

United States Court of Appeals,  
Fourth Circuit.  
Stephanie HOWARD, Appellant,  
v.  
Gordon R. ENGLAND, Appellee.  
No. 05-1258.  
July 21, 2005.

On Appeal from the U.S. District Court for the Eastern District of Virginia at Alexandria, Virginia

Appellant's Brief

John F. Karl, Jr., Esquire, Karl & Tarone, 900 17th Street, NW, Suite 1250, Washington, D.C. 20006, (202) 293-3200, Counsel for Appellant.

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#### \*1 JURISDICTIONAL STATEMENT

Subject matter jurisdiction is premised upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. <section><section>2000e to 2000e-17. After Howard exhausted her administrative remedies, she filed suit. Joint Appendix ("JA") 10.

This Court has jurisdiction pursuant to 28 U.S.C. <section>1291 to review the district court's order granting Defendant's Motion for Summary Judgment entered in favor of the Navy on January 7, 2005. This is an appeal from a final order that disposes of all of Howard's claims.

This appeal is timely as plaintiff filed her Notice of Appeal on March 4, 2005. JA 571. The appeal was docketed on March 15, 2005. JA 8.

#### ISSUES PRESENTED FOR REVIEW

The sole issue before this Court is the application of the Supreme Court's decisions in *Farragher-Ellerth* [FN1] to Howard's claims of sexual harassment, which turns on whether the Navy may be held liable for the sexual harassment of Stephanie Howard by Randy McCall, both of whom were \*2 employed at all relevant times by the Navy. Resolution of this questions turns on:

FN1. The Supreme Court established this defense in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) and *Farragher v. Boca Raton*, 524 U.S. 775, 782 (1998).

1. Whether there are disputes of material fact as to whether McCall was Howard's "supervisor" for the purposes of Title VII?
2. Whether there are disputes of material fact as to whether the Navy exercised reasonable care by having an effective or adequate sexual harassment policy that was disseminated to Howard?
3. Whether there are disputes of material facts as to whether the Navy exercised reasonable care in failing to adequately investigate and in failing to take prompt remedial action, including any disciplinary action against McCall?
4. Whether there are disputes of material fact as to whether Howard unreasonably failed to take advantage of remedial measures provided by the Navy?

#### STATEMENT OF THE CASE

After exhausting her administrative remedies, plaintiff filed suit in U.S. District Court for the District of Columbia. JA 10. The District Court granted defendant's motion to transfer the case transferred to the Eastern District of Virginia. See JA 4.

After discovery, defendant filed a Motion for Summary Judgment. After oral argument, U.S. District Judge Brinkema granted the motion. JA 548.

Judge Brinkema focused on "reaction or the action taken in November," and characterized it as "about the fastest I've seen an employer do in a long time in these cases." JA 569. The District Court ruled that Howard's conduct was key, stating,

the problem simply is in my view that the plaintiff, who has to have some responsibility for protecting herself as well, did not give the employer adequate information to trigger the kinds of response you're requesting. She indicated she didn't want him getting in trouble. \*3 JA 569.

Judge Brinkema concluded that the onus for taking further action rested with Howard: "There was an open door for further communication, and there were no further reports of any problem until the November incident." JA 569. [FN2]

FN2. Judge Brinkema further stated: "And even then, it was not your client who went to her supervisor or back to Pendleton. She went to friends or colleagues, and they brought it to the attention of the appropriate people, which also suggests that the atmosphere in that particular office was actually open, that is, that the other people knew to take it to the supervisor, and the supervisors took immediate action." JA 569.

The district court upheld that Navy's policy as adequate:

I think in this case, based upon the materials that we discussed earlier that you submitted to the reply brief, that there was certainly adequate information about what sexual harassment means and what was available. It may not have been a perfect policy, but the question is was it a fair and adequate policy under the law as it existed back then in the mid-1990s and would it give a reasonable employee a fair opportunity to raise these concerns.

JA 569-570. (Emphasis added).

The district court rejected Howard's contention that the Navy's response was inadequate: "I think that it would clearly on this record. I also think that the response of the Navy given the information it was presented with was adequate and therefore that the motion for summary judgment is granted." JA 570.

In her decision, Judge Brinkema did not specifically address Howard's argument that McCall was her supervisor for the purposes of Title VII. Nor did Judge Brinkema directly address in her decision Howard's argument that the Navy was on notice of the McCall problem prior to November, 1996, that the investigation was inadequate, and that the failure to take disciplinary action against McCall rendered the Navy's policy ineffective.

#### \*4 FACTUAL BACKGROUND

Stephanie Howard was employed for the Navy as a Secretary, GS-318-06, by the Naval Air Systems command ("NAVAIR"), Arlington, Virginia. JA 64-81; 401-402. In her position of secretary, Howard provided administrative support for the Division Head and approximately 55 employees in the Branch AIR-3.1.2., including Randy McCall. JA 401-402. Howard was the only secretary in this Branch. JA 401-402.

The majority of employees in the Branch were high-ranking government officials, such as Logistic Management Specialists, GS-12 to GS-15, each of whom was able to exercise direct and indirect supervisory control of Howard in the performance of her secretarial duties. JA 6481; 401-402.

At all times relevant herein, McCall occupied the position of Logistic Management Specialist, GM-346-13, and often exercised direct or indirect supervisory authority over the duties of Howard. If McCall required secretarial and/or support staff to complete work for him, Howard was required to provide such assistance to him. JA 64-81; 401-402.

During the period June 1995 to November 1996, Howard was subjected to sexual harassment by McCall. McCall's sexual harassment of Howard took the form of verbal comments, sexual gestures coupled with unwelcome physical touching, sexist remarks and slurs, sexually explicit jokes, conversations about sex, and overtly sexual gestures and mannerisms. JA 82-97.

McCall had a history of inappropriate behavior in the office. He often engaged in making comments and jokes of a sexual nature. McCall's supervisor at the time, Cresswell Elmore, recalled that he told McCall to take down pictures of naked women that he had hung on his office wall. JA 453-454. Elmore also admonished McCall about using bad language in the \*5 office. Id. During 1996, McCall also had a pornographic screen saver on his computer, a picture of a vagina. Baranowski, McCall's supervisor, ordered McCall to remove

the screen saver. The Navy was on notice of McCall's offensive and inappropriate conduct. JA 453-454; 445-446.

The Navy received constructive and actual notice that McCall was a repeat offender given the public display of sexual pictures/photos on the walls of his cubicle and the use of sexual material on his government computer. JA 453-454; 445-446.

The Navy received additional notice of particularly offensive incident that occurred on or about March 6, 1996. McCall physically assaulted Howard by placing his hands on her body and placing his fingers through her clothes and inside of her vagina. Shortly after this incident, Howard went to the Navy's Human Resource Office. There, she saw Jessica DeMaris. During the meeting, Howard told DeMaris that she was anxious to get out of her then current work area because she was being attacked, and that she was under attack in her job. JA 35.

