether and how those responses might or might not have assisted in her avoidance of harm or mitigation of damages. All of these factors should be relevant to a determination of whether Lena avoided harm as required under the affirmative defense to sexual harassment liability.

A. Harms from Sexual Harassment

Despite its underutilization, the “avoid harm otherwise” component of the affirmative defense is well-suited to unifying the rationales for Title VII and the affirmative defense with the reality of women employees’ experiences with sexual harassment. The job-related, economic and psychological harms are intertwined injuries resulting from sexual harassment and should be analyzed as such in liability determinations.81

Many sources, including the law, workplace studies and social science studies, identify the multiple harms resulting from sexual harassment. Harm is more complex and varied than a discrete act of discrimination – such as a termination based on one’s sex. Rather, harm includes all the multiple injuries that result from the discrimination in addition to the discrimination itself. Under Title VII, harm has had a distinct meaning that is more extensive than the discriminatory act. For instance, Title VII, as originally enacted, makes illegal and remedies harm that results from the discrimination, tangible employment harm, such as being fired, not hired and demoted, and intangible employment-related harm, such as the altering of an employee’s terms and conditions of employment.82

In addition, a broad notion of harm in sexual harassment cases is consistent with the Civil Rights Act of 1991, which amended Title VII. The Civil Rights Act of 1991 recognizes other forms of harm resulting from actionable discrimination under Title VII, such as emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life.83 As explained in the legislative history of the Act, many harms of discrimination were identified for compensation: “terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”84

The Supreme Court’s own definition of “sexual harassment” indicates that the harm from sexual harassment is broader than simply the acts of harassment. For

81 Cf. Chamallas, supra note 7, at 384-85 (discussing the reality that women employees suffer economic and psychological harms as job-related injuries resulting from sexual harassment).
82 42 U.S.C. §2000e et seq.
84 H. Rep. No. 102-40(I), at 64-65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602-03. As one commentator has noted, despite the recognition of both economic and psychological harms under Title VII, courts have tended to prioritize the economic harms as job-related over psychological ones, creating unnecessarily a hierarchy of harms. Chamallas, supra note 7, at 386.
example, the Court has held that the sexually harassing behavior has to be severe or pervasive in order to be legally cognizable. As discussed earlier, under Harris, the employee herself has to feel that the harassment is severe and pervasive and the harassment has to be severe and pervasive to the reasonable person. Accordingly, the subjective perception of the behavior contributes to whether or not the harassing behavior is seen as rising to a legal harm of sexual harassment. An employee’s acts to avoid other forms of harm, including her subjective perception of the harassment, may prevent the abusive conduct from becoming subjectively severe or pervasive. Indeed, such avoidance mechanisms that target the employee’s psychological and emotional response to the harassment could be effective in even those instances where the abusive conduct would not result in severe psychological harm or injury.

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

In Faragher, the Court described the meaning of harm as those damages resulting from sexual harassment and that need to be avoided or mitigated in order to “avoid harm” under the affirmative defense. Specifically, the Court stated that if the plaintiff unreasonably failed to use the employer’s complaint and grievance

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85 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”)

86 It is important to note that tangible psychological harm or injury is not required for a hostile work environment to violate Title VII. Id. at 22; Marks, supra note 4, at 1433 (“Without knowing [the] point of accrual [when the hostile environment becomes severe or pervasive], there can be no sensible application of the avoidable consequences doctrine, at least not as that doctrine was explained in Greene (and in the EEOC Enforcement Guidance).”) Discussing only the harm of sexual harassment, Marks states that only if plaintiff’s dilatory behavior in reporting contributes to the sexual harassment should it impact recovery. Id. at 1434-35. Marks therefore notes that the “Harm-avoidance analysis under Ellerth and Faragher thus contemplates the possible avoidance of a truly imprecise and intangible type of legal harm.” Id. at 1449. Specifically, it is imprecise because it is difficult to distinguish between nonactionable and actionable misconduct that does not rest on “actual harm” but legal harm. Id. at 1447-48.

87 Faragher, 524 U.S. at 806-07 (stating that requiring the employer to show that “the employee has failed in the coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize damages’ . . . .”).
mechanisms, the employee should not recover for any damages that could have been avoided by using the mechanisms. Additionally, if the employer would be held liable, no damages should be awarded for harm that could have been mitigated but was not. A commentator succinctly stated that in making the above pronouncements, the Court was incorporating the “harm-avoidance concept,” which does not look at “whether, or to what extent, a negligent plaintiff is blameworthy and thus undeserving of compensation; instead the fact finder tries to determine how much harm the plaintiff should have avoided.”

Much of the law, therefore, has defined harm broadly – from employment to economic to psychological harms. A broad range of injuries resulting from sexual harassment are documented in workplace and other social science studies as well. The 1995 MSPB workplace study estimated the following job-related harms from sexual harassment over a two year period. First, the study documented $4.4 million in lost wages due to the taking of leave without pay. In addition, the study concluded that 973,000 hours of annual leave were taken as a result of sexual harassment. In addition, employees subjected to sexual harassment were terminated, resigned and were reassigned as a result of the sexual harassment. And 21% of the workers subjected to sexual harassment in the federal workplace study reported that they suffered a decline in productivity as a result of the sexual harassment.

88 Id.
89 Id. at 807.
90 Marks, supra note 4, at 1446 (referencing DAN B. DOBBS, THE LAW OF TORTS 510 (2000)).
91 Well before the Supreme Court’s articulation of the affirmative defense to employer liability for supervisor sexual harassment, social psychologists were researching responses to sexual harassment as a way of informing the discourse about whether sexual harassment was “unwelcome.” See generally Fitzgerald., Why Didn’t She Just Report Him?, supra note 18, at 117-138. For a more in-depth discussion of the social science research regarding sexual harassment, including responses to sexual harassment, and their impact on the law see e.g. BEINER, GENDER MYTHS, supra note 27 (discussing social science research regarding the operation of sexual harassment in the workplace and identifying the legal doctrine’s inconsistencies thereto); Krieger, supra note 4, at 177-198 (discussing how social science research on responses to sexual harassment should inform the “reasonableness” of an employee’s failure to use the employer’s preventive and corrective mechanisms under the affirmative defense). In addition, Professor Beiner discusses the “great promise” social science research holds to informing the legal doctrine in sexual harassment cases even though methodological difficulties and the preliminary and incomplete nature of some of the research results in a fit between law and social science research that is not perfect. BEINER, GENDER MYTHS, supra note 27, at 1-14.
93 Id.
94 Id.
95 Id.
The MSPB’s 1995 federal workplace study also documented economic, emotional, psychological and physical harms as a result of sexual harassment. Specifically, the study reported that “[f]or the employees who experience it, sexual harassment takes its toll in the form of mental and emotional stress and even loss of income, if victims leave their jobs or take leave without pay as a result of their experiences.”96 One survey respondent stated “‘My stomach would get sick when I’d hear his chair creak – because I knew he’d be coming back to my desk. I actually even had nightmares involving this man . . . .’”97 Another survey respondent stated “‘He has repeatedly, since I have worked there, said disgusting and vulgar things about women. I have gone home or stayed home many times so I wouldn’t have to face him or hear the remarks he would make throughout the day.’”98 And another survey respondent stated “‘I can perform under normal pressure very well, but added mental stress had reduced my productivity. I had to take time to report, talk about it, seek medical and mental assistance.’”99 Yet another stated “‘I was very upset by his request for a sexual favor. My superior performance rating was lowered by him to fully acceptable. I did not want to hurt his career, but it hurt mine. I felt I must resign. After six months on unemployment, which was very degrading, I returned to work with the government, having to take a downgrade. This experience has left me very bitter and down on myself and my abilities.’”100 And even though a low percentage of victims of sexual harassment received medical or emotional help, many more reported that they would have found such help beneficial.101

Similarly, social science research offers identified categories of harm resulting from sexual harassment beyond the act of discrimination itself. Dr. Louise Fitzgerald defines sexual harassment as a psychological stress where the person subjected to the sexual harassment is harmed because she views her relationship with her environment as taxing or exceeding her resources and endangering her well-being.102 Fitzgerald has identified four categories of harm resulting from sexual harassment. First, her

96MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995) supra note 13, at 23. Similarly, Martha Chamallas has demonstrated that economic and psychological harm are interrelated injuries. See infra notes 128 to 130 and discussion in text therein.
98Id. at 24.
99Id. at 25.
100Id. at 27.
101Id. at 26 (Whereas only 3% of the victims of sexual harassment reported receiving medical or emotional help, 7% found that such help would have been beneficial).

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research identifies a multitude of job-related harms, including decreased satisfaction with co-workers and supervision, work withdrawal or absenteeism, stronger turnover intentions, more time spent thinking about leaving the job, and increased job stress.103 Similar findings have been made by other social psychologists as well.104 Second, Dr. Fitzgerald’s research documents severe psychological harms, such as post-traumatic stress disorder, a decrease in life satisfaction, a worsening of emotional condition, and a decrease in self-esteem.105 Third, she has identified numerous emotional harms, including increased anger, fear, depression, anxiety, loss of self-esteem and feelings of alienation.106 Finally, Dr. Fitzgerald identified physical harms resulting from sexual harassment, such as gastrointestinal disturbances, jaw tightness, teeth grinding, nervousness, binge eating, headaches, inability to sleep, tiredness, nausea, loss of appetite, weight loss and crying spells.107

Others have identified similar harms, even identifying five categories of harm from sexual harassment:“emotional and physical reactions;108 changes in self-perception;109 social, interpersonal relatedness; sexual effects; and career effects.”110

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103 See also, Ellen I. Shupe et al., The Incidence and Outcomes of Sexual Harassment Among Hispanic and Non-Hispanic White Women: A Comparison Across Levels of Cultural Affiliation, PSYCHOLOGY OF WOMEN QUARTERLY 26 (2002): 298-308, 305 (Hispanic women least associated with U.S. culture revealed greater dissatisfaction with work and co-workers when sexually harassed than women more associated with the culture).

104 Knapp, supra note 25, at 688 (those subjected to sexual harassment may experience “career interruption, lower productivity, less job satisfaction, lower self-confidence, loss of motivation, deterioration of interpersonal relationships, and loss of commitment to work and employer”) (citing Crull, 1982; DiTomaso, 1989; Fitzgerald, Hulin & Drasgow, 1994; Fitzgerald et al., 1988; Gutek, 1985; Gutek & Koss, 1993; USMSPB, 1981, 1987).

105 See also Shupe, supra note 103, at 306 (sexual harassment was linked with decreased life satisfaction and increased psychological distress for the Hispanic women who were the study’s participants).


107 Id.

108 Beiner, Sex, Science and Social Knowledge, supra note 4, at 320-21 (citing Karen Maitland Schilling & An Fuehrer, The Organizational Context of Sexual Harassment, in MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL, app. 3, at 129-30.). Some have labeled these effects of sexual harassment as Sexual Harassment Trauma Syndrome. See Beiner, Sex, Science and Social Knowledge, supra note 4, at 320 (citing MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 27, 29-30 tbl. 2.1 (1991)).

109 Beiner, Sex, Science and Social Knowledge, supra note 4, at 320-21 (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 33 (1993))

110 These harms include loss of self-esteem and life satisfaction. Beiner, Sex, Science and Social Knowledge, supra note 4, at 320-21 (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 32-33 (1993)).

