

**IMPROVING SEXUAL HARASSMENT PROTECTIONS:
AN EXAMINATION OF THE LEGAL COMPLIANCE
OF U.S. UNIVERSITY SEXUAL HARASSMENT POLICIES**

CHARLIE PENROD

Northwestern State University of Louisiana

MARCELLINE FUSILIER

American University of Kuwait

ABSTRACT

One way in which employees are protected from sexually harassing behavior is through the dissemination of effective workplace sexual harassment policies. The adequacy of U.S. state university sexual harassment policies was examined nationwide. Sexual harassment is a worldwide problem that lingers despite the presence of sexual harassment laws requiring employers to design effective sexual harassment policies. U.S. university policies were examined in light of the rules set forth in two American court decisions: *Faragher v. City of Boca Raton* (1998) and *Clark v. UPS* (2005). The results of the study supported predictions that universities generally have promulgated sexual harassment policies and have disseminated them online. However, universities have not adequately included several important anti-harassment provisions in their policies. In fact, more than half of the sexual harassment policies were missing at least one recommended element. Recommendations are discussed with a view to exploiting these inadequacies.

INTRODUCTION

Sexual harassment is a serious and pervasive worldwide problem in today's workplace. Gender diversity in the workplace continues to increase, with women

comprising at least a third of the workforce in most parts of the world (United Nations Statistics Division, 2010). Although women tend to be the target of sexual harassment, both men and women are frequently subjected to workplace sexual harassment, the reporting of which varies across countries (Sigal, 2006). Harassment of students also occurs on college campuses, according to a nine-country study by Sigal (2006) and surveys conducted in Brazil (DeSouza, Pryor, & Hutz, 1998) and India (Kumar, 2009). This widespread mistreatment is occurring in spite of the fact that over 31 countries have passed sexual harassment legislation (Fiedler & Blanco, 2006; Sigal, 2004). Employees worldwide work for companies that purport to oppose sexual harassment by designing sexual harassment policies, yet studies show that harassment persists (O'Leary-Kelly et al., 2009).

Employees can be justifiably hesitant to report incidents of sexual harassment for several reasons. First, they may be afraid to report sexual harassment due to the danger of retaliation by the employer for having filed a complaint. Instead of dealing with the complaint appropriately, some employers may choose the nefarious option of simply firing the employee, which allows the employer to ignore the problem or to retain a harassing, but otherwise productive, employee. These fears are reasonable. In 2010, the U.S. Equal Employment Opportunity Commission (EEOC) received more than 30,000 complaints of retaliation against employees for filing discrimination or harassment complaints—up from nearly 20,000 just 10 years earlier (EEOC, 2011a).

Victims of sexual harassment may also have emotional or psychological reasons for their reluctance to come forward and lodge a complaint of harassment against a person who engages in some sort of sexual misconduct. Research on the outcomes of sexual harassment has repeatedly confirmed the negative emotional, psychological, and financial consequences of unchecked sexual harassment (Chan et al., 2008; O'Leary-Kelly et al., 2009; Willness, Steel, & Lee, 2007). High-profile sexual harassment cases, such as one involving Wisconsin district attorney Ken Kratz (Collar, 2010), illustrate the devastation that victims can suffer. An employee can also be faced with humiliating interviews and confrontations caused by employers more interested in “damage control” than in ferreting out the root cause of the harassment.

Universities are significant employers in the United States, employing nearly 2.8 million employees as of 2009 (U.S. Bureau of Labor Statistics, 2011). It is important, then, to understand the extent to which university employers protect their employees by enforcing strong sexual harassment policies. Universities are centers of learning and understanding that generally purport to promote tolerance and intellectual freedom. Thus, one would hope that sexual harassment of employees would be minimal and that compliance with legal standards would be high.

The present study's particular concern is prevention of the sexual harassment of faculty and staff employees in public universities. In the United States, the majority of institutions of higher education are “state” universities, meaning that

they are primarily funded and supported by the government. Distinct from state universities are private universities, which are owned and operated by a non-governmental entity such as a religious group or a nonreligious board of trustees. Title IX of the Civil Rights Act of 1964 places constraints on state universities in return for the receipt of federal funding. Title IX, as it is known, is a federal statute governing university behavior in a wide range of areas, including athletics, discrimination, and faculty conduct. Title IX specifically prohibits student-teacher harassment and makes funding contingent on the suppression of the harassment of students. Thus, state universities should be keenly attuned to combating sexual harassment, whether the harassment is directed at students or at employees.