The Navy received notice of the March, 1996 incident when Howard met with Aaron Pendleton, a high ranking manager in Human Relations Office, to seek advice as to what she could do to stop McCall from harassing her. Howard was visibly shaken and upset as she told Pendleton that McCall's behavior must stop. Since Pendleton occupied a management position in the HRO, Howard believed he was the person to whom complaints like hers should be addressed. Howard explained how she needed to put an end to the problem with McCall. JA 3536; 321-329; 338-339, 507.

Pendleton failed to take any action, except to tell Howard to write a letter to McCall to discourage further misconduct. Pendleton emphasized the importance of keeping a record and suggested if the harassment occurred again, only then should Howard report it. JA 35-36; 321329; 338-339, 507.

\*6 Pendleton failed to tell Howard that she was to report the harassment to the EEO Office; nor did he even tell her where the EEO Office was located. At the conclusion of the meeting, Pendleton led Howard to believe that the matter was now in his hands. But Pendleton took no action. JA 35-36; 321-329; 338-339, 507.

Howard followed Pendleton's advice. She wrote McCall a letter and gave it to him on March 7, 1996, at work. JA 439. In that letter, she referred to and described the many incidents of McCall's sexual harassment, demanding him to stop his inappropriate and outrageous behavior, to "STOP touching my breast, grabbing by [sic] butt, going up my dress, trying to put your fingers up my vagina [sic], like yesterday." JA 439. She explained in her letter that his unwelcome sexual advances made her feel sick and violated. JA 439.

On March 7, 1996, Howard also told Lt. Col. William Willard, a senior military officer, assigned to the Navy, of the sexual harassment and the letter to McCall. After Howard gave the letter to McCall, she had a lunch meeting with Lt. Col. Willard. During this lunch meeting, she told Lt. Col. Willard about how McCall would touch her in the office and make unwanted sexual advances toward her. He did nothing, so the Navy did nothing. JA 85, 294-295, 339.

Capt Gibson, USN, O-6, also observed McCall attack Howard by placing his hands on Howard's neck. He also did nothing. JA 352-355, 357-359.

Howard also told Lisa Pace that she had to do something about McCall. Pace had long been aware that Howard had been subjected to harassment by McCall. Pace inquired of Howard: "Is he still doing that?" Howard replied "yes." JA 36, 343- 346 360

Despite Howard's request to McCall to stop harassing her, McCall continued to make unwanted sexual advances towards her. On November 18, 1996, McCall cornered Howard while \*7 she was sorting the mail and asked her: "You don't

mind if I pat you on the ass?" Howard was disgusted and offended with his behavior and walked away. JA 443.

That afternoon, McCall approached Howard when she was at the mail bins. He physically positioned his body close to Howard's body and ran his hands over her face, throat and breasts. Baranowski was walking by the partition at that time and observed that McCall was cornering Howard. JA 88, 102-105, 353-354.

That same day, Howard's supervisor, Mike Erk, met with Howard and told her to contact the EEOC office to report McCall's conduct. JA 444. He then discussed separating Howard and McCall. Erk's and Baranowski's first reaction was not to remove McCall but to remove Howard. JA 354-354 362-363. It appears that McCall was removed only because he agreed to the removal.

After the November 1996 incident, the Navy's EEO conducted an investigation that did not include interviews with key witnesses. JA 441, 474.

No disciplinary action was taken against McCall. McCall was not required to take any sensitivity training on appropriate conduct in the workplace or any workshops on sexual harassment. JA 116-117, 126-127.

At all relevant times, the Navy had a sexual harassment policy. However, as Howard argues below, this policy was legally inadequate and inconsistent with the EEOC's guidelines. Moreover, the Navy never provided a copy of this policy to Howard. Howard did not know even if there was an EEO office within the building. JA 506-507.

In 1997, after the events in at issue, the Navy finally issued a revised sexual harassment policy that complied with the EEOC's 1990 guidelines. JA 457- 473.

#### \*8 SUMMARY OF THE ARGUMENT

The trial court erred in failing to apply the legal standards articulated in Faragher and Ellerth to Howard's complaint. Instead, the trial court asked the "question is was it a fair and adequate policy under the law as it existed back then in the mid-1990s. JA (emphasis added).

Disputes of material fact as to whether McCall was Howard's supervisor for the purposes of Title VII bar the entry of summary judgment.

Granting summary judgment is error where there are disputes of material fact as to whether the Navy's sexual harassment policy was effective and adequate to prevent entry of summary judgment when the Navy received constructive and actual notice of the sexual harassment by McCall months before taking any action.

Granting summary judgment is error where there are disputes of material fact as to whether the Navy properly disseminated its sexual harassment policy to Howard prevent entry of summary judgment.

Granting summary judgment is error where there are disputes of material fact as to whether the Navy properly investigated Howard's charges and took effective and appropriate remedial action prevent entry of summary judgment.

Granting summary judgment is error where there are disputes of material fact as to whether Howard unreasonably failed to take advantage of remedial measures provided by the Navy.

Since a reasonable jury could find that the Navy had actual and constructive notice, both before and after March 6, 1999, failed to have an effective sexual harassment policy and failed to take sufficient corrective action to protect Howard and deter sexual harassment in the future, the court erred in granting defendant's Motion for Summary Judgment. The trial court erred in \*9 accepting defendant's view of the evidence that the Navy did not receive

notice of McCall's actions until November, 1996.

## ARGUMENT

### I. LEGAL STANDARDS FOR SUMMARY JUDGMENT

In deciding a motion for summary judgment, all evidence and the inferences to be drawn from it must be considered in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Langon v. Dept. of Health and Human Services*, 959 F.2d 1053, 1058 (D.C. Cir. 1992) (reversing in part summary judgment in favor of agency). "If material facts are at issue, or, though undisputed are susceptible to divergent inferences, summary judgment is not available." *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). Howard is entitled to have her version of all that is in dispute accepted, all internal conflicts in it resolved favorably to her, the most favorable of possible alternate inferences from it drawn in her behalf; and finally to be given the benefit of all favorable legal theories invoked by the evidence so considered. *Charbonages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

In *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177 (4th Cir. 1998), Circuit Judge Michael, in an opinion concurring in the judgment, suggested that the Faragher/Ellerth defense [FN3] is not well suited for summary judgment.

FN3. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The prospects for summary judgment look doubtful to me because the new Faragher-Ellerth defense depends on facts and because Lissau's allegations, if proven true, would show that she was subjected to actionable harassment. Nowhere does the Supreme Court suggest summary judgment as a shortcut in dealing with this \*10 new defense. Rather, the Court recognizes the factual nature of the defense by emphasizing that it is "subject to proof by a preponderance of the evidence."