111 Beiner, Sex, Science and Social Knowledge, supra note 4, at 318 note 298 (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping
Clearly, there is overlap between the categories. As one commentator has noted, sexual harassment "affects not only career opportunities and job satisfaction but also has personal implications that go beyond the workplace. The impact on victims is somewhat difficult to study because it is multidimensional, including effects on physical health, mental health, and 'work variables including attendance, morale, performance, and impact on career track.'"112

Another study also shows that people subjected to workplace sexual harassment suffer job-related harms and psychological and physical harms.113 And in fact such harms are often interrelated.114 Sexual harassment may affect the interpersonal relationships in the workplace.115 Sexual harassment that involves ostracism of the target of the harassment may lead to additional intangible job harms, such as loss of mentorship, as well as "loss of learning and networking opportunities, which can lead to decreased work opportunities."116 Many studies have shown that supervisor sexual harassment was strongly correlated to decreased job satisfaction as well.117 For instance, one study showed that supervisor sexual harassment correlated to women's "lower levels of satisfaction with work, supervision, and promotion as well as with higher levels of role ambiguity, role conflict, and stress."118 Another showed that sexual harassment of all levels of severity negatively impacted job satisfaction and work productivity.119

In addition, multiple physical harms have been documented as resulting from sexual harassment. These physical harms include "stomach and appetite problems,

112BEINER, GENDER MYTHS, supra note 27 (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 28, 30 (1993)).
113Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 28, 30 (1993).
114See infra note 128-130 and text accompanying thereto.
115BEINER, GENDER MYTHS, supra note 27, at 186.
116Id. (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 28, 31-2 (1993)).
117E.g. id. (citing David N. Laband & Bernard F. Lentz, The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers, 51 INDUS. & LAB. RELATIONS REV. 594, 599-600 (1998)).
118Id. at 187 (citing Paula C. Morrow et al., Sexual Harassment Behaviors and Work Related Perceptions and Attitudes, 45 J. VOCATIONAL BEHAV. 295, 303 (1994)).
119Id. at 187 (citing Vicki J. Magley et al., The Impact of Sexual Harassment on Military Personnel: Is it the Same for Men and Women?, 11 MIL. PSYCHOL. 283, 297 (1999)).
sleep disorders, headaches, and crying spells. But unfortunately, the research is limited as to all of the physical harms of sexual harassment.

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

Of course, the employment-related harms of sexual harassment are tied closely to the physical and psychological harms. One study found that “women who experienced high levels of harassment reported the worst job-related and psychological outcomes; women who were not sexually harassed reported the lowest negative outcomes. Women who reported moderate levels of harassment likewise

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121 BEINER, GENDER MYTHS, supra note 27, at 187 (citing Bonnie S. Dansky & Dean G. Kilpatrick, Effects of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152, 164 (William O’Donohue ed. 1997)).
122 Id. at 187 (citing Barbara A. Gutek & Mary P. Koss, Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment, 42 J. VOCATIONAL BEHAV. 28, 33 (1993)).
123 Id. (citing Jane Goodman-Delahunt & William E. Foote, Compensation for Pain, Suffering, and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims, 13 BEHAV. SCI. & L. 183, 188 (1999)).
124 Id. at 158 (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994)). If someone has suffered PTSD in the past, then less severe forms of sexual harassment can also trigger PTSD. Id.
had significantly worse outcomes than women who were not harassed. Even low levels of harassment increased negative outcomes."\(^{127}\)

Professor Chamallas’ work demonstrating that economic and psychological harm are job-related injuries is highly relevant to sexual harassment harms analysis.\(^{128}\) Chamallas argues that economic injury can lead to psychological harm.\(^{129}\) For instance, when an employer takes an adverse action against the employee, the employee may then suffer from corresponding stress over economic opportunities and job security; similarly, an employee’s psychological distress resulting from the sexual harassment can lead to economic harm because thereafter, the employee may have difficulty in being as motivated or productive in the workplace.\(^{130}\) In fact, the Supreme Court opinion in *Harris* lends support to Chamallas’ argument. In *Harris*, the Court showed that psychological harm, even if not severe, is interconnected to economic harm when it noted that “[a] discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”\(^{131}\)

One study has indicated that “psychological and physical symptoms appear related to the harassment itself — specifically, the intensity of the harassment. However, the data suggests that ‘negative job outcomes [such as being fired, transferred or quitting] may derive more from retaliation and negative organizational response (e.g. victim blaming) than from the sexually harassing behavior itself.”\(^{132}\) More research is needed in this area to help determine the linkage between sexual harassment, the reporting of sexual harassment and the job-related and other harms.\(^{133}\) As seen from the MSPB study discussed earlier, the employees reported quite a bit of job-related harm that resulted from the sexual harassment itself and not from the

\(^{127}\) Beiner, Gender Myths, * supra* note 27, at 188 (citing Kimberly T Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. Applied Psychol. 401, 412-13 (1997)).

\(^{128}\) Chamallas, * supra* note 7, at 384-85.

\(^{129}\) *Id.* at 384.

\(^{130}\) *Id.* at 384-85.

\(^{131}\) Harris, 510 U.S. at 22.


\(^{133}\) *Id.* at 164 -65 (hypothesizing that the different results regarding frequency of termination of sexual harassment victims may be explained by whether or not the victim filed a formal complaint – although those subjected to sexual harassment were fired, those who were sexually harassed and filed a formal complaint were fired in much larger numbers) (citing Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* (1995), * supra* note 13, at 23, 26 and Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 Sex Roles 81 (1986)).
reporting of the sexual harassment. For instance, 8% of the employees subjected to sexual harassment reported using sick leave, 8% reported using annual leave, 1% used leave without pay, 2% were reassigned or fired, 2% were transferred to a new job, and 21% reported a decline in productivity.\footnote{MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995), supra note 13, at 23, 26.}

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

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

\textit{B. Harm Avoidance}

Once we have identified all of the harms from sexual harassment, we see that we must identify all of the harm avoidance actions in response to these harms. In fact, the acts taken to “avoid harm” from sexual harassment are more diverse than filing a formal complaint of sexual harassment. One workplace study summarized the reality, which is that “[t]he range of responses for a victim of sexually harassing behavior is probably as vast as the range of human behavior itself.”\footnote{\textit{Id.} at 29.} To understand what harm avoidance mechanisms are relevant to a supervisor sexual harassment liability determination, we must again look to the law and social science research.
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1. Legal and social science support for identifying harm avoidance mechanisms

As discussed above, the Supreme Court’s rationale for the employee-focused prong of the affirmative defense specifically relied upon the avoidable consequences doctrine. One of the avoidable consequences doctrine’s rules is the intention “to discourage even persons against whom wrongs have been committed from passively suffering . . . (economic) loss which could be averted by reasonable efforts.”¹³⁶ Accordingly, the “avoid harm otherwise” component of the employee-focused prong is grounded in preventing and mitigating harm. It is not grounded in notice or conciliation rationales. Therefore, the analysis of the “avoid harm otherwise” component is not restricted to acts informing the employer of the sexual harassment or acts utilizing the employer’s processes for complaining about and resolving the sexual harassment.¹³⁷

Similarly, the legislative history of the Civil Rights Act of 1991 shows the importance of accounting for all employee harm avoidance mechanisms. Explaining the need for proving compensatory damages to victims of discrimination, the House Report stated “Monetary damages simply raise the costs of an employer’s engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens.”¹³⁸ The affirmative defense is an attempt to decrease monetary damages if the employee fails to avoid all otherwise compensable harms.

To understand how employees avoid the harms of sexual harassment, social psychology research and employer workplace surveys are again instructive.¹³⁹ It is important to note that some of the early research is limited because it was based on persons who were not subjected to sexual harassment. As recent social psychology research has shown such prior sexual harassment studies were methodologically flawed. Those studies reported what persons who had never experienced sexual harassment hypothesized would be their response to sexual harassment.¹⁴⁰ These responses did not correspond to those of real victims of sexual harassment.¹⁴¹

¹³⁶McCORMICK’S LAW OF DAMAGES at 127 (1935).
¹³⁷See infra Sections V.B. and V.C. for a discussion of the applicability of the notice and conciliation rationales to the affirmative defense.
¹³⁹See generally, Fitzgerald, Why Didn’t She Just Report Him?, supra note 18.
¹⁴⁰Fitzgerald, Why Didn’t She Just Report Him?, supra note 18.
¹⁴¹Id.; Beiner, Sex, Science and Social Knowledge, supra note 4, at 291-294, 313 (stating that social science research is incredibly valuable in understanding the operation of sexual harassment in the
addition, the prior literature is limited because the studies tended to ask about “active” or “passive” responses only, and did not request narrative descriptions of what the responses were.142

Recent studies have created new typologies, discussed below, to identify and research more completely the multitude of responses of women who are sexually harassed.143 These typologies are modifications of the past incomplete ones that inaccurately categorized responses into “active” and “passive” responses.144 Unfortunately, even the new typologies, though more inclusive in the responses being studied, do not correlate the responses to all of the harms resulting from sexual harassment. Therefore both the recent and prior studies do not fully address the effectiveness of the various responses in avoiding the harm.145 As a result, the discussion below is a beginning of what will hopefully be a call for research of how all of the responses women employees take in response to sexual harassment affect the various harms resulting from the harassment.

Although more research is needed in this area, as the following discussion indicates, current social science research does provide insight into employee harm workplace and for exploring the legal standard for sexual harassment, yet it has some limitations: social science research cannot determine causation of sexual harassment but rather correlations between sexual harassment and other factors; data is limited because it may be generated by college students as opposed to employees who have been subjected to sexual harassment, and research shows that public perception of how one should respond to sexual harassment and how one actually responds is very different; social scientists have different definitions for sexual harassment among themselves and as compared to the legal standard; and the research is still developing). 142Fitzgerald, Why Didn’t She Just Report Him?, supra note 18.

143 See e.g. Krieger, supra note 4, at 177-190 (surveying the social science research regarding externally focused and internally focused response mechanisms).

144 Interestingly, social psychologists’ early research on responses to sexual harassment was flawed in much the same way current legal discourse is flawed; early research was limited to studying only one response to sexual harassment: the filing of a formal complaint. See also Knapp, supra note 25, at 690. Accordingly, Knapp, Fitzgerald and others have created conceptual frameworks that permit the “full range of responses to [sexual harassment] to be identified . . . .” Id. See e.g. Grossman, Culture of Compliance, supra note 23, at 23-26 (discussing sexual harassment victims’ responses to sexual harassment, including not filing formal complaints, responding with mild retributions and responding non-assertively, such as ignoring, rationalizing, avoiding the harasser, the job or the situation, cognitive strategies for responses, including internal and externally focused responses).

145 Interestingly, the research shows that while many of the strategies to avoid harm may be effective in decreasing some forms of harm, the same strategies may actually increase other forms of harm. The tension between these strategies and their affect on the harm resulting from sexual harassment is an invaluable part of the necessary discourse in this area. See also Krieger, supra note 4, at 190-192 (discussing research findings regarding the effectiveness of the employees’ responses to sexual harassment in eradicating sexual harassment).
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avoidance actions. In a study conducted by Dr. Louise Fitzgerald and her colleagues regarding responses to sexual harassment, they identified various coping mechanisms that were used by those subjected to sexual harassment in order to avoid harm. Fitzgerald identified that “coping [represents] constantly changing cognitive and behavioral efforts to manage specific external and/or internal demands that are appraised as taxing or exceeding the resources of the person.” These cognitive and behavioral responses by women are undertaken “to manage or alter the distressing situation itself (problem-focused coping)” and “to regulate emotional reaction (emotion-focused coping).”

Based upon the stress and coping literature, Dr. Fitzgerald’s research created a new typology that includes both the “action-oriented” and the “emotion-focused” responses used by women subjected to sexual harassment. The “action-oriented” responses are externally-focused responses that focus on the woman’s attempts to prevent future harassment. The “emotion-focused” responses include the various internally-focused responses, those that are focused on the woman’s personal coping strategies. All of these responses demonstrate employees’ harm avoidance actions in response to sexual harassment.

