A New Look at Harassment by Supervisors: Focusing on Partitioning Damages Rather Than Assigning Liability

James F. Morgan, California State University, Chico
Glenn M. Gomes, California State University, Chico
James M. Owens, California State University, Chico

Introduction
For years, sexual harassment law concerning the extent of an employer's liability for claims of harassment by supervisory employees has been a policy quagmire. In 1998, the United States Supreme Court tackled the critical issue of "vicarious liability" — the employer's liability for the harassing behavior of supervisory employees — in the Burlington Industries, Inc. v. Ellerth ("Ellerth") and Faragher v. City of Boca Raton ("Faragher") decisions. While ruling that employers could be held liable, the Court also created a defense for those seeking to avoid liability for a supervisor's illegal behavior. In the intervening years, however, the Court's position has come under critical scrutiny, and it is far from clear that the Supreme Court provided a truly satisfactory resolution to policy questions involving the assignment of liability or the partitioning of damages.

Both employers and employees deserve a legal and ethical framework that provides a certain, reliable, unambiguous, and equitable means for distributing the rights and responsibilities of the respective parties. A recent decision by the California Supreme Court, in State Department of Health Services v. Superior Court ("McGinnis"), provides a provocative yet workable process for achieving this important public policy objective. The California high court elected to resolve the issue of employer liability for supervisory harassment in favor of the victim by eliminating any employer defense against liability. It also focused on the more critical question of apportioning damages resulting from the harassing behavior. As a means for providing incentives to prevent sexual harassment, or as a way to fairly compensate victims once sexual harassment has occurred, the McGinnis ruling in California, in our opinion, is a superior approach to balancing the workplace interests of both employers and employees.

This article first reviews and critically evaluates the employer defense against liability created by the U.S. Supreme Court in Ellerth and Faragher. Next, we summarize the California Supreme Court's ruling in McGinnis, with particular emphasis on the court's adoption of a "strict liability" (i.e., liability without fault) standard for assigning to the employer the responsibility for sexual harassment by a supervisor. We also review the California Supreme Court's focus on the "avoidable consequences" doctrine to apportion damages arising from sexual harassment, thereby creating an economically efficient and administratively effective system for balancing workplace rights and responsibilities. In addition to calling on lawmakers and the courts to adopt the California approach, we also provide practical advice on how employers can best function under this suggested framework.

The Ellerth/Faragher Defense: A Flawed Compromise
Courts and legislatures have typically agreed on the appropriate standard of employer liability — negligence — for harassment of employees by co-workers. The negligence standard creates a substantial safe harbor for employers provided they either had no prior knowledge of the harassing behavior, or that they did have (or should
have had) such knowledge and acted reasonably to prevent subsequent harm.

Harassment by supervisors, however, has been a much more problematic and controversial area of the law. The evolution of the employer's liability in these situations took a major turn as a result of the U.S. Supreme Court's 1998 decisions in Ellerth and Faragher, which suggested new standards for employer liability. While initially thought to be a workable solution that advanced public policy in the area of workplace sexual harassment, subsequent decisions by the lower courts created significant uncertainties for managements seeking to rationalize the employer defense created by the Ellerth and Faragher rulings. And for many victimized employees, the promise of greater workplace justice has not been realized.

- **The essence of the Ellerth/Faragher defense**
  Confronted with the question of an employer's liability for supervisory harassment, the Supreme Court in Ellerth stated that the proper initial inquiry is whether a "tangible employment action" changing the terms and conditions of employment (e.g., firing, demotion, relocation) occurred when an employee refused to submit to a supervisor's demand for sexual favors. When the supervisor acts with the authority of the employer in effecting a tangible employment action, the employer is strictly liable for the supervisor's harassing behavior. The liability exists even though the employer may have taken prior steps to prevent harassment and regardless of whether the harassment was a one-time incident or a pattern of behavior.

  When no tangible employment action was taken, however, the Supreme Court crafted a means for employers to escape liability under certain circumstances. The Court established a defense for employers based on two necessary conditions: "(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 preventative or corrective opportunities provided by the employer or to avoid harm otherwise" (Ellerth, p. 765). The promulgation and communication of an anti-harassment policy by the employer might satisfy the first prong of the defense, and the employee's unreasonable failure to use the complaint process provided by the company's policy could meet the standard created by the second prong.