Id. Judge Michael continued: "Moreover, by employing terms such as 'reasonable care' and 'unreasonably failed,' the defense focuses on the reasonableness of conduct on the part of both the employer and the employee." Id. Judge Michael observed that: "When the reasonableness of conduct is in question, summary judgment is rarely appropriate because juries have 'unique competence in applying the reasonable person standard' to the facts of the case." Id. (citation omitted). Judge Michael concluded by stating: "If Faragher and Ellerth signal anything, it is that fewer sexual harassment cases will be resolved on summary judgment." Id. [FN4] We submit Judge Michael's analysis applies irrespective of which party bears the burden of proof.

FN4. But cf. *Matvia v. BaldHead Island Management, Inc.*, 259 F.3d 261, 267 (4th Cir. 2001) "Faragher and Ellerth simply do not lend themselves to a result that would make a grant of summary judgment an impossibility." (emphasis added).

### II. THE LAW OF SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. <section>2000e-2(a)(1). This provision "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (citation omitted).

A claim of sexual harassment is cognizable under this provision if the alleged harassment alters, either explicitly or constructively, the terms or

conditions of an individual's employment. \*11 See, e.g., Meritor Savings Bank, FSB v. Vinson 477 U.S. 57, 67-68 (1986). Courts describe an explicit alteration as "quid pro quo" harassment and a constructive alteration as "hostile work environment" harassment. Ellerth, 524 U.S. at 752.

In order to prevail on a hostile work environment claim under Title VII, a plaintiff must prove that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' ... that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Systems, 510 U.S. 17, 21 (1993). The Court explained in Harris that whether an environment is hostile is determined by looking at the totality of the circumstances: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to whether the plaintiff actually found the environment abusive." Id. at 23.

The elements for a cause of action for sexual harassment amounting to a hostile environment include unwelcome conduct that is based on plaintiff's sex. Anderson v. G.D.C. Inc. 281 F.3d 452, 458 (4th Cir. 2002) (citations omitted). Plaintiff must also demonstrate that the conduct is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment which is imputable to the employer. Id.

The Navy conceded for the purposes of this motion that plaintiff can establish most of the elements of a hostile environment claim. The Navy challenges only the final element of plaintiff's claim, arguing that plaintiff cannot present sufficient evidence to impute McCall's conduct to the Navy for liability purposes. JA 40-41. Thus, defendant seeks to escape liability for sexual \*12 harassment and damage caused by McCall, even though the Navy assumes the truth of Howard's allegations for the purposes of this motion.

"[W]hen no tangible employment action is taken, the employer may defeat vicarious liability for supervisor harassment by establishing, as an affirmative defense, both that 'the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' and that 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2353-2354 (2004) (emphasis added) (citations omitted). The case law places "the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm." Id. at 2354 (citation omitted).

Even if this Court rules as a matter of law that McCall is not Howard's "supervisor," the court must address the same issue regarding the effectiveness of the Navy's sexual harassment policy. There is no dispute "the employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it." Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 333-335 (4th Cir. 2003), cert. denied, 124 S. Ct. 1411 (2004).

Where the harasser is a co-worker rather than plaintiff's supervisor, plaintiff has the burden to show that management knew or should have known of the harassment and failed to take reasonably prompt corrective action. Id. We submit there is a factual dispute to be decided by the jury irrespective of which party bears the burden of proof.

### III. THERE ARE DISPUTES OF MATERIAL FACT AS TO WHETHER McCALL WAS HOWARD'S "SUPERVISOR" UNDER TITLE VII

The first legal issue is whether McCall was Howard's "supervisor" for the purposes of Title VII. Resolution of this issue determines the legal standard for deciding whether defendant is liable \*13 for McCall's actions. The

evidence of record shows that there is a dispute of material fact as to whether McCall was Howard's "supervisor," a dispute which must be resolved at trial.

While the appeal was pending, the Supreme Court decided *Ellerth and Faragher*, which significantly clarified extant law respecting employer liability under Title VII for sexual harassment by its employees. *Mikels v. City of Durham*, 183 F.3d 323, 331 (4th Cir. 1999). The Court held that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* (citation omitted).

This Court did not adopt the narrow *per se* rule advocated by the Navy. Instead the Court ruled:

The fundamental determinant of this form of vicarious liability is not, therefore, the harasser's formal rank vis-a-vis that of the victim in the particular employment hierarchy, though that is of critical and sometimes decisive evidentiary importance, but whether the particular conduct was "aided by the agency relation."

*Id.* at 331-332 (citation omitted). Vicarious liability "can only arise from the conduct of an employer having some measure of supervisory authority over the victim; it cannot arise from the conduct of a mere co-worker, one with no form of authority." *Id.* at 332.

Rather than adopting the perspective advocated by the Navy, this Court held: "The determinant is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not." *Id.* at 333. The court must examine the facts presented by each case, as the "most powerful indicator of such a threat-induced vulnerability deriving from the supervisor's agency relation lies in his authority, though not exercised in the particular situation, ..." *Id.* Although the "most threatening form of supervisory authority" was the power of a supervisor to take tangible employment actions, this Court went on to assume without deciding that "lesser forms derived from the agency relation may aid particular acts of supervisor harassment." *Id.* at 333.

In these circumstances, the victim's response to the harassment may be probative of whether the harasser's authority "aided his conduct by increasing her sense of vulnerability and defenselessness." *Id.* Accordingly, this Court should also consider Howard's response to McCall's actions, "where the level of authority had by a harasser over a victim-- hence her special vulnerability to his harassment--is ambiguous, the tip-off may well be in her response to it." *Id.*

The approach taken by other courts of appeal supports Howard's argument. For example, the Third Circuit concluded that a "mechanic in charge" of elevator mechanics at a certain site was a "supervisor" for the purposes of determining whether the employer was liable for alleged sexual harassment. *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2nd Cir. 2003). The "mechanic in charge" was a supervisor for the purposes of Title VII because he had "the right to assign and schedule work, direct the work force, assure the quality and efficiency of the assignment and to enforce the safety practices and procedures." *Id.* at 127.

The Second Circuit explained the concept of vicarious liability: Vicarious liability, whether automatic or subject to the affirmative defense, depends on whether the power-- economic or otherwise, of the harassing employee over the subordinate victim given by the employer to the harasser-- enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment.

Id. at 126. The Second Circuit explicitly rejected the argument that to be a supervisor one must have the authority to make economic decisions affecting plaintiff. Rather the Mack court held that the question instead was "whether the authority given by the employer to the employee enabled \*15 or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates." Id.

"In general, 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." *Durham Life Ins. Co v. Evans*, 166 F.3d 139, 155 (3rd Cir. 1999), citing *Bonenberger v. Plymouth Township*, 132 F.3d 20, 23 (3d Cir. 1997) (emphasis added). That McCall might not have had the authority to act alone in taking disciplinary action against Howard did not mean that he was without supervisory authority over Howard. McCall was a GS-13, while Howard was a GS-6 during the relevant time period. Under the circumstances present here, there is a dispute of material fact as to whether McCall's harassment was aided by his place in the Navy hierarchy many levels above Howard. [FN5]

FN5. The 1999 EEOC guidelines provide:

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," <section>III.A.2 at 5-6, which may be found at [www.eeoc.gov/policy/docs/harassment](http://www.eeoc.gov/policy/docs/harassment)) (emphasis added) (June 18, 1999).