146 For discussions of the social science research regarding the decision of employees not to report harassment, see e.g. Beiner, Sex, Science and Social Knowledge, supra note 4, at 312-323 (discussing responses to sexual harassment and the effects of sexual harassment on reporting).
147 Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 126. Fitzgerald created this typology in response to case law finding that inaction or submission by women in response to sexual harassment indicated welcomeness to the harassing behavior, thus invalidating their claim of discrimination. Id. at 129-135.
148 Id. at 126 (citing Lazarus & Folkman, supra note 102, at 178).
149 Id.
150 Id. at 127; Knapp, supra note 25, at 689.
151 Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 128. The responses to sexual harassment result from the victim’s assessment of the degree of danger posed by the unwanted conduct and the opportunities available at the time. Id. at 129.
152 Id.
153 Fitzgerald cautions that the internally-focused coping strategies have been under-researched due to the excessive focus on externally-focused coping strategies. Id. at 119-20.
154 Fitzgerald notes that a particular response to sexual harassment cannot be judged for appropriateness or effectiveness without consideration of the individual woman herself because each response is influenced by factors such as the woman’s cognitive evaluation of the situation’s ability to impact her well-being, her evaluation of realistic and available options, and personal and situational resources and constraints. Id. at 129. See also Krieger, supra note 4, at 181 (identifying that the social science research shows that women employ many “reasonable” responses to cope with sexual harassment in the workplace, including internally-focused actions and externally-focused behaviors).
2. Externally-focused harm avoidance mechanisms

The external coping mechanisms, or those strategies utilized to solve, manage or alter the distressing situation itself, include a wide-range of responses extending beyond a formal complaint to the employer pursuant to a non-harassment policy. As repeatedly discussed in the social psychology literature, the filing of a formal complaint is the least likely external response taken by women subjected to sexual harassment. These findings are confirmed in the 1995 MSPB federal workplace study where only 12% of workers who were subjected to unwanted sexual action reported the sexual harassment to a supervisor or other official. When examining

155Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 121 (stating that filing charges against the harasser is the least common response to sexual harassment and is used primarily when other responses have proved unsuccessful); Kimberly T. Schneider et al., Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations, JOURNAL OF APPLIED PSYCHOLOGY 82 (3) 1997: 401-415, Table 2 (only 13.3% of sample 1 victims filed a complaint; only 6% of sample 2 victims filed a complaint. 35.7% of sample 1 victims discussed situation with a supervisor and 17.4% of sample 2 victims discussed the situation with a supervisor or union representative); Grossman, Culture of Compliance, supra note 4, at 23-26 (stating that formal complaints are the least likely response to sexual harassment based on Fitzgerald’s research and federal government studies of its workforce). Shupe, supra note 103, at 304 (Hispanic women least associated with U.S. culture have the lowest report rate for sexual harassment. Hispanic women “moderately affiliated: with U.S. culture have higher report rates, and non-Hispanic white women have even higher report rates). S. Arzu Wasti and Lilia M. Cortina, Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 83 (2) 2002: 394-405, 402 (Even though Turkish, Hispanic American and Anglo American working women all tended not to report or file complaint about being sexually harassed, Hispanic working class women were less likely than White working class women to report harassment); Krieger, supra note 4, at 182-83 (describing various studies showing that between five to fifteen percent of employees seek organizational relief in response to sexual harassment). But see Janice D. Yoder and Patricia A. Aniakudo, The Responses of African American Women Firefighters to Gender Harassment at Work, SEX ROLES 32 (3-4) 1995: 125-137 (58% of the African American women firefighters who were participants in the study filed some sort of complaint); Anna-Maria Marshall, Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies, 39 LAW & SOC’Y REV. 83, 87 (2005) (interpreting the Yoder & Aniakudo study to show that “resistance to sexual harassment is shaped by specific organizational settings characterized by particular power arrangements.”).

Given the social science research and the current case law’s limiting of liability under the affirmative defense rubric, one set of scholars posit that the result is a “perverse incentive for employers” who seek to avoid liability: “exercise just enough reasonable care to satisfy a court, but not enough to make it easy or comfortable for employees to complain of workplace harassment.” See Sherwyn, supra note 4, at 1267.

156Chamallas, supra note 7, at 374 (citing MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995), supra note 13, at 30). These results are consistent with earlier studies of federal workers showing that 11% reported their sexual harassment to superiors, but only 2.5% actually used the appropriate mechanisms to report. Id. (citing Stephanie Riger, Gender Dilemmas in Sexual Harassment Policies and Procedures, 46 AM.
the same response by gender, 8% of the male workers and 13% of the female workers reported the sexual harassment to a supervisor or other official. In the same federal workplace study, only 6% of the victims of sexual harassment actually made a formal complaint of sexual harassment. In the 2002 Armed Forces study, fewer women reported in some manner the sexual harassment than in 1995 (38% in 1995 vs. 30% in 2002). This is especially interesting since, as mentioned above, the Supreme Court had opined that the affirmative defense, articulated in 1998, would encourage more employees to report than before the affirmative defense. The 2002 study shows that although reporting behavior has changed since the affirmative defense was created, the reporting behavior has decreased rather than increased.

Importantly, some research has provided insight into employees’ decisions to not report sexual harassment by indicating that filing a formal complaint can in many ways worsen the employment situation of the employee and increase other harms to the employee. For instance, the 1995 MSPB federal workplace study reported that filing a formal complaint made the situation worse for more employees subjected to sexual harassment. Studies have shown that when a complaint has been filed, reporters of sexual harassment have been subjected to retaliation. One study showed that 33% of the reporters were subjected to retaliation by the employer and another

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158 Id. at 33-34 (1995).
159 Rachel N. Lipari and Anita R. Lancaster, Armed Forces 2002 Sexual Harassment Survey supra note 9, at 30. In fact, fewer than 10% of employees who experienced incidents of sexual harassment reported it to the designated office handling sexual harassment complaints or another official. Id. at 30. Rather, 21% of women and 12% of men reported to their immediate supervisor and 16% of women and 10% of men reported to the offender’s supervisor. Id. at 30.
160 Ellerth, 524 U.S. at 764.
161 William O'Donohue, Sexual Harassment: Theory, Research and Treatment 153 (1997); Grossman, Culture of Compliance, supra note 4, at 3 (demonstrating that sexual harassment policies are not necessarily effective in deterring, preventing or correcting sexual harassment).
162 Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges (1995), supra note 13, at 30-31 (finding that 47% of the victims of sexual harassment found grievances or adverse actions made things worse for them, while 32% found such actions to help them; similarly, the filing of a formal complaint for 37% of the victims of sexual harassment made things worse and helped only 21% of them).
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one showed that 62% of the reporters were subjected to retaliation by the employer.163 In the 2002 Armed Forces study, it was found that 29% of women and 23% of men reported experiencing work-related difficulties as the result of sexual harassment or the reporting of it.164

The 2002 study also showed that women did not report the sexual harassment for numerous other reasons, including because they felt uncomfortable making a report (37%); because they did not believe anything would be done if reported (30%); because they thought they would be labeled a troublemaker if they reported (29%); because they did not want to hurt the sexual harasser’s career, family or feelings (28%); because they thought their coworkers would be angry if they reported (23%); because they were afraid of retaliation from the sexual harasser (18%); because they thought they would not be believed (15%); because they wanted to fit in (15%); because they thought their performance evaluation or chance of promotion would suffer (14%); and because they were afraid of retaliation from the sexual harasser’s friends (13%).165 Similarly, other research showed that employees did not report because of their “ambivalence about sexual harassment policies and the personnel who administer them.”166 Specifically, one set of federal workers explained their skepticism of formally complaining about sexual harassment because “they were worried that they would be blamed for the incident, that they would not be believed, or that the complaint would not be kept confidential.”167 They further worried that management’s reaction would be “at best ineffectual and at worst threatening.”168

163 Chamallas, supra note 7, at 375 (citing Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 122. Dr. Patricia A. Frazer, Ph.D., after conducting a literature review, found that retaliation occurs in about one out of four of the cases where the person subjected to sexual harassment formally complained and then was subjected to retaliation. Patricia A. Frazier, Ph.D., Overview of Sexual Harassment from the Behavioral Science Perspective, WL N97SHCB ABA-LGLED *B-1, *B-7 (citing the fact that in the Dansky, B.S., Kilpatrick, D.G., Saunders, B.E., Resnick, H.S., Best C.L., Hanson, R.F., & Saladin, M.E. (1992) Sexual harassment: I can’t define it but I know it when I see it. Paper presented at the annual meeting of the American Psychological Association, Washington D.C. study, one-fourth of the women stated that the harasser retaliated against her for complaining about the sexual harassment; and in the Loy, P.H. and Stewart, L.P. (1984), The extent and effects of sexual harassment of working women. Sociological Focus, 17, 31-43 study, 12% of the women reported lower evaluations after complaining, 7% reported being denied promotions, 5% reported being terminated and 2% reported being reassigned.)
164 Rachel N. Lipari and Anita R. Lancaster, Armed Forces 2002 Sexual Harassment Survey, supra note 9, at v.
165 Id. at 33.
166 Marshall, supra note 155, at 87.
167 Id. (internal citations omitted).
168 Id. at 87 (internal citations omitted). See also, Beiner, Gender Myths, supra note 27, at 161 (2005) (“‘organizational factors were the best predictors of response when severity of harassment was controlled.’”) (citing Fitzgerald., Why Didn’t She Just Report Him?, supra note 18, at 122 (citing study by James E. Gruber & Lars Bjorn, Women’s Responses to Sexual Harassment: An Analysis of Socio-Cultural Organizational, and Personal Resources Models, 67 SOC. SCIENCE Q. 814 (1986)).
Because official sexual harassment policies and procedures “reflect the power dynamics at work in particular organizations . . . [they] dampen rather than promote employee complaints.”\textsuperscript{169} In addition, many women subjected to sexual harassment did not formally complain about the harassment because they believed such complaints would be ineffective.\textsuperscript{170} In fact, recent research has found that managers were more likely to side with the harasser, seen as the “institution,” over the complainant, seen as the “troublemaker.”\textsuperscript{171}

In addition, there are some studies that showed that persons subjected to sexual harassment do not report it because they do not recognize it as sexual harassment.\textsuperscript{172} For instance, the 2002 Armed Forces study showed that 67% of women and 78% of men stated that they did not report incidents of sexual harassment because they felt that the situation was not important enough to warrant reporting.\textsuperscript{173}

Further, many employees do not formally report sexual harassment because it would cause other and greater harms to them. For instance, one study showed that women who complain about sexual harassment are often fired or unable to obtain other employment because of bad references.\textsuperscript{174} One study suggested that “’negative job outcomes may derive more from retaliation and negative organizational response (e.g. victim blaming) than from the sexually harassing behavior itself.’”\textsuperscript{175} Another study showed female blue-collar workers who confronted their harassers were subjected to more harassment and ostracism.\textsuperscript{176} Another study showed that “assertive and formal responses were actually associated with more negative outcomes of every sort. Women who reported harassment to their supervisors or who filed complaints

\textsuperscript{169}Marshall, \textit{supra} note 155, at 87.
\textsuperscript{170}Laurie A. Rudman et al., \textit{Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures}, 17 Basic & \textit{APPLIED PSYCHOL.} 519 (1995); Krieger, \textit{supra} note 4, at 185 (citing Rudman’s article).
\textsuperscript{171} Id. (internal citations omitted).
\textsuperscript{172}BEINER, \textit{GENDER MYTHS}, \textit{supra} note 27, at 160 (citing Louise F. Fitzgerald et al., \textit{The Incidence of Sexual Harassment in Academia and the Workplace}, 32 \textit{J. VOCATIONAL BEHAV.} 152, 171 (1988). See also Caroline C. Cochran et al., \textit{Predictors of Responses to Unwanted Sexual Attention}, 21 \textit{PSYCHOL. WOMEN Q.} 207, 217 (1997); Kimberly T. Schenider et al., \textit{Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations}, 82 \textit{J. APPLIED PSYCHOL.} 401, 406-07 (1997))
\textsuperscript{173}RACHEL N. LIPARI AND ANITA R. LANCASTER, \textit{ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY}, \textit{supra} note 9, at 33.
\textsuperscript{174}BEINER, \textit{GENDER MYTHS}, \textit{supra} note 27, at 164 (citing Audrey Murrell et al., \textit{Sexual Harassment and Gender Discrimination: A Longitudinal Study of Women Managers}, 51 \textit{J. SOCIAL ISSUES}, Spring 1995, at 139, 141 (citations omitted)).
\textsuperscript{175}BEINER, \textit{GENDER MYTHS}, \textit{supra} note 27, at 164 (citing Matthew S. Hesson-McInnis & Louise F. Fitzgerald, \textit{Sexual Harassment: A Preliminary Test of an Integrative Model}, 27 \textit{J. APPLIED SOC. PSYCHOL.} 877, 896 (2002)).
were more likely to quit, be fired, or be transferred; to need or utilize medical assistance or psychological assistance; to feel worse about their jobs; and so forth.”

In fact, one documented barrier to women employees’ filing of formal complaints is the “embarrassment and psychological costs associated with such complaints.”

On the other hand, reporting harassment to a supervisor or other official may be effective in stopping one form of harm, the harassment. Dr. Deborah Knapp’s research showed that “advocacy seeking” responses, including requesting outside intervention, reporting the harassment to a supervisor or to an outside agency and filing a lawsuit, may be effective in ending the harassment. Yet a different workplace study showed that employees felt that reporting the sexual harassment to a supervisor or other official provided mixed-results. These mixed results are not surprising given the research, discussed above, that shows the effectiveness of reporting sexual harassment will depend on the formal and informal organizational culture relating to complaints of sexual harassment.

