Identifying Employers' "Proxies" in Sexual-Harassment Litigation

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ABSTRACT: The Supreme Court's companion decisions of Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton *represent the modern framework governing employer liability in sexual-harassment suits. The opinions organize the basic rules for employer liability, its affirmative defense, and unique situations where the affirmative defense is unavailable. An employer's affirmative defense is unavailable when the harasser is a "proxy" of the employer. But who constitutes a proxy? The Supreme Court has provided little guidance on who constitutes a proxy, and the federal circuit courts have struggled to apply the existing doctrine with much consistency. This Note proposes that the courts utilize a suggestion from* Ellerth *that has gone ignored: the courts should use the concept of corporate intent as a yardstick for identifying proxies. Specifically, the courts should find that proxies are those who have the capability to impute intent to an employer by making policy for the employer. The courts should empirically locate those policy-making capabilities by looking to employers' "Corporate Internal Decision Structures." This approach shows fidelity to the Court's jurisprudence, provides for a more objective and flexible standard for identifying proxies, and does not suffer from the problems that plague some alternative methods.*

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I. INTRODUCTION

The Supreme Court's companion decisions of *Burlington Industries, Inc. v. Ellerth*[1] and *Faragher v. City of Boca Raton*[2] (collectively "*Ellerth/Faragher*") represent the modern framework governing employer liability in sexual-harassment suits.[3] These opinions establish the rule that "[a]n 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."[4] To emphasize, employer liability is

1. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

2. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

3. *See* BARBARA T. LINDEMANN & DAVID D. KADUE, WORKPLACE HARASSMENT LAW 1-21 (2012) ("*Ellerth* and *Faragher*, though factually dissimilar, gave the Court an opportunity to articulate a unified jurisprudence of employer liability for harassment." (footnote omitted)). Since *Ellerth/Faragher*, the Supreme Court has examined other aspects of Title VII cases, such as punitive damages, retaliation claims, and constructive discharge claims, but has not altered the fundamental framework of *Ellerth* and *Faragher*. *See id.* at 1-29 to -47.

4. *Faragher*, 524 U.S. at 777; *Ellerth*, 524 U.S. at 765.

limited to situations of supervisor harassment.[5] *Ellerth* and *Faragher* also created an affirmative defense that employers may use to protect themselves from such liability.[6] But the affirmative defense does not provide protection to employers in certain circumstances.[7] This Note is about one of those situations.

This Note is concerned with harassment cases where the harassing supervisor is the employer's "proxy" or "alter ego."[8] When a proxy or alter ego harasses a subordinate, the employer is liable for the harassment and may not use the *Faragher/Ellerth* affirmative defense. This Note adopts the phrase "proxy liability" to refer to situations in which this fact pattern occurs.[9] This is a particularly unclear area of employer liability because the definition of proxy is quite nebulous. To paraphrase the current state of proxy-liability jurisprudence, a proxy is someone very high up in the employer's organization. But how senior must an employee be to count as a proxy? Unfortunately, the federal circuits have struggled to apply a consistent proxy-liability standard,[10] and the Supreme Court has not provided clear guidance to resolve the circuits' troubles.[11] Likewise,

5. *Ellerth*, 524 U.S. at 764. There could be rare cases of peer-on-peer (co-worker) harassment, leading to employer liability. *Id.* at 759 ("If, in the *unusual* case, it is alleged there is a false impression that the [harasser] was a supervisor, when he in fact was *not*, the victim's mistaken conclusion must be a reasonable one." (emphasis added)).

6. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

7. *Faragher*, 524 U.S. at 808 ("No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."); *Ellerth*, 524 U.S. at 765; *see also infra* note 36 (discussing tangible employment actions).

8. This Note uses the terms "proxy" and "alter ego" as synonyms. *See* LINDEMANN & KADUE, *supra* note 3, at 22-2 n.6 ("The two terms seem for all practical purposes to be synonymous.").

9. This Note adopts the phrase "proxy liability" in the face of terminological uncertainty. This uncertainty is due to the fact that commentators and courts do not present a consensus as to whether or not proxy harassment constitutes an *exception* to the affirmative defense or if it entails *automatic liability* for which the affirmative defense is unavailable. *Compare* Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 52 (2d Cir. 2012) ("Every Court of Appeals to have considered this issue has held that the . . . *affirmative defense is unavailable* when the supervisor in question is the employer's proxy or alter ego." (emphasis added)), *with* Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) ("*Vicarious liability automatically applies* when the harassing supervisor is [the organization's proxy]." (emphasis added) (citing *Faragher*, 524 U.S. at 789)). Notwithstanding the fine conceptual distinction, the practical effect of proxy harassment is liability for the employer. This Note does not attempt to resolve this definitional confusion.

10. *See infra* Part III.B. Also, this Note uses the phrase "proxy-liability standard" as shorthand for "identifying proxies;" thus, the phrase "lack of a standard for proxy liability" is equivalent to the phrase "lack of a standard for identifying proxies."

11. *See* Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 (10th Cir. 2000) (noting "the absolute scarcity of case law development of this alternate avenue of employer liability").

academics[12] and the Equal Employment Opportunity Commission ("EEOC")[13] have yet to provide a solution.

This Note proposes that all courts adopt the following test for identifying employers' proxies: a proxy, for purposes of Title VII sexual-harassment suits, is an individual capable of creating "corporate intent" for the employer, where corporate intent is shown by the actions and statements of the firm's directors and employees who are in positions of authority to make policy for the corporation (the "policymaker standard"). Part II provides a brief overview of the development of the Supreme Court's Title VII employer-liability jurisprudence, including the emergence of proxy liability. Part III examines *Faragher*'s sparse proxy-liability guidance and the federal circuits' subsequent struggles to apply a consistent, coherent proxy-liability standard. Part IV explains that *Ellerth* provides proxy-liability guidance that has gone unutilized. It then suggests that the courts will be more successful in consistently allocating proxy liability if they utilize *Ellerth*'s guidance by using the policymaker standard. Finally, Part IV examines three reasons why the courts should adopt the policymaker standard.

II. THE DEVELOPMENT OF THE SUPREME COURT'S EMPLOYER-LIABILITY JURISPRUDENCE AND THE RISE OF PROXY LIABILITY

This Part examines the development of the Supreme Court's employer-liability jurisprudence for sexual harassment under Title VII. In particular, this Part tracks case law and policy guidance leading up to, and including, the *Faragher/Ellerth* framework and the emergence of proxy liability.

A. TITLE VII AND MERITOR SAVINGS BANK V. VINSON

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."[14] Early in the history of sexual-harassment litigation, the federal courts acknowledged that quid pro quo sexual harassment—the

12. *E.g.*, Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 552 n.209 (2002) (noting that proxy liability "appears to have no basis in agency law, but it somewhat resembles the 'vice-principal' exception to the fellow servant rule"); Justin P. Smith, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After* Faragher *and* Burlington Industries, 74 N.Y.U. L. REV. 1786, 1800–01 (1999) (noting that the Supreme Court has yet to consider the proxy liability doctrine); Brian C. Baldrate, Note, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in* Burlington Industries, Inc. v. Ellerth *and* Faragher v. City of Boca Raton, 31 CONN. L. REV. 1149, 116–77 (1999) (discussing the confusion generated by *Ellerth/Faragher*, and supporting either negligence or strict liability as the employer-liability standard).

13. *See infra* note 47.

14. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012).

conditioning of a tangible employment benefit upon "sexual liberties"[15]—was an actionable offense under Title VII.[16] However, the courts did not address whether hostile work environment harassment—that is, "disparate treatment that ha[s] no economic impact"—violated Title VII.[17]

In 1980, the EEOC published guidance on sexual harassment addressing this question.[18] The guidance prescribed that hostile work environment harassment should be actionable.[19]

Additionally, the guidance confirmed quid pro quo harassment as an actionable offense. It stated, "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment."[20]

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson*, confirming the consensus view that sexual harassment is actionable[21] under Title VII for both quid pro quo and hostile work environment injuries.[22] *Meritor* stated that harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[23] The *Meritor* Court also confirmed the existence of employer liability, though it refused to issue a standard for determining such liability.[24] However, the Court did articulate two principles that would guide its future employer-liability jurisprudence. First:

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15. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

16. LINDEMANN & KADUE, *supra* note 3, at 1-11 to -12 (citing Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978)).

17. *Id.* at 1-12 (citing Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)). The Supreme Court would later describe the distinction between quid pro quo and hostile work environment injuries as the difference between fulfilled and unfulfilled threats. *Ellerth*, 524 U.S. at 753–54.

18. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1980).

19. *Id.* § 1604.11(a)(3) (concluding that harassment occurs in situations where "[harassing] conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

20. *Id.* § 1604.11(a)(1).

21. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." (alteration in original)).