The Navy argues that these officials are mere co-workers of Howard and therefore not supervisors for the purposes of Title VII. The Navy cites to Howard's own words characterizing these persons as "co-workers," as though that characterization were binding on this court.

NAVAIR is a military organization, akin to a naval ship, that reported directly to the Chief of Navy Operations, ("CNO"). NAVAIR was and is led by a three star flag rank of Vice Admiral. \*16 Throughout the NAVAIR organization, its program managers were and are to this day by and large Naval O-6 rank military Captains. *Washington Post*, June 4, 2000 "New NAVAIR Commander RADM Joe Dyer to be Promoted to Replaced VADM Lockhardt."

In this hierarchy, Howard held the rank of a seaman, whereas McCall held the rank of a GS13, the equivalent of a Lieutenant Commander of the Navy. Lt. Col. William Willard held the equivalent of a GS-14. The persons to whom Howard complained are not "co-workers," but rather supervisors and senior officers of the command structure. Pendleton, Capt Gibson, and Lt. Col. Willard represent Navy command rank and supervisory authority.

Even if Howard sincerely believe that McCall was a "co-worker," this court is not required to accept this fiction. We submit it is a misstatement of the facts to present McCall as a co-worker because he exercised direct and indirect direct supervisory control, in and outside her chain of command over Howard.

Alternatively, the Navy is liable because Howard reasonably believed that McCall exercised supervisory authority over her. The EEOC Enforcement Guidelines state that an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," <section>III.B at 6, which may be found at [www.eeoc.gov/policy/docs/harassment](http://www.eeoc.gov/policy/docs/harassment)) (emphasis added) (June 18, 1999). This

analysis should only apply if the employee reasonably believed that the harasser had such power. Ellerth, 118 S. Ct. at 2268 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one.")

Under the facts presented here, it is reasonable that Howard held the belief that McCall was one of her supervisors. Howard was the only GS-6 secretary for the branch in which McCall was \*17 an officer. Her duties and responsibilities included providing secretarial services and support staff to all of the officers of the branch on an "as needed" basis. McCall, who was a manager and GS-13, would often ask Howard for her assistance and secretarial support. Based on the facts of this case, it is clear that McCall did exercise supervisory power and control over Howard. Corrigan v. U.S.A., 815 F.2d 954, 961 (4th Cir. 1987) "[A]s a matter of common knowledge, an enlisted man practically cannot disregard the 'request' of an officer."). Further, Howard reasonably believed that McCall had such power to do so. [FN6] There is a dispute of material fact as to whether McCall was Howard's supervisor for the purpose of Title VII.

FN6. The 1999 EEOC Guidelines state subjecting an employer to vicarious liability for harassment by a supervisor who does not have actual authority over the employee may be appropriate if the employee reasonably believed that the harasser had such power. This would be justified where "the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command." EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," <section>III.B at 6, which may be found at [www.eeoc.gov/policy/docs/harassment](http://www.eeoc.gov/policy/docs/harassment) (June 18, 1999). The Guidelines cite Ellerth, 118 S.Ct. at 2268 and Lampallas v. Mini-Circuit Lab, Inc., 163 F.3d 1236, 1247 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").

#### IV. THERE ARE DISPUTES OF MATERIAL FACT AS TO WHETHER THE NAVY EXERCISED REASONABLE CARE TO PREVENT SEXUAL HARASSMENT

Irrespective of whether McCall was Howard's "supervisor" under Title VII and who bears the burden of proof there are disputes of material fact as to whether the Navy exercised reasonable care to prevent sexual harassment by adopting an appropriate and effective sexual harassment policy that was disseminated this policy to Howard.

Although there is no dispute that the Navy had some sort of a sexual harassment policy, the mere existence of a written policy and grievance procedure without more does not necessarily \*18 suffice to meet the employer's burden of proof. See Brown v. Perry, 184 F.3d 388, 398 (4th Cir. 1999) ("mere promulgation of such a policy may well fail to satisfy the employer's burden"); Hurlley v. Atlantic City Police Department, 174 F.3d 95, 118 (3rd Cir. 1999) (there is no absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort.).

In 1990, the Equal Employment Opportunity Commission (EEOC) issued a policy statement "enjoining employers to establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.'" Faragher, 524 U.S. at 806 (citation omitted) (alteration in original).

The Navy's 1993 policy failed to comply with the EEOC's 1990 guidelines discussed in Faragher. There is no serious dispute on this issue because the Navy waited until 1997 to promulgate regulations that comply with the EEOC's

1990 Guidelines.

The Navy's 1997 policies adopted after the events at issue in this litigation thus concede the inadequacy of the 1993 sexual harassment policy in place at the time of McCall's sexual harassment of Howard. The fact that the Navy adopted a more effective policy in 1997 highlights the inadequacy of its previous policy. JA 457-474.

Even if the Navy's 1997 policy is not admissible to show negligence because it is a subsequent remedial measure under Fed.R.Evid 407, the 1997 policy shows that an effective policy was feasible and to impeach the Navy's claim the agency complied with Title VII. The Navy provided no evidence to prove implementation of the 1997 policy was not possible in time to prevent the harassment at issue in this case.

Comparison of the 1993 and 1997 policies is also useful because this answers the question court about what the Navy could have done differently. See JA 457- 474.

#### \*19 A. Channels for Voicing Complaints Were Inadequate

The Navy was required to have more than one channel for complaint. A policy that identifies only one individual to receive complaints, or that requires employees to bring their complaints to their direct supervisors do not pass muster, due to the risk that the employee would be required to complain to the harasser himself. See *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-812, (7th Cir. 1999); *Conto v. Concord Hosp., Inc.*, 2000 WL 1513798 \* 6(D.N.H. 2000), *aff'd*, 265 F.3d 79 (1st Cir. 2001). Conversely, a policy that does not provide multiple mechanisms for the prompt resolutions of complaints and does not allow complainants to circumvent the supervisory chain of command is not adequate. *Slaw, supra*, 180 F.3d at 811-812.