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177 Matthew S. Hesson-McInnis & Louise F. Fitzgerald, Sexual Harassment: A Preliminary Test of an Integrative Model, 27 J. APPLIED SOC. PSYCHOL. 877, 896 (2002). Because this study is older and done before widespread public attention to sexual harassment, the authors and others note that the findings may be limited. BEINER, GENDER MYTHS, supra note 27, at 164.

178 Id.

179 Knapp created another typology of responses to the harm of psychological stress caused by sexual harassment. Her typology of coping mechanisms is based upon the context of the sexual harassment, such as the mode of response and focus of response. Knapp, supra note 25. Knapp’s research drew from research regarding whistleblowing behavior as well as the coping literature. Id. She stated that the coping literature identified two types of coping: engagement or problem-focused coping, focused on altering the situation, such as finding ways to change or prevent the situation, and disengagement or emotion-focused coping, such as self-blame, seeking social support, avoidance or distancing. Id. at 698. Accordingly, under mode of response, Knapp considered the amount of outside support being sought through the coping mechanism: the mode may be self- response, which involves no outside resources to address sexual harassment, or the mode may be a supported response, which means that the woman harassed uses others, such as individuals and organizations, to address the sexual harassment. Id. Under the focus of response, Knapp considered what the focus of the coping mechanisms was: the woman who was harassed (self-focused) or the harasser or the event (initiator focused). Id. at 690. Knapp identified four response strategies from these various modes and focuses of responses: (1) avoidance/denial; (2) social coping; (3) confrontation/negotiation; and (4) advocacy seeking. Id. Her research indicated that persons who are sexually harassed tend to employ more than one response strategy, sometimes sequencing them. Id. at 693. Further Knapp stated that “response behavior may vary not only among individuals but also among different environments and organizational contexts.” Id. at 695.

180 MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995), supra note 13, at 31 (33% of male workers and 58% of female workers stated that reporting the sexually harassing behavior to a supervisor or other official had a beneficial affect on the sexual harassment; 16% of male workers and 13% of female workers reported that it made had a detrimental affect; and 52% of male workers and 29% of female workers stated that it had no affect on the sexual harassment).

181 See supra text accompanying notes 166-71.
Unfortunately, the research is silent as to other harms and how they are impacted by these “advocacy seeking” responses. For example, Knapp’s research did not identify the effectiveness of these responses in coping with the intangible employment harm or the psychological or emotional harm resulting from the sexual harassment.

And simply because few women file complaints of sexual harassment does not mean that they fail to respond or fail to react to the harassment in attempts to avoid harm. In fact, women’s most common response to sexual harassment is avoiding the harasser himself.\(^\text{182}\) In fact, it appears that those subjected to harassment often will avoid the harassment unless it becomes intolerable.\(^\text{183}\) Women employees may also use defusion in response to sexual harassment. Defusion is going along with the behavior, making a joke of it in order to minimize conflict or stalling.\(^\text{184}\) Women employees appease the harasser by attempting to stop the harasser from engaging in sexually harassing behavior without conflict by using humor, excuses or delay.\(^\text{185}\) Knapp has categorized these types of behavior as an “avoidance/denial” behavior.\(^\text{186}\)

[^182]: Schneider, supra note 155, at Table 2 (74.1% of Sample 1 victims responded by avoiding the harasser; 53.9% of sample 2 victims responded by avoiding the harasser). Early research showed that 50% of the women subjected to sexual harassment responded by avoiding the harassers. Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120. Cf. Yoder, supra note 155, at 126. (50% of federal employees avoided the harasser) (citing S.S. Tangri, M.R. Burt, and L.B. Johnson, Sexual Harassment at Work: Three Explanatory Models, Journal of Social Issues 38: 33-54); Wasti, supra note 1 at 155, at 402 (Turkish and Hispanic American women relied on avoidance more than Anglo American women, although all women relied increasingly on avoidance as the harassment increased in frequency). In addition, in the 2002 Armed Forces Survey, 60.5% of employees to some extent stayed out of the harasser’s way and 48.8% of employees to some extent avoided being alone with the harasser. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1169, 1193.

[^183]: Béiner, Gender Myths, supra note 27, at 160.

[^184]: Fitzgerald, Why Didn’t She Just Report Him?, supra note 18; See Knapp, supra note 25, at 689 (citing Gruber (1989) (defusion also includes such actions as stalling).

[^185]: Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120. Summarizing the previous literature, Fitzgerald notes that humor is a common response to less serious harassment. Id. (citing United States Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? (1981); United States Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: An Update (1988)). Delaying tactics were used by 10% of blue-collar workers as non-confrontational ways of communicating lack of interest in the harasser. Id. (citing James E. Gruber and Lars Bjorn, Blue-Collar Blues: The Sexual Harassment of Women Autoworkers, Work and Occupations 9 (1982): 271-298).

[^186]: “Avoidance/denial” behaviors include avoiding the harasser, changing the job situation by quitting or transferring, ignoring the behavior, going along with the behavior, treating the event as a joke, doing nothing, and self-blame. See Knapp, supra note 25, at 691. Knapp’s research shows that avoidance/denial behaviors are coping mechanisms that are self-focused and done without outside support. Id. In a different study, 25% of female faculty reported that ignoring the sexually harassing behavior was effective. Patricia A. Frazier, Ph.D., LP, Overview of Sexual Harassment from The Behavioral Science Perspective, WESTLAW N97SHCB ABA-LGED *B-1, *B-6 (1997) (citing
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Referencing the social science research, Chamallas stated that women may use avoidance and appeasement because they typically have less power than men in the organization and are reluctant to use mechanisms, such as official reporting mechanisms, created by those in power because they tend to favor the organization and/or the harasser but not the victim of the harassment.187

The effectiveness of these avoidance/denial behaviors in reducing all harms seems mixed. The research shows that some of these actions reduce certain harms, while increasing others. The 1995 MSPB federal workplace study showed that victims of sexual harassment found that avoiding the harasser beneficially affected the sexual harassment.188 On the other hand, the MSPB study hypothesized, without offering any support data, that avoiding the harasser “can also have a negative effect on the victim’s work performance, if she or he spends a lot of time trying to avoid the harasser.”189 Avoiding the harasser and ignoring the harassment have been found to have some additional benefits, such as avoiding potential retaliation.190 Such behaviors though may also have a negative impact on the employee’s employment,
because avoiding the harasser may interfere with the employee’s ability to work “as the target rearranges his or her job duties to avoid the harasser.”

The same MSPB study showed mixed results for defusion responses to sexual harassment as well. One commentator noted that making a joke of the harassment “may well be an attempt by the target [of the sexual harassment] to fit in and downplay the effects of the harassment.” Another study showed that women miners who tried to fit in and be “one of the boys” were subjected to less harassment. The results of the MSPB study correspond to the findings of sociologist Mary Lindenstein Walshok of various blue-collar workplaces.

Dr. Knapp’s research looked at these behaviors as a whole under the category of avoidance/denial behaviors. Dr. Knapp has found that these behaviors are in general coping mechanisms that are more effective than other strategies in ending one specific type of harm: the sexual harassment behavior. Knapp’s research does not indicate whether these behaviors are effective at ending the emotional harm, the psychological harm, the tangible employment harm or the intangible employment harm resulting from sexual harassment.

In addition to the avoidance/denial responses, women employees also use so-called “assertive” responses, such as directly telling the harasser to stop, 44% of female respondents in one study responded to sexual harassment by confronting the harasser. Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 121 (citing U.S. Merit Systems Protection Board 1988 study). In the 2002 Armed Forces Survey, 68.2% of employees to some extent told the harasser of their dislike for the harassment, 61.2% of employees to some extent told the harasser to stop, and 41.3% of employees to some extent asked the harasser to leave them alone. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY--WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1165, 1197, and 1205. Yoder, supra note 155, at 130 (86% of the study participants challenged the harasser); Id. (16% of a different study’s participants ordered the harasser to stop) (citing Reilly M.E., Lott, B., and Gallogy, S.M., Sexual Harassment of University Students, SEX ROLES 15: 333-358). In one study, 24% of the subjects proposed that the sexual harassment victim verbally challenge the harasser or inform authorities of the harassment. Tricia S. Jones and Martin S. Remland, Sources of Variability in Perceptions of and Responses to Sexual Harassment, SEX ROLES 27 (3-4) 1992:121-142; Wasti, supra
threating to report the harasser, or verbally or physically attacking the harasser. Taking each so-called “assertive” response in turn, there is some research that shows that the strategy of confronting the harasser is effective in ending the harassment. In fact, one review of the literature identified confronting the harasser as the most effective strategy at decreasing the harassment. Regarding employees who threatened the harasser that they would tell others about his harassment, one workplace study showed that many employees found this response to affect beneficially the sexual harassment itself. One review of the literature showed that...
“confronting the harasser is rated as more effective than other strategies, but it only seemed to be effective about half of the time.”

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

and 37% of female employees subjected to sexual harassment found threatening to tell or telling others about the harassment beneficially affected the sexual harassment; no male employees and 14% of female employees found such action to make the sexual harassment worse and 46% of male employees and 49% of female employees found such action to have no affect on the sexual harassment).


204Id.

205Id. (citing Loy, P.H. & Stewart, L.P. (1984). *The extent and effects of sexual harassment of working women*. SOCIOLOGICAL FOCUS, 17, 31-43, which found that of those who were harassed and confronted their harassers, 12% received lowered performance evaluations, 7% were not promoted; 5% were terminated and 2% were reassigned). *See also* Krieger, supra note 4, at 191 (identifying that there are more recent studies that have yielded similar results) (citing Amy L. Culberston et al., Navy Personnel Research & Development Center, *Assessment of Sexual Harassment in the Navy: Results of the 1989 Navy-Wide Survey 17 (1992); M. Hesson-McGinnis & L.F. Fitzgerald, *Predicting the Outcomes of Sexual Harassment: A Preliminary Test* (1992) (paper presented at the 2d APA/NIOSH Conference on Stress and the Workplace, Washington, D.C., on file with Linda Hamilton Krieger)).

206Fitzgerald, *Why Didn’t She Just Report Him?*, supra note 18; Wasti, supra note 155, at 402 (studying responses to sexual harassment reported by Turkish, Hispanic American and White working women, the researchers found that Turkish women relied on negotiation more than White women, working class women relied more on negotiation than professional women when the harasser was of a high status, and all women relied increasingly on negotiation responses as harassment incidences increased). *See also* Knapp, supra note 25, at 689 (negotiation may include direct requests for harasser to stop the behavior) (citing Gruber (1989)).

207Knapp’s research showed that these responses focus on the harasser and involve little outside support. Knapp, supra note 25, at 692.

208Id.(citing Livingston (1982).
behavior. Unfortunately, the Knapp research was silent as to the tangible and intangible employment-related harms. Therefore, although the research is limited, taking the research as a whole, it appears that “assertive” responses are mixed in their success of harm avoidance. Although “assertive” responses can be effective in decreasing the sexual harassment that impact must be weighed against the fact that such responses increase the tangible job harm through retaliation and increase the emotional distress.

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

209 Id.
210 Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120-121 (finding that 68% of the study respondents talked with colleagues about the sexual harassment and 60% talked with friends and family members) (citing U.S. Merit Systems Protection Board, Sexual Harassment of Federal Workers: Is it a Problem?, Washington, D.C.: U.S. Government Printing Office, 1981); Wasti, supra note 155, at 402 (Turkish, Hispanic American and Anglo American women fairly equally relied on friends, family and coworkers, except that professional women relied increasingly on social support as harassment incidences increased). See also Knapp, supra note 25, at 689 (“using sympathetic others to express anger and provide emotional support”) (citing Gruber (1989)). Social coping responses, which include self-focused strategies that seek outsider support, include ensuring others are present when harasser present, discussing harassment with others who are sympathetic, peers, coworkers, friends and family. Knapp, supra note 25, at 692. In the 2002 Armed Forces Survey, 32.9% of employees to some extent talked to family about the situation, 49.2% of employees to some extent talked to their coworkers about the situation, 47.8% of employees to some extent talked to their friends about the situation, and 7.7% of employees to some extent talked to a chaplain or counselor about the situation. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1177, 1181, 1185, and 1189.
211 Knapp, supra note 25, at 692 (emphasis added).
212 Id.
213 See supra text accompanying notes 128-130.
In sum, the research shows that while there are multiple externally-focused harm avoidance mechanisms, not one particular mechanism can help the employee to avoid all the harms of sexual harassment. Rather, what emerges from the research is that each mechanism, based on the context, may result in both increasing and decreasing different harms.

