The Practical Effect of the Affirmative Defenses Enunciated in Faragher and Ellerth: What Plaintiffs Need to Plan for and Do

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I. THE TESTS FOR EMPLOYER LIABILITY

Employers are potentially liable for the actionable sexual harassment of a supervisor with "immediate (or successively higher) authority" over an employee. When there is no tangible employment action, an employer may raise an affirmative defense, to liability or damages, comprised of two elements: "(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." No affirmative defense is available to an employer where the supervisor's harassment "culminates in a tangible employment action such as discharge, demotion, or undesirable reassignment." Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998).

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II. ACTIONABLE SEXUAL HARASSMENT

Van Steenburgh v. Rival Co., ___ F.3d ___, 1999 WL 95721 (8th Cir. Feb. 26, 1999).

Oleta Van Steenburgh was repeatedly touched and propositioned by her immediate supervisor over a five-year period. Although Ms. Van Steenburgh made repeated complaints about her supervisor, the only action taken was a verbal warning that was never documented. After the supervisor announced in a demeaning manner and in front of numerous co-workers and his superiors that he had decided to place another employee above Ms. Van Steenburgh on the production line, she quit. Ms. Van Steenburgh waited over eight months before filing a charge.

A jury awarded Ms. Van Steenburgh $47,500 in back pay and $115,00 in compensatory damages, but the district court granted the employer's motions for judgment as a matter of law and a new trial.

The court of appeals noted that hostile environment harassment is by its nature a continuing violation, and that it is not necessary that the incident(s) within the limitations period satisfy the definition of sexual harassment under Title VII when viewed in isolation, nor must there be incidents within the limitations period that are explicitly sexual. "Rather, the jury must be capable of perceiving the incident as 'discriminatory' in light of all the prior incidents of sexual harassment." 1999 WL 95721, at *2. Here, the court found that the jury could have inferred a link between the demeaning treatment of Ms. Van Steenburgh on her last day of employment and her repeated rejections of her supervisor's sexual overtures.

Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340 (7th Cir. 1999).

Katie Hardin was subjected to sexual harassment in the form of profanity directed to her and her coworkers and numerous incidents of physical touching by her immediate supervisor over a seven year period. In response to Ms. Hardin's complaints to management in 1993 and 1995, the company met with the supervisor and warned him about his inappropriate behavior. A charge was filed on June 13, 1995.

The court of appeals affirmed the district court's decision to grant the employer's motion for summary judgment, finding the continuing violation doctrine inapplicable under these facts. Because Ms. Hardin recognized that she was a victim of sexual harassment long before she filed her charge, the court of appeals held that she could not rely on evidence of incidents occurring more than 300 days

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before she filed her charge but that her "sexual harassment complaints must stand or fall on conduct occurring between August 16, 1994, and June 12, 1995 . . . ." 167 F.3d at 345.

Then, the court determined that the acts committed by the supervisor within the 300-day period (allowing a door to close in her face, surprising her by coming up behind her without warning in an electrical cart, cutting her off in the parking lot, persistent use of profane language) "cannot be seen as having . . . gender overtones" and were "insufficiently severe to give rise to a hostile environment." 167 F.3d at 346.

Significantly, the court of appeals noted (for the third time in less than two years) that there is "a safe harbor for employers in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." 167 F.3d at 346.

Adusumilli v. City of Chicago, 164 F.3d 353 7th Cir. 1998).

The trial court granted defendant's motion for summary judgment on Adusumilli's claims of discrimination based on race, color, and national origin; harassment based on race, color, national origin, and gender; and retaliation based on race, color, national origin, and gender.

Adusumilli was hired as an administrative assistant in January 1992. Her four performance evaluations between January 1992 and December 1993 rated her as "good." In January 1994, Adusumilli reported to her immediate supervisor that she believed a coworker poked her in the buttocks. The supervisor reported the incident to the watch lieutenant, who initiated an internal affairs department investigation. The investigation resulted in a finding that the allegations of harassment could not be sustained. In Spring 1994, the City assigned the officer Adusumilli had complained about to a computer terminal five to ten feet from her desk.