The Navy's policy is inadequate as a matter of law because it required Howard to begin the complaint process by writing a letter to McCall. See JA at 49 n. 16. The Ochel tree Court was skeptical of the requirement that "Anyone having a complaint or problem should first try to resolve it with their immediate supervisor." *Id.* 335 F.3d at 334. The Court ruled that: "If this amounts to a sexual harassment policy, a jury could reasonably find that it fails to provide reasonable avenues of complaint." *Id.*

In deciding whether the Navy had reasonable complaint procedures in 1996, a jury may give negative weight to the fact that a purported sexual harassment policy does not require a supervisor, with whom complaints of sexual harassment must be lodged in the first instance, to forward unresolved complaints to higher authority. See *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 540-42 (10th Cir. 1998). A reasonable jury could make the basic finding that the Navy's 1993 sexual harassment policy did not provide Howard with reasonable avenues for voicing her sexual harassment complaints. *Ochel tree*, 335 F.3d at 333-334. In other words, the Navy "did not exercise reasonable care in setting out the channels by which it could receive reports [of sexual harassment], \*20 and it is therefore in no position to rely on those inadequate channels to claim that it did not receive notice." *Id.*, citing *Wilson*, 164 F.3d at 542.

An employer cannot avoid Title VII liability for coworker harassment by adopting a "see no evil, hear no evil" strategy. Knowledge of harassment can be imputed to an employer if a "reasonable [person], intent on complying with Title VII," would have known about the harassment. *Id.* citing *Spicer v. Virginia Department of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995). Under this rule an employer may be charged with constructive knowledge of coworker harassment when it fails to provide reasonable procedures for victims to register complaints. See, e.g., *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 441 (2d Cir. 1999); *Wilson, supra*, 164 F.3d at 540-42. The question then is whether a reasonable jury could find that the Navy had actual

or constructive knowledge of McCall's harassment of Howard because the agency failed to provide adequate complaint procedure. [FN7]

FN7. The 1999 EEOC Guidelines state: "An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures." EEOC, "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," <section>V.C.2 at 15, which may be found at [www.eeoc.gov/policy/docs/](http://www.eeoc.gov/policy/docs/) (emphasis added) (June 18, 1999).

Areasonable jury could make the basic finding that the Navy's sexual harassment policy did not provide Howard with reasonable avenues for voicing her sexual harassment complaints. Ocheltree, supra, 335 F.3d at 333-335. [FN8] In other words, the Navy "did not exercise reasonable care \*21 in setting out the channels by which it could receive reports [of sexual harassment], and it is therefore in no position to rely on those inadequate channels to claim that it did not receive notice." Id., citing Wilson, 164 F.3d at 542.

FN8. In Ocheltree, court discussed the employer's requirement that: "If a supervisor cannot or does not adequately resolve an employee's complaint, the employee has the responsibility of complaining to the company president or vice president." Id. The Fourth Circuit held that "This approach seems ill designed to ensure that upper management learns of harassment." Id.

A reasonable jury could make the basic finding that the Navy sexual harassment policy did not provide Howard with reasonable avenues for voicing her sexual harassment complaints. Ocheltree, supra, 335 F.3d at 333-335. The Navy "did not exercise reasonable care in setting out the channels by which it could receive reports [of sexual harassment], and it is therefore in no position to rely on those inadequate channels to claim that it did not receive notice." Id., citing Wilson, 164 F.3d at 542. See Dees v. Johnson Controls World Services, Inc., 168 F.3d 417, 422 (11th Cir. 1999) (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action).

#### B. The Navy Was On Notice of the McCall Problem Prior to November, 1996

Whether the Navy was on notice of the McCall problem must be evaluated in light of McCall's history. A reasonable jury could find at trial that the Navy knew or should have known about the harassment because the Navy was on notice that McCall was a repeat offender. The evidence of record could support a finding by the jury that the Navy was on notice because of previous complaints about McCall. The jury could also find that the Navy was on notice because the computer used by McCall has a vagina as a "screen saver."

The Navy was on notice of McCall's sexual assault in March, 1996 actions because of the knowledge of three high ranking NAVAIR officials knew about [or were on inquiry notice] of McCall's harassment of Howard.

\*22 Howard told Pendleton that McCall had been touching her and that she did not like this conduct. JA 49 (citation omitted). The record is clear that the Navy had notice of the March, 1996 assault.

Pendleton took no action after receiving this notice. Instead of taking any action to end the harassment, Pendleton "instructed" Howard "to write McCall a letter explaining that she did not appreciate his advances and wished them to stop." JA 49. A jury could conclude that Pendleton was just giving Howard the "brush-off" and that the Navy was on notice of the harassment.

Howard also told Lt. Col Willard about McCall's actions. JA 313-314. The Navy had notice when Howard informed Lt. Col. Willard in March 1996. He took no action, yet he was a senior military officer in a military organization. The Navy's argument that Lt. Col. Willard was not a supervisor in the matter or in the chain of command ignores the rank of a senior officer at O-6 and the duty imposed on all officers of the military by law. Willard would have been required to act under the 1997 policy. JA 457-473.

Although the time frame is not clear, Capt. Gibson was also aware of McCall's actions prior to November, 1996 because he saw McCall with his arms on Howard's neck. Capt. Gibson also failed to take any action. JA 351-355. Capt. Gibson would have been required to act under the 1997 policy. JA 457-473.

Contrary to the apparent reasoning of the district court, see JA at 567, there is no requirement that the employee file a formal complaint to place the Navy on notice of the sexual harassment. *Nichols v. Azteca Rest. Enterprises*, 256 F.3d 864, 876, n. 10 (9th Cir. 2001) (citation omitted) ("Although these complaints did not follow the formal reporting requirements of Azteca's anti-harassment policy, they were sufficient to place the company on notice of the harassment.") (citation omitted); *Young v. Bayer Corp.*, 123 F.3d 672, 675 (7th Cir. 1997) (sufficient for employee \*23 to give notice to a person who should reasonably be expected to stop the harassment or refer the complaint up the chain of command to someone who can stop it); see also *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 64-65 (2d Cir. 1998) (if a direct supervisor who had the responsibility to stop the harassment knew of the harassment and failed to act, employee has no further obligation to bring it to the employer's attention).

Despite actual and/or constructive knowledge of McCall's actions, the Navy took no meaningful action prior to November, 1996.

### C. The Navy's Sexual Harassment Policy Was Not Effective

Because the Navy knew or should have known about the harassment prior to November, 1996, the Navy may be charged with knowledge because it did not provide reasonable avenues of complaint. Under the reasoning in *Ochel tree*, the jury could properly hold the Navy responsible for McCall's harassment of Howard under the negligence or constructive knowledge theory.

The Navy's policy, like the one that the jury found wanting in *Ochel tree* "fails to place any duty on supervisors to report incidents of sexual harassment to their superiors." *Id.* The absence of any duty placed on the supervisors or the Human Relations people to report complaints up the chain of command is fatal to the Navy's claim that its 1993 sexual harassment policy was adequate. JA 208-221. *Curry v. District of Columbia*, 195 F.3d 654, 663, n. 17 (D.C. Cir. 1999) ("The employer is, of course, obliged to respond to any repeat conduct."); See *White v. New Hampshire Dep't of Corr.*, 221 F.3d 254, 261-262 (1st Cir. 2000) (employer did not act appropriately when it did not conduct a timely investigation into the alleged harassment and, in fact, allowed the harassing comments and conduct to continue).