3. Internally-focused harm avoidance mechanisms documented in the social science literature

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

One internally-focused strategy used in response to sexual harassment is endurance, which is tolerating the harassment because it is unavoidable, one knows of no other option or one is afraid. Previous research mistakenly labeled this as a lack of response because endurance would often be externally manifested as “ignoring the behavior” or “doing nothing.” In addition, women subjected to sexual harassment employ thought avoidance as a coping strategy, which includes ignoring thoughts about the harassment. Other coping mechanisms include denial, which is

214Yoder, supra note 155, at 126 (citing 1982 study finding that 60% of those harassed ignored or took no action (citing Tangri, S.S., Burt, M.R., and Johnson, L.B., Sexual Harassment at Work: Three Explanatory Models, JOURNAL OF SOCIAL ISSUES 38: 33-54); a 1987 study finding that 53% of federal employees ignored the harassment or took no action (U.S. Merit Systems Protection Board, Sexual Harassment of Federal Workers: An Update, Washington, D.C.:U.S. Government Printing Office); a 1986 study finding that 61% of college students ignored the harassment or took no action (citing Reilly, M.E., Lott, B., and Gallogy, S.M., Sexual Harassment of University Students, SEX ROLES 15:333-358); and a 1986 study that 29% of the women used “passive responses” (citing Gruber, J.E. and Bjorn, L., Women’s Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models, SOCIAL SCIENCE QUARTERLY 67: 814-826).

215Krieger, supra note 4, at 181-82 (describing how internally focused strategies to cope with sexual harassment were previously inaccurately categorized as passive responses).

216Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120. In the 2002 Armed Forces Survey, 64.3% of employees to some extent just put up with the harassment. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1201.

217Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120.

218Id.; Avoidance has been defined as a “passive” response including such behavior as ignoring the sexual harassment or doing nothing. See Knapp, supra note 25, at 689 (citing Gruber (1989)). As noted in the DSM-IV, for those employees suffering from PTSD, one harm previously discussed as resulting from sexual harassment, those persons will attempt to “avoid thoughts, feelings, or
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deliberately deciding to “ignore the situation, to pretend it is not happening, or that one does not care,” detaching, self-blame or believing one has illusory control over the situation, and reattribution, such as reinterpreting the situation in order to make it not able to be categorized as harassment or empathizing with the harasser.

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

conversations about the traumatic event . . . and to avoid activities, situations, or people who arouse recollections of it.” AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424-25 (4th ed. 1994)

In the 2002 Armed Forces Survey, 72.4% of employees to some extent tried to forget about the harassment and 65.8% of employees to some extent told themselves it was not important. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1161 and 1173.


Very little research has been conducted on the prevalence of detachment as a coping strategy by women who are sexually harassed. Id. at 120.

In the 2002 Armed Forces Survey, 15% of employees to some extent blamed themselves for what was happening. JAMES B. GREENLEES ET AL., TABULATIONS OF RESPONSES FROM THE 2002 STATUS OF THE ARMED FORCES SURVEY-WORKPLACE AND GENDER RELATIONS, VOLUME 2, supra note 19 at 1209.

Fitzgerald, Why Didn’t She Just Report Him?, supra note 18 (citing Jensen and Gutek (1982) finding 25% of female victims attributed harassment in some way to their own behavior). Other than the Jensen and Gutek study, little else is known about the prevalence of illusory control in sexual harassment victims. Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120.


Similar to the research regarding detachment and illusory control, the research on reattribution needs to be studied further to understand its rate of utilization by women who are sexually harassed. Fitzgerald, Why Didn’t She Just Report Him?, supra note 18, at 120.

Id.

Id.

See supra text accompanying notes 128-130.
4. Lena’s harm avoidance responses

Again, returning to Lena’s situation, considering the social psychology research, the workplace studies, and the policy behind the avoidable consequences doctrine, a more complete picture of Lena, her harms and actions taken to avoid these harms are available for the liability determination. Perhaps most importantly, by considering all of Lena’s externally- and internally-focused actions, Lena clearly appears as an actor – she is responding to the sexual harassment, she is harm avoiding, she is not passive. Her actions are many.

Lena employed a variety of externally-focused coping mechanisms to avoid harm. She physically avoided Dave by calling in sick frequently, avoiding overtime work, and asking that her meetings with Dave be in her cubicle rather than in his closed office. Lena also appeased Dave by trying to deter him without conflict when she moved her body away from him and by standing up to leave a meeting with a false work-related excuse. Lena also informally complained to Victor. She then stopped giving Victor information once he humiliated her. Lena sought social support by telling Karen, her best friend, about Dave’s sexual harassment of her and how it made her feel. Lena also used the internally-focused mechanism of reattributing Dave’s sexual harassment of her as accidental or resulting from Dave’s personality as a “touchy” person. Finally, Lena endured the harassment and did not formally complain in order to lessen further humiliation and avoid ostracism and possible retaliation.

According to Knapp’s research and other studies, Lena’s externally-focused appeasement and avoidance behaviors could be effective at stopping the sexual harassment, but may impair Lena’s ability to perform her work.\(^ {228} \) Unfortunately, the research is silent as to how avoidance actions impact emotional and psychological harms.\(^ {229} \) Knapp’s research also indicates that while Lena’s discussions with Karen are not effective at ending the sexual harassment, they may be effective in managing resulting emotional and psychological harm.\(^ {230} \) Regarding Lena’s informal complaint to Victor, the informal organizational structure impacted the effectiveness of her complaint.\(^ {231} \) Victor responded with a joke and did not follow-up in any way. This resulted in Lena feeling humiliated and not complaining any further. And the sexual harassment continued. Therefore, in this situation, reporting did not avoid any of her harms. The research indicates that Lena’s use of retribution may be helpful in eliminating some of the emotional and psychological harm as well. And Lena’s endurance of the harassment is an internally-focused coping mechanism designed to

\(^ {228} \) See supra text accompanying notes 182-195.
\(^ {229} \) Id.
\(^ {230} \) See supra text accompanying notes 210-11.
\(^ {231} \) See infra text accompanying note 290.
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avoid the harm of the stress of sexual harassment. The mechanism may vary in its effectiveness at reducing the harm in the short and long term. Unfortunately, the research is silent as to the effect of the internally coping mechanisms on avoiding other harms from sexual harassment such as the acts of sexual harassment and employment-related harms.

Nonetheless, through this discussion, it becomes apparent that broader notions of avoiding harm will result in a more complete view of Lena and how she is attempting to mitigate her damages and avoiding injury. Such a view permits a more thorough liability determination under the affirmative defense because the court can more accurately determine whether Lena is reasonably avoiding harm, such as sexual harassment, emotional harm, and psychological harm, by actions other than filing a formal complaint. At the same time, the complexity of determining whether an employee has reasonably avoided or attempted to avoid harm becomes clear. Perhaps the most striking example of this complexity is the research that supports Lena’s experience that complaining about the harassment increased her emotional harm.232

IV. EMPLOYER LIABILITY AND AVOID HARM OTHERWISE

As previously stated, in deciding liability for supervisor sexual harassment cases, the courts to date have focused primarily on the limited questions of whether the employer had a policy, and, if so, whether the plaintiff employee unreasonably failed to use the formal complaint mechanism pursuant to the policy.233 The courts have also examined whether the employer properly responded to any employee reporting of sexual harassment.234 In evaluating whether the employer satisfied the employer-focused prong, the courts have focused on whether the company had a non-harassment policy and whether the policy contained an appropriate complaint mechanism.235 In general, despite the fact that harm avoidance is an animating

232 See supra text accompanying notes 174-78.

233 In one study, 100% of employer defendants prevailed on summary judgment regarding the affirmative defense where the employer had a policy and the employee failed to complain pursuant to the policy. Sherwyn, supra note 4, at 1286; see e.g. Taylor v. United Reg’l Health Care Sys., 2001 WL 1012803 *1, *7 (2001) (summary judgment denied because the plaintiff reported harassment pursuant to employer’s plan); Fisher v. Elec. Data Sys., 278 F. Supp. 2d 980, 993 (2003) (granting summary judgment where plaintiff failed to report harassment pursuant to employer’s plan).

234 If the employee did properly complain, the courts also have examined whether the employer responded appropriately to the complaint, such as conducting an investigation or changing the environment to control the harassment, and whether the employee reasonably participated in the investigation process. See Sherwyn, supra note 4, at 1281, 1287. Such actions related to the employer prong’s requirement that the “employer exercised reasonable care to . . . correct promptly any sexually harassing behavior.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

235 See Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999) (“[E]xistence [of a sexual harassment policy] militates strongly in favor of a conclusion that the employer exercised reasonable care to prevent and promptly correct sexual harassment.”); see also Grossman, Culture of Compliance, supra note 4, at 11
principle of the affirmative defense, the courts have not scrutinized the effectiveness of employer policies in avoiding harm. Specifically, the courts have not properly scrutinized whether an employer’s policy was actually effective in getting employees to report sexual harassment or whether the complaint mechanism effectively deterred sexual harassment and protected employees from retaliation. Such failings show that “file cabinet” compliance, having a policy despite its effectiveness, is credited to the employer even though it is not necessarily related to decreasing sexual harassment or otherwise avoiding the harms of sexual harassment.

The focus of this section is to examine the case doctrine regarding the employee-focused prong of the affirmative defense and how such doctrine meets or fails to meet the driving rationale of avoiding harm. Since the Supreme Court first articulated the employer’s affirmative defense to hostile environment sexual harassment, the courts have failed to analyze all of the types of harm experienced by women employees subjected to supervisor sexual harassment. Similarly, the courts have failed to fully acknowledge all of the strategies such employees use to avoid those harms. As a result, because courts have judged employees’ responses almost exclusively on whether employees reported the sexual harassment, and because few employees actually do so, the courts have regularly found no employer liability citing the employers’ satisfaction of the employee-focused prong. One study showed that between June 1998 and January 2000, courts dismissed approximately 70% of supervisor sexual harassment cases based upon defendants’ ability to prevail on the affirmative defense. Such a limited analysis of harms and harm avoidance is
inconsistent with the affirmative defense and the policy behind it and Title VII. This section analyzes the body of case law regarding the employee-focused prong and concludes that the courts are almost consistently failing to properly credit employees with all of their harm avoidance actions, and thus are not properly determining liability for supervisor sexual harassment.

A. “Avoid Harm Otherwise” Analysis Absent From Court Decisions

Regarding the employee-focused prong of the affirmative defense, many courts simply fail to consider whether or not the employee “avoided harm otherwise” when analyzing the affirmative defense. This failure is a result of either conflating the two components of the employee-focused prong into one component or truncating the prong to exclude the “avoid harm otherwise” component altogether. For example, some courts simply delete the “avoid harm otherwise” component from the affirmative defense and state that the employer need show only that plaintiff failed to utilize the employer’s preventative or corrective opportunities. More often, the courts recognize that the avoid harm otherwise component is a part of the rule, but then fail to analyze it. These courts then conflate the two components of the employee-focused prong into the single analysis of whether or not the employee complained pursuant to the company’s policy and cooperated in any investigation thereto.

One case exemplifying this conflation is Lane v. State of Oregon Department of Corrections. In this case, the court denied defendant’s motion for summary judgment stating that there was a dispute of facts as to the reasonableness of the employee’s failure to timely initiate a report of her supervisor’s sexual harassment of her. The court found that because the supervisor had threatened her if she complained and because the supervisor was respected and seen as a father-figure by

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243 See e.g. Lane v. State of Oregon Department of Corrections, 2006 WL 3762104 (D. Ore. Dec. 18 2006). Following the courts’ lead, scholars often conflate the two components of the employee-focused prong as well. See e.g. Sherwyn, supra note 4, at 1290 (an employee’s failure to report is “tantamount to per se ‘unreasonable’ behavior” under the employee-focused prong).