In January 1994, the defendant discovered that Adusumilli had made errors in court notifications. In late March, a district officer sent a memo to the Commander regarding errors made by Adusumilli. More memos documenting Adusumilli's performance errors were sent in April, May and June. Adusumilli was laced in the Behavior Alert program in March 1994. Then, Adusumilli received an overall "unsatisfactory" rating in June 1994. In May, the Commander recommended that Adusumilli be transferred to a position with less responsibility, and she was subsequently terminated effective September 6, 1994.

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In addition to the poking incident, Adusumilli pointed to other acts of harassment. Her immediate supervisor (female) told Adusumilli that to avoid being laughed at, she should break her banana in half rather than eating it whole. A female officer told Adusumilli on one occasion to wash a banana before eating it. On another occasion, she asked Adusumilli what putting one rubber band on top and another on the bottom means. A male officer once told Adusumilli that she should not wave at squad cars in front of the police station because people would think she was a prostitute. Three male officers tried to make eye contact with Adusumilli and stared at her breasts.

The Seventh Circuit held that, "while employers are vicariously liable for hostile environment sexual harassment by supervisors (subject to certain defenses), Faragher v. City of Boca Raton, ___ U.S. ___, 118 S.Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998); Burlington Industries Inc., ___ U.S. at ___, 118 S.Ct. at 2270, a plaintiff must show negligence in order to hold an employer liable for co-worker harassment. Baskerville v. Culligan Internat'l Co., 50 F.3d 428, 431-32 (7th Cir. 1995)."

After reviewing the incidents complained of, the court of appeals determined that the incidents alleged did not constitute harassment.

Mendoza v. Borden, Inc., 158 F.3d 1171 (11th Cir. 1998).

The Eleventh Circuit reversed a directed verdict in favor of Borden's on Red Mendoza's Title VII sexual harassment claim. Ms. Mendoza testified that the highest ranking executive at Borden's Miami facility constantly followed her around the office, stared at her in a sexually suggestive manner and once rubbed his hip against hers while touching her shoulder.

Rejecting the employer's argument that Ms. Mendoza's complaints involved only "sporadic and innocuous interactions with no sexual or otherwise gender-related abusive overtones," the court of appeals said that all of the supervisor's actions must be viewed in the context of the workplace in order to determine whether the conduct substantially altered Ms. Mendoza's working conditions. Based on Ms. Mendoza's testimony, which was "essentially unrebutted," the court determined that a jury could find that the supervisor's conduct was "pervasive, unwelcome, and unreasonably interfered with Mendoza's work performance, subjecting her to a sexually abusive work environment." 158 F.3d at 1176.

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III. A SUPERVISOR WITH IMMEDIATE OR SUCCESSIVELY HIGHER AUTHORITY

Dudley v. Wal-Mart Stores, 166 F.3d 1317 (11th Cir. 1999).

A jury awarded Lillian Dudley $75,000 in compensatory damages and awarded Clara Robinson $50,000 in compensatory and $250,000 in punitive damages in their respective Title VII race discrimination claims.

The Eleventh Circuit upheld the compensatory damages awards for both women. However, the court of appeals reversed the award of punitive damages, holding that to get punitive damages under Title VII, the employee must show "either that the discriminating employee was 'high[ ] up in the corporate hierarchy . . . or that 'higher management' countenanced or approved [his] behavior."

Noting that "Wal-Mart is a giant business, " the court determined that the store managers who discriminated against Ms. Robinson because of her race were not high enough up in Wal-Mart's corporate hierarchy to allow their discriminatory acts to be the basis of punitive damages against the corporation.

Harrison v. Eddy Potash, Inc., 158 F.3d 1371 (10th Cir. 1998).

A jury found for Jeanne Harrison on her claims of intentional infliction of emotional distress and battery, but for the employer on her Title VII claim of hostile work environment sexual harassment. The Tenth Circuit determined that the trial court did not properly instruct the jury on the issue of employer liability under Title VII and reversed and remanded the Title VII claim. On the employer's petition for writ of certiorari, the Supreme Court remanded the matter for further consideration in light of Faragher.

Ms. Harris started working as an underground potash miner in May 1992. She was the only female in a crew of about 30 males. The harasser was designated as the person Ms. Harris was to call if she was off sick or wanted to take vacation. He was also involved in the disciplinary process. His harassment consisted of attempting to kiss Ms. Harris, putting his hands on her breasts and between her legs, and unzipping her pants. He also made sexually suggestive comments to Ms. Harris and asked her to have sex with him. On several occasions, the harasser exposed his penis, put Ms. Harris' hand on his penis, and forced her to masturbate him.

Eventually, Ms. Harris complained to a safety manager, who informed the human resources manager, who issued a three-page report. The report, in part, stated that "because of Mr. Brown's (the harasser's) position as Ms. Harrison's

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supervisor and the authority and intimidation possibilities inherent in that position, it is also my determination that Ms. Harrison's participation in the relationship was truly unwilling and that the situation did cause Ms. Harrison great mental stress. Her fear of the possibility of losing her job if she filed a complaint, while not necessarily well-founded, was understandably very real to her."

Ms. Harrison asserted that the trial court should have instructed the jury on three theories of vicarious employer liability: (1) alter ego, (2) apparent authority, and (3) actual authority. In Harrison II, the court of appeals held that a supervisor who is not a member of top-level management cannot properly be considered the employer's alter ego simply because he or she exercises a high degree of control over a subordinate.

Having initially determined that an employer could be vicariously liable where the employer's conduct caused the employee to believe that the supervisor had authority to sexually harass her, on remand, the court of appeals rejected this theory. The court held that apparent authority is only a viable theory of vicarious employer liability where there is a reasonable but false impression that the actor was a supervisor.

Finally, the court held that the evidence clearly indicated that the harasser had actual and immediate supervisory authority over Ms. Harrison and misused that authority to sexually harass her. She was, therefore, entitled to a jury instruction on her "misuse of actual authority" theory of liability against the employer, and the trial court erred in refusing the instruction.

IV. TANGIBLE EMPLOYMENT ACTION

Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236 (11th Cir. 1998).

Elba Llampallas had a consensual sexual relationship with a woman who, after their relationship began, became her supervisor at work. When the relationship ended after thirteen years, the supervisor moved out of their home and began threatening Ms. Llampallas that if she did not resume their relationship, the supervisor would have her fired. The supervisor eventually contacted the president of the company and said she was resigning because she could no longer work with Ms. Llampallas. After acting as though he would transfer Ms. Llampallas to another facility, the president terminated her employment.

The trial court found that the supervisor had engaged in quid pro quo sexual harassment and awarded Ms. Llampallas back pay and front pay totaling $1,736,256.48.

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The court of appeals, however, reversed, holding that Ms. Llampallas failed to establish a causal link between the supervisor's discriminatory animus towards her and the termination. The court apparently believed the president, who claimed he had no idea until the charge was filed that the two women were involved in a sexual relationship (even though he had been to the home they shared and dined with them on several occasions). The court expressly "recognize(d) that (the supervisor's) threat to quit was probably part of a scheme to manipulate the company into firing Llampallas because of her sex--(the supervisor) made a 'fake' threat knowing that (the president) would choose her over Llampallas." Even so, the court would not impose liability on the employer, finding that the president "broke the chain" of causation between the supervisor's harassment and the decision to terminate Ms. Llampallas "both because it behaved reasonably in response to the supervisor's threat to quit, and because Llampallas herself failed to avoid the consequences of that threat (by not informing the president of her relationship and the supervisor's previous threat to have her fired)." 163 F.3d at 1250.

Newton v. Cadwell Laboratories, 156 F.3d 880 (8th Cir. 1998).

After Anne Newton's consensual affair with her immediate supervisor ended, the supervisor continued to pursue her. Ms. Newton testified that the supervisor forced her to participate in a sexual act, continually "hovered" around her, asked about her travel schedule so her could intercept her on business trips, maneuvered to sit next to her at company meetings, and failed to reach agreement with another supervisor to transfer Ms. Newton. The trial court granted the employer's summary judgment motion on Ms. Newton's gender discrimination and sexual harassment claims.

The court of appeals agreed with the trial court that Ms. Newton suffered no adverse employment action. The supervisor did not condition Ms. Newton's continued employment on submission to his sexual advances, and the reason Ms. Newton was not transferred was that the supervisors could not agree on an equitable trade of salespeople and the other regional supervisor refused to take Ms. Newton without an exchange.

However, since the trial court did not determine whether the behavior was actionable hostile environment sexual harassment, the case was remanded.

Reinhold v. Commonwealth of Virginia, 151 F.3d 172 (4th Cir. 1998).

Kathryn Reinhold, a school psychologist, was subjected to unwelcome sexual

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advances from her supervisor for about seven months. She alleged both quid pro quo and hostile work environment sexual harassment, and a jury found in her favor on both claims, awarding $85,000 in compensatory damages. The trial court denied the employer's motion for judgment as a matter of law.

The court reviewed Ms. Reinhold's claim of a tangible employment action and found that, while she alleged she was assigned extra work, given inappropriate work assignments and was denied the opportunity to attend a professional conference, as a result of her rejection of the supervisor's sexual advances, there was no claim of a "significant change in employment status" such as a demotion, or a reassignment entailing significantly different job responsibilities.

On appeal, the employer conceded hostile environment sexual harassment. Therefore, the issue centered squarely on the affirmative defenses articulated in Faragher and Ellerth. The trial proceeded in October 1996, and the reasonableness of Ms. Reinhold's actions in light of the school's policies were not at issue. Therefore, the court remanded the case for a determination as to whether the employer can prove "by a preponderance of the evidence (1) that they exercised reasonable care to prevent and correct promptly (the) sexually harassing behavior, and (2) that Reinhold unreasonably failed to avail herself of any preventive or corrective opportunities."

V. REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT

Indest v. Freeman Decorating, Inc., 164 F.3d 258 (D.C. Cir. 1999).

Constance Chaix Indest was subjected to crude sexual comments and sexual gestures on four occasions over a six-day period by a vice president of Freeman Decorating. During this same time period, the vice president also approached Ms. Indest while she was speaking with her immediate supervisor and her director at a cocktail event and made another sexual comment to her. Ms. Indest expressly objected to the comment, telling him it was sexual harassment. The vice president ordered Ms. Indest not to threaten him, profanely disparaged her abilities as an employee and said that she would have to prove herself by working with him at another convention.

Ms. Indest immediately used the company's sexual harassment policy and an investigation was done. The vice president was reprimanded. When Ms. Indest threatened to file a charge of discrimination, the company met with her and told her that the vice president would be suspended without pay for seven days and that she would never have to work at any trade show where the vice president was present.

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The company also assured Ms. Indest that her complaint would neither jeopardize her job or inhibit her ability to advance within the company.

Ms. Indest filed a charge and a subsequent complaint, and the trial court granted judgment as a matter of law to the employer. The Fifth Circuit ruled that Ellerth and Faragher do not apply to cases such as Ms. Indest's, where the employee quickly resorted to the company's sexual harassment policy and the employer took prompt remedial action. "(F)or purposes of imposing vicarious liability, a case presenting only hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment." 164 F.3d at 265.

Wilson v. Tulsa Junior College, 164 F.3d 534 (10th Cir. 1998).

A jury found for Frances Wilson on her hostile environment sexual harassment claim and awarded her $100,000 in compensatory damages, and the junior college appealed.

Ms. Wilson was a night custodian for the junior college, working 5:00 p.m. to 1:00 a.m. The junior college did have a sexual harassment policy in place, which suggested that any employee who felt s/he had been "sexually offended," should go to his or her supervisor. If the employee was uncomfortable with that option, the policy suggested bringing the matter to the attention of the Director of Personnel Services, who was housed in the Administrative Office, which was open only during "normal" business hours.

One evening, Ms. Wilson was working alone because her partner had been suspended. One of her supervisors entered the classroom Ms. Wilson was cleaning, exposed his penis to her and requested oral sex. He told her he could make her life really good, that she could have every Friday off with pay, and threatened that if she refused him again the following evening, he would make her life hell. Although he left the classroom, he followed Ms. Wilson for the rest of the evening, preventing her from reporting the incident to anyone.

Ms. Wilson drove home after her shift and reported the incident by telephone to her local police, knowing that several members of the force worked part time as campus security for the junior college. Because the local police did not have jurisdiction over the junior college, Ms. Wilson also telephoned the Tulsa police department, with whom she filed a complaint. One of the campus security officers notified the head of campus police for the southeast campus that an unidentified "hysterical female" had called the police claiming that the custodial supervisor had exposed himself to her during her shift. The head of the campus police did not

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make any attempt to identify the female who complained, did not contact either police department to gather more information, and did not report the matter to his boss, the director of security. All he did was ask the evening shift supervisor to investigate the matter.

The evening following the incident in question, Ms. Wilson was equipped by the Tulsa police with a body microphone and transmitter. At about 11:00 p.m., the custodial supervisor approached Ms. Wilson by defining sexual harassment as unwelcome sexual advances and warned her that he had witnesses who would say that she initiated offers of sex and that his advances were welcomed by her. He stated that, as long as he had witnesses, the truth was irrelevant and told Ms. Wilson that she should keep her mouth shut or he would give her a poor recommendation to prevent her from getting a job in the future. The supervisor was arrested about an hour later.

The junior college suspended the supervisor the following evening when he reported to work. Ms. Wilson resigned a few months later, when she relocated to Missouri.

The court held that the sexual harassment policy was not sufficiently effective to insulate the junior college from liability because it did not establish a procedure for employees who were harassed by their supervisors at night when the administrative offices were closed, and there was no procedure instructing campus police on handling such complaints. Further, while the procedure provided that it was the responsibility of the supervisors to report "formal complaints," the policy did not define what would be a "formal complaint," as opposed to an informal one. Neither did the policy provide any instruction on the responsibilities of a supervisor after learning of an incident of harassment through informal means. "A procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take action falls short of that which might absolve an employer of liability," citing, Varner v. National Super Mkts., 94 F.3d 1209, 1214 (8th Cir. 1996).

Phillips v. Taco Bell Corp., 156 F.3d 884 (8th Cir. 1998).

Rita Phillips was subjected to inappropriate touching from her supervisor, the store manager, on at least five occasions from March to June 18, 1995. On June 20, 1995, Ms. Phillips complained via voice mail message to the local market manager, who returned her call the following day and scheduled a meeting with her. The next day, the local market manager contacted a human resources manager to discuss Ms. Phillips' claims and informed Ms. Phillips that he would be out of town for two weeks and would conduct an investigation on his return. Ms. Phillips was

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offered a two-week paid vacation, which she declined. A week later, however, another incident occurred, and Ms. Phillips was instructed to take a two-week paid vacation.

The market manager did not commence his investigation until July 10, because the harasser was on vacation. After being interviewed, the harasser was suspended pending the outcome of the investigation and terminated four days later. When Ms. Phillips returned to the store to check her work schedule, she found that she had been scheduled for some evening hours, and an assistant manager spoke to her in a "nasty" tone of voice. Believing that she would be badgered about her sexual harassment complaint, Ms. Phillips resigned.

The district court granted Taco Bell's motion for summary judgment, finding that the company took prompt remedial action reasonably calculated to end the harassment. The court of appeals remanded the case for further proceedings concerning the affirmative defense. Although the record did reveal that Taco Bell maintained a written sexual harassment policy, which Ms. Phillips reviewed and signed, the court ruled that "(w)hether this is sufficient to satisfy this portion of the affirmative defense is best left to the finder of fact."

The court also determined that, while the delay in reporting the harassment was reasonable, "the effect this delay might have on Taco Bell's liability and any damages afforded Phillips is a question best left to the finder of fact." 156 F. 3d 889.

VI. UNREASONABLE FAILURE TO TAKE ADVANTAGE OF PREVENTIVE OR CORRECTIVE OPPORTUNITIES

Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999).

Luria Greene alleged that from the first day of her employment forward she was subjected to unwelcome discussions regarding sexual matters and to amorous advances by her immediate supervisor. Ms. Greene waited about a month after she was raped before she made a report to a Navy EEO counselor.

The supervisor admitted having sex with Ms. Greene, but claimed it was consensual. The Navy introduced a diary, supposedly written by Ms. Greene (which she denied), confirming the supervisor's account of the sexual encounter, as well as evidence suggesting that Ms. Greene had previously filed a number of frivolous sexual harassment complaints. The trial court granted the Navy's motion for summary judgment, apparently believing that Ms. Greene had fabricated her allegations of sexual harassment.

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The District of Columbia Circuit found that the trial court had invaded the province of the jury, and held that "(i)n order for the Navy to avoid all liability based upon its Faragher defense . . . it must show not merely that Greene inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in Greene's place would have come forward early enough to prevent (the) harassment from becoming 'severe or pervasive.'"

Williamson v. City of Houston, Texas, 148 F.3d 462 (5th Cir. 1998).

During her employment as a police officer in the Houston Police Department, one of Linda Williamson's partners harassed her on nearly a daily basis for 18 months. Ms. Williamson was subjected to comments about her appearance and the size of her buttocks and breasts, as well as physical touching, such as having a tongue stuck in her ear and being slapped. She repeatedly told her partner that his conduct was offensive and demanded that he stop. She also repeatedly complained to their supervisor.

In 1992, Ms. Williamson finally requested a transfer. Her supervisor directed her to put her complaint in writing and take it to internal affairs. Although the partner was transferred to another division, he retaliated against Ms. Williamson during the internal investigation. The investigation concluded that Ms. Williamson's complaints were unsubstantiated. No disciplinary action was taken against the supervisor. The partner was reprimanded for waiving a rubber snake in Ms. Williamson's face.

The jury verdict included $28,000 in back pay, $100,000 in compensatory damages, plus attorneys' fees and costs. The City appealed.

The City argued first that it did not have notice that Ms. Williams was being sexually harassed until April 1992 when she filed her internal affairs complaint. The court of appeals determined that Ms. Williams' complaints to the supervisor, and the supervisor's own observation of the behavior complained of, provided adequate notice of the harassment to the City prior to the internal affairs complaint.

Next, the City claimed that the supervisor's knowledge should not be imputed to the City. The court of appeals noted: (1) information regarding an employer's organizational structure may be relevant to determining whether notice to an employee at a given level constitutes notice to an employee at a given level constitutes notice to the employer, but the court agreed with the Seventh Circuit that the issue does not turn on labels attached to levels of hierarchy. See Young v. Bayer Corp., 123 F.3d 672, 673-75 (7th Cir. 1997); (2) although the supervisor did not have the power to make decisions regarding firing or promoting the harasser,

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he did have some authority to address the harassment problem, and he could have directed the harasser to cease his harassing behaviors, and the harasser would have been subject to discipline for failing to obey; and (3) the Department's sexual harassment policy specifically directs those who believe they have been harassed to report it to their supervisors.

The department's policy also provided that if a complaint to a supervisor did not lead to a satisfactory resolution, the employee should go directly to the city's director of affirmative action. However, the court held that an employer cannot use its own policies to insulate itself from liability by placing an increased burden on an employee to provide notice beyond that required by law.

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