There is no basis in the law to allow the agency to escape liability because of its refusal to take action on complaints of which the Navy had actual and constructive notice. See *\*24Dees v. Johnson Controls World Services, Inc.*, supra, 168 F. 3d at 422 (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action). In this case, it is clear that the Navy failed to exercise reasonable care to prevent McCall from harassing Howard.

The district court relied heavily on fact that Howard did not insist on disciplinary action be taken against McCall after the March, 1996 incident. The district court erred in assessing the effectiveness of the 1993 policy in terms of Howard's subjective preference in an atmosphere of intimidation

We submit that the issue presented here is not what Howard "expected" the Navy to do, but rather "whether a reasonable jury could conclude that [the Department] knew of [McCall's] behavior prior to [April 9, 1998], and thus acted unreasonably and indifferently." *McCombs v. Meijer, Inc.*, 395 F.3d 346, 355 n. 9 (6th Cir. 2005). Howard's reluctance to ask the Navy to discipline her superior does not negate the Navy's duty to exercise reasonable care and to investigate the harassment. The choice of whether to investigate is not Howard's choice and there is no authority that would allow the Navy to delegate this duty.

If the Navy's sexual harassment policy did not require these high ranking Navy officials to relay Howard's sexual harassment complaints up the chain, then a reasonable jury could find in Howard's favor as there are disputes of material fact as to the adequacy of the Department's sexual harassment policy. *Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 349 (6th Cir. 2005) (an effective EEO policy should at least "require supervisors to report incidents of sexual harassment.") (citation omitted).

Accordingly the trial court erred in granting summary judgment because there is a dispute of material fact as to whether the Navy's policy was truly effective in light of the Navy's actual and \*25 constructive knowledge of McCall's actions and the failure of the Navy to respond. *Clark v. United Parcel Service, Inc.*, 400 F.3d at 349 ("[O]nce an employer has knowledge of the harassment, the law imposes a duty to take reasonable steps to eliminate it.") (citation omitted).

#### V. THERE ARE DISPUTES OF MATERIAL FACT AS TO WHETHER THE NAVY EXERCISED REASONABLE CARE TO DISSEMINATE ITS SEXUAL HARASSMENT POLICY

To be effective, an anti-harassment policy must be properly disseminated to its employees. See *Frederick v. Spring/United Management Co.*, 246 F.3d 1305, 1315 (11th Cir. 2001). There is no indication in the record that the policy was adequately disseminated to Howard. Howard did not receive any EEO training until July, 1996, many months after McCall began to sexually harass her and more than four months after McCall sexually assaulted Howard. Moreover, the Navy provided only generalized EEO training to Howard. JA 476, 506.

Moreover, there is limited mention of sexual harassment in the policy documents and no evidence that the Navy conducted any sexual harassment training prior to July, 1996. The only EEO training Howard received was given in May 1996. Sexual harassment was mentioned only in passing as part of the training on all aspects of Title VII. JA 506. Thus, there is at the very least a dispute of material fact as to whether Howard ever saw the Navy's 1993 sexual harassment policy. Accordingly, the trial court erred in granting summary judgment.

#### VI. THERE ARE DISPUTES OF MATERIAL FACT AS TO WHETHER THE NAVY EXERCISED REASONABLE CARE TO ENFORCE ITS SEXUAL HARASSMENT POLICY

Enforcement of a policy against sexual harassment has two components: investigation and remediation. As we show below, granting summary judgment on these two components is error.

##### \*26 A. Investigation

There are disputes of material fact as to whether the Navy conducted an adequate investigation and did so in a timely manner. The Navy did not investigate the March 6, 1996 incident and began its investigation only in November, 1996, after McCall again sexually harassed Howard. See *White v. New Hampshire*, supra. 221 F.3d at 261-262 (employer did not act appropriately when it did not conduct a timely investigation into the alleged harassment and, in fact, allowed the harassing comments and conduct to continue). There is no basis in the law to allow the agency to escape liability because of its

refusal to investigate the March 6, 1996 incident, of which the Navy had actual and constructive notice.

The EEO office conducted the only investigation into Howard's charges of sexual harassment, but did not begin this investigation until long after the November, 1996 incident. JA 474. The Declarations were not taken until the late summer or fall of 1997. JA 97, 101, 106.

Moreover, this investigation was not adequate because the EEO office obtained declarations from only five people [in addition to Howard] and did not even bother to require McCall to submit an affidavit. JA 475. Howard's declaration advised the investigator of the role played by Pendleton. Howard also placed the agency on notice regarding the information provided by Lt. Col. Willard. See JA 86, 93, 35-36; 321-329; 338-339, 507.

The Navy was also on notice that Capt. Gibson saw McCall with his hands on Howard's neck. JA 352-355, 357-359. But the Navy never obtained testimony from Pendleton, Capt. Gibson, or Lt. Col. Willard, even though the agency knew that the only significant legal issue presented in Howard's case was the question of notice to the Navy that McCall was harassing Howard.

Here the investigation was inadequate where the Navy failed to search McCall's computer, failed to take statements from Pendleton, Capt Gibson and Lt Col. Willard and then claimed there \*27 was insufficient evidence to justify taking any action against McCall. See JA 476. The district court erred in implicitly ruling that the investigation was adequate. See *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475-76 (5th Cir. 2002) (reversing grant of judgment as a matter of law because complaints show that employer was on notice and employee's evidence contradicted employer's description of investigation)

#### B. Remediation

There are disputes of material fact as to whether the Navy had an effective policy as evidenced by lack of appropriate action in response to Howard's complaints. The reasonableness of the remedy depends on its ability to: "(1)" "stop harassment by the person who engaged in harassment;" and (2) "persuade potential harassers to refrain from unlawful conduct." *Nichols*, supra, 256 F3d at 876-878 (citation omitted)

Contrary to the district court's suggestion, see JA 570, Howard is not attempting to retroactively impose new legal principles on an employer. Rather, Howard seeks enforcement of well settled law "as it existed back then in the mid-1990s," law that the Navy evidently felt did not apply to that agency.

Employers cannot demonstrate the existence of an effective policy when they failed to take effective corrective action when the corrective action taken they take is a sham. See, e.g., *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000); *Curry v. District of Columbia*, supra, 195 F.3d 654 at ("[M]anagers should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party") (citing *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981)).

The Ninth Circuit analyzed similar facts in *Nichols v. Azteca Restaurants*, supra, and reversed the district court's finding that the employer took "appropriate remedial measures." \*28256 F.3d at 876. In *Nichols*, Azteca's Human Resources Director told the employee to inform the regional general manager "if the offensive conduct recurred," but took no further action. *Id.* As the Court noted, this "solution did not remedy the harassment that had already occurred, and was not adequate to deter future harassment." *Id.* Accordingly, because Azteca failed to meet its remedial obligation, the employer was liable for the harassment by co-workers.