244 Id. at *7.
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other employees, a fact finder could decide it was not unreasonable for the employee to not timely complain.\footnote{Id.}

In denying the summary judgment motion, the court did not also conduct any analysis of the “avoid harm otherwise” component, though there were many facts relevant to this analysis. For instance, the record showed that employee Lane took specific actions in response to the sexual harassment in an attempt to mitigate her resulting harms. In order to mitigate possible job loss, Lane did not timely report the sexual harassment. She was a trial employee and feared termination because she was actually told by her supervisor that everyone would believe him and not her if she were to complain.\footnote{Id. at *6.} In addition, Lane stated that she did not file a complaint initially because “those in the chain of command were ‘tight,’ and she did not want the humiliation and embarrassment associated with filing a complaint of sexual harassment.”\footnote{Id.} Therefore, in not initially filing her complaint, Lane was managing the effect of reporting the harassment on two different harms -- Lane was attempting to balance the increased emotional harms that would result from the filing with the potential that reporting might decrease the incidence of the sexual harassment itself. Lane also avoided her emotional harm and the sexual harassment when she made up “excuses so that ‘[the supervisor] would get the hint and not continue.’ . . . For example, when [the supervisor] asked Lane if she ‘was ever going to meet him,’ Lane told [him] directly that she would not because of his wife, after which they rarely spoke.”\footnote{Id.} This action by Lane is a great example of the use of the external coping mechanism of assertion in order to manage the stressor, the harm, of sexual harassment.\footnote{Id.} Moreover, based upon the court’s recounting of the supervisor’s response to Lane’s avoidance behavior, her behavior actually worked in stopping his sexual advances. Accordingly, Lane took multiple harm avoidance actions. Nonetheless, the court did not use these harm avoidance actions as part of its affirmative defense analysis under the “avoid harm otherwise” component. Rather, the court only focused on the reasonableness of her failure to initiate a complaint, and that determination did not adequately acknowledge Lane’s full range of harms other than sexual harassment and her multiple harm avoidance actions other than reporting the harassment.

Returning to Lena and her situation, despite her multiple harms and harm avoidance actions discussed above and following the trend in \textit{Lane} and other court decisions, a court would inappropriately omit any “avoid harm otherwise” analysis in determining liability. Lena’s employer would most likely prevail on the affirmative

\footnote{See \textit{supra} text accompanying notes 147-54, 182-83, 186-91.}
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defense and avoid liability by concentrating on the employer-focused prong and the first component of the employee-focused prong. Specifically, the employer would show that it had a policy and that Lena unreasonably failed to “take advantage of preventive and corrective opportunities” by failing to file a formal complaint under the policy. The employer and the court would either ignore the second component of the employee-focused prong altogether or conflate it with the first component.\textsuperscript{251} As a result, they would pay no attention to Lena’s other actions that were taken to avoid harm, including those harms other than sexual harassment. Lena might argue that it was not “unreasonable” for her to fail to complain because of Victor’s response to her informal complaint.\textsuperscript{252} To date, such arguments, by and large, have been unsuccessful.\textsuperscript{253} Lena might also argue that her failure to complain was not “unreasonable” given her other actions to try to avoid the harm, such as moving away from Dave when he touched her inappropriately, avoiding Dave and work, trying to defuse the situation and discussing her problem and the emotional toll on her with Karen.\textsuperscript{254} Such arguments are becoming a bit more frequent in court and have been met with mixed success. At times, courts recognize that such actions may be a reasonable justification for their delay in reporting, but usually they do not credit the employee with avoiding that harm.\textsuperscript{255}

As a result, despite the affirmative defense’s inclusion of the word “otherwise” to indicate that availing oneself of the employer’s formal mechanisms might be one of many ways to avoid harm,\textsuperscript{256} in Lena’s case a narrow liability interpretation by the

\textsuperscript{251}See supra note 27.

\textsuperscript{252} Hardy v. Univ. of Illinois at Chicago, 328 F.3d 361, 365 (7th Cir. 2003) (second prong was not satisfied because the Court said that employer could not say that the plaintiff’s delay in filing a complaint was unreasonable); Holly D. v. California Inst. of Tech., 339 F.3d 1158, 1178-1179 (9th Cir. 2003) (court held that plaintiff’s hesitation in complaining to the employer was unreasonable); Payano v. Fordham Tremont CMHC, 287 F. Supp. 2d 470, 477 (S.D.N.Y. 2003) (despite plaintiff’s fear, his failure to complain pursuant to the policy was deemed unreasonable). Grossman, Culture of Compliance, supra note 4, at 22-23 (discussing reasonableness of plaintiff’s failure to complain).

\textsuperscript{253} See e.g. Holly D., 339 F.3d at 178.

\textsuperscript{254} See supra Sections II and III.B.4. (discussing Lena’s harm avoidance actions based on the social science research regarding coping mechanisms for the stressors of sexual harassment).

\textsuperscript{255} See e.g. Mackenzie v. Potter, 2006 WL 1005127 *9 (N.D. Ill. Apr. 14, 2006) (when plaintiff argued that her failure to formally report the sexual harassment for seven months was justified because she at first attempted to ignore the smaller sexually harassing incidents for a time and attempted to resolve the problem herself by such actions as struggling to get free from the harasser when he grabbed her, the court found that plaintiff’s delay in reporting was nonetheless unreasonable because her actions had been insufficient in stopping the harassment and “denied [her employer] an opportunity to remedy the situation for seven months”). Clearly in Mackenzie, the plaintiff was employing harm avoidance mechanisms. Because the court failed to conduct an avoid harm otherwise analysis, the court did not credit plaintiff with any of her actions. The court’s failure could be attributed to its incorrect reliance upon notice to employer, rather than harm avoidance, as the policy rationale underlying the affirmative defense and liability determinations. See infra Section V.B.

\textsuperscript{256} But see Grossman, Culture of Compliance, supra note 4, at 3 (demonstrating that sexual harassment policies are not necessarily effective in deterring, preventing or correcting sexual harassment).
court most likely would only examine whether or not Lena complained pursuant to the employer’s policy. This is consistent with many court decisions. There would likely be no focus on the “avoid harm otherwise” component of the affirmative defense. As a result of its lack of attention to the second component, the court would fail in basing its liability decision on the animating principle of harm avoidance.

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

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

Unlike the above discussed cases, there are other cases in which courts actually have analyzed the “avoid harm otherwise” component or at least based its liability decision in part on actual harm avoidance. In those cases, however, the courts have too narrowly construed “harm” and “avoidance of harm.” As a result, the courts

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257 In fact, one study shows that courts fail to consider any employee-related conduct, save for whether or not she filed a formal complaint of sexual harassment, in analyzing the employee-focused prong or the entire affirmative defense. See Sherwyn, *supra* note 4, at 1285-86. This study shows that as long as the employer had an adequate policy and an adequate response to workplace sexual harassment, the employer would prevail on both prongs of the affirmative defense. *Id.* at 1286.

258 *Id.* See e.g. Walton v. Johnson & Johnson Servs., Inc., 247 F.3d 1272 (11th Cir. 2003) (an employee avoids harm by filing complaint). See also *supra* note 17.

259 *See supra* text accompanying notes 155-226.

260 *Id.*

261 *See supra* Section III.B.4.

262 Watts v. Kroger Co., 170 F.3d 505, 511 (5th Cir. 1999) (limiting “avoid harm otherwise” to corrective mechanisms designed to stop sexual harassment); Brown v. Perry, 184 F.3d 388, 397 (4th Cir. 1999)(plaintiff failed to “avoid harm otherwise” when she failed to avoid the harasser despite her formal complaint); Mays v. City Sch. Bd., 2001 WL 208493, *1 (4th Cir. 2001) (plaintiff failed to avoid harm when she did not avoid the harasser); Green v. Servicemaster Co., 66 F. Supp. 2d 1003, 1013-14 (N.D. Iowa 1999) (denying employer’s summary judgment motion because there was a factual dispute as to whether plaintiff attempted to “avoid harm otherwise” when she complained to her union steward); Taylor v. United Reg’l Health Care Sys., Inc., 2001 WL 1012803, *8 (N.D. Tex. 2001) (defining “avoid harm otherwise” as requiring the employee to provide notice of sexual harassment to the employer); Cherry v. Menard, Inc., 101 F. Supp. 2d 1160, 1178 (N.D. Iowa 2000) (issue for jury whether plaintiff attempted to avoid harm otherwise when she complained about the sexual harassment to her friend, who was also a manager in the company); Rodriguez v. City of
fail to comprehensively address an employee’s mitigation of all of her damages resulting from sexual harassment. Such a failure is usually due to the courts’ lack of consideration of the broad range of harms and harm avoidance behaviors, rather than a rejection of their relevance to the liability determination under the affirmative defense. For instance, in Speaks v. City of Lakeland, the court found that plaintiff failed to use the employer’s complaint procedure. Therefore, the court found that “[m]ost, if not all, of the harm to Plaintiff could have been avoided by Plaintiff simply reporting [her supervisor] at the beginning of the harassment.” The court did not explore whether certain harms, such as employment, emotional or psychological harms, were mitigated by Plaintiff’s decision to not report. In addition, the court did not discuss whether Plaintiff took other actions in order to decrease the harassment itself. Rather, because Plaintiff did not report the harassment, the court granted summary judgment to the employer because the “Plaintiff did not exercise reasonable care to avoid sexual harassment by [the supervisor] or otherwise avoid harm.” Unfortunately, the Speaks court is not alone in its failure to fully analyze all the harms and harm avoidance actions taken by the employee.

Regarding the concept of “harm,” courts have almost uniformly failed to pay attention to the diversity of harms suffered by a victim of sexual harassment. To the extent that courts are looking to whether a plaintiff mitigated “harm,” the majority of courts have inappropriately narrowly construed harm to include the acts of sexual harassment only. In a couple of cases, courts have acknowledged that one of the harms resulting from sexual harassment is ongoing contact with the harassing supervisor. A couple of courts have also recognized that psychological trauma is a harm resulting from sexual harassment. One case even cited to plaintiff’s lack of

 Houston, 250 F. Supp.2d 691, 702 (S.D. Tex. 2003) (“avoid harm otherwise” does not require plaintiff to vacate her job position that subjects her to daily contact with harasser); Cromer-Kendall v. District of Columbia, 326 F. Supp.2d 50, 64 (D.D.C. 2004) (affirmative defense was defeated because the plaintiff reported the harassment, thus the defendant failed to show that she did not “avoid harm otherwise”); Walton v. Johnson & Johnson Serv. Inc., 347 F.3d 1272, 1290 (11th Cir. 2003)(plaintiff’s fear of retaliation was not a sufficient justification in her failure to report and “avoid harm otherwise”).

 Speaks, 315 F. Supp. 2d 1217, 1229 (M.D. Fl. 2004).

 Watts, 170 F.3d at 511 (fails to define “harm” explicitly, but implicitly “harm” is equated to sexual harassment); Brown, 184 F.3d at 397 (“harm” is equivalent to sexual harassment); Green, 66 F. Supp. 2d at 1013-14 (“harm” is synonymous with sexual harassment); Taylor, 2001 WL 1012803, *8 (“harm” is equated to sexual harassment) Cherry, 101 F. Supp. 2d at 1178 (“harm” is equivalent to sexual harassment); Duhe v. United States Postal Service, 2004 WL 439890 *16 (E.D. La. March 9, 2004) (harm is an actionable hostile work environment).

 Mays, 2001 WL 208493, at *1 (“harm” is equated to the proximity to the supervisor); Rodriguez, 250 F. Supp.2d at 702 (“harm” means sexual harassment and proximity to supervisor).

 Walton, 347 F.3d at 1290 (recognizing that severe sexual harassment “can be particularly traumatic”); Reed, 333 F.3d at 35 (recognizing that reporting sexual harassment is scary, uncomfortable and painful).
employer as a harm. Yet on the rare occasions when the courts have recognized broader harms, the courts usually fail to credit the plaintiff with having attempted to balance her harms by taking action that might decrease some harms while not affecting or increasing other harms. This is especially true if plaintiff has chosen an action that may decrease her emotional harm but results in her failure to report the sexual harassment.

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

To the extent that “avoiding harm” has been discussed, most courts have acknowledged only a plaintiff’s reporting of the sexual harassment to her employer pursuant to the official policy against sexual harassment as “avoiding harm.” At

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270 Walton, 347 F.3d at 1290 (even though reporting sexual harassment can be traumatic, employer will not be held liable since plaintiff’s failure to report precluded the employer from being able to correct the sexual harassment); Reed, 333 F.3d at 35 (“[the Supreme Court’s] regime necessarily requires the employee to make this painful effort [of reporting sexual harassment] if the employee wants to impose vicarious liability on the employer and collect damages under Title VII.”). See also Chamallas, supra note 7, at 384-85 (discussing courts’ tendency to undervalue emotional harm by not seeing it as interrelated to economic harm and also a job-related injury). See also Brown, 184 F.3d at 391, 397 (court found that plaintiff failed to avoid harm even though she reported the harassment because plaintiff did not avoid the harasser himself in order to protect her employment).