  In Faragher, the Supreme Court sought to balance employer liability with the desirable policy of encouraging forethought by employers and corrective initiatives by objecting employees, as envisioned in Title VII of the 1964 Civil Rights Act. In adopting the two-prong defense created in Ellerth, the Faragher court recognized that the primary objective of Title VII was to prevent harm and not necessarily to provide damages to victims of offending behavior.

- **Applying the Ellerth/Faragher defense: interpretational flaws**
  While the Ellerth and Faragher decisions taken together were initially believed to break new ground in sexual harassment law by offering an intuitively appealing way to resolve issues of employer liability, subsequent interpretations and applications of the Ellerth/Faragher defense by lower courts have been anything but consistent. This inconsistency necessarily creates uncertainties in the minds of both employers and employees. For example, the essence of the employer's Ellerth/Faragher defense against liability seems to be straightforward: the employer must act reasonably and the victim must act unreasonably. Yet, before the ink on the Supreme Court's Ellerth and Faragher decisions was dry, some appellate courts began interpreting the two-pronged Ellerth/Faragher defense in ways that effectively bypassed the need for the employer to prove the second prong, a pro-employer interpretation not lost on numerous commentators (e.g., Grossman, 2000; Marks, 2002; Shachter, 2001).

  Some courts argued that inequitable outcomes could arise, particularly for the employer, when both the employer and the employee acted reasonably (i.e., the employer enacted anti-harassment policies and procedures, and the employee utilized the employer's procedures for reporting harassment). The apparent inequalities were thought to be especially evident in cases involving one-time incidents of sexual harassment when the harassed employee promptly reports the offending behavior, and the employer promptly and effectively responds to the complaint. Thinking that it would be inherently unfair to hold an employer liable for supervisory harassment of which it was unaware prior to receiving notice from the harassed employee, some appellate courts quickly crafted decisions that effectively rendered the second prong of the
Ellerth/Faragher defense “optional” (see, e.g., Todd, 1999; Indest, 1999; Watkins, 1999). In both the Ellerth and Faragher cases, multiple instances of sexual harassment occurred over an extended period. Unfortunately, in cases involving a single incident, victims are not able to avail themselves of any existing preventative or corrective measures prior to being victimized by the offending behavior. Should an employer be entitled to an Ellerth/Faragher defense even when the second prong of the defense cannot under any circumstances be established? Should it offend our sense of justice to learn, for example, that an employer was allowed to avoid civil liability completely under the Ellerth/Faragher defense when one of its supervisors raped an employee? Amazingly, far from being an extreme hypothetical question, a Maryland employer was able to escape liability by proving that it had implemented anti-harassment policies and procedures, and that it had acted promptly to respond to the raped employee’s complaint. By showing that it had satisfied the first prong of the defense, the employer had no obligation to the employee (Watkins, 1999). In another case involving a single incident, another appellate court simply stated that the “strict adherence to the Supreme Court’s two-prong affirmative defense . . . is like trying to fit a square peg into a round hole” (McCurdy, 2004, p. 771). Finding that the second prong of the Ellerth/Faragher defense presumes multiple incidents of supervisor sexual harassment, the court held that to find employers liable for all single incidents of supervisor harassment, while allowing other employers a defense for multiple and ongoing incidents, was “absurd.”

If employers can escape liability for single incidents of harassment, “the first bite [i.e., first incident of harassment] is free” (see Grossman, 2000). Courts treating the first prong of the Ellerth/Faragher defense as a sufficient condition for avoiding employer liability for supervisory harassment, instead of requiring each prong to be a necessary condition, effectively adopt a pro-employer bias to the detriment of the civil rights of harassment victims (see Skidmore and Kaake, 2001). Under these circumstances, the liberal application of the Ellerth/Faragher defense against liability arguably fails to fully protect the harassed employee by rewarding procedural compliance at the expense of effective prevention (Grossman, 2003). Even when the second prong of the Ellerth/Faragher defense is not ignored, however, another shortcoming of the defense arises—the actual operation of the second prong’s “reasonableness” standard. How much delay is allowable between the time an employee experiences alleged harassment by a supervisor and reports it using the employer’s established procedures? In other words, at what point does an employee unreasonably fail to take advantage of any preventative or corrective opportunities provided by the employer such that the employer is able to escape liability altogether by establishing the second prong of the Ellerth/Faragher defense?

Unlike situations involving single incidents, sexual harassment often develops gradually over an extended period. Under these circumstances, an employee may have difficulty deciding when a supervisor’s offending behavior necessarily triggers a duty to act reasonably by informing the employer. The social science literature is replete with studies documenting how women cope with incidents of sexual harassment, and the numerous legitimate reasons why a harassment victim may be hesitant to report instances of offending behavior (see, e.g., Fitzgerald, et al., 1988; Fitzgerald, Swan, and Fischer, 1995; Gruber and Bjorn, 1986; Gruber and Smith, 1995; Gutek and Koss, 1993).

The second prong of the Ellerth/Faragher defense may not adequately take into account the pressures an employee experiences in deciding if, or when, to utilize the employer’s procedural mechanisms (see, e.g., West, 2002). The second prong places a significant (and perhaps onerous) burden on a harassed employee to come forward as early as possible, maybe sooner than the employee would consider prudent. Undoubtedly, some victims of sexual harassment delay reporting out of feelings of embarrassment, a sense of shame, fear of retaliation, economic circumstances, or simply a desire to avoid having to ultimately confront the harasser. For these women, a delay in reporting or complaining is a perfectly rational act. Unfortunately, but consistent with the pro-employer bias already noted, courts seldom hold the employer to their obligation under the second prong to prove the unreasonableness of the timing of the employee’s response (Marks, 2002).

Overcoming the Deficiencies of Ellerth and Faragher: The California Approach

Given the difficulties in interpreting and applying the Ellerth/Faragher defense, it is fair to ask
whether the public policy goal of a harassment-free workplace would be better served if employers were held strictly liable for all supervisory harassment. If employers could not escape liability, is there any mechanism by which the damages resulting from harassment could be fairly partitioned, reduced, or eliminated based on the actions of either the employer or the harassed employee? In the McGinnis case, the California Supreme Court confronted this very issue. By focusing on the effectiveness of the actions taken by employers and the harassment victims to avoid or minimize the damages resulting from the harassing behavior, the McGinnis court crafted a provocative yet workable compromise that more fairly balances workplace rights and responsibilities. The appropriate partitioning of damages — and not defending against liability — became the central issue.

Theresa McGinnis, an employee of the State of California Department of Health Services (DHS), alleged sexual harassment by her supervisor. While she failed to promptly inform management of the harassment, McGinnis did inform a co-worker. When DHS management was finally notified by McGinnis, it investigated and instituted disciplinary action against the supervisor after concluding that the supervisor had violated DHS’s sexual harassment policy. McGinnis sued claiming sexual harassment in violation of the anti-harassment provisions of state law. DHS asserted that a dual-pronged defense to employer liability analogous to that adopted by the Supreme Court in Ellerth and Faragher was applicable under California law. DHS argued that it had satisfied the first prong by implementing a sexual harassment policy, training employees in harassment-prevention techniques, and correcting instances of harassment, thereby demonstrating that it had exercised reasonable care. It alleged that the second prong was also met because McGinnis, by waiting at least 10 months before reporting the sexual harassment, failed to act reasonably by not availing herself of her employer’s policies and procedures.

Constrained by statute, the California Supreme Court had no choice but to find that, in cases of supervisory harassment, employers are strictly liable. The McGinnis opinion, however, recognized that damages recoverable against the employer may be reduced (or eliminated) if the harassed employee did not act reasonably in attempting to minimize the harm. This decision is based upon the common law doctrine of “avoidable consequences,” a principle that focuses on allocating damages, not on assigning liability, in balancing the competing interests of employers and victims.

Although under California law an employer remains strictly liable for the harassment conducted by a supervisor, the McGinnis court stated that the avoidance of consequences doctrine does not affect liability. Nevertheless, the employer is provided with a means to reduce damages flowing from that liability if it can prove that: (1) “the employer took reasonable steps to prevent and correct workplace sexual harassment;” (2) “the employee unreasonably failed to use the preventive and corrective measures that the employer provided;” and (3) “reasonable use of the employer’s procedures would have prevented at least some of the harm that the employee suffered” (p. 1044). The McGinnis court in effect adopted both prongs of the Ellerth/Faragher defense under federal law. By focusing on the question of damages while maintaining the employer’s strict liability for supervisory harassment, the court’s third requirement constitutes California’s innovative contribution to sexual harassment law.

Why McGinnis Matters
Sexual harassment law, as embodied in statute and expressed through judicial interpretations throughout the country, attempts to equitably balance the rights and responsibilities of employers and employees in service to two societal goals: (1) eliminating sexual harassment from the workplace and, (2) compensating victims appropriately when harassment has occurred. These expressions of the law ultimately must be evaluated according to their administrative effectiveness and economic efficiency. Questions of “Who is at fault?” and, perhaps more important, “Who pays, and how much?” are at the heart of the maturing public policy debate over sexual harassment law.

To the extent that the Ellerth/Faragher defense theoretically applies in instances when an employee unreasonably fails to take advantage of employer-created preventive or corrective procedures, and to the extent that such a defense is unavailable to employers who fail to create such safeguards, it is a step toward properly allocating responsibility between the employer
and the employee for preventing and correcting harassment. Nevertheless, as we have shown, the defense suffers from interpretational flaws, not the least of which is the propensity of lower courts to fashion curious modifications to the two prongs. In contrast, the California Supreme Court's McGinnis decision reflects, in our opinion, a more appropriate and equitable balance among the interests, rights, and responsibilities of both employers and employees consistent with the dynamics of the contemporary workplace. Moreover, the avoidable consequences doctrine is robust enough to be applicable for resolving all cases of sexual harassment, including those involving single incidents. The California Supreme Court's decision in McGinnis provides employers and harassment victims a greater clarity for determining their respective obligations in this complex area of the law (cf., e.g., Oppenheimer, 1995). It achieves greater efficiency in accomplishing public policy objectives than the Supreme Court's rulings in Ellerth and Faragher. The power of the California Supreme Court's logic in McGinnis decision lies less in its insistence upon unequivocally answering the question of employer liability for supervisory harassment (i.e., holding employers strictly liable) than on its focus on the more problematic issue of properly apportioning damages.

- **A Strict liability standard prevents escaping liability**
  In our opinion, the deficiencies in the Ellerth/Faragher defense against liability can best be overcome by adopting the McGinnis approach that focuses on limiting damages rather than escaping liability. Strict liability is already recognized as the proper standard in cases involving tangible employment actions. Holding employers strictly liable for the harassing behavior of supervisors in hostile environment cases (where no tangible employment action exists) is an equally effective way of achieving an important public policy goal: deterrence. The appropriateness of a strict liability approach that precludes an employer from escaping liability in hostile environment cases is warranted for several reasons.
  First, when employers are held strictly liable they have a strong incentive to take all necessary precautions to ensure, to the extent possible, that the workplace environment remains non-hostile. If, however, an employer believed — correctly or not — that it could avoid liability altogether based on its post-harassment remedial action, or on the failure of the victim to follow the employer's anti-harassment policies and procedures, then the employer would probably be less diligent about implementing attempts to prevent harassment in the first place. The inability to escape liability, coupled with the availability of damages, provides strong incentives for preventative measures, informing employees about behaviors that will not be tolerated, and creating procedures for uncovering instances of harassment at the earliest possible time.
  Second, because employers have ultimate control over two decisions that affect the probability that sexual harassment will occur — the hiring decision, and decisions about workplace structure and systems — employers are in the best position to prevent harassment. It is a fundamental principle that the risk of loss should be borne by those in the best position to prevent the loss from occurring.
  Third, the strict liability standard recognizes that employers can only act through their agents (i.e., managers and supervisors). Accordingly, employers must be held accountable for the acts (or failures to act) of those given decision-making authority.
  Finally, a strict liability standard helps to ensure that victims receive the compensation to which they are entitled as a result of the harm they endured. Employers are typically in a far better financial position to compensate victimized employees for their losses than the perpetrator of the harassment. If employers are forced to bear the full costs of harassment by its supervisors, they would be more likely to hire managers and design systems that would significantly lower the probability that sexual harassment would occur (see Smith, 1999; Grossman, 2000).

- **The avoidable consequences doctrine equitably apportions damages**
  The McGinnis decision incorporates the first prong of the Ellerth/Faragher defense by requiring employers to establish reasonable policies and procedures to prevent and promptly correct any sexually harassing behavior. The ultimate success of the employer in fulfilling this duty will be gauged by the absence of sexual harassment. In other words, prevention is the only result that renders an employer free from responsibility for damages. While the full eradication of sexual harassment from the workplace is a
noble goal, it is unrealistic to assume that it will be achieved completely.

By embracing the common law principle of "avoidable consequences," the McGinnis court recognized that the employer can avoid all damages if, and only if, reasonable care by the harassed employee would have avoided all harm. Conversely, if reasonable care by the employee would have avoided only some harm, the employer remains liable but is not required to pay for those damages that reasonably could have been avoided. Assuming that it is extremely unlikely that an employee will be able to avoid all harm from the harassing behavior, even if the employee reasonably uses the employer's preventative or corrective measures (especially in single incident cases), the essence of the McGinnis decision is its focus on the apportionment of damages. This focus seeks to address another important public policy goal: compensation. Accordingly, the proper question becomes: For which unavoidable damages must the employer pay, and for which avoidable damages is the employee not entitled to receive compensation?

Even though employers remain strictly liable for the harassing acts of its supervisors, the McGinnis decision requires that employees assume the responsibility for taking reasonable actions to avoid harm. The aggrieved party should mitigate damages and is entitled only to damages that could not reasonably have been avoided — these are the second and third prongs of the McGinnis standard.

This focus on damages, however, raises two questions regarding issues of timing. First, when did the harassed employee initially suffer harm? Often, this factual determination will be the initial instance of activities properly characterized as sexual harassment. Second, when should a reasonable employee have reported the harassment? Under McGinnis, the employer is responsible only for damages from "first harm" until a reasonable employee would have reported the harassment. When an aggrieved employee delays beyond a reasonable period he or she is not entitled to an award of damages for injuries suffered after the moment when management should have been informed. An employer under McGinnis can avoid only those damages "that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment" (p. 1044). The court required that the reasonableness of the injured party's activities be judged in light of the existing situation and not with the benefit of hindsight. In so doing, the court recognized the potential burden the avoidable consequences doctrine might have on an aggrieved employee.

Practical Advice

The Ellerth/Faragher defense remains federal law, subject to jurisdictional "modifications" made by certain lower courts. Arguably, California is a bellwether state in matters of public policy in the area of employment law. Given the superiority of the McGinnis standard compared with the Ellerth/Faragher defense, we anticipate that other states, and perhaps even the U.S. Supreme Court, may adopt California's use of strict liability in conjunction with the avoidable consequences doctrine in sexual harassment cases involving supervisors. Indeed, that is our major public policy proposal.

In the meantime, however, by acknowledging that liability falls on the employer but that damages can and should be apportioned between employer and employee based on the reasonableness of their actions, both parties in the employment relationship are given a powerful incentive to prevent workplace harassment. A transition from an Ellerth/Faragher approach to that taken in McGinnis has the potential for creating greater cooperation in the workplace. What can employers do now to prevent sexual harassment in the first place (the only way to avoid liability under the McGinnis standard)? If the best efforts of employers fail to accomplish this public policy goal, what can employers do to reduce damages for themselves and harassed employees?

The employer must redouble efforts to hire managerial and supervisory personnel who will not engage in harassing behavior. Toward this end, employers should adopt intensive screening procedures, probably involving more rigorous background and reference checks. After the hiring decision, the development and dissemination of a policy statement unequivocally stating that harassing behavior will not be permitted or condoned by the employer at any time or in any fashion may be the most profound and effective preventive measure. Employers must also recognize that the prevention of workplace harassment rests on effectively communicating
unequivocal policy statements, establishing procedures that fully implement the policy, assigning responsibility for enforcement at each organizational level, and providing ongoing training programs for all employees. With a lead-by-example approach to creating a system of values emphasizing workplace civility, the employer’s management team will create a strong, zero-tolerance culture that eventually becomes self-regulating. A relentless focus on creating a harassment-free workplace is the only guarantee of avoiding legal responsibility for supervisory harassment under a strict liability approach.

In contrast to the Ellerth/Faragher defense, the McGinnis approach to apportioning damages emphasizes the actions of both the employer and the victimized employee after sexual harassment has occurred. This places a premium on how well management works collaboratively with the victimized employee to minimize the harm caused by the inappropriate behavior. The employer and the employee are mutually dependent for a critical exchange of information: the employee must rely on the employer’s internal procedures to report the harassment, and the employer must rely on the employee to report in a timely manner. When sexual harassment is alleged, user-friendly procedures must allow an employee to lodge a complaint or seek assistance with the complaint process. Moreover, employees must be assured that the employer will take complaints seriously and address the complaints in a timely and (to the extent possible) confidential manner. While employers should have taken these steps already based on best practices in human resource management, the McGinnis approach heightens the importance of creating an environment of trust that allows victims to overcome their natural hesitancy in reporting harassing behavior by supervisors.

By promptly and effectively addressing the victim’s complaint, the employer establishes an upper limit to the damages under the avoidable consequences doctrine. Actual damages would be reduced if the employer can show that the employee acted unreasonably by delaying reporting (or otherwise acting upon) the alleged inappropriate behavior. The avoidable consequences doctrine prohibits employees from recovering damages that could have reasonably been avoided by using anti-harassment policies and procedures. However, the employer’s objective should not be to create conditions that show unreasonable behavior by victimized employees, but rather to create conditions under which naturally hesitant victims feel comfortable in reporting unacceptable behavior in a way that is undeniably reasonable.

The McGinnis doctrine assumes that employees should reasonably comply with the employer’s anti-harassment policy to reduce the harm associated with the harassing behavior. While most employees probably would prefer to resolve such problems in an informal way, the point is that employees must act, informally or formally, at the earliest opportunity that is reasonable under the circumstances. By doing so, the employee assumes the proper level of responsibility required by the avoidable consequences doctrine, and thus shifts responsibility to the employer for taking effective remedial action. The failure of a harassment victim to act “reasonably” necessarily reduces the damages for which employers are responsible and increases those to be borne by the victim. In a more collaborative environment envisioned by McGinnis, an enlightened employer has no vested interest in making the victimized employee’s share of the damages larger, but should focus instead on seeking ways to lower the total amount of damages allocatable to both parties.

Conclusion
In our opinion, deficiencies arising from the application of the federal Ellerth/Faragher defense were corrected by the rationale in the California Supreme Court’s McGinnis decision. Denied the ability to avoid liability, employers nevertheless were given a way to ameliorate the effects of strict liability by allowing them to seek a reduction of damages through the avoidable consequences doctrine. With its focus on partitioning (and, perhaps, reducing) damages rather than avoiding liability, the McGinnis decision improves on the federal approach in Ellerth and Faragher and advances the twin public policy goals of deterrence and compensation. For these reasons, we believe that legislators and the courts will want to adopt the California model.

The authors, all of whom earned J.D. degrees, are currently professors of Management. Professor Morgan teaches employment law and human resource management; Professor Gomes, who also holds a Ph.D. in Business Administra-
tion, teaches strategic management and business policy, and Professor Owens teaches courses in business and labor law. All have published extensively in academic and practitioner journals on management and human resource issues.

REFERENCES


*Index v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999).
McCord v. Arkansas State Police, 375 F.3d 762 (8th Cir. 2004).
Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000(e) et seq.
Todd v. Ortho Biotech, Inc., 175 F.3d 595 (9th Cir. 1999).

*(References continued from page 26)*

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