A reasonable jury could find the Navy liable for the same reasons in this case, i.e., that the Navy failed to meet its remedial obligation. See *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 188 (4th Cir. 2001) (jury could rationally conclude that by not enforcing the policy, company unreasonably failed to correct offending behavior); *Hurley*, 174 F.3d at 118 (proof that harassment policies were issued but not enforced precluded employer from using the Faragher/Ellerth defense).

#### C. The March 6 Assault

Initially, we note that the Navy took no action after the March 6, 1996 assault, even though the Navy was on actual and/or constructive notice of the incident and McCall's history. [FN9]

FN9. Pendleton's inaction, except for request for a report regarding further harassment "was not sufficient." *Nichols v. Azteca*, 256 F.3d at 876 ("harassment is to be remedied through actions targeted at the harasser, not at the victim") (citation omitted).

The Navy defends and tries to explain away Pendleton's instruction to Howard to write McCall a letter because: "Importantly, this is exactly the procedure that the Navy's sexual harassment policy requires." JA 49 See JA 32 (apparently defending this requirement). And that is precisely the point.

The Navy's policy was ineffective. Requiring Howard to write McCall a letter after he had forcibly shoved his hand up her vagina underscores how "defective or dysfunctional" the Navy's sexual harassment policy really was. *Brown*, 184 F.3d at 396 (quoting *Faragher*, 524 U.S. at 808). \*29 Under the circumstances present here, where the jury could find McCall was a repeat offender and where the Navy took no action in response to the March 6, 1999 event, except to tell Howard to write McCall a letter, there are disputes of material fact concerning the adequacy of the Navy's sexual harassment policy.

Further, neither Pendleton nor Lt. Col Willard ever told Howard she should direct her complaints to the EEO office. Instead, Pendleton left Howard with the incorrect impression that he would take care of the problem. Under the circumstances present here, a reasonable jury could find the Navy's policy was "defective or dysfunctional." *Brown*, 184 F.3d at 396 (quoting *Faragher*, 524 U.S. at 808). The district court erred in giving the Navy immunity for the March 6 assault.

#### D. Comparison with Effective Policies

The Navy's 1993 sexual harassment policy is inadequate on its face as compared to policies found to be effective by this court where the employer immediately launched an investigation and took disciplinary action against the harasser. *Barrett v. Applied Radian Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (employer immediately launched an investigation and then fired the harasser less than a week after discovery of the harassment); [FN10] *Brown v. Perry*, supra, 184 F.3d at 398 (immediate investigation and subsequent suspension of harassing employee sufficient to establish that company exercise reasonable care to correct promptly any sexually harassing behavior.) However, no action was ever taken against McCall.

FN10. The employer's policy in *Barrett* also prohibited "the posting of calendars, cartoons, posters and other material which have sexual overtones in places where they can be viewed by others." *Id.* at 265. The jury could find, based on the Elmore Declaration, JA 455, that either the Navy had no comparable policy or that any such policy was not enforced.

#### \*30 E. Refusal to Discipline McCall

We do not contend the Navy should have disciplined McCall without a thorough investigation. Rather, the Navy's failure to discipline a harassing employee can show the absence of reasonable care to prevent and correct any sexually harassing behavior. See *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 511 (6th

Cir. 2001) (jury could have found that by failing to discipline the harasser, the employer's corrective actions were not reasonably calculated to stop the harassing behavior. *Nichols v. Azteca*, 256 F.3d at 876-878 (by failing to discipline employees responsible for harassment, company did not exercise reasonable care to correct sexually harassing behavior). The Navy failure to take any disciplinary action against McCall is a relevant consideration for assessing the effectiveness of the Navy's sexual harassment policy.

The Navy claims it did not discipline McCall on the grounds it was unable to resolve a credibility dispute between Howard and McCall. As set forth in the discussion of the inadequacy of the investigation, there is a dispute as to whether the Navy conducted an adequate investigation. An employer cannot conduct an inadequate investigation and then claim it cannot resolve a credibility dispute.

Howard contends that it is up to the jury to determine the effectiveness of the Navy's response. If the jury finds that McCall was a repeat offender and/or that the Navy was required to take action as soon as Howard reported the sexual harassment to Pendleton and Willard, then the jury could also find that the Navy's failure to discipline a harassing employee can show the absence of reasonable care to prevent and correct any sexually harassing behavior. See *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 511 (6th Cir. 2001); *Smith v. First Union National Bank*, 202 F.2d 234 (4th Cir. 2000) (investigation was flawed for a number of reasons, including allowing supervisor to remain in his position); *\*31Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995) (citation omitted); *Baty v. Williamette Indus., Inc.*, 172 F.3d 1232, 1238-1243 (10th Cir. 1999) (affirming jury verdict because jury could reasonably find that the investigation was a sham, given that the investigators concluded that no harassment has taken place); *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) (jury could have found employer's investigation of complaint was unreasonable because investigators failed, inter alia, to corroborate the truth or falsehood of the accused version of facts, although it would have been easy to do so and to interview an important witness for the complainant and to give sufficient weight to evidence in her favor.); *Jackson v. Quanex Corp.*, 191 F.3d 647, 654-55 (6th Cir. 1999) (citing *Fuller* with approval); see *Loughman v. Malnati Organization, Inc.*, 395 F.3d 404, 407 (7th Cir. 2005) (observing "when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive" and holding that "[c]onsidering the severity of the incidents, a reasonable jury could determine that simply talking to the people involved ... was not a sufficient response.") (citation omitted); *Barna v. City of Cleveland*, 172 F.3d 47, \* 5 (6th Cir. 1998) (Table), 1998 WL 939884 (employers response was inadequate where jury could conclude plaintiff "was telling the truth.).

A reasonable jury could resolve the credibility dispute in Howard's favor and find that the Navy's failure to resolve the credibility dispute resulted from its inadequate investigation and/or its unwillingness to enforce its sexual harassment policy. Consistent with resolving that credibility dispute in Howard's favor, a reasonable jury could find the Navy's policy was inadequate because no disciplinary action was taken against McCall. The trial court erred in granting summary judgment because the resolution of the factual dispute surrounding whether the Navy's failure to discipline McCall is a matter for the jury, which is not bound by the internal decision of the Navy, acting in its own institutional interests, not to conduct a complete investigation.