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

272 Duhe, 2004 WL 439890 at *16. As noted elsewhere in this article, equating the reporting of sexual harassment with avoidance of harm is ironic considering the fact that social science research has
times, the courts have recognized other reporting actions as “avoiding harm otherwise” if they provided some form of notice to the employer.\textsuperscript{273} For instance, a couple of courts have found that even though plaintiff’s reporting did not technically comply with the employer’s policy because plaintiff complained to a manager not identified in the employer’s sexual harassment policy, plaintiff’s actions “avoided harm otherwise” because they notified the employer of the harassment.\textsuperscript{274} This again is an inappropriate limitation of the avoid harm otherwise component. As the Supreme Court designed the employee-focused prong to increase harm avoidance, all forms of harm avoidance, not just notifying the employer, should be analyzed.

Other courts have correctly analyzed the “avoiding harm otherwise” component by recognizing any action that is aimed at avoiding harm.\textsuperscript{275} For instance, courts have recognized that grieving the sexual harassment to one’s union can constitute “avoiding harm otherwise” since it is a corrective mechanism aimed at avoiding the harm of harassment. Some courts also have acknowledged on occasion plaintiff’s actions to avoid the harassing supervisor himself as relevant to the “avoid harm otherwise” component.\textsuperscript{276} One court identified that whether a plaintiff stayed in or quit her job was relevant to “avoiding harm otherwise.”\textsuperscript{277} However, the courts’ analyses are incomplete because they primarily recognize harm avoidance actions only for their effect on sexual harassment and not on any other harms.

A good example of the courts’ general failure to fully analyze all the harms when analyzing harm avoidance acts is Walton v. Johnson & Johnson Servs., Inc.\textsuperscript{278} In Walton, the court correctly identified that there were multiple, relevant harms resulting from the sexual harassment.\textsuperscript{279} Specially, the court found that the sexual harassment was one harm and the psychological trauma was another. Nonetheless, the court only credited as “harm avoidance” actions taken by the plaintiff those

\begin{enumerate}
\item shown that employer policies, complainant reporting and employer investigations do not necessarily reduce sexual harassment. Grossman, Culture of Compliance, supra note 4, at 3.
\item But see discussion and critique of the notice requirement infra Section V.B.
\item Taylor, 2001 WL 1012803, *8 (actions to “avoid harm” include notifying management of the harassment, including notifying managers outside of the formal complaint mechanism); Cherry, 101 F. Supp. 2d at 1178 (actions to “avoid harm” include complaining to a manager not identified in the formal complaint mechanism, even if the manager is friend).
\item Watts, 170 F.3d at 511 (actions to “avoid harm” include filing a union grievance); Green, 66 F. Supp. 2d at 1013-14 (filing a union grievance can be avoiding harm otherwise).
\item Brown, 184 F.3d at 397 (plaintiff failed to “avoid harm” because she socialized with supervisor); Rodriguez, 250 F. Supp.2d at 702 (plaintiff need not vacate her job position that subjects her to daily contact with harasser in order to effectively “avoid harm”); Mays, 2001 WL 208493, at *1 (actions to “avoid harm” include not provoking supervisor);
\item Mueller, 2003 U.S. Dist. LEXIS 12378, at *28-29 (plaintiff’s quitting of her job despite the fact that the sexual harassment had ceased was a failure to avoid harm).
\item 247 F. 3d 1272 (11th Cir. 2003).
\item Walton, 247 F. 3d at 1290 (avoiding harm equated with filing a complaint, even if reporting increases plaintiff’s trauma).
\end{enumerate}
actions it determined would have eradicated the sexual harassment. As a result, the court dismissed the relevance of plaintiff’s psychological trauma being exacerbated as a result of reporting the harassment. This court’s narrowing of harm avoidance though inappropriate is not surprising given the multitude of court decisions that fail to properly recognize all harms and harm avoidance when making liability determinations.

Courts that either ignore an “avoiding harm” analysis altogether or narrowly construe harm avoidance are incorrectly analyzing the affirmative defense. As discussed earlier, in Faragher and Ellerth, the Supreme Court stated that harm avoidance is the motivating principle for liability determinations for supervisor sexual harassment. Without properly analyzing all of the harms and the ways in which they are avoided or not, the courts fail to credit employees with their full range of harm avoidance.

V. RECONCEPTUALIZING “AVOID HARM OTHERWISE”

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

A. “Avoiding Harm Otherwise”

In order to determine liability, an employer must show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” If the employee utilized the employer’s mechanisms, then the employer has failed to meet its burden and liability should attach, whether or not she avoided any other harm in any other way. The reason for this is the employer has supposedly in part created the policy to avoid the harm of harassment. Therefore, if the employee avails herself of reporting, she satisfies what the employer thought was necessary to avoid harm.

On the other hand, assuming that the employee did not reasonably fail to use the employer’s process for reporting the sexual harassment, the employer should still be required to show that plaintiff did not avoid harm otherwise. The types of harms that should be explored should be all of the harms identified by the case law, social

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280 See supra text accompanying notes 47-72.
281 Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.
282 See supra note 278.
science research and workplace studies. As stated earlier in this article, these harms should include the sexual harassment, the stigma of discrimination, the resulting tangible job harm, such as termination or non-promotion, the resulting intangible job harm, such as an abusive work environment and loss of employment advancement, economic harm, and emotional, psychological and physical harms. In response to these harms, women who are sexually harassed utilize a wide range of strategies to avoid these harms, such as avoiding the harasser, objecting to the harasser, formally complaining about the sexual harassment, seeking support from friends and family, and ignoring thoughts about the sexual harassment and denying that the harassment occurred. And of course, because one harm avoidance strategy may decrease one type of harm while increasing another, the determination of liability based upon “avoid harm otherwise” requires a court to weigh the various strategies employed and their effectiveness in mitigating damages in the aggregate, as required by the avoidable consequences doctrine.

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

For instance, in Lena’s case, as discussed above, Lena has been subjected to multiple harms and she has taken multiple actions to avoid harm. Lena has suffered the sexual harassment of being touched by Dave on her thighs, lower back and arms. She has also suffered the harm of intangible job harm of having her complaint about the sexual harassment be discounted by Victor when he made a joke of the sexual harassment. In addition, she is worried about being ostracized at work if she complains to her other co-workers because she thinks they too will not take it
seriously. She is also worried about losing her job if she complains further. In addition, Lena is suffering other work harm with direct economic consequences in that she is taking more sick leave than she ever has in the past, she is not volunteering for and is even turning down overtime work. Her less frequent attendance and willingness to work overtime may also be causing her to be seen as no longer enthusiastic about her position or even not a team player. She is also suffering lost joy in her work, she feels dread about going to work and is on edge. These are the emotional harms that she is suffering. And finally, she is suffering the physical harms of loss of appetite and difficulty in sleeping.

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

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

But throughout this process, one thing does become clear. And that is by exploring these questions, a more complex view of Lena is developed. It is a picture of Lena who is an actor, not one who is passive and simply submitting to the sexual harassment. It is for this reason alone, and despite the many questions remaining, that there is a value in exploring all of the harms and harm avoidance actions. By the end

\(^{287}\) See supra Section III.B.
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of the inquiry, there should be a more reliable understanding of whether liability should attach to the employer because of Lena’s attempts to avoid harm as required under the avoidable consequences doctrine.

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

The above section discussed this article’s proposal for crediting an employee with her harm avoidance actions in determining liability for supervisor sexual harassment. It is true that under this harm avoidance proposal, there might be times that an employer will be held liable despite having no notice of the sexual harassment. Such a result is not problematic as the liability determination must focus on harm avoidance rather than employer knowledge. A harm avoidance focus comports with the underlying avoidable consequences rationale of the affirmative defense and broader liability framework for supervisor sexual harassment. Accordingly, the focus should be on whether the action taken was reasonably calculated to avoid the harms from sexual harassment. Within this analysis, notice needs to be examined as to whether or not it actually avoids harms. As explained below, employer notice does not necessarily avoid all the harms of sexual harassment and therefore cannot, without more, be a prerequisite for attaching liability to the employer.288

For many reasons, the assumption that employers who receive reports of sexual harassment then act to stop the harassment is not necessarily true. For instance, there have been many studies that show that rather than decreasing harassment, such reports may instead cause retaliatory adverse treatment of the complainant.289 In addition, Martha Chamallas has shown that employees who lodge formal complaints

288Even if there could be agreement that notice to employers about sexual harassment would decrease harassment in the workplace, it is not clear that employer policies laying out complaint mechanisms are, or could ever be, effective on their own in providing employer notice. For instance, Joanna Grossman explains that there is no social science research to support the assumption that requiring victims of harassment to complain pursuant to company anti-harassment policies, without also grappling with such things as gender balance in the workplace, organizational power, and treatment of prior complainants, will actually increase reporting incidents because the least likely response to harassment is for an employee to complain. Grossman, Culture of Compliance, supra note 4, at 52-56. See also Chamallas, supra note 7, at 374 (“It is noteworthy that it is atypical for victims to file an internal complaint even when their complaint is grievous enough to make them willing subsequently to embark on legal action.”). The fact that an employer policy does not always result in increased formal reporting and thus a deterrence of sexual harassment is not surprising. As David Sherwyn and his co-authors argue, the requirement that employees provide notice to employers in order to attach liability actually provides employers with the incentive to create policies hoping no employee will ever use them. Sherwyn, supra note 4, at 1294.

289Chamallas, supra note 7, at 374 (citing two different studies showing that a large percentage of employees who complained about sexual harassment (33% in one study and 61% in another) also suffered subsequent retaliation).
of sexual harassment suffer subsequent work-related harms because they are often viewed as troublemakers and ostracized by co-workers.290

Such treatment underscores the reality that it is the workplace’s informal organization, not its formal organization of reporting and investigation procedures, that controls the environment and the occurrence of sexual harassment in the workplace.291 Chamallas explains that the ineffectiveness of formal grievance procedures is due in part to the fact that such procedures are created in order to protect employers from liability as opposed to seeking justice for civil rights violations.292 Specifically, the procedures:

allow the employer to control the process and assume that compliance does not interfere with the employer’s other more pressing interests. The decisionmaker is not neutral in the sense of not being accountable to either side; rather, the person assigned to resolve the dispute is an employee of the potential defendant who has an interest in minimizing the extent of the conflict, saving the image of the employer, and maintaining smooth relationships. His or her main job is to insulate the employer from legal liability, a goal that may not always coincide with cutting down on the incidence of sexual harassment.293

Finally, formal reporting to the employer, and thus notice itself, does not necessarily decrease the incidence of sexual harassment for other reasons. The formalization of the complaint processing has resulted in many complaint processing officials who do not understand sexual harassment law and how it fits into the broader civil rights policies and laws.294 As a result, they receive the complaints and try to problem solve them as “personality clashes,” rather than viewing the complaint as part of a pattern of systemic discrimination.295 And the way in which these complaints are processed further isolates complaints to individual acts of harassment. This is because it is very common for the employer to require that the harassed employee agree to keep her harassment confidential as part of the processing of her complaint.296 As a result, the confidentiality obligation limits the employee’s opportunity to discuss her harassment with other employees who might be similarly

290Id. at 376
291Id. at 377-78. See also, Marshall, supra note 155, at 85-86 (discussing the same work by institutional theories of organizations). As Chamallas states, “[w]hether an organization discourages or tolerates harassment may have more to do with the personal style and commitments of top manager than the formal policies in the employee handbook.” Chamallas, supra note 7, at 378.
292Id. at 379.
293Id.
294Id.
295Id. Marshall, supra note 155, at 86, 115-16 (showing that in the end, the employee’s rights are reinterpreted from civil rights to management interests).
296Chamallas, supra note 7, at 379.
affected and could otherwise come forward to show a larger pattern of harassment.\footnote{297 Id.}
In the end, an isolated incident of harassment is less likely to be aggressively eradicated or disciplined than a pattern of systemic sexual harassment that is impacting the civil rights of numerous female employees. Because of the culture of formal complaint processing, notice itself does not necessarily decrease the incidence of sexual harassment. Accordingly, because there is no definitive correlative relationship between notice and deterring sexual harassment, Theresa Beiner questions whether courts should even credit the employer with a defense to liability when there is a lack of “notice.”\footnote{298 Beiner, Women’s Stories, supra note 4, at 144.}

There are numerous examples in case law as well that show notice by itself does not always eradicate sexual harassment in the workplace. For instance, in Cerros v. Steel Technologies, Inc.,\footnote{299 398 F.3d 944 (7th Cir. 2005).} there is an indication that despite plaintiff telling the supervisors and the plant manager about the harassment, the company failed to correct the harassment or deter future harassment, thus failing to deter the act of sexual harassment.\footnote{300 Id. at 949, 952, 954.}

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

Below is a discussion of one court’s decision that notice was required in order to attach liability to the employer. In this case, the court improperly narrowed the employee’s obligation to “avoid harm otherwise” to require that she provide notice to the employer.\footnote{301 Fields v. Illinois Dept. of Corrections, 2006 WL 2645200, Case No. 03-cv-4222-JPG (S.D. Ill. Sept. 12, 2006).} In Fields v. Illinois Dept. of Corrections, the Illinois Department of Corrections (IDOC) had a sexual harassment policy that permitted the targeted employee to report the sexual harassment to the IDOC or to file a complaint with the EEOC.\footnote{302 Id. at *15. Specifically, the court found that “the policy urged employees to use the internal complaint process to obtain resolution to sexual harassment complaints, [but] it also allowed an employee to proceed directly to the Illinois Department of Human Rights or the Equal Employment Opportunity Commission (‘EEOC’).” Id. at *2.} Ms. Gunn, one of the plaintiffs in this case, chose the option that permitted her to file an EEOC complaint rather than file an internal IDOC complaint.\footnote{303 Id. at *15.}
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court stated that under the affirmative defense, “the requirement that an employee report sexually harassing conduct arises out of her duty to take reasonable care to avoid harm.” The court continued that “‘[T]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists.’” Accordingly, the court determined that in filing a complaint with the EEOC, rather than reporting the harassment to the employer, plaintiff had failed to use the employer-provided measure that would stop the harassment.

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

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

304 Id.
305 Id.
306 It should be noted that another case, also in the Seventh Circuit, similarly narrowly construed harm avoidance. Equal Employment Opportunity Commission v. V&J Foods, 2006 WL 3203713 (E.D. Wis. Nov. 3, 2006). In V&J Foods, the court again required that plaintiff provide employer with notice in order to satisfy the employee-focused prong of the affirmative defense. Id. at *7. The court based its decision on the fact that the policy rationale to avoid harm is met only if plaintiff provided the employer “with the knowledge and the means to avoid future harassment.” Id. at *8. For reasons discussed in this section, such an interpretation of how harm is to be avoided is far too narrow.
308 Id.
the EEOC. For instance, Gunn told one of her supervisors, Parker, that she was offended by his sexual comments about her anatomy,\(^{309}\) she indicated to another one of her supervisors, Turner, that she did not appreciate his sexual advances,\(^{310}\) and she filed an IDOC incident report about Parker’s sexually inappropriate and offensive conduct.\(^{311}\) In addition, in its calculation that Gunn’s failure to file an internal IDOC complaint was an unreasonable failure to avoid harm, the court failed to acknowledge Gunn’s severe employment-related harms that were created and aggravated by another plaintiff’s IDOC internal complaint of sexual harassment that identified Gunn as a target of sexual harassment.\(^{312}\) As a result of the other plaintiff’s complaint, IDOC subjected Gunn to scrutiny not suffered by other employees that resulted in numerous disciplinary actions, including reprimands and suspensions.\(^{313}\)

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

Accordingly, avoiding harm cannot always be satisfied by notice. In addition, by focusing exclusively on whether an employee provided notice of the sexual harassment to her employer, courts are failing to acknowledge and analyze all of the harms resulting from sexual harassment and all of the strategies an employee utilizes that are reasonably calculated to avoid these harms. The result is that a liability determination is not being made based upon a thorough analysis of the harm avoidance principle.\(^{314}\)

\(^{309}\)Id. at *3.
\(^{310}\)Id. at *15.
\(^{311}\)Id.
\(^{312}\)Id. at *5-7.
\(^{313}\)Id.
\(^{314}\)Theresa Beiner has provided another argument against a liability standard that requires notice. Specifically, Beiner has argued that a liability standard that requires notice to the employer of any sexual harassment would provide more protection to the employer, who is not a victim here, than to the employee, who is the actual victim of sexual harassment. Beiner, Women’s Stories, supra note 4, at 144. Moreover, it would provide absolutely no Title VII remedy to an employee who was in fact sexually harassed and whose workplace was affected. Id. Beiner has stated that supervisor sexual harassment should be considered a cost of business similar to a supervisor’s discriminatory firing of an employee. Id. Accordingly, as no notice is required before liability could attach for a discriminatory firing by a supervisor, no notice should be required before liability could attach for supervisor sexual harassment.
C. Avoiding Harm Should Be More Important Than Conciliation As An Animating Policy Behind the Affirmative Defense

Similarly, in evaluating an employee’s actions under the affirmative defense, it is more appropriate to analyze whether those actions serve to avoid the employee’s harms from sexual harassment than whether or not they promote informal conciliation. It is true that in articulating the affirmative defense, along with the importance of harm avoidance the Supreme Court noted the importance of Congress’ preference for conciliation rather than litigation of Title VII violations.315 The Court reasoned that having a policy of non-harassment and a mechanism by which an employee could complain would enable the employer to informally resolve an employee’s sexual harassment claim.316 As a result, there would be fewer charges of discrimination filed at the EEOC and less litigation of such complaints in court.317 Despite the underlying rationale for the affirmative defense, there are several reasons why conciliation is not necessarily promoted by the liability framework and therefore, whether or not an employee’s actions are analyzed as promoting conciliation should not be the basis for liability attachment.

First, as explained by Chamallas, effective conciliation is not achieved when the conciliation decisionmakers are not neutral.318 The type of conciliation that is promoted through the affirmative defense framework is one in which the employer is both a party to the conciliation effort and the decisionmaker. This structure is flawed because the decisionmakers are accountable to the employer and therefore, will tend to make decisions that are not based solely on the best conciliation outcome for both parties.319 In addition, the employer’s conciliation process, as discussed above, is not solely intended to reach an agreement without litigation, but to protect the employer from legal liability.320 Also, a true conciliation process at its core is intended to provide a speedy remedy to a plaintiff.321 Yet employer conciliation mechanisms are often constructed to ensure the dismissal of plaintiffs’ claims by only minimally

315Ellerth, 524 U.S. at 764.
316Id.
317Suders, 542 U.S. 129, 145 (linking the employer’s effective grievance procedures to liability promotes conciliation rather than litigation). In addition, the Court stated that the affirmative defense promoted conciliation in another way. Specifically, a liability scheme that would find automatic liability for explicit and implicit uses of power by the supervisor would encourage litigation rather than conciliation of all supervisor sexual harassment claims. Accordingly, since the affirmative defense can preclude strict liability for the class of sexual harassment claims that do not result in a tangible employment action without conciliation efforts, the Court would be hindering litigation. Faragher, 524 U.S. at 805.
318Chamallas, supra note 7, at 379.
319Id.
320Id. See also Marshall, supra note 155, at 86.
321Ford Motor Co. v. EEOC, 458 U.S. 219, 228-229 (1982) (conciliation is a tool to get a remedy to plaintiff quickly because litigation is so slow).
complying with the employer-prong of the affirmative defense, thus ensuring that the complaint mechanisms are not truly effective in getting the employees to complain pursuant to them.\textsuperscript{322} It is precisely because of these flaws that employer-run conciliation is not effective. In fact, under Title VII and previous Supreme Court cases, the conciliation goal that is envisioned is one that would occur through a neutral entity, such as the EEOC,\textsuperscript{323} not the employer. Therefore, under the affirmative defense, it does not make sense to prioritize conciliation mechanisms that are operating solely to protect employers from liability rather than harm avoidance mechanisms.

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

Finally, it is important to note that despite the conciliation rationale, the affirmative defense does not bar liability in all instances where conciliation with the employer is not attempted. For instance, if the sexual harassment is one severe act of sexual harassment, such as a supervisor raping an employee, then the affirmative defense would not bar liability even though there was no opportunity to provide notice by reporting that rape and conciliate the claim before the sexual harassment had occurred.\textsuperscript{324} Accordingly, for the reasons discussed above, conciliation cannot be

\textsuperscript{322} Chamallas, \textit{supra} note 7, at 379.
\textsuperscript{323} See \textit{e.g.}, North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 552 (1982) (Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC).
\textsuperscript{324} See \textit{Todd v. Ortho Biotech, Inc.}, 175 F.3d 595, 598 (8th Cir. 1999) (noting the affirmative defense, which was "adopted in cases that involved ongoing sexual harassment in a workplace . . . may not protect an employer from automatic liability in cases of single, severe, unanticipatable sexual harassment"); \textit{see also Indest v. Freeman Decorating, Inc.}, 168 F.3d 795, 804 n.52 (5th Cir. 1999) (Wiener, J., specially concurring) (contending that under Faragher and Ellerth, when a supervisor engages in "sufficiently severe conduct," i.e. rape, an employer may be vicariously liable regardless of the timeliness of the employer’s response or the plaintiff’s complaint). \textit{But see id.} (when an employee promptly complains of sexually harassing behavior and the employer promptly responds, disciplines the harasser and stops the harassment, there will be no employer liability); \textit{Watkins v. Prof’l Sec. Bureau, Ltd.}, 1999 WL 1032614 at *1, *4-5 (4th Cir. 1999) (using the affirmative defense and finding that an employee who waited four months before reporting her supervisor raped her acted unreasonably according to the second prong of the affirmative defense, and, moreover, the employer satisfied the first prong of the defense as it did not fail to exercise reasonable care by not anticipating the supervisor was a potential rapist); \textit{Marks, supra} note 4, at 1423-27 (discussing the fact that some courts have nonetheless held that the employer should be able to defeat liability by merely establishing the employer-focused prong and not have to show that the employee complained pursuant to the policy under the employee-focused prong).
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the primary motivating rationale over harm avoidance in deciding affirmative defense cases when it is merely a pretext for providing notice.

CONCLUSION

As seen in this article, the concepts of employee harms and harm avoidance are important to the liability framework for hostile work environment sexual harassment by a supervisor. Whether an employer is liable for supervisor sexual harassment depends in part on whether or not the employee avoids her harm or mitigates her damages resulting from the sexual harassment. Despite the law’s interest in employees’ harm avoidance, courts have failed to fully explore the vast array of harms resulting from sexual harassment and the variety of ways in which employees avoid these multiple harms.

This article reframes the legal discussion of employees’ actions in response to sexual harassment from one that almost exclusively focuses on whether the employees failed to report the sexual harassment. As discussed above and shown through the story of Lena, a limited view of the affirmative defense, one that merely considers whether the employer had a policy and whether the employee formally complained thereto, constructs women employees as non-actors because they do not complain about being sexually harassed. They appear as “silent sufferers.”^325 And no liability attaches.

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

As a result, the discourse of women’s subordination in the workplace can be balanced with the embracing of women’s acts of resistance, choices, self-definition and self-direction. By recognizing women’s agency we are creating the necessary legal “space”^326 “between construction”^327 of oneself to “determination”^328 by

^325 Chamallas, supra note 7, at 380 (stating that because of inherent flaws in internal grievance procedures, employees may not come forward to complain and hence, as in the 1970s, are “silent sufferers”). See also Krieger, supra note 4, at 180 (similarly, the early social science research focused only on externally focused coping mechanisms to sexual harassment and therefore internally focused strategies were considered under the category of “‘ignoring’” or “‘doing nothing’”).

^326 Abrams, Subordination and Agency, supra note 24, at 114.

^327 Id. at 113.
oneself. Such a legal space is important for its potential to impact women employees, their employers, and the larger legal discourse in the courts and in scholarship regarding how women who are sexually harassed are not passive and silent sufferers but complex actors. These employees act in various ways to avoid the multiple forms of harm resulting from sexual harassment.

328 *Id.*