Prevalence of Sexual Harassment in the Workplace

Although the number of complaints, or “charges,” filed with the EEOC have steadily decreased over the last 12 years, a large number of charges continue to be filed—11,717 individual charges of sexual harassment were filed with the EEOC in 2010 alone (EEOC, 2011b). While the downward trend is good news for employees, the reality remains that harassment is occurring far too frequently in the workplace. The EEOC, which investigates and attempts to mediate sexual harassment disputes prior to litigation, has obtained \$48.4 million in benefits for sexual harassment victims who deserve compensation for their wide-ranging physical and psychological injuries (EEOC, 2011b). This amount does not include compensation resulting from litigation awards, which can justifiably range up to millions of dollars per case. One study reported that 90% of Fortune 500 companies have received and processed at least one sexual harassment complaint (Fisher, 1993). For universities, the evidence suggests that employees and up to 60% of nonworking students are sexually harassed in university settings (Cochran, Frazier, & Olson, 1997; Fisher, Cullen, & Turner, 2000; Lombardi, 2009).

Employers are responsible for assuring a harassment-free workplace. The Willness et al. (2007) meta-analysis results suggested that organizational climate has the largest effect as an antecedent of sexual harassment. While having a sexual harassment policy may be a critical component of a workplace sexual harassment prevention effort, other proactive approaches to changing the organizational climate have been suggested (e.g., Herzog, Wright, & Beat, 2008). Research indicates that a multistrategic approach involving education, training, and a proactive, top-down “zero-tolerance” approach creates a climate that minimizes sexually harassing behavior (Hartmus & Niblock, 2000). Indeed, an employer needs to have an attitude of respect for all employees to ensure that policies and training have the required effect (Fowler, 1996).

The Need for a Sexual Harassment Policy

To prevent devastating physical and psychological injuries from occurring, employees need a legally compliant workplace sexual harassment policy to ensure

that potential harassers are aware of the consequences of misbehavior and to encourage complaints if harassment does occur. Setting up such a policy will ensure that employees receive the maximum protection against sexual harassment that the law affords. It is imperative that employers provide their employees with freedom from unwelcome and threatening harassment. Although employees do have the right to sue their employers in court, such lawsuits are expensive and time consuming, and they require the victim to be subjected to humiliating depositions and trials, mandating that the victim recount the incidents of harassment in graphic detail. Proactive efforts to prevent such inappropriate behavior from ever occurring mean that employees would be less likely to be sexually harassed.

The U.S. courts have constructed a labyrinthine structure for litigating sexual harassment that gives employers a defense in cases where the employer has made a good faith effort to prevent the harassment. The logic behind this structure is the promotion and incentivization of employer behavior that should protect employees from sexual harassment. The “affirmative defense” acts as a reward to employers who truly are acting in their employees’ best interests and are not seeking to turn a blind eye to unwelcome harassment.

To fully comprehend the necessity of a sound policy, it is important to have an understanding of the contours of U.S. sexual harassment law. Crucially, no federal law currently exists that explicitly prohibits sexual harassment in the workplace. Instead, courts have construed Titles VII and IX of the Civil Rights Act of 1964 to include an implied prohibition against sexual harassment. Title VII is a federal statute whose ostensible purpose is to prohibit discrimination on the basis of race, sex, national origin, and other “protected” classes. Title VII does not prohibit or even mention sexual harassment; instead, the clear wording of the statute prevents employers from using a protected class in hiring and firing decisions or in any other employment action.

Sexual harassment was first recognized as a viable cause of action under Title VII in the case of *Meritor Savings Bank v. Vinson* (1986). The court essentially found that sexual harassment was a form of discrimination on the basis of sex, since it affects the terms and conditions of employment. Sexual harassment includes both “quid pro quo” harassment (where an employment decision such as promotion or firing is contingent upon some sexual act) and “hostile environment” harassment (where an employee is subjected to sexual misconduct that is unrelated to a specific employment action). Hostile environment claims, which are the more common claims, include situations where the employee is inappropriately touched, told sexually charged jokes, or subjected to sexually charged comments.

The lynchpin of *Meritor* was that a hostile environment sexual harassment claim is to be analyzed within the framework for a discrimination claim; however, the two claims are not easy to harmonize. In order to prove a prima facie case of sexual harassment, a victim must prove five different elements. These are

as follows: (1) the victim belongs to a protected class; (2) the harassment was “unwelcome”; (3) the harassment must have been “because of sex”; (4) the harassment was “severe or pervasive”; and (5) the employer is responsible for the harassment (*Fleenor v. Hewitt Soap Co.*, 1996; *Miller v. Kenworth of Dothan, Inc.*, 2002). While these elements, particularly the “severe or pervasive” element, can often be difficult for a victim to prove, they are certainly not insurmountable obstacles.

The fifth element was the subject of the U.S. Supreme Court’s landmark ruling in *Faragher v. City of Boca Raton* (1998) and its companion case, *Burlington Industries v. Ellerth* (1998). *Faragher* held that sexual harassment policies now play a key role in eliminating employer liability for harassment claims. *Faragher* gives employers a means to avoid liability for hostile environment harassment claims where there is a reasonable and effective sexual harassment policy with a complaint procedure, and the employee fails to use it. This is called the “affirmative defense.” *Faragher*, which was decided in 1998, was the first time the U.S. Supreme Court specifically found that a sexual harassment policy plays a crucial part in limiting or eliminating employer liability. This means that even if an employee was actually sexually harassed under the law, the employer is not liable for the actions of its harassing employee if the affirmative defense applies. This shields employers who, in good faith, attempt to prevent harassment from the outset, with the ultimate goal of giving employees greater freedom from unwelcome harassment.

Faragher requires that employees receive protection via an enforced sexual harassment policy. At first blush, *Faragher* may appear to be a pro-employer ruling since it gives employers immunity from lawsuits if their policy is legally compliant. To the contrary, *Faragher* is a pro-employee decision, since it greatly encourages employers to do what they should have been doing all along—taking proactive steps to prevent sexual harassment in the workplace. These policies, assuming they are implemented and executed, are great assets in the protection of employees’ rights in the workplace.

Employees can also reap the benefits of *Faragher* if an employer chooses to disregard the law and continues to implicitly condone harassment. A few examples illustrate the extent of the compensation given when employers do not have an adequate policy. A junior college with a deficient and insufficiently enforced sexual harassment policy paid out a \$100,000 damages award for various acts of sexual harassment by one of its employees (*Wilson v. Tulsa Junior College*, 1998). Two garbage truck drivers were awarded \$300,000 each (making a total of \$600,000) due to a harassment claim, because the employer’s harassment policy and the enforcement of that policy were ineffective (*White v. BFI Waste Services, Inc.*, 2006). In another case, a court found that the affirmative defense was inapplicable and awarded the sexual harassment victim \$633,000 under Title VII (*Monteagudo v. Asociacion de Empleados Del Estado Libre Asociado de Puerto Rico*, 2009).

Thus, under *Faragher*, employees “win” whether or not the employer has a policy. If there is a policy in place, employees should no longer be subjected to sexually harassing behavior, or at the very least the harassment should be resolved quickly before serious and long-lasting injuries occur. If there is not an adequate policy in place, employees can sue their employers to gain monetary awards in compensation for their negative experiences.

One significant problem with the court’s decision in *Faragher* was the lack of guidance as to what exactly constitutes an effective and legally complaint policy. Lower courts have noted the lack of a “uniform test” for determining the legality of an employer’s antiharassment policy (*Mack v. ST Mobile Aerospace Engineering, Inc.*, 2006; *Walton v. Johnson & Johnson Services, Inc.*, 2003). *Faragher* describes one, and only one, specific requirement that must be included in a sexual harassment policy—all sexual harassment policies must give assurances that “the harassing supervisors can be bypassed in registering complaints.” In other words, the complaint procedure described in the policy must give the victim a way to report the behavior without having to go to the harasser to make the complaint. Several subsequent lower court cases have made it clear that this requirement mandates employees to have “multiple avenues” through which employees can report behavior (*Anderson v. Wintco*, 2009; *Gallagher v. C.H. Robinson Worldwide, Inc.*, 2009).

In sum, *Faragher*’s mandate to employers includes two separate but related parts. First, a sexual harassment policy needs to be present to allow the employer to assert the affirmative defense. Second, the policy must be “effective,” which includes but is not limited to provisions for multiple reporting avenues. Given that *Faragher* has nationwide application and is more than 10 years old, it is expected that *Faragher* should be appropriately integrated by various institutions. *Faragher* is well known and has been well publicized, so employers should be complying with that decision at a relatively high rate.

THE ELEMENTS OF A SEXUAL HARASSMENT POLICY

While *Faragher* did not expressly state what should be included in a sexual harassment policy, other sources have attempted to fill the void. Following *Faragher*, the EEOC established guidelines to aid in drafting policies, including laying out six specific elements that should be present in a policy (EEOC, 1999). However, since the EEOC’s guidelines do not have the force of law, they are not binding mandates. Fowler (1996) recommended a variety of elements such as a complaint procedure, a definition of sexual harassment, and a policy written in “plain English.” Five elements of an effective policy were identified by Eberhardt, Moser, and McFadden (1999): these included protection against retaliation, a guarantee of confidentiality, and a promise that prompt action will be taken in the event that wrongdoing is found. Reese and Lindenberg (2004)

suggested that confidentiality provisions, sanctions, and training are appropriate in sexual harassment policies. None of these standards, however, legally bind employers, unlike the rules laid out in *Faragher* and *Clark v. UPS* (2005).

The *Clark v. UPS* Test

In the organizational hierarchy of federal courts, the U.S. Supreme Court sits at the top of the pyramid. Beneath the Supreme Court are 11 regional “circuit courts,” whose duty is to interpret and apply Supreme Court decisions. To date, only one circuit court—that of the Sixth Circuit—has fleshed out the Supreme Court’s general rule requiring a sexual harassment policy.

In 2005, the Sixth Circuit in *Clark v. UPS* (2005) laid out specific factors that must be present in a sexual harassment policy to allow the employer to assert the affirmative defense. Notably, the court’s decision in *Clark* has been followed in subsequent Sixth Circuit decisions in cases such as *Thornton v. Federal Express* (2008) and *Sanford v. Main Street Baptist Church Manor Inc.* (2009). The court in *Clark* stated that

While there is no exact formula for what constitutes a “reasonable” sexual harassment policy, an effective policy should at least: (1) require supervisors to report incidents of sexual harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy. (*Clark v. UPS*, 2005: 350-351)

Essentially, the holding in *Clark* requires that all four elements be present in the policy in order for the employer to assert the affirmative defense. Prong 3 of the *Clark* standard covers the *Faragher* mandate requiring multiple avenues, applicable to employers nationwide. Prongs 1, 2, and 4 are new elements that seek to fully describe *Faragher’s* mandate. First, requiring supervisors to report incidents of sexual harassment ensures that harassment is reported, investigated, and ultimately resolved. Without this requirement, supervisors may prefer to “look the other way” when harassment is occurring, opting to ignore harassment rather than to deal proactively with the problem. Second, allowing for informal complaints of harassment permits the victim, who may have feelings of humiliation, anxiety, or fear, to lodge a complaint in an anonymous and less confrontational way. Some victims may prefer not to lodge a formal complaint and begin a rigid investigatory procedure. The *Clark* rule ensures that victims have options in selecting the appropriate means to stop the harassment. The absence of even one of the prongs will prove fatal to the availability of the affirmative defense and will allow employees to rightfully pursue their claims in court.

Of particular note is the “training” requirement. Research suggests that workplaces attempting to improve their organizational climate should provide training on sexual harassment as a way to reduce hostile environment sexual harassment claims (Antecol & Cobb-Clark, 2003; Herzog et al., 2008). Hartmus and Niblock

(2000) suggest that public sector employers can demonstrate a commitment to fighting sexual harassment through regular seminars on sexual harassment supplemented with video presentations and guest speakers.

The court's pronouncement in *Clark* is ambiguous, however, as a clear reading of the court's holding suggests that the policy itself must include a provision for training on the policy. The passage states that "an effective policy should at least . . . provide for training regarding the policy." However, courts applying the *Clark* factors have consistently read this provision to mean that training on the policy should actually occur, not that training should be mentioned in the policy (*Bishop v. Woodbury Clinical Laboratory, Inc.*, 2010; *Crouch v. Rifle Coal Company, LLC*, 2009; *Sanford v. Main Street Baptist Church Manor Inc.*, 2009). In light of the seemingly clear meaning of *Clark*, it would be wise to mention training in the policy itself. Accordingly, this article examines the mentioning of training in policies, but does not include it as a component of overall legal compliance.

Compliance Evidence

While other studies have examined sexual harassment policies in light of either EEOC standards or research suggestions, no study to date has examined the level of compliance of policies in light of *Faragher* and *Clark*. Survey results from local governments in Michigan indicated that 67% of those responding generally complied with EEOC guidelines and 45% required some form of sexual harassment training (Reese & Lindenberg, 2002). Furthermore, 56% of the employees sampled felt that it was important to include attributes such as confidentiality, timeliness, and detailed definitions in a policy (Reese & Lindenberg, 2004).

Eberhardt et al. (1999) examined the availability of sexual harassment policies in small governmental units in a large Midwestern state and found that just over half (38 out of 75) of those units had some kind of sexual harassment policy, but those policies did not consistently provide for training. Fowler (1996) examined four policies from a range of organizations, including the University of Utah's policy, to determine compliance under EEOC guidelines and research-suggested criteria, and reported that compliance was generally adequate. Hertzog et al. (2008) found that complaints were filed in nearly one-third of organizations with sexual harassment policies, suggesting that policies by themselves are not sufficient to eliminate sexually harassing behavior.

A Strategic Perspective on Harassment Litigation

It is vitally important for an employee to check his/her employer's sexual harassment policy for deficiencies. If an employee finds a deficiency that renders the policy legally noncompliant, the employee has a strategic decision to make. The first option is to inform the university's human resources department of the

deficiency and request that the policy and its enforcement be updated. Updating the policy will, hopefully, lessen the probability that sexual harassment will occur. The second option is for the employee to mentally note the deficiency but not to report it. This option secures the right to sue an employer for sexual harassment in the event that such harassment occurs. By choosing this option, an employee actually benefits from a noncompliant policy, because such a deficiency automatically leads to the employer's right to the affirmative defense being waived. Thus, the focus of this article will be to find out how many policies are not compliant, so that, in the case of harassment that has yet to occur, an employee can be assured of the viability of a lawsuit as long as the sexual harassment is severe or pervasive.

As noted in P'ng (1983), plaintiffs in tort actions have a strategic choice as to whether to sue or to settle. One of the underlying assumptions in the theory of strategic litigation concerns the issue of asymmetric information and refers to the plaintiff's disadvantage in not knowing whether or not the defendant has actually violated the law. This uncertainty can cause a plaintiff to accept a settlement that is too low, since any award is preferable to the risk of winning nothing if judgment is rendered in favor of the defendant.

In the case of a noncompliant sexual harassment policy, this inherent disadvantage disappears. A court looking at the legal issue of the affirmative defense will be looking at the policy itself, and nothing more, which is equally available to both the plaintiff and the defendant at all times. If the plaintiff knows with certainty that the policy is deficient and the employer's right to the affirmative defense is consequently waived, an employee may actually be better off being covered under a noncompliant policy. Thus, according to P'ng's (1983) model, assuming that the plaintiff feels confident that the underlying sexual harassment claim is meritorious, he/she is in a much better position to gauge the value of the claim and ultimately can decide with greater precision whether to settle or to try the case. This is valuable information that most plaintiffs do not possess—a sword of knowledge that the plaintiff can feel confident will render the employer liable, with only the question of damages unresolved.

METHODOLOGY AND HYPOTHESES

The present study used a nationwide sample of university sexual harassment policies to investigate compliance with *Faragher* and *Clark*. While *Clark* is not binding nationwide, it is an excellent explication of the contours of *Faragher*. *Clark*, thus, provides an objective basis from which to discern the actual protection from sexual harassment that employees receive.

Policies were accessed from U.S. state university Web sites. As technologically advanced organizations with many stakeholders, universities are likely to make policies available electronically on their Web sites. From a research perspective, the electronic retrieval of policies also permits a more objective approach to

data collection than self-reports and avoids the respondent bias that may have affected some earlier research (Hobson & Guzewicz, 2002).

With the foregoing precepts in mind, the specific hypotheses to be addressed in this study are the following:

- Hypothesis 1: Given that *Faragher* more than 10 years ago announced that a sexual harassment policy was a necessity, a majority of state universities will have some sort of sexual harassment policy available to their employees.
- Hypothesis 2: Given that state universities are centers of learning that are specifically prohibited from engaging in harassing behavior under Title IX, a majority will have compliant sexual harassment policies.

Sample

State college and university employee sexual harassment policies were obtained from school Web sites from October 2009 to February 2010. The University of Texas at Austin's comprehensive list of universities by state (U.S. Universities by State, 2010) was used to determine the state schools' Web sites to be accessed. The Web sites of all state universities and colleges were accessed. Universities and colleges were included in the present study's sample if they offered at least a bachelor's degree. Professional or specialized schools, such as law or medical colleges, that were separate from a larger university were excluded. The resulting sample size was 376 schools.

Search Procedure for Policies

A sexual harassment policy is a written document that typically indicates an organization's prohibition of sexual harassment and the procedures for filing a complaint. Employee sexual harassment policies were obtained for the present study by using an Internet search engine and the search term "[name of the school] sexual harassment policy." If that approach did not yield the desired results, the search option available on the school Web sites was used. If necessary, the online faculty handbook, the employee handbook, or human resources pages were checked for a link to the policy. In a number of cases, the statement prohibiting harassment was to be found in a different part of a university's Web site from the procedures for making complaints. Both the statements and the procedures were obtained for inclusion in the analysis.

Universities with multiple campuses were treated as follows: (a) their system-wide policy was included in the sample if it could be located; and (b) any campus policies that were more comprehensive in their legal compliance than the system-wide policy were included in the sample. The purpose of this procedure was to avoid multiple counting of identical policies, thereby according them undue weight in the analyses. For example, in some cases, a single comprehensive system or Board of Regents policy would cover several campuses. That single policy

would be included in the sample representing all campuses of the system. In other cases, the systemwide policy was very general, essentially stating that each campus should develop its own policy. Such systemwide policies were not used. Instead, individual campus policies were included in the sample.

Coding

Each policy was coded according to the extent to which it satisfied the legal requirements of an effective sexual harassment policy as provided for in *Clark*: (a) supervisors must report incidents of harassment; (b) both formal and informal complaints are permitted; and (c) multiple reporting avenues exist. Those policies that included all three of these items are coded as legally compliant under *Clark*. Mention of training in the policy was also coded. Binary codes were assigned: “1” for compliance with a requirement and “0” for noncompliance. The study’s authors independently evaluated every policy’s written content for its compliance with each of the requirements. Coding agreement was 92%. Disagreements and detected omissions in the coding were identified, discussed, and reconciled. Typically, policies that did not comply with a given requirement did not address it.

Sexual harassment training or education was coded as being included only when it was mentioned in the policy. Policies were coded as “1” if training was mentioned and “0” if it was not. Training mentioned in the policies took many forms, for example, general harassment training or education; training on the policy; the use of a face-to-face and/or online format; and scheduling at the discretion of the employee or at times set by the organization. In some cases, a link for training appeared in a different area of a university’s Web site but was not included in the policy. In such cases, the policy was scored as not including the training requirement.

RESULTS AND DISCUSSION

Hypothesis 1—Availability of a Policy

Universities have had ample time to recognize *Faragher*’s mandate, requiring the presence of a sexual harassment policy as a way both to offer greater protection to employees and to assert the affirmative defense to a sexual harassment claim. The results suggest that universities nationwide have taken this first, important step in complying with *Faragher*. Of the 376 state universities examined in this study, 98.7% made a sexual harassment policy available online. The results of a *z*-test for a sample proportion suggest that this is a clear majority ($z = 18.73, p < .01$). Given that *Faragher* has been the law in the United States for nearly 10 years, it makes sense that nearly all U.S. universities have appropriately responded to *Faragher* by drafting and posting a sexual harassment policy (see Table 1).

Table 1. Frequencies and Percentages of State Universities with a Sexual Harassments Policy Available Online/Not Available Online

	Frequency	Percentage
Policy available	371	98.7
Policy not available	5	1.3
Total	376	100

These results are promising. Employees who work in a university should expect to have access to a sexual harassment policy online that outlines the goals, objectives, and institutional structures designed to combat sexual harassment. While this is a good start, the components of the policy itself must be fully examined to make sure that the policy is actually enforceable, adequate, and workable in today's universities.

Hypothesis 2—Policy Compliance

The results suggest that universities have not adequately addressed all of the *Clark* factors (see Table 2). Certainly, some of the factors have been included more representatively than others, but the overall compliance rate of the universities' policies is less than 50%. Indeed, only 42.3% of all U.S. universities in the study have a posted sexual harassment policy that contains all of the first three elements listed in *Clark*. This finding fails to support the hypothesized compliance of a majority of universities. Rather, a minority of university policies were compliant ($z = -3.19, p < .01$). Clearly, U.S. employees need better policies ensuring that adequate safeguards will be set in place to prevent harassment from escalating. But noncompliant policies ensure that employees retain the ability to successfully litigate their sexual harassment injuries in court. Sexually harassed university employees may defeat the affirmative defense when so many policies fail to meet the *Clark* test.

This study also examined whether sexual harassment training is provided for in each policy. When employers expressly provide for training in the policy, employees may feel reassured that employers are signaling to harassers that sexual harassment is taken seriously. Also, mentioning training in the policy might make it more likely that training is actually carried out. However, only 39.1% of all of the policies included some provision for training. Although this figure does not take account of those universities that may offer training but simply do not include it in their policy, the fact that less than 40% of the policies mention training in policy may be a sign that universities as a whole do not emphasize training on sexual harassment.

Table 2. Policies That are in Compliance with *Clark* Factors
($n = 371 =$ schools with policies)

Factor	Compliant		Noncompliant	
	Frequency	Percentage	Frequency	Percentage
Multiple reporting avenues	330	88.9	41	11.1
Supervisor reporting	215	58	156	42
Informal reporting	263	70.9	108	29.1
Policy includes all three factors listed above	157	42.3	214	57.7
Training mentioned	145	39.1	226	60.9

Some of the *Clark* elements were more frequently represented than others. The multiple reporting avenues element was included at a relatively high rate. Since *Faragher* expressly requires more than one reporting avenue, and this is a rule that binds every university nationwide, it is expected that many universities will comply with this rule. Of the 371 school policies that were available, only 41 (11.1%) did not specify more than one avenue for a victim to file a complaint. Given the express requirement in *Faragher* that the specification of more than one avenue is essential for any well-drafted sexual harassment policy, it appears that universities have responded to *Faragher*'s mandate. This finding supports hypothesis 2 with regard to multiple reporting.

While the multiple avenues prong is generally present in these policies, the requirement that supervisors report sexual harassment and the presence of formal and informal complaint procedures are generally underrepresented. Indeed, only 215 policies (58.0%) include the supervisor reporting provision. While they are more compliant with regard to formal and informal complaint procedures, only 263 policies (70.9%) have some provision for both formal and informal complaint procedures. Policies that are missing a formal and/or informal procedure were not deemed compliant. The absence of any one of these three prongs will likely make the policy legally defective, and victims cannot receive the fullest protection from sexual harassment, which will either commence or continue unabated without such protection.

A possible explanation as to why these items are not included in harassment policies is that state universities are resistant to allocating the resources necessary to make these changes. Requiring supervisors to report all complaints of sexual harassment might increase the number of complaints that would need to be investigated and resolved. Further, having informal and formal complaint

procedures requires additional resources in order to ensure that adequate staff are available to cover both options. With many universities facing large budget cuts, the need for these additional procedures may not be appropriately prioritized. However, a university's refusal to include these important provisions wrongly prioritizes resource allocation over the fundamental protection of inherent employee workplace rights.

Shortcomings of the Study and Future Research Directions

Future research could be directed toward the question of how effective well-styled policies are at actually preventing sexual harassing conduct. A comparison of EEOC sexual harassment charges filed against state universities that have at least three *Clark* elements with charges filed against those that have fewer than three *Clark* elements could illustrate the practical effect of having a compliant sexual harassment policy. The presence of a formal policy and the characteristics of this policy should also be linked to the perceptions of organization members. For example, does posting a policy on an organization's Web site actually increase members' awareness of it? Perceptions measured using an instrument such as the Organizational Tolerance for Sexual Harassment Inventory (Hulin, Fitzgerald, & Drasgow, 1996) could be related to policy availability, legal compliance, and training.

This study was limited to state universities. Broader-scale research on the legal compliance of all types of employers should be carried out to provide a complete gauge of the level of compliance with both *Faragher* and *Clark*. For example, private employers not restricted by Title IX may not be as responsive to the need for a well-crafted sexual harassment policy as state universities are.

Finally, this study looked only at one specific type of compliance—case law compliance with the *Faragher* and *Clark* decisions. Future research could be directed toward compliance with EEOC guidelines and could ask whether increased EEOC compliance leads to fewer complaints, fewer “reasonable cause” determinations by the EEOC, or fewer litigation damages awards.

CONCLUSION

On the one hand, the present findings indicate that legal compliance with *Faragher* is strong nationwide. The fact that *Faragher* is a well-known and relatively old decision supports the notion that universities should respond and actually have responded to that decision by establishing and disseminating some form of sexual harassment policy.

On the other hand, the present findings show a distinct lack of attention given to the important provisions that should be included in policies as provided for in *Clark v. UPS*. Close to 60% of all university policies surveyed are

noncompliant with at least one of these provisions. Consequently, victims of sexual harassment in those institutions will not receive the benefits that flow from the *Clark* provisions.

Employees should also routinely review the sexual harassment policies of their employing institution, in order to understand both the procedures and the safeguards available in the workplace and the full nature of their legal rights should harassment occur. Since the goal should be to prevent sexually harassing conduct, important omissions from the policies could be brought to the attention of the human resources manager in order to ensure maximum protection against sexual harassment. Or an employee taking a more strategic approach could simply note these deficiencies and prepare to use them in court to defeat the affirmative defense. Further, even for those policies that are compliant, it is suggested that all employees become familiar with university sexual harassment policy in the event that any type of sexual harassment occurs. It is crucial to understand that the law requires that victims be given the opportunity to report harassment to someone other than the harasser. A nonharassing supervisor can be an ideal person to approach when a harassed employee wishes to file an informal or formal complaint, since supervisors should be reporting all incidents of harassment to the appropriate department.

While only those policy flaws that have some sort of connection to the victim may be relevant to eliminating the affirmative defense, these types of flaws will almost always positively affect a victim's chance of success in litigation, even where the victim remains employed and has not complained. For example, not allowing for multiple complaint avenues and therefore requiring the employee to complain to the harasser effectively kills the victim's ability to complain. Even where the employee chooses not to complain, the employer will be precluded from raising that as an argument given the deficiency of the procedures themselves.

A potential solution is to give employees a much larger role in drafting sexual harassment policies. Allowing input from the very people the policy is designed to protect will make a harassment policy more attuned to the specific issues within a particular workplace. Such an inclusive approach will allow employees to take part in the decision-making process and to have their individual concerns adequately addressed.

REFERENCES

- Anderson v. Wintco*. 2009. 314 Fed. Appx. 135.
- Antecol, H., & Cobb-Clark, D. 2003. Does sexual harassment training change attitudes? A view from the federal level. *Social Science Quarterly*, 84: 826–842.
- Bishop v. Woodbury Clinical Laboratory, Inc.* 2010. 2010 U.S. Dist. LEXIS 37429.
- Burlington Industries v. Ellerth*. 1998. 524 U.S. 742.
- Chan, D. K.-S., Lam, C. B., Chow, S. Y., & Cheung, S. F. 2008. Examining the job-related, psychological, and physical outcomes of workplace sexual harassment: A meta-analytic review. *Psychology of Women Quarterly*, 32: 362–376.

- Clark v. UPS*. 2005. 400 F.3d 341.
- Cochran, C. C., Frazier, P. A., & Olson, A. M. 1997. Predictors of responses to unwanted sexual attention. *Psychology of Women Quarterly*, 21: 207–226.
- Collar, J. 2010. Wisconsin county DA resigns from office over texts. *USA Today*, October 4.
- Crouch v. Rifle Coal Company, LLC*. 2009. 2009 U.S. Dist. LEXIS 119029.
- DeSouza, E. R., Pryor, J. B., & Hutz, C. S. 1998. Reactions to sexual harassment charges between North Americans and Brazilians. *Sex Roles*, 39: 913–928.
- Eberhardt, B., Moser, S., & McFadden, D. 1999. Sexual harassment in small government units: An investigation of policies and attitudes. *Public Personnel Management*, 28: 351–364.
- EEOC (Equal Employment Opportunity Commission). 1999. Enforcement guidance: Vicarious employer liability for unlawful harassment by supervisors. Retrieved from www.eeoc.gov/policy/docs/harassment.html, March 2011.
- EEOC (Equal Employment Opportunity Commission). 2011a. Charge statistics: FY 1997 through FY 2010. Retrieved from <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>, March 2011.
- EEOC (Equal Employment Opportunity Commission). 2011b. Sexual harassment charges: EEOC and FEPAs combined: FY 1997–FY 2010. Retrieved from http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm, March 2011.
- Faragher v. City of Boca Raton*. 1998. 524 U.S. 775.
- Fiedler, A. M., & Blanco, R. I. 2006. The challenge of varying perceptions of sexual harassment: An international study. *Journal of Behavioral and Applied Management*, 7: 274–291.
- Fisher, A. B. 1993. Sexual harassment: What to do. *Fortune*, August 23.
- Fisher, B. S., Cullen, F. T., & Turner, M. G. 2000. The sexual victimization of college women. Retrieved from <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>, March 2011.
- Fleenor v. Hewitt Soap Co.* 1996. 81 F.3d 48.
- Fowler, L. 1996. Sexual harassment policies: An employer's burden or advantage? *BYU Journal of Public Law*, 10: 71–93.
- Gallagher v. C.H. Robinson Worldwide, Inc.* 2009. 567 F.3d 263.
- Hartmus, D., & Niblock, S. 2000. Elements of a good sexual harassment policy. *Public Manager*, 29: 50–55.
- Hertzog, J. L., Wright, D., & Beat, D. 2008. There's a policy for that: A comparison of the organizational culture of workplaces reporting incidents of sexual harassment. *Behavior and Social Issues*, 17: 169–181.
- Hobson, C. J., & Guziewicz, J. 2002. Sexual harassment preventive/protective practices at U.S. colleges and universities. *College Student Affairs Journal*, 21(2): 17–29.
- Hulin, C. L., Fitzgerald, L. F., & Drasgow, F. 1996. Organizational influences on sexual harassment. In Stockdale, M. S. (Ed.), *Sexual harassment in the workplace: Perspectives, frontiers, and response strategies*: 127–150. Thousand Oaks, CA: Sage.
- Kumar, P. B. V. 2009. Sexual harassment at workplace: A scar on humanity. *ICFAI Journal of Employment Law*, 7(1): 12–26.
- Lombardi, K. 2009. Sexual assault on campus. Retrieved from http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1838/, March 2011.
- Mack v. ST Mobile Aerospace Engineering, Inc.* 2006. 195 Fed. Appx. 829.
- Meritor Savings Bank v. Vinson*. 1986. 477 U.S. 57.

- Miller v. Kenworth of Dothan, Inc.* 2002. 277 F.3d 1269.
- Monteagudo v. Asociacion de Empleados Del Estado Libre Asociado de Puerto Rico.* 2009. 554 F.3d 164.
- O’Leary-Kelly, A. M., Bowes-Sperry, L., Bates, C. A., & Lean, E. R. 2009. Sexual harassment at work: A decade (plus) of progress. *Journal of Management*, 35: 503–536.
- P’ng, I. P. L. 1983. Strategic behavior in suit, settlement, and trial. *Bell Journal of Economics*, 14: 539–550.
- Reese, L. A., & Lindenberg, K. E. 2002. Assessing local government sexual harassment policies. *American Review of Public Administration*, 32: 295–311.
- Reese, L. A., & Lindenberg, K. E. 2004. Employee satisfaction with sexual harassment policies: The training connection. *Public Personnel Management*, 33: 99–119.
- Sanford v. Main Street Baptist Church Manor Inc.* 2009. 327 Fed. Appx. 587.
- Sigal, J. 2004. Sexual harassment. In C. Spielberger (Ed.), *Encyclopedia of applied psychology*: 393–403. San Diego, CA: Academic Press.
- Sigal, J. 2006. International sexual harassment. *Annals of the New York Academy of Science*, 1087: 356–369.
- Thornton v. Federal Express.* 2008. 530 F.3d 451.
- United Nations Statistics Division. 2010. World’s women 2000: Statistics and indicators on women and men. Retrieved from <http://unstats.un.org/unsd/demographic/products/indwm/wwpub2000work.htm>, March 2011.
- U.S. Bureau of Labor Statistics. 2011. An occupational comparison of private and state colleges and universities. Retrieved from <http://www.bls.gov/oes/>, March 2011.
- U.S. universities by state. 2010. Retrieved from <http://www.utexas.edu/world/univ/state/>, March 2011.
- Walton v. Johnson & Johnson Services, Inc.* 2003. 347 F.3d 1272.
- White v. BFI Waste Services, Inc.* 2006. 193 Fed. Appx. 283.
- Willness, C. R., Steel, P., & Lee, K. 2007. A meta-analysis of the antecedents and consequences of workplace sexual harassment. *Personnel Psychology*, 60: 127–162.
- Wilson v. Tulsa Junior College.* 1998. 164 F.3d 534.

Direct reprint requests to:

Charlie Penrod
 School of Business
 Northwestern State University
 313 Russell Hall
 Natchitoches, LA 71497
 e-mail: penrodch@nsula.edu