22. *Id.* (finding that Title VII was meant "'to strike at the entire spectrum of disparate treatment of men and women' in employment" (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))). Although the *Meritor* Court agreed with the EEOC's guidance, it noted that the guidance was "not controlling upon the courts . . . [but] constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 65 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)) (internal quotation marks omitted).

23. *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

24. *Id.* at 72–73.

> Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.[25]

Second, the Court also declared that it was improper to "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case."[26]

B. BASELINE EMPLOYER LIABILITY UNDER ELLERTH *AND* FARAGHER

In *Ellerth* and *Faragher*, decided twelve years after *Meritor*, the Court articulated the standard for employer liability, filling the void left by *Meritor*. The Court held, "[a]n 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."[27] As indicated, the holding is limited to hostile work environment situations (as opposed to quid pro quo situations).[28] In a hostile environment situation, the victim suffers a constructive (as opposed to explicit) change in the terms of his or her employment.[29] For a hostile work environment claim to be actionable under Title VII, the harasser's conduct must be "severe or pervasive."[30]

In addition to establishing the baseline employer-liability standard, the Court affirmed the importance of *Meritor*: "*Meritor*'s statement of the law is

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25. *Id.* at 72 (citation omitted).

26. *Id.* at 73.

27. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). The *Ellerth* litigation concerned the harassment of a salesperson by her supervisor, a "midlevel manager." *Ellerth*, 524 U.S. at 747. The victim "refuse[d] the unwelcome and threatening sexual advances of a supervisor, yet suffer[ed] no adverse, tangible job consequences." *Id.* The supervisor was "a vice president in one of five business units within one of the divisions." *Id.* According to his own supervisor, the harasser was "not amongst the decision-making or policy-making hierarchy." *Id.* (citation omitted) (internal quotation marks omitted). The *Faragher* litigation focused on the claims of a female lifeguard against her immediate supervisors for inappropriate verbal conduct, physical touching, and gestures. *Faragher*, 524 U.S. at 780–83.

28. *Ellerth*, 524 U.S. at 751, 754. The distinction between the two is subtle. Title VII makes it illegal to discriminate "with respect to terms or conditions of employment." *Id.* at 752. "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment . . . ." *Id.* "The terms *quid pro quo* and hostile work environment are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility." *Id.* at 751.

29. *Id.* at 752.

30. *Id.* at 753–54. This Note does not attempt to delineate the scope of "severe or pervasive" conduct.

the foundation on which we build today."[31] In that vein, "we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment."[32] As noted, in *Meritor*, the Court indicated that absolute employer liability is inappropriate.[33] To make good on that principle, the *Faragher/Ellerth* Court provided employers with an affirmative defense.

C. *EMPLOYERS' AFFIRMATIVE DEFENSE UNDER* ELLERTH *AND* FARAGHER

The *Ellerth/Faragher* Court established an affirmative defense that employers can deploy to stave off liability.[34] If two conditions exist, then the employer is protected: "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[35] Although not stated as a third prong, there is also another condition to using the affirmative defense: the employer may not use the affirmative defense if the harassment victim suffered a tangible employment action.[36]

In creating the affirmative defense, the Court was implementing the principle that "Title VII does not make employers 'always automatically liable for sexual harassment by their supervisors.'"[37] The Court supported the defense under the theory that it would go a long way towards "complement[ing] the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their

31. *Faragher*, 524 U.S. at 792.

32. *Ellerth*, 524 U.S. at 763.

33. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

34. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. The employer bears the burden of persuasion on the two elements of the affirmative defense. Steven M. Warshawsky, Ellerth *and* Faragher*: Towards Strict Employer Liability Under Title VII for Supervisory Sexual Harassment*, 2 U. PA. J. LAB. & EMP. L. 303, 310–11 (1999).

35. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

36. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765. A harassed employee suffers a tangible employment action when there is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. The Court reasoned that the infliction of a tangible employment action was an exercise of the employer's institutional power: "only a supervisor, or other person acting with the authority of the company, can cause this sort of injury." *Id.* at 762. In other words, a tangible employment action is, by definition, an act of the employer. *See id.* Therefore, the employer is automatically liable for the sexual harassment propagated by its supervisors if the victims suffer tangible employment actions. *See id.* ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.").

37. *Faragher*, 524 U.S. at 792 (citing *Meritor*, 477 U.S. at 72).

duty."[38] However, there is a situation in which an employer may not use the affirmative defense, even if it establishes both prongs of the test and the victim does not suffer a tangible employment action. This Note is about that situation—proxy liability.

D. INDEFENSIBLE HARASSMENT UNDER ELLERTH *AND* FARAGHER*: PROXY LIABILITY*

Although the *Ellerth/Faragher* Court created an affirmative defense for employers, the Court also identified situations in which employers may not use the affirmative defense. One of those situations occurs when the harassing supervisor is a proxy of the employer. The Court acknowledged this fact in both *Faragher* and *Ellerth*. Each opinion referred to proxy liability in different contexts.

The *Faragher* opinion briefly noted the existence of proxy liability while reviewing prior case law. The Court was examining cases in which the parties litigated the sufficiency of the harassers' abuse, but did not litigate the standard of liability. While discussing examples, the Court stated:

> Nor was it exceptional that standards for binding the employer were not in issue in *Harris* [*v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)]. In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer . . . *who was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy*.[39]

To paraphrase the Court's comments: the litigants in *Harris* did not fight about the employer's liability because the harasser, the corporation's president, was the firm's "proxy."

The *Ellerth* opinion discussed proxy liability in the context of a discussion of agency principles. First, the Court laid out a basic rule of agency liability: a principal is liable for its agent's torts when the agent is acting within its scope of employment.[40] Of course, harassment is not within the scope of an employee's duties.[41] However, under certain circumstances, a principal will be liable for its agent's torts even when the agent is acting

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38. *Id.* at 806; *see also* Daniel J. Harmelink, Note, *Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment*, 84 IOWA L. REV. 561, 564–65 (1999) (recommending a standard of employer liability based on an employers' adoption and implementation of successful sexual-harassment policies, thus incentivizing compliance with Title VII).

39. *Faragher*, 524 U.S. at 789 (emphasis added). In *Harris*, the Court did not explicitly consider the harasser's rank in determining the employer's liability. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). The case was an important one in the development of the Supreme Court's employer-liability jurisprudence. However, the case does not speak directly to the issue of proxy liability.

40. *Ellerth*, 524 U.S. at 755–56 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957)).

41. *Id.* at 757.

outside of the scope of his employment. The *Restatement (Second) of Agency* subsection 219(2)(a) governs those situations. In examining those exceptions, the Court stated, "[s]ubsection (a) addresses direct liability, where the employer acts with tortious intent, *and indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego*."[42] The Court noted that the *Ellerth* parties did not "contend [that the harasser's] rank imputes liability under this principle."[43] This comment clearly identifies proxy liability as a principle of agency analysis: someone's high rank in a firm might impute liability to the firm.

In these two comments, the Court discussed harassment by very high-ranking officials of an employer, using the terms "proxy" and "alter ego" to describe the harassers. However, the comments do not say that employer's may not use the *Faragher/Ellerth* defense in situations of harassment by a proxy. However, as recently noted by the Second Circuit Court of Appeals in *Townsend v. Benjamin Enterprises, Inc.*, "[e]very Court of Appeals to have considered this issue has held that the *Faragher/Ellerth* affirmative defense is unavailable when the supervisor in question is the employer's proxy or alter ego."[44] Proxy liability clearly exists. But the Supreme Court's brief commentary on the subject does not appear to make the affirmative defense unavailable in situations of proxy harassment. Although worthy of research, this Note does not attempt to answer the question of whether proxy liability

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42. *Id.* at 758 (emphasis added). *Restatement* subsection 219(2)(a) reads: "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences . . . ." RESTATEMENT (SECOND) OF AGENCY § 219(2)(a).

43. *Ellerth*, 524 U.S. at 758.

44. Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 52 (2d Cir. 2012). Many other courts have come to the same conclusion. *E.g.*, Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 383 (5th Cir. 2003) ("[T]he employer is vicariously liable for its employees activities in two types of situations: (1) there is a tangible employment action or (2) the harassing employee is a proxy for the employer."); Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) ("Vicarious liability automatically applies when the harassing supervisor is . . . 'indisputably within that class of an employer organization's officials who may be treated as the organization's proxy . . . .'" (quoting *Faragher*, 524 U.S. at 789)); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152 n.8 (3d Cir. 1999); *cf.* Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000) ("Thus, the [affirmative] defense remains inapplicable as a defense to punitive damages when the corporate officers who engage in illegal conduct are sufficiently senior to be considered proxies for the company."). Notwithstanding the general consensus, a few courts have challenged proxy liability. *See Ackel*, 339 F.3d at 386 (Garza, J., concurring) ("Disregarding the sound judgment of the Supreme Court, the majority needlessly creates a second [exception to the *Faragher/Ellerth* affirmative defense]: when the harassing supervisor is the employer's proxy. . . . Nothing in *Faragher* or *Ellerth*, however, indicates that the Supreme Court intended to bar an employer from asserting the affirmative defense when the harassing supervisor happens to be of sufficiently high rank to qualify as the employer's proxy."); Allen v. McPhee, 240 S.W.3d 803, 814 (Tenn. 2007) ("[N]othing in the Supreme Court's explanation of the affirmative defense suggests that the availability of the defense depends on whether or not the supervisor is an alter ego or proxy for the employer."), *abrogated by* Garrett v. Tractor Supply Co., 320 S.W.3d 777 (Tenn. 2010).

should exist. Instead, another concern is pressing: Who counts as an employer's proxy? The next Part digs deeper into the foundations of proxy liability and the federal circuits' attempts to articulate a standard in the wake of *Ellerth* and *Faragher*.

III. SEARCHING FOR A PROXY-LIABILITY STANDARD

The Supreme Court has not provided direct guidance on identifying employers' proxies,[45] and the federal courts of appeals,[46] the EEOC,[47] and academic literature have been of little help.[48] This Part identifies sources of confusion by examining the case law the *Faragher* Court relied on in recognizing the existence of proxy liability. This Part then examines the circuits' failure to reach consensus on a clear standard for proxy liability.

A. FARAGHER*'S CASE LAW FOUNDATION*

In *Faragher*, the Court cited four cases in support of its proposition recognizing proxy liability: *Burns v. McGregor Electronic Industries*, *Katz v. Dole*, *Torres v. Pisano*, and *Harris v. Forklift Systems*, which the Court used as an example of proxy liability.[49]

In *Burns v. McGregor*, the Eighth Circuit held the employer liable for harassment because the company's owner committed the harassment.[50] Although the court never described the owner as the employer's "alter ego" or "proxy,"[51] the court did state, "the *employer* clearly knew of the harassment."[52] In *Katz v. Dole*, the Fourth Circuit noted that a plaintiff in a sexual-harassment suit would have to prove the "propriety" of holding the employer liable for the harassment, "[e]xcept in situations where a proprietor, partner or corporate officer participate[d] personally in the

45. Helm v. Kansas, 656 F.3d 1277, 1285–86 (10th Cir. 2011) ("[T]he [Supreme] Court has yet to examine the alter-ego theory in any detail, and the theory has received little attention in our case law.").

46. *See infra* Part III.B (examining the circuits' difficulties).

47. The EEOC, in its own guidance, has not tried to clarify the language from the courts—it simply repeats examples the Supreme Court has previously identified. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/harassment.html (last modified Apr. 6, 2010).

48. Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 (10th Cir. 2000) (noting "the absolute scarcity of case law development of this alternate avenue of employer liability"); LINDEMANN & KADUE, *supra* note 3, at 22-2 n.6 ("Relatively few cases have had the occasion to address employer liability on the basis of harassment committed by a proxy or alter ego.").

49. Faragher v. City of Boca Raton, 524 U.S. 775, 789–90 (1998).

50. Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992), *abrogated by* Miller v. Woodharbor Molding & Millworks, Inc., 174 F.3d 948 (8th Cir. 1999).

51. *Id.*

52. *Id.* at 564 (emphasis added).

harassing behavior," when liability, it seems, is automatic.[53] Like in *Burns*, the *Katz* court made no mention of "proxy" or "alter ego."[54]

In *Torres v. Pisano*, the Second Circuit stated an explicit, but vague, proxy-liability rule. The *Pisano* court stated that an employer is liable for a supervisor's hostile-work-environment harassment against a subordinate when the supervisor is "at a sufficiently high level in the [company's] hierarchy."[55] The *Pisano* court acknowledged the vague nature of its standard by noting the difficulty in establishing when a supervisor would, in fact, be at a "sufficiently high level."[56] *Pisano* relied on *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, in support of its "sufficiently high level" standard.[57] The *Kotcher* opinion used the same vague language: "the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company."[58] *Faragher* parenthetically referred to this language when it cited *Pisano* as authority for the proposition that certain individuals are "indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."[59]

Faragher also used *Harris v. Forklift Systems, Inc.* as an example of proxy liability.[60] It was while discussing *Harris* that the *Faragher* opinion referred to proxy liability, stating: "standards for binding the employer were not in issue in *Harris*," because the harasser was the president of the employer, who "was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy."[61] *Faragher*'s use of *Harris* is peculiar insofar as the *Harris* opinion itself does not hold that the harasser's high rank affected its liability analysis.[62] Instead, the *Harris* opinion focused on clarifying the standard for "hostile . . . work environment."[63] It is the *Faragher* opinion's commentary of *Harris* that is important.

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53. Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983), *abrogated by* Mikels v. City of Durham, 183 F.3d 323 (4th Cir. 1999).

54. *See id.*

55. Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997).

56. *Id.* ("While it is not clear where the line . . . above which a supervisor is at a sufficiently high level in the management hierarchy of the company for his actions to be imputed automatically to the employer . . . is to be drawn, we find that [the harasser's] position did not cross it." (footnote omitted)).

57. *Id.*

58. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992).

59. Faragher v. City of Boca Raton, 524 U.S. 775, 789–90 (1998) (citing Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992); and *Pisano*, 116 F.3d at 634–35 & n.11).

60. *Id.* at 789

61. *Id.*

62. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993). Although the Court noted that the supervisor was the president of the employer, the Court's analysis centered on the threshold question of the victim's injury. *Id.* at 19, 21–22.

63. *Id.* at 20–22.

In *Faragher*, the Supreme Court relied on the above cases, indicating the existence of liability for an employer when the harasser is a very senior employee. However, the *Faragher* opinion did not articulate a clear standard for identifying proxies. *Torres* (relying on *Kotcher*) provides the closest statement of a proxy standard: a supervisor is a proxy if that individual is "at a sufficiently high level in the [employer's] hierarchy."[64] The Supreme Court cited *Torres* favorably, lending only implicit support for the standard. Furthermore, the only fact-specific clarifications of that standard can be gleaned from *examples* from the facts in *Burns* and *Katz*: owners, proprietors, partners, or corporate officers are potential proxies.[65] In short, the Supreme Court did little to articulate a standard of proxy liability, although its short commentary on *Harris* and its citations to *Burns*, *Katz*, and *Pisano* throw implicit support behind the standard. This Part will now look at the federal circuits' attempts, and struggles, to apply proxy liability.

B. CIRCUIT CONFUSION: THE PROLIFERATION OF FACTORS FOR IDENTIFYING PROXIES

The federal courts of appeals have struggled to consistently apply *Ellerth* and *Faragher*, leading to an unclear proxy liability standard. This Subpart examines that inconsistency. In particular, this Subpart demonstrates that the circuits uniformly state the same test for proxy liability, but they rely on different factors when applying that test.

1. The Tenth Circuit

The Tenth Circuit has produced three modern[66] opinions that discuss proxy liability: *Mallinson-Montague v. Pocrnick*,[67] *Helm v. Kansas*,[68] and *Harrison v. Eddy Potash*.[69] The Tenth Circuit first examined *Harrison* in 1997 ("*Harrison I*")[70] before the Supreme Court decided *Faragher* and *Ellerth* in 1998. The second opinion ("*Harrison II*"),[71] decided on remand in 1998, was the circuit's first application of *Faragher* and *Ellerth*.[72] It was *Harrison II* that directly addressed proxy liability. To understand the *Harrison II* opinion, it is important to look at *Harrison I* for context.

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64. *Pisano*, 116 F.3d at 634 (quoting Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 64 (2d Cir. 1992)).

65. Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983).

66. The opinions are "modern" in that they are historically proximate to *Ellerth* and *Faragher*.

67. Mallinson-Montague v. Pocrnick, 224 F.3d 1224 (10th Cir. 2000).

68. Helm v. Kansas, 656 F.3d 1277 (10th Cir. 2011).

69. Harrison v. Eddy Potash, Inc. (*Harrison I*), 112 F.3d 1437 (10th Cir. 1997), *vacated*, 524 U.S. 947 (1998).

70. *Id.*

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

72. The Supreme Court granted certiorari in *Harrison I* and vacated the ruling, remanding for further proceedings in light of *Faragher* (and *Ellerth*). Eddy Potash, Inc. v. Harrison, 524 U.S. 947 (1998).

In *Harrison I*, the plaintiff brought a Title VII suit, seeking damages for hostile work environment harassment.[73] The female plaintiff worked in a potash mine.[74] The defendants in the case were the plaintiff's employer, Eddy Potash, Inc., and the plaintiff's supervisor, her shift foreman in the mine.[75] The plaintiff alleged that her foreman sexually harassed her numerous times during her tenure at the firm.[76]

> In *Harrison I*, the plaintiff attempted to hold her employer liable under a theory based on the mine foreman's "significant supervisory authority." The plaintiff attempted to have the court use these jury instructions: "Eddy Potash would be liable if [the plaintiff's foreman] had significant supervisory authority over [the plaintiff]. 'Significant supervisory authority' means the authority to hire, fire, discipline, or promote, or at least to participate in or recommend such actions, or the ability to control the conditions of a person's employment."[77]

The instructions would hold the employer liable based *solely* on the theory that the foreman "had significant supervisory authority over" the plaintiff.[78] The court rejected these jury instructions, stating, "[n]or can [the significant-supervisory-authority definition of 'agent'] be construed . . . as setting forth an *independent* basis for imposing liability on an employer under Title VII for the actions of a supervisor."[79] In other words, the *Harrison I* court concluded that significant supervisory authority was not sufficient to create employer liability. Although this concept is not the same as proxy liability, the plaintiff tried to turn "significant supervisory authority" into proxy liability in *Harrison II*.

Harrison II directly addressed the issue of proxy liability within the shadow of the *Faragher* and *Ellerth* opinions. In *Harrison II*, the plaintiff argued that her supervisor was the proxy of the employer because he "exercised significant control over her conditions of employment."[80] *Harrison II* did acknowledge that *Faragher* and *Ellerth* recognized proxy liability as a viable avenue of employer liability.[81] But the court rejected the plaintiff's argument as a misreading of *Ellerth*: "nothing in [the *Ellerth*]

73. *Harrison I*, 112 F.3d at 1439.

74. *Id.* at 1440.

75. *Id.* at 1439–40.

76. *Id.* at 1440–42.

77. *Id.* at 1451.

78. *Id.*

79. *Id.* (emphasis added).

80. Harrison v. Eddy Potash, Inc. (*Harrison II*), 158 F.3d 1371, 1376 (10th Cir. 1998).

81. *See id.* ("[T]he Supreme Court in *Burlington* [*Industries, Inc. v. Ellerth*] acknowledged an employer can be held vicariously liable under Title VII if the harassing employee's 'high rank in the company makes him or her the employer's alter ego . . . .'" (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998)).

opinion suggests a supervisory employee can be considered an employer's [proxy] simply because he or she possesses a high degree of control over a subordinate."[82] Furthermore, the *Harrison II* court noted that the facts would not have supported proxy liability even if the plaintiff had presented an appropriate statement of the law because the plaintiff's harassing supervisor, a shift foreman, "was a low-level supervisor who could in no way be considered by a reasonable juror to be the [proxy] of Eddy Potash."[83]

In *Mallinson-Montague v. Pocrnick*, the court, relying on *Ellerth*, stated that a supervisor was an employer's proxy "where the agent's high rank in the company makes him or her the employer's alter ego."[84] In articulating this standard, the *Pocrnick* appellate court noted the district court's jury instructions: "Where an employee . . . serves in a supervisory position and exercises significant control over an employee's hiring, firing or conditions of employment, that individual operates as the alter ego of the employer."[85] This language is similar to the "significant supervisory authority" language that *Harrison II* explicitly rejected.[86] The *Pocrnick* appellate court found that proxy liability did exist.[87] In reaching its decision, the court did not explicitly elucidate the vague standard of "high rank," but instead performed a fact-specific analysis.[88]

The *Pocrnick* plaintiffs—loan officers at a bank—suffered harassment at the hands of a supervisor, the "Senior Vice-President of Consumer Lending."[89] In discussing the bank's liability, the *Pocrnick* appellate court appeared to identify a handful of facts as critical to its analysis. The defendant–harasser reported "directly to the President of [the bank, who] answered directly to [the bank's] Board of Directors."[90] The bank's president testified that title was very important at the bank and within the industry.[91] In addition, the defendant had hiring and firing power over the lending department's personnel.[92] Furthermore, the defendant performed policymaking functions.[93] The harasser also had the power to approve or

82. *Id.*

83. *Id.* at 1376 n.2.

84. Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 (10th Cir. 2000) (quoting *Ellerth,* 524 U.S. at 758) (internal quotation marks omitted). The case is largely a discussion of proxy jury instructions used in the district court. *Id.* at 1232–33.

85. *Id.* at 1232.

86. *Harrison II*, 158 F.3d at 1376.

87. *Pocrnick*, 224 F.3d at 1232 ("[T]his is one of those rare cases in which an alter ego instruction was appropriate based on [the supervisor's] high rank at [the employer].").

88. *Id.* at 1232–33.

89. *Id.* at 1226.

90. *Id.*

91. *Id.* at 1233 n.10 ("[I]n [the banking] industry, titles are a really big deal, especially a senior level title.").

92. *Id.* at 1226.

93. *Id.* at 1233 n.11.

disapprove the loans that the plaintiffs made for the bank.[94] Based on these facts, the court concluded that the supervisor was "more than simply one of [the bank's] supervisory employees."[95]

In short, the *Pocrnick* appellate court stated that "high rank" was the relevant standard for proxy liability, and then the court identified several factors that seemed to control, but never stated how many were sufficient or which ones were critical to its conclusion.[96]

In *Helm v. Kansas*, the Tenth Circuit considered proxy liability in the government-employment context.[97] After reviewing the guidance of *Ellerth*, *Faragher*, *Harrison II*, and *Pocrnick*,[98] the *Helm* court, relying on a Fifth Circuit case, stated that "[t]hese cases indicate that an official must be high enough in the management hierarchy that his actions 'speak' for the employer before he may be considered the employer's alter ego."[99] In its application of the standard, the *Helm* court concluded that "[o]nly individuals with exceptional authority and control within an organization can" speak for the employer.[100] Because the harasser did not have "a sufficient degree of control over the myriad operations of the employer–entity]," and because his "decisions are subject to review and reversal," the supervisor did "not occupy [a] position[] in the top echelons of the state's *management*."[101]

Synthesizing the Tenth Circuit opinions, it appears that the circuit has adopted the following proxy-liability standard: a supervisor is a proxy where the supervisor has a sufficiently high rank in the company[102] such that the proxy "speaks" for the company.[103] The Tenth Circuit considered several factors in making its analysis, such as title, policymaking authority, hiring and firing power, position within the chain-of-command, ability for higher-ups to reverse a decision, and supervisory power over subordinate

94. *Id.* at 1229.

95. *Id.* at 1232.

96. *See id.* at 1232–33. The *Pocrnick* court stated, "the district court erred in concluding that the alter ego instruction was appropriate *simply because* [the defendant] was the Plaintiff's supervisor and exercised a high degree of control over them . . . ." *Id.* at 1233 (emphasis added). The court was critical of the district court not because the district court's analysis relied on defendant's control over the plaintiffs, but because the district court relied *solely* on the factor of defendant's control. *Id.*

97. Helm v. Kansas, 656 F.3d 1277 (10th Cir. 2011).

98. *Id.* at 1286. Interestingly enough, the court stated that the authority to hire and fire employees was a factor considered in *Pocrnick*. *Id.* However, a close reading of *Pocrnick* does not indicate that the factor was *essential* to the court's analysis. *See supra* note 97.

99. *Helm*, 656 F.3d at 1286 (citing Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 384 (5th Cir. 2003)).

100. *Id.* In this case the employer was the State of Kansas. *Id.* at 1279–80. The harasser was a judge, and the victim was an administrative assistant. *Id.*

101. *Id.* at 1287.

102. Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1232 (10th Cir. 2000).

103. *See Helm*, 656 F.3d at 1286.

employees.[104] However, in none of the opinions did the court systematically justify why any particular factor was essential to its jurisprudence.

2. Consistently Inconsistent: Other Circuits Apply Other Factors

In addition to the Tenth Circuit, the other circuits have also failed to utilize a consistent set of factors for identifying employers' proxies. While the other circuits tend to parrot the same standards as those in the Tenth Circuit (proxies are those who speak for the employer because they are "sufficiently high" in the organization[105]), they have looked to different factors in applying these standards. For instance, the circuits have considered the harasser's status as a stockowner of the entity,[106] the *number* of supervisors senior to the harasser,[107] and "the ability to change the terms and conditions of [the victim's] employment."[108]

This brief examination of the Tenth Circuit and notes on other cases has shown that courts have inconsistently allocated proxy liability. The federal courts have only provided the roughest of standards for proxy liability. It should be no surprise that the federal courts would have difficultly determining, without further guidance, those harasser–supervisors that are at "a sufficiently high level"[109] within an organization's hierarchy to impute proxy liability to the employer. The standard is vague, leading to inconsistent analysis. As one federal district judge recently put it:

> [t]he . . . cases illustrate how courts have considered a variety of factors and evidence when evaluating whether a harasser is the . . . proxy of his employer. . . . Inasmuch as no single factor is determinative, however, [proxy] determinations are highly fact-based, and require considering the totality of the circumstances . . . .[110]

In an effort to refine proxy-liability doctrine, this Note now identifies a factor that can help the federal courts bring consistency to proxy-liability analysis.

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104. *Mallinson-Montague*, 224 F.3d at 1232–33.

105. Johnson v. West, 218 F.3d 725, 730 (7th Cir. 2000) (citing Harrison v. Eddy Potash, Inc. (*Harrison II*), 158 F.3d 1371, 1376 (10th Cir. 1998)). A review of *Harrison II*, shows that the opinion does *not* use the phrase "spoke for the [employer]," or an iteration of that phrase. *See generally Harrison II*, 158 F.3d at 1371.

106. *See* Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 54–55 (2d Cir. 2012) (citing Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 384 (5th Cir. 2003)) (noting that a jury "reasonably could have concluded" that the harasser was the employer's alter ego because the harasser was "a corporate shareholder with a financial stake in [the employer]"; however, the stock ownership did not "conclusively establish" the harasser's status as an alter ego).

107. *Id.* at 54 (noting that the harasser was "second-in-command").

108. *Johnson*, 218 F.3d at 730.

109. Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997).

110. Rios v. Municipality of Guaynabo, 938 F. Supp. 2d 235, 256 (D.P.R. 2013).

IV. *ELLERTH*'S HIDDEN INSTRUCTIONS: USING CORPORATE INTENT TO IDENTIFY PROXIES

Ellerth demonstrates that *corporate intent* can be a useful tool in identifying proxies in proxy-liability cases. In that vein, this Part advocates for the adoption of the "policymaker standard" of proxy liability, which uses the concept of corporate intent to determine the class of individuals who can qualify as proxies. The policymaker standard identifies a proxy based on that individual's corporate powers: a proxy, for purposes of Title VII sexual-harassment suits, is an individual capable of creating corporate intent, where corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority to *make* policy for the firm. This Part concludes with an examination of three reasons for courts to adopt and apply the policymaker standard. First, the policymaker standard shows fidelity to the text and agency analysis of *Ellerth*, *Faragher*, and subsequent case law. Second, the rule provides a flexible, yet objective test that is applicable to a variety of organizational structures. Third, the policymaker standard does not suffer from some of the problems that plague its alternatives.

A. ELLERTH *POINTS THE WAY: THE* RESTATEMENT (SECOND) OF AGENCY *§ 219(2)(A) AND CORPORATE INTENT*

One reason the circuits have not produced a tightly articulated proxy-liability standard is that the circuits have failed to utilize an important piece of text in the *Ellerth* opinion, discussing the *Restatement (Second) of Agency*. The Court first identified *Restatement* sections 219(1) and (2) as providing "central" principles of agency law, dictating some of the contours of employer liability.[111] Those sections govern employer liability when agents (also called "servants") commit torts.[112] Each subsection of 219(1) and (2) provides a different liability regime depending on whether the tortfeasor committed the harassment "while acting in the scope of [his or her]

111. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755–59 (1998). As a general matter, the Court recognized the need for agency-based analysis for employer liability. *See id.* at 754–55 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)) ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles . . . . [W]e conclude a uniform and predictable standard must be established as a matter of federal law. We rely 'on the general common law of agency, rather than on the law of any particular State . . . .'"). The *Faragher* opinion also opined on the *Restatement*, identifying section 219(1) and (2) as providing some of the contours of employer liability. Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998) (finding that "the aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement [(Second) of Agency] provides an appropriate starting point for determining liability for the kind of [hostile work environment] harassment presented [in the case]").

112. RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

employment."[113] The Court concluded that "sexual harassment by a supervisor is not conduct within the scope of employment"[114] because a supervisor rarely serves its employer by sexually harassing a subordinate.[115] Therefore, as a "general rule," section 219(1) does not represent a viable route for finding employer liability in most cases.[116]

However, under section 219(2), principals, including employers, can be liable for their agents' torts when those agents act outside the scope of employment.[117] The *Ellerth* opinion focused its analysis on subsection 219(2)(d), which "concerns vicarious liability for intentional torts committed by an employee when the employee uses apparent authority," or when the employee was aided by the agency relationship.[118] But the *Ellerth* opinion raised the specter of proxy liability via reference to subsection 219(2)(a).[119]

Subsection 219(2)(a) reads: "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

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113. *Ellerth*, 524 U.S. at 756 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1)) (internal quotation marks omitted); *id.* at 755 ("Section 219(1) of the Restatement sets out a central principle of agency law . . . ."); *id.* at 758 ("The principles [of employer liability for agent torts committed outside of the scope of employment] are set forth in the much-cited § 219(2) of the Restatement . . . .").

114. *Id.* at 757.

115. *Id.*

116. *Id.* The vice-principal doctrine is another potential avenue for agency-driven liability. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 572 (5th ed. 1984). The vice-principle doctrine is an exception to the fellow-servant doctrine. *See* RESTATEMENT (SECOND) AGENCY § 474; *see also generally* WILLIAM M. MCKINNEY, A TREATISE ON THE LAW OF FELLOW-SERVANTS, §§ 43, 70 (1889) (examining the history of the fellow-servant doctrine). The fellow-servant doctrine holds that "[a] master is not liable to a servant or subservant who, while acting within the scope of his employment or in connection therewith, is injured solely by the negligence of a fellow servant." RESTATEMENT (SECOND) OF AGENCY § 474. Vice principals were superior "servant[s] who represented the employer in his responsibility to the plaintiff." KEETON, *supra* § 80, at 572. This Note declines to adopt this theory of analysis for two reasons. First, Justices Posner and Wood raised the vice-principal doctrine in their opinions in *Jenson v. Packaging Corp. of America*, a case that consolidated the *Ellerth* litigation in the Seventh Circuit. Jansen v. Packaging Corp. of Am., 123 F.3d 490, 509 (7th Cir. 1997) (Posner, J., concurring in part and dissenting in part); *id.* at 572 (Wood, J., concurring in part and dissenting in part). Therefore, it seems reasonable that the Supreme Court had the opportunity to adopt *Jansen*'s vice-principal analysis in *Ellerth* if it had wanted. Instead, the Court utilized *Restatement* subsection 219(2)(a). *See supra* text accompanying note 42. Second, the vice-principal doctrine seems to cover only injuries of negligence committed in the scope of employment, *Restatement* section 474, and sexual harassment is an intentional tort committed outside of the scope of employment. *See supra* note 116. However, it should be noted that Justice Posner indicated that the fellow-servant doctrine, and thus the vice-principal doctrine, could apply to intentional torts, not simply negligence. *Jansen*, 123 F.3d at 509.

117. *Ellerth*, 524 U.S. at 758.

118. *Id.* at 759. *Faragher* also discussed the *Restatement*, focusing on subsection 219(2)(d). Faragher v. City of Boca Raton, 524 U.S. 775, 801–03 (1998).

119. *See supra* notes 41–44 and accompanying text.

(a) *the master intended the conduct* or the consequences."[120] The *Ellerth* Court stated that subsection 219(2)(a) "addresses direct liability, where the employer acts with tortious intent, and indirect liability, *where the agent's high rank in the company makes him or her the employer's alter ego*."[121] The Court's commentary on subsection 219(2)(a) indicates that the employer and the proxy are equivalent in an important sense: an agent's "high rank in the company"[122] is enough to prove that "the *master intended* the conduct or the consequences."[123] In other words, when a proxy commits a tort, the employer itself commits the tort. In subsection 219(2)(a) situations, the employer itself "acts with tortious intent"[124]—this suggests that corporate intent is a crucial concept in proxy-liability analysis.[125]

Before moving on, it is worth considering the extent to which the courts have failed to utilize the *Ellerth* Court's commentary on subsection 219(2)(a). On a linguistic level, it appears that the federal courts have actually incorporated *Ellerth*'s insights on corporate intent: for instance, the current proxy definition in the Tenth Circuit is that a proxy is someone sufficiently high in a firm so as to "speak" for the employer.[126] "Speaking" for the employer seems, on its face, to be very similar to corporate intent (linguistically, speaking is often an *intentional* act). However, this Note contends that the courts have not incorporated the clear lesson from *Ellerth* to focus on corporate intent. Instead, the courts have simply gone to a grab bag of factors to apply the vague standard. In the Tenth Circuit, the *Pocrnick* opinion adopts, at least in part, this Note's strategy by looking to policymaking powers[127] (the core indicia of corporate intent, discussed below[128]). But there has been no consistency. So, although the courts seems to adopt *Ellerth*'s guidance on a shallow linguistic level, the general disarray of proxy-liability analysis shows that no strong consensus has emerged. The

120. RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (emphasis added). The *Restatement*'s commentary on subsection (2)(a) is sparse, and does not provide any specific analysis of subsection (a). The commentary reads:

> This Subsection [(2)] enumerates the situations in which a master may be liable for torts of servants acting solely for their own purposes and hence not in the scope of employment. The first three categories [(a)–(c)] are those in which the master is guilty of tortious conduct or is, by law, responsible for the conduct of others not his servants.

RESTATEMENT (SECOND) OF AGENCY § 219(2) cmt. e.

121. *Ellerth*, 524 U.S. at 758 (emphasis added).

122. *Id.*

123. RESTATEMENT (SECOND) OF AGENCY § 219(2)(a) (emphasis added).

124. *Ellerth*, 524 U.S. at 758.

125. Black's Law Dictionary defines "intent" as "[t]he state of mind accompanying an act, esp. a forbidden act." BLACK'S LAW DICTIONARY 881 (9th ed. 2009).

126. Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011); *see supra* Part III.B.1.

127. *See* Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1233 nn.10–11 (10th Cir. 2000).

128. *See infra* Part IV.B.

next Subpart tries to lay the groundwork for more consistent application of proxy liability, and the next Subpart utilizes corporate intent[129] as a conceptual surrogate for analyzing proxies' actions.

B. THE POLICYMAKER STANDARD

Firms can act with intent.[130] The idea of corporate intent is, however, conceptually challenging because a corporate body of any kind is an aggregate of individuals.[131] Not surprisingly, several strategies exist for locating corporate intent.[132] In an early article discussing corporate criminal liability,[133] Gerhard Mueller articulated a concept called the "inner circle" principle:

> [W]e can call all those officers, whether elected or appointed, who direct, supervise and manage the corporation within its business sphere and *policy-wise*, the "inner circle." They are the *mens*, the mind or brain, of the corporation. It is this *mens* which is capable of

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129. By "corporate intent" this Note does not refer only to the intent imputed to corporations. The phrase is used as a placeholder for any instance where intent is imputed to a firm, like an LLC or LLP, for example.

130. For example, in securities-fraud litigation, a plaintiff can prove that a defendant–corporation committed securities fraud by using or employing "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale, of any security." 15 U.S.C. § 78j(2)(b) (2012). A plaintiff needs to prove corporate scienter, "a mental state embracing intent to deceive, manipulate, or defaud." Paul B. Maslo, *The Case for Semi-Strong-Form Corporate Scienter in Securities Fraud Actions*, 108 MICH. L. REV. FIRST IMPRESSIONS 95, 95 (2010) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976)) (internal quotation marks omitted).

131. *See* Presbyterian & Reformed Publ'g. Co. v. Comm'r, 743 F.2d 148, 155 (3d Cir. 1984) ("The difficulties inherent in any legal standard predicated upon the subjective intent of an actor are further compounded when that actor is a corporate entity."); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 31–47 (1984) (teasing apart the metaphysical descriptions related to holding a corporation to be a moral person capable of intentional acts); Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 83 ("Like the mythical multiheaded monster, Hydra, a corporation has many minds."); Maslo, *supra* note 131, at 95 ("A corporation has no 'single mind of its own,' so 'its scienter is necessarily derived from its employees.'" (footnote omitted) (quoting *In re* Monster Worldwide, Inc. Sec. Litig., 549 F. Supp. 2d 578, 583 (S.D.N.Y 2008))).

132. *See* Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1306 (1990) (proposing "a three-pronged test: (1) Did a corporate practice or policy violate the law? or (2) Was it reasonably foreseeable that a corporate practice or policy would result in a corporate agent's violation of the law? or (3) Did the corporation adopt a corporate agent's violation of the law?"); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 664–68 (1994) (describing four dominate models of corporate intent: proactive fault, reactive fault, corporate ethos, and corporate policy). This Note adopts Peter French's version of the corporate-policy model. *See infra* Part IV.C.

133. It should be noted that this Part relies on some articles that analyze corporate intent in the context of criminal liability. Those authorities can provide insight because "concepts of corporate liability, though developed and tested in the context of criminal law, can provide great insight into other areas of law where corporate intent figures prominently." Abril & Olazábal, *supra* note 132, at 100.

> mental self-direction and, because of its human nature, single or composite, there is no reason in the world why this *mens* should not also be capable of harboring a *mens rea.*[134]

The "inner circle" language also appears in *United States v. Basic Construction Co.*[135] In that antitrust case, the court stated, "corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation."[136] Both statements indicate that policymaking powers are indicia of a firm's "inner circle."

Some clarification is needed regarding the phrase "make policy." This Note adopts Peter French's description of the term "policy": a firm's policies are the "rather broad, general principles that describe what the corporation believes about its enterprise and the way it intends to operate. Policies contain basic belief and goal statements regarding both the what and the how of corporate life, but they are not detailed statements of appropriate methods."[137] Thus, policies are very much like the firm's mental thoughts. And those who can make policy are the ones who act as the brain (the *mens*) of the employer.

But what does "make" mean? How does one "make" a firm think, give it intentionality and an animating force? This is a hard question that cannot be fully answered in this Note. However, this Note suggests that courts adopt an empirical strategy, looking to a firm's "Corporate Internal Decision Structures" ("CID Structures"). The goal is that proxy status "can usually be readily determined, generally by written documentation."[138] A CID Structure has two elements: "(1) an organizational or responsibility flowchart that delineates stations and levels within the corporate power structure and (2) corporate-decision recognition rule(s) (usually embedded in something called corporation policy)."[139] A CID Structure will indicate those individuals

134. Gerhard O. W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 41 (1957) (emphasis added).

135. United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir. 1983) (per curiam). *See also, e.g.*, Dist. Lodge 26, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Tech. Corp., 610 F.3d 44, 53 (2d Cir. 2010) (citing *Basic Constr. Co.*, 711 F.2d at 573); Songbird Jet Ltd. v. Amax Inc., 581 F. Supp. 912, 925 n.41 (S.D.N.Y. 1984) (citing *Basic Constr. Co.*, 711 F.2d at 573).

136. *Basic Constr. Co.*, 711 F.2d at 573. Although the court approved of that standard for determining corporate intent, it also concluded, "[a] corporation may be responsible for the action of its agents done or made within the scope of their authority." *Id.* at 572. Of course, this standard of employer liability mirrors *Restatement* section 219(1). *See supra* note 112 and accompanying text.

137. FRENCH, *supra* note 132, at 58.

138. *Cf.* Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013) (noting that the quoted language applies to its definition of supervisor).

139. FRENCH, *supra* note 132, at 41.

that can make policy for the employer.[140] The CID Structure of a firm "expresses, or maps, the interdependent and dependent relationships, line and staff, that are involved in determinations of corporate decisions and actions. The organizational chart provides what might be called the grammar of corporate decision-making. What I shall call internal recognition rules provide its logic."[141] By utilizing CID Structures, the policymaker standard is a sort of "doctrine of identification," under which the standard seeks to identify "the decision-making powers of certain offices within the corporate internal decision structure."[142] The policymaker standard simply seeks to identify individuals with the "decision-making power" to make policy.[143]

Courts should unify the insights and language from *Mueller*, *French*, and *Basic Construction Co.* with the *Ellerth* Court's commentary on *Restatement* subsection 219(2)(a). As shown above, under the *Ellerth* Court's analysis, a proxy's intent is equivalent to the firm's intent.[144] Based on that observation, under the *Basic Construction Co.* language, a party who is capable of imputing corporate intent[145] to an organization is a good candidate to fill the proxy role. Therefore, this Note proposes the following standard for identifying a proxy: a proxy, for purposes of Title VII sexual-harassment suits, is an individual capable of creating corporate intent, where corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority to make policy for the employer. This Note terms this standard the "policymaker standard."

Of emphasis is that a proxy is someone capable of creating corporate intent. This does not mean, as a matter of logic, that every action of a proxy is the intentional act of the employer.[146] Proxy-liability analysis is couched in

140. *See id.* at 42–43. An employer's organizational charts and internal recognition rules indicate those employment positions that can participate in animating corporate acts. *Id.*

141. *Id.*

142. *Id.* at 182.

143. *Id.* The construction of corporate policies is another type of act that an employee can perform. *See id.* at 62 ("[E]very corporation has a certain set of policies, some remain more central or fixed than others, [and] policies can and do change . . . ."). The acknowledgement that "policies can and do change" is an implicit acknowledgment of the obvious that individuals within the corporation change them. *Id.*

144. *See supra* notes 122–25 and accompanying text; *see also* B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?*, 34 WAKE FOREST L. REV. 1, 11 (1999) ("[When the harasser is a proxy,] the harasser and the employer are considered one; thus, the 'employer' has acted with actual intent.").

145. *See generally* Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773 (2010) (providing general support for the application of "corporate character" analysis to Title VII problems). Corporate-character concepts are similar to the "corporate ethos model" of corporate intent. *See* Laufer, *supra* note 133, at 666–67; *infra* note 199 and accompanying text.

146. French notes:

the framework of *Restatement* subsection 219(2)(a), which governs employer liability for agents' torts; of course, not every action of a proxy is a tort. The policymaker standard holds that it is proper to find an employer liable for a proxy's commission of a sexual harassment tort against a subordinate, without giving the employer access to the *Ellerth/Faragher* affirmative defense. In that situation, a proxy's tortious behavior is imputed to the employer.[147] The language from *Basic Construction Co.* and *Mueller* simply helps to establish the appropriate inquiry: does the harasser have the corporate powers to make policy?

C. ATTRIBUTES OF THE POLICYMAKER STANDARD

The policymaker standard is an ideal concept for harmonizing proxy-liability jurisprudence. An examination of the policymaker standard's attributes reveals three reasons that justify its adoption: first, the policymaker standard shows fidelity to the text and agency analysis developed in *Ellerth*, *Faragher*, and subsequent cases; second, the rule provides a flexible, yet objective test that is applicable to a variety of organizational structures; and third, it does not suffer from the problems that plague alternative theories.

1. Fidelity to *Ellerth*, *Faragher*, and Subsequent Case Law

The policymaker standard shows fidelity to the agency analysis that the Supreme Court requires. The *Ellerth* Court, as indicated above, identified *Restatement* subsection 219(2)(a) as the provision governing proxy liability.[148] The Court interpreted that provision as incorporating the concept of corporate intent.[149] Thus, the *Ellerth* opinion indicated that corporate intent is an appropriate yardstick for agency-driven analysis for identifying proxies.[150] The circuits have not explicitly utilized corporate intent in

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> Even though meetings in the fifth-floor lavatory between the vice-president for public relations and advertising and the assistant vice-president for marketing services may be productive of a number of agreements about how promotional material ought to be distributed, until those agreements have withstood the scrutiny and received the endorsement of the vice-presidents for marketing, under the chair of the senior vice-president for marketing and, if required, been referred to the next level of management either for information or action, they are not decisions of that corporation.

FRENCH, *supra* note 132, at 51.

147. *See supra* Part II.D.

148. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758–59 (1998).

149. *See supra* Part IV.A. (demonstrating the relationship between proxies and corporate intent).

150. *See Ellerth*, 524 U.S. at 758–59; United States v. Bainbridge Mgmt., L.P., Nos. 01 CR 469-1, 01 CR 469-6, 2002 WL 31006135, at *4 (N.D. Ill. Sept. 5, 2002) ("Corporate criminal liability requires the application of agency principles. To impute criminal liability to a corporation, its officers, directors, or employees must have authority or apparent authority to act for the corporation.") (citation omitted) (citing United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir.1983) (per curiam)).

performing their proxy-liability analysis.[151] The *Ellerth* opinion's use of subsection 219(2)(a), which indicates the usefulness of entity-level-intent concepts, is the most persuasive reason for adopting the policymaker standard. The policymaker standard represents the use of a Supreme Court suggestion to resolve the messy doctrine existing in the lower courts.

The policymaker standard also squares well with the *Faragher* Court's commentary. The Court, looking at other courts' analyses, noted that when a supervisor (who may or may not be a proxy) takes a "tangible employment action"[152] against a subordinate, then the supervisor "'merges' with the employer, and his act becomes that of the employer."[153] The *Faragher* Court identified the merging relationship between supervisor and employer as "a variation of the 'proxy' theory."[154] "Tangible employment actions" are, strictly speaking, unrelated to proxy-liability analysis.[155] However, tangible employment actions provide a nice parallel: just as there are certain actions that always count as the actions of the employer (tangible employment actions), so too are there individuals that act as the employer (proxies). The policymaker standard provides a more precise test for identifying proxies.[156]

Furthermore, the policymaker standard adheres to the rule, established in *Meritor* and reaffirmed in *Ellerth* and *Faragher*, that an employer should not suffer automatic liability for its supervisors' harassment, regardless of circumstances.[157] The policymaker standard imputes liability to the company only in instances where those who can make policy for the employer harass subordinates. The group of employees who can make policy for the employer will likely constitute a small percentage of the overall workforce for that firm. The policymaker standard's small scope helps protect employers from inappropriate automatic liability. Of course, the primary risk of the rule is its potential underinclusiveness. In light of the Supreme

151. *See supra* Part III.B.

152. *See supra* note 36.

153. Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998) (citing, among other cases, Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d. Cir. 1992)).

154. *Id.* The "'proxy' theory discussed above" refers to the Court's discussion of proxy liability which occurs two paragraphs before the "merging" comment. *Id.* at 789–90.

155. *See supra* note 36.

156. *See supra* Part IV.B. Of course, most of the proxy-liability standards that courts have applied have the goal of equating a proxy's behavior with that of the employer. For example, the Tenth Circuit's language implicitly appears to equate the two: a proxy is someone "sufficiently high" in an organization's hierarchy so that he or she may "speak" for an employer. Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011) (quoting Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 384 (5th Cir. 2003) (quoting Torres v. Pisano, 116 F.3d 625, 634 (2d Cir. 1997))) (internal quotation marks omitted). In this regard, the policymaker standard is not novel. The policymaker standard's novelty derives from its use of corporate intent as a conceptual yardstick for identifying proxies.

157. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

Court's desire to protect against automatic liability though,[158] the risk of under-inclusion is preferable to a risk of over-inclusion.

The policymaker standard also comports with the Court's holdings on ancillary issues within broader Title VII jurisprudence. In *Kolstad v. American Dental Association*, decided shortly after *Faragher* and *Ellerth*, the Court addressed "the proper legal standards for imputing liability to an employer in the punitive damages context."[159] The Court concluded that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"[160] The Court then remanded the case to determine whether the "petitioner [could] identify facts sufficient to support *an inference that the requisite mental state* [could] *be imputed to respondent*."[161] Thus, the Court explicitly adopted the notion that an investigation of a firm's "mental state" is an appropriate inquiry for determining an employer's liability for punitive damages. This fact suggests that a firm's "mental state" is an appropriate inquiry for the exceptional case of proxy harassment.

Finally, the policymaker standard finds structural support in the recently decided case of *Vance v. Ball State University*.[162] In that case, the Supreme Court defined "supervisor"—an important issue in applying the *Ellerth/Faragher* affirmative defense. The Court held that a supervisor is an employee that "is empowered by the employer to take tangible employment actions against the victim."[163] The *Vance* Court narrowed its definition of "supervisor" to employees with specific powers: the ability to hire, fire, promote, reassign, change benefits, etc., namely, those people who could "take tangible employment actions."[164] This suggests the same type of inquiry is appropriate for locating a different employee, such as a proxy (who can make policy). This Note's analysis, therefore, parallels the Court's. The *Vance* Court's commentary further edifies this Note's position. The *Vance* Court states, "*Ellerth* and *Faragher* presuppose[] a clear distinction between supervisors and co-workers."[165] Likewise, this Note's framework presupposes a clear distinction between proxies, supervisors, and co-workers. Quoting *Ellerth*, the *Vance* opinion clarifies the supervisor distinction:

158. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

159. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 540 (1999).

160. *Id.* at 545 (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)). This Note leaves aside the distinction between "managerial agents" and proxies.

161. *Id.* at 546 (emphasis added).

162. Vance v. Ball State Univ., 133 S. Ct. 2434 (2013). Although *Vance* was about racial harassment, the Court "assume[d] that the framework announced in *Faragher* and *Ellerth*" was appropriate. *Id.* at 2442 n.3.

163. *Id.* at 2439.

164. *Id.* at 2444–45.

165. *Id.* at 2443.

> "The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control. . . . Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." The strong implication of this passage is that the authority to take tangible employment actions is the defining characteristic of a supervisor . . . .[166]

This Note identifies proxies as a distinct class of agent, too. They are the ones with the power to make policy for the firm.

2. Flexibility & Objectivity

The courts have struggled to create a consistent proxy-liability standard because employer–firms come in all shapes and sizes.[167] The policymaker standard is flexible enough to apply to different organizations.[168] The current proxy standard utilized by the courts (applicable to those "sufficiently high" in an organization's hierarchy to "speak" for an employer[169]) is similarly flexible.[170] However, the current standard's flexibility is a vice, not a virtue; it achieves its flexibility through inconsistency.[171] The current proxy-liability jurisprudence is flexible because the courts simply pick and choose the factors they think appropriate for the given situation.[172] The policymaker standard provides just as much flexibility, but it does so through a predictable, objective analysis: it asks whether or not an individual is in a position to make policy for the employer. This is an empirically verifiable question by reference to a firm's CID structures, discussed above.[173]

Although one could argue that the phrase "make policy" is an ambiguity that exists within the policymaker standard, the standard simplifies the proxy-liability framework significantly by cabining the analysis to one factor:

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166. *Id.* at 2448 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (alteration in original)).

167. *See* Foerschler, *supra* note 133, at 1293, 1296–1303 (noting the difficulty in finding corporate intent because of the complex nature of a corporation, which can be viewed, for example, as an aggregation of individuals, processes, and bargaining groups, to name a few).

168. *See* FRENCH, *supra* note 132, at 51–52, 65–66 (noting the applicability of the CID-Structure concept to "phantom" structures, unpublished structures, and "lattice" structures); *id.* at 182–83 (noting the CID-Structure concept is flexible enough to identify the "corporate mind" even within idiosyncratic entity-structures and unique corporate-power distributions).

169. Helm v. Kansas, 656 F.3d 1277, 1286 (10th Cir. 2011) (citations omitted).

170. *See supra* Part III.B.1–2 (indicating that the circuits simply focus on different factors when the conditions of the organization or industry so demand).

171. *Supra* Part III.B.1–2.

172. *Supra* Part III.B.1–2.

173. *See supra* notes 141–46 and accompanying text.

a supervisor's objective ability to make policy.[174] When faced with a line-drawing problem, it is often too much to ask of a theory to eliminate the line altogether. However, it is not too much for a rule to manifest itself in a consistent form. The policymaker standard can provide some much-needed clarity, predictability, and uniformity to the courts' proxy-liability jurisprudence.

3. Inferior Alternative Theories

As noted, the policymaker standard attempts to identify certain individuals that have a role in animating a corporation's (or other structure's) intentional actions. Logically, there are three classes of alternatives to the policymaker standard. Each class of alternative suffers from problems that do not plague the policymaker standard.

a. The Status Quo Alternative

First, one could attempt to follow the course of the circuits and other courts, picking and choosing different factors that exemplify those who are "sufficiently high" in an organization to be proxies.[175] Of course, this method has the potential to produce a consensus in the long run, but at the moment it appears arbitrary and inconsistent.[176] This Note represents a direct response to those problems, and its proposal constitutes a non-arbitrary, objective, and flexible rule.[177] Other alternatives not contemplated by this Note must, of course, be assessed on their merits.

b. Target Alternatives

Second, one could argue that the policymaker standard's methodology is generally correct but seeks out the wrong target. That is, rather than seeking individuals who can make policy for a firm, courts should be looking for individuals who can, say, contractually bind an employer, have supervisory authority over a certain number of employees, or lead various firm divisions. Those individuals (division heads, for example), so goes the argument, are superior proxy candidates. There are two counterarguments to this point. If the methodology attempted to target another class of employees, that class: (1) would be too rigid and/or broad; or (2) would not capture the essence of the *Ellerth* Court's commentary on *Restatement* subsection 219(2)(a).

First, if the courts were to equate proxies with, for example, division heads, then the courts would be following a nice, bright-line rule—but an inflexible one. Under such a rigid rule, a court *could not* find a high-ranking

174. United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) (per curiam).
175. *See supra* Part III.
176. *See supra* Part III.
177. *See supra* Part IV.

official, even a policy maker, to be a proxy of the employer unless the high-ranking official was a division head of the employer. However, if the courts were to equate proxies with, for example, employees who could contractually bind a firm (supposedly a much broader class of individuals), then the courts would be following a flexible rule—but one so broad it might create *de facto* strict liability.[178]

Second, if the courts attempted to identify different, discrete classes of employees as proxies, those classes would fail to capture the essence of *Ellerth*'s commentary on *Restatement* subsection 219(2)(a). *Ellerth* indicated that a proxy's intent was the functional equivalent of an employer's intent.[179] Therefore, proxies should be those individuals who can most closely approximate an employer.[180] Based on this rule, an employee's possession of policymaking power is a very good signal that the employee is fit to be a proxy because policy is a close approximation of corporate identity.[181] In other words, a set of policies is to a corporation what a personality is to a person, and policymaking is the analog of a firm's mental activities.[182] If courts looked for characteristics besides policymaking powers (like supervisory power), then they would be looking for employees that approximate the employer less than policymakers do.

c. Corporate Intent Alternatives

Third, one could utilize a different "corporate intent" theory. Still utilizing the basic formula, one would follow this inquiry: a proxy is an employee with the capability of imputing corporate intent to the employer, where corporate intent is found by *X*.[183] The policymaker standard locates corporate intent functions in employees' power to make policy for the employer.[184] Other models of corporate intent locate corporate intent in other concepts. Some prominent models that might replace "policymaking"

178. *Meritor* and *Ellerth/Faragher* prohibit this outcome. *See supra* Parts II.A, C.

179. *See supra* note 151.

180. *See supra* note 151.

181. FRENCH, *supra* note 132, at 58. "By 'policies' what is meant are rather broad, general principles that describe what the corporation *believes about its enterprise and the way it intends to operate*. Policies contain basic belief and goal statements regarding both the what and the how of corporate life, but they are not detailed statements of appropriate methods." *Id.* (emphasis added). "[E]very corporation has a certain set of policies, some remain more central or fixed than others, [and] policies can and do change, but the central policies of a corporation are inviolate or their corporately endorsed violation constitutes *a different corporation*." *Id.* at 62 (emphasis added). This last statement, that a shift in core corporate policies, or the endorsement of their violation, constitutes a *different* corporation, supports the proposition that *policies* are the core elements of an employer's identity (be it a corporation, LLC, LLP, or otherwise). *See also* Mueller, *supra* note 135, at 40–41 (analogizing the "inner circle" to the firm's "mind").

182. *See supra* note 182 and accompanying text.

183. *See* United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) (per curiam).

184. *See supra* Part IV.B.

are the proactive fault model, reactive fault model, and corporate ethos model.[185]

The proactive fault model "finds liability where a corporation's practices and procedures are inadequate to prevent the commission of a crime [or tort]."[186] Inserting this concept into the basic model, the proxy-identification standard would hold that a proxy is an employee who has the capability to impute corporate intent to the employer, where corporate intent is shown by a lack of practices and procedures to prevent the commission of the harassment. This model essentially shields an employer from liability if it exercises some prophylactic measures against harassment, no matter who the harasser is.[187] However, this concept is already at play in Title VII sexual-harassment jurisprudence: it is the first prong of the *Ellerth/Faragher* affirmative defense.[188] For an employer to receive the benefit of the affirmative defense, the employer must show that it "exercised reasonable care to *prevent* and correct promptly any sexually harassing behavior."[189] The Supreme Court has already adjudged the role the proactive fault model plays in Title VII sexual-harassment, employer-liability jurisprudence: it is a prong of the *Ellerth/Faragher* affirmative defense. However, the affirmative defense is unavailable in proxy-liability situations.[190]

The reactive fault model of corporate intent identifies fault in an entity's inadequate "reaction" to the proxy's tortious act.[191] However, this model is *also* a part of the first prong of the *Ellerth/Faragher* affirmative defense. The affirmative defense is only available if "the employer exercised reasonable care to prevent and *correct promptly* any sexually harassing behavior."[192] However, again, in the case of proxy harassment the employer cannot gain the protections of the affirmative defense.[193] Therefore, the Court has already adjudged the role the reactive fault model has to play in the Title VII sexual-harassment jurisprudence. It seems like folly to reintroduce reactive fault into proxy-liability analysis after *Ellerth* and *Faragher* have stripped it out in cases of proxy harassment.

The corporate ethos model of corporate intent holds that "the personality of the organization literally encourages corporate agents to commit a criminal [or tortious] act."[194] There are three circumstances that

185. Laufer, *supra* note 133, at 664–67.

186. *Id.* at 665.

187. *See id.*

188. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *see supra* Part II.C.

189. *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765; *see supra* Part II.C.

190. *See supra* Part II.D.

191. Laufer, *supra* note 133, at 666.

192. *Faragher*, 524 U.S. at 807 (emphasis added); *Ellerth*, 524 U.S. at 765 (emphasis added).

193. *See supra* Part II.D.

194. Laufer, *supra* note 133, at 666–67.

must exist for an organization's "personality" to encourage an employer's agents to commit torts: "(1) the presence of an illegal policy and an agent who carries out the policy, (2) an illegal act which is committed, authorized, ordered, or endorsed by a high managerial agent, and (3) the implicit ratification or endorsement of the violation by the corporation."[195] Inserting this model into the *Basic Construction Co.* formula, it would hold that a proxy is an employee who can impute corporate intent to the employer, the coexistence of the three facts just stated show corporate intent. Under this model a court would have to find that the alleged proxy had the capability to make a tortious (or illegal) policy,[196] the capability to commit a tortious act,[197] and that the employee had the capability to ratify his or her own wrongdoing. The third element (the ratification element) makes this test too strenuous: absent a finding that an employee could ratify his or her own harassing behavior, the courts, under this model, *could not* identify the employee as a proxy. Such a rule appears too rigid. Not only does it require a proxy to have policymaking powers (element one), it also requires a proxy to have a *specific* policymaking function: namely, the ability to ratify his or her own tortious conduct. Under such a rule, an individual–harasser that has at least one "layer" of superiors in the firm's CID Structure *could not* be a proxy because, presumably, the layer of superiors is the group (and not the harasser himself or herself) that has the power to "ratify" the harasