DEFENSE ANALYSIS UNDER *FARAGHER/ELLERTH* OF MS. STRONG'S SEXUAL HARASSMENT ALLEGATIONS:

ANNOTATED OUTLINE FOR DRAFTING ARBITRATION BRIEF OF DEFENDANT HEALTHY, WEALTHY & WISE

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INTRODUCTION

Ms. Strong alleges claims under Title VII for (1) failure to promote because of her sex and (2) sexual harassment. The outline that follows explores the elements that she must prove to prevail on her harassment claim. Although the outline addresses all of the legal elements of her claims, the two key issues of fact are: (1) whether the encounter was "unwelcome" and (2) whether the decision to defer Ms. Strong's partnership candidacy was causally connected to her alleged resistance to Mr. Wise's alleged sexual advances.

MS. STRONG WAS NOT SUBJECTED TO SEXUAL HARASSMENT

The U.S. Supreme Court in *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), declared that the terms "quid pro quo" and "hostile work environment" harassment that have been used in past decisions, are of "limited utility." Instead, the court pronounced the analysis in all sexual harassment cases properly begins with application of the test that has long been used in hostile work environment cases:

- Was the plaintiff subjected to unwelcome conduct because of her sex that was both objectively and subjectively so severe or pervasive so as to alter the terms and conditions of her employment?
- If so, then the trier of fact must consider whether the harasser was a co-worker or a supervisor.
- If the alleged harasser is a co-worker, a negligence test is applied: The employer is liable if it knew or should have known about the harassment and failed to take action reasonably designed to stop it.
- If the alleged harasser is a supervisor with immediate or higher authority, then the employer is strictly liable, subject to an affirmative defense.
- If the harassment did not result in a tangible employment action, the employer can raise the following affirmative defense and avoid liability by establishing:

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1. That it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
2. That the plaintiff unreasonably failed to take advantage of preventative or corrective opportunities.

A. Ms. Strong Was Not Subjected to Unwelcome Severe or Pervasive Conduct That Would Alter the Terms or Conditions of Her Employment

1. Mr. Wise's Embrace Was Welcomed

This is a pure factual issue. Nothing in *Faragher* or *Ellerth* changes the U.S. Supreme Court's original statement in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986), that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (Citation omitted.) If the trier of fact believes Mr. Wise's version of their encounter, *i.e.,* that the limited embrace was consensual, the case ends.

2. Mr. Wise's Actions Did Not Constitute Severe or Pervasive Harassment.

At most, Ms. Strong has evidence to support one incident of harassment: Mr. Wise's embrace in July 1998. She claims he forced "sexual attentions" on her and that she refused to return his "embraces." No contact other than an embrace and a possible kiss was alleged. Ms. Strong also claims that Mr. Wise said she would be "very, very sorry." And, 16 months later, he abstained from her partnership vote.

As a matter of law, this alleged conduct is neither severe nor pervasive and did not alter the terms and conditions of Ms. Strong's employment. Compare this scenario with the following:

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Burnett v. Tyco Corp., 203 F.3d 980, 985 (6th Cir. 2000) (summary judgment for employer affirmed because "under the totality of the circumstances, a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment").

Morris v. Oldham County Fiscal Court, 201 F.3d 784, 787 (6th Cir. 2000) (alleged offer to increase performance rating in return for sexual favors, frequently telling sexual jokes and once referring to plaintiff as "Hot Lips" is not severe or pervasive).

Minor v. Ivy Tech State College, 174 F.3d 855, 857 (7th Cir. 1999) (affirming summary judgment despite Chancellor putting his arm around plaintiff, kissing her, squeezing her and saying "Now, is this sexual harassment?" during meeting when he accused plaintiff of spreading rumors about him was not sexual harassment).

Mendoza v. Borden, Inc., 195 F.3d 1238, 1243 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1674 (2000) (en banc panel affirms trial court's finding that conduct of highest ranking executive at plaintiff's facility was not severe and pervasive when he once rubbed his hip against hers while touching her shoulder, constantly followed her around the office, stared at her in sexually suggestive manner, twice made sniffing sound while looking at her crotch and once said "I'm getting fired up, too").

B. Even If Mr. Wise's Conduct Was Harassment, the Firm Is Not Liable

1. Mr. Wise Is Not a Supervisor as Defined by *Faragher* and *Ellerth*; the Firm Did Not Know Nor Could it Reasonably Have Known About the Incident Because Neither Mr. Wise Nor Ms. Strong Reported it to Anyone

This argument is almost certainly a loser for the firm. *Ellerth* and *Faragher* impute strict liability on the employer for unlawful harassment by "a supervisor with immediate (or successively higher) authority over the employee." Although the firm might argue that Mr. Wise did not have direct authority over Ms. Strong, he certainly had authority to recommend tangible employment decisions–or at least the apparent authority to do so. Indeed, he was chosen on two

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occasions (one, the night in question in July) to provide Ms. Strong with constructive criticism. This principle has been borne out in the following cases:

> *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 154-55 (3d Cir. 1999) (being part of "ruling 'triumvirate'" is enough to be supervisor because "complete authority to act on the employer's behalf without the agreement of others is not necessary to meet Title VII's agency standard for supervisor liability" (citation omitted)).
>
> *Qualls v. Radix Group Int'l, Inc.*, No. 98 C 2695, 1999 WL 1267716 (N.D. Ill. Nov. 17, 1999) (question of fact as to whether plaintiff's belief that harasser who was not her actual supervisor had authority to terminate her employment).

2. Even If Mr. Wise Is a Supervisor, the Firm Is Not Liable Because Ms. Strong Unreasonably Failed to Avail Herself of the Means Available Within the Firm to Prevent Harassment

a. The Affirmative Defense Is Available Because There Was No Tangible Employment Action

Ellerth and *Faragher* define tangible employment action as "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." *Ellerth*, 118 S. Ct. at 2268. Ms. Strong will have a hard time showing that Mr. Wise's refusal to vote and/or Ms. Strong's alleged constructive discharge are "tangible employment actions," as demonstrated by the following:

> *Morris*, 201 F.3d 784 (lower performance review that does not result in firing, demotion or transfer not tangible employment action).
>
> *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) (constructive discharge is not tangible employment action because can be accomplished by co-worker as well as supervisor).
>
> *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999) (resignation not tangible employment action).

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> *Meadows. v. County of Tulare*, No. 98-16412, 1999 WL 685960 (9th Cir. Sept. 1, 1999) (demotion without change in pay, benefits, duties or prestige is not tangible employment action).
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> *Janowicz v. Martin*, No. 97-336-M, 1999 WL 1210887 (D. N.H. Feb. 5, 1999) (voluntary resignation, even if allegedly motivated by stress of harassment, is not tangible employment action).
>
> *But see Durham*, 166 F.3d 139 (constructive discharge is tangible employment action).
>
> *See also Montero v. Agco Corp.*, 192 F.3d 856 (9th Cir. 1999) (refusing to decide if constructive discharge is tangible employment action).

Although failure to promote to partner falls within the definition of "tangible employment action" to block the affirmative defense, Ms. Strong must show a causal connection–a link–between the firm's failure to promote her actions and the alleged discrimination:

> *Hill v. American Gen. Fin., Inc.*, No. 99-2682, 2000 WL 536670 (7th Cir. May 4, 2000) (transfer to undesirable location with $10,000 reduction in pay was not adverse tangible employment action barring employer's affirmative defense because plaintiff alleged that those actions were taken in retaliation to her complaints of harassment, not as result of her supervisor's harassment).
>
> *Watkins v. Professional Sec. Bureau, Ltd.*, No. 98-2555, 1999 WL 1032614, at *3 (4th Cir. Nov. 15, 1999) (plaintiff raped by supervisor and later terminated could not defeat affirmative defense because there was no evidence establishing termination "'resulted from a refusal to submit to a supervisor's sexual demands'" (citation omitted)).
>
> *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999) (whether tangible employment action occurred was question of fact because not clear whether plaintiff's termination resulted from alleged harassment or plaintiff's own misconduct).
>
> *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998) (termination was not tangible employment action because president did not know

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about sexual threat of supervisor).

Mirakhorli v. DFW Management Co., No. CIV. A. 394-CV-1464D, 1999 WL 354226 (N.D. Tex. May 24, 1999) (harasser reporting plaintiff for absenteeism that contributed to her termination not tangible employment action because (1) only three of eight points needed for termination came from harasser and (2) never complained that points were received as part of harassment).

Pritchard v. Earthgrains Baking Cos., No. 7:98CVO536, 1999 WL 397910, at *7 (W.D. Va. Mar. 5, 1999) (job reassignment to a comparable position not tangible employment action and in any event, "'[t]angible employment actions, if not taken for discriminatory reasons, do not vitiate the affirmative defense'" (citation omitted)).

Corcoran v. Shoney's Colonial, Inc., 24 F. Supp. 2d 601, 606 (W.D. Va. 1998) ("Even though a tangible employment action was taken against [the plaintiff], because it was not taken by the supervisor who allegedly created the hostile work environment, the employer defendant in this case may try to avoid liability by invoking the *Faragher-Burlington Industries* affirmative defense.").

b. The Firm Exercised Reasonable Care To Prevent Harassment

It is undisputed that the firm has an anti-harassment policy that provides multiple avenues for reports of inappropriate behavior and prohibits retaliation. In *Ellerth*, the Supreme Court held that the existence of such a policy supports the "reasonable care" element of the affirmative defense. Other courts have followed:

Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999) (existence of anti-harassment policy including complaint procedures "is an important consideration in determining whether the employer has satisfied the first prong of this defense"), *cert. denied*, 2000 WL 574539 (S. Ct. May 15, 2000).

Shaw, 180 F.3d 806 (distributing policy providing multiple mechanisms for prompt resolution containing ways to circumvent supervisory chain of command was sufficient to satisfy this prong).

Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379 (S.D. Ga. 1998) (policy

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effective to satisfy prong even though plaintiff not given copy to keep and no training held).

c. Ms. Strong Unreasonably Failed To Take Advantage of the Firm's Preventative Opportunities

It is also undisputed that Ms. Strong failed to report the alleged embrace to anyone (not even her fiancé). She claims it was pointless because no one would believe her and that she would have been terminated in a "New York minute." She also implies that Mr. Wise has a "reputation" and was improperly involved with two former associates. As the following cases demonstrate, her justifications for her silence are unlikely to defeat this prong of the affirmative defense.

Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1293 (11th Cir. 2000) (telling manager that another manager "'made me sick'" is insufficient use of employer's anti-harassment procedures (citation omitted)).

Montero, 192 F.3d at 863 (not complaining for two years unreasonable).

Caridad, 191 F.3d 283 (fear of retaliation does not alleviate duty to report).

Meadows, 1999 WL 685960 (failing to report for nine years, making incomplete report and failing to participate in investigation unreasonable).

Alberter v. McDonald's Corp., 79 F. Supp. 2d 1138 (D. Nev. 1999) (15-year-old plaintiff who was embarrassed to talk to her manager unreasonably failed to report harassment).

Barrett v. Applied Radiant Energy Corp., 70 F. Supp. 2d 644, 652 (W.D. Va. 1999) ("[A]ll harassment victims risk retaliation when they complain[; however, i]f the purposes of Title VII are to be served, the reasons for not complaining about harassment should be substantial and based upon objective evidence that some significant retaliation will take place.").

Dedner v. Oklahoma, 42 F. Supp. 2d 1254 (E.D. Okla. 1999) (waiting three months after harassment began unreasonable).

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Duran v. Flagstar Corp., 17 F. Supp. 2d 1195 (D. Colo. 1999) (not complaining until transferred to another store unreasonable).

Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998) ("threat of termination, without more, is not enough to excuse an employee from following the procedures adopted for her protection").

C. Ms. Strong Suffered No Damages

Absent a showing of constructive discharge, Ms. Strong's voluntary resignation cuts off her economic damages for failure to mitigate her damages. In addition, any punitive damages will be eliminated if the trier of fact determines that the firm made a good faith effort to comply with Title VII. *Kolstad v. American Dental Ass'n*, 199 S. Ct. 2118 (1999).

CONCLUSION

If the embrace was not harassment, the firm should prevail. Under the analysis articulated in the *Faragher/Ellerth* decisions, what has been traditionally analyzed as a quid pro quo harassment claim now focuses on Ms. Strong's ability to show that the decision to defer her promotion to partner was causally connected to her alleged resistence to Mr. Wise's embrace 16 months earlier. If the embrace was harassment and the partnership deferral decision is causally related, then the firm cannot rely on the affirmative defense and is strictly liable for the partner's conduct; however, damages should be limited to the deferral as the voluntary resignation is not a tangible employment action. If the partnership deferral decision is not causally related to the embrace, the firm is likely to prevail under the affirmative defense because it had a sufficient policy designed to prevent and correct harassment and Ms. Strong did not reasonably take advantage of the policy.

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