#### \*32 F. Failure to Cleanse the Environment

The Navy failed to exercise reasonable care to prevent McCall from harassing Howard or other women employed at NAVAIR because the actions taken by the Navy could not deter future harassment, where no disciplinary action was taken. See *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d at 422 (employer can be held liable despite its immediate and appropriate corrective action in response to harassment complaint if it had knowledge of the harassment prior to the complaint and took no corrective action); *Rowe v. Hussmann Corp.*, 381

F.3d 775, 781 (8th Cir. 2004) (affirming jury verdict for sexual harassment where fact that employer either lacked knowledge of particular harassing acts within limitations period or undertook appropriate action within that period does not, by itself, absolve employer of liability);

Even if the Court concludes that there was no actionable harassment after the November, 1996 incident, this is "not a defense to liability in the face of an inadequate remedial response. *Nichols v. Azteca*, 256 F.3d at 876, n. 12. As the *Nichols* Court noted, this "solution did not remedy the harassment that had already occurred, and was not adequate to deter future harassment." *Id.* When the employer fails to implement a remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment. *Fuller v. City of Oakland*, supra, 47 F.3d at 1528-29. Where defendants' "remedial action did not effectively cleanse the hostile environment caused by the sexual harassment," summary judgment is not available. *Harrison v. Eddy Potash Inc.*, 248 F.3d 1014, 1027 (10th Cir. 2001) (jury could reasonably find failure to exercise care to prevent harassment where policy was "largely ignored"). See *Dortz v. City of New York*, 904 F. Supp. 127, 154 (S.D.N.Y. 1995) (denying summary judgment).

\*33 Thus, there is a dispute of material fact as to whether Navy has an effective anti-harassment policy. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (affirming rejection of Faragher/Ellerth defense even though the employer had a written policy where there "was substantial evidence the Wax Works neither conducted the 'thorough investigation' nor took the 'appropriate action' promised by its sexual harassment policy, belying its claim to have exercised 'reasonable case to prevent and correct promptly... sexually harassing behavior.'"); See *Spriggs*, supra, 242 F.3d at 188 (jury could rationally conclude that by not enforcing the policy, company unreasonably failed to correct offending behavior); *Hurley v. Atlantic City Police Department*, supra, 174 F.3d at 118 (citation omitted) (proof that harassment policies were issued but not enforced precluded employer from using the Faragher/Ellerth defense).

The district court erred in finding that the Navy's response to McCall's sexual harassment of Howard was adequate as a matter of law.

#### VII. THERE ARE DISPUTES OF MATERIAL FACT AS TO WHETHER PLAINTIFF UNREASONABLY FAILED TO TAKE ADVANTAGE OF THE REMEDIAL MEASURES PROVIDED BY THE EMPLOYER

There are disputes of material fact as to whether plaintiff "unreasonably failed to take advantage of the remedial measures provided by the employer." *Suders*, supra, 124 S. Ct. at 2354. The District Court erroneously ruled against Howard on this issue. JA 569-570.

Drawing directly from the Faragher and Ellerth decisions, the case law addresses the question of reasonableness of the employee's response. For instance, in *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (1st Cir. 2003), reh'g denied, 337 F.3d 1 (1st Cir. 2003), the United States Court of Appeals for the First Circuit surveyed the case law regarding the second prong of the affirmative defense, focusing at length on the reasonableness inquiry, and found sufficient evidence to demonstrate the reasonableness of the plaintiff's failure to complain of sexual harassment. \*34 See *Reed*, supra, 333 F.3d at 33-38 (citation omitted); *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999), cert. denied, 529 U.S. 1107 (2000); *Distasio*, supra, 157 F.3d at 64-65; *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Miller v. Woodharbor Molding & Millworks, Inc.*, 80 F. Supp.2d 1026, 1031 - 1033 (N.D. Iowa 2000) (where employer was made aware of the offending conduct and failed to act, it cannot make out the second element of the affirmative defense), citing *Todd v. Ortho Branch, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999); See also *Watts v. Kroger Co.*, 170 F.3d 505, 510 (5th Cir. 1999). The very premise of the Supreme Court's holding in Faragher and Ellerth was that "sometimes

inaction is reasonable." Reed, 333 F.3d at 36.

In *Greene v. Dalton*, supra, 164 F.3d at 674-76, even where the defendant's "strict anti-harassment policy [was] unquestioned" and the plaintiff failed to complain after multiple acts of harassment and then rape, the D.C. Circuit reversed a grant of summary judgment in light of *Faragher*, holding that there was sufficient evidence to conclude that her failure to complain was nonetheless reasonable.

The entry of summary judgment should be reversed where Howard initially directed her complaint about the sexual harassment to Pendleton, a high ranking civilian official in the Human Relations Office. Pendleton brushed her off, telling her to write a letter to McCall. JA 35-36; 321-329; 338-339, 507. The entry of summary judgment should also be reversed because Howard also reported her complaint to Lt. Col. Willard. JA 85, 294-295, 339. These reports satisfy the notice requirements and the Navy did nothing. Contrary to the sentiment of the District Court, expressed \*35 in a question to counsel, see JA 568, there is no requirement that Howard file a "formal complaint." [FN11]

FN11. Under NAVAIR's 1997 sexual harassment policy implemented after the harassment at issue in this litigation, Pendleton and Willard would have been required to report the harassment. JA 458, 462-463.

By contrast, the Navy produced no evidence pointing to when a reasonable person should have complained (the very essence of the affirmative defense), or when the environment became hostile. See *Greene v. Dalton*, 164 F.3d at 675 (explaining that the record fails to reveal "the point at which the harassment became severe or pervasive nor when a reasonable person would have reported his behavior."); *Corcoran v. Shoney's Colonial*, 24 F. Supp. 2d 601, 606 (W.D. Va. 1998) (observing that it is not uncommon for victims to initially ignore objectionable behavior). Under the circumstances present here, the Navy did not produce evidence to demonstrate that failure to file an EEO complaint at an earlier time was unreasonable. See Reed, 333 F.3d at 36-37 ("[Plaintiff] could reasonably have regarded this initial low-level harassment as not worth reporting; indeed, standing alone, it may not have triggered Title VII liability at all. Thus the failure to report at this stage was not unreasonable.") (citing *Greene*, 164 F.3d at 675). See also *Watts*, 170 F.3d at 510.

Even assuming the Navy produced any evidence probative of this issue, the reasonableness of Howard's response is a question for the jury.

#### CONCLUSION

WHEREFORE, plaintiff respectfully requests the Court reverse the entry of judgment and remand for analysis under *Faragher* and *Ellerth*. There is no legal basis for refusing to apply this binding precedent in this case. There are disputes of material fact unresolved by the District court as to whether McCall was Howard's supervisor under Title VII.

\*36 There are also disputes of material fact as to whether the Navy failed to exercise reasonable care to prevent McCall from harassing Howard. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225-226 (2d Cir. 2004) (reversing grant of summary judgment because the court could not conclude as a matter of law that employer has so conclusively demonstrated the effectiveness of its anti-harassment policy or the unreasonableness of Petrosino's actions to be absolved from liability for any gender-hostile environment.); *McCombs v. Meijer*, supra, 395 F.3d at 353 (affirming verdict where "remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination," where employer ignored the early complaints) (footnote omitted).

There are also disputes of material fact as to whether Howard unreasonably failed to take advantage of remedial measures provided by the Navy.

We respectfully request the Court to reverse and remand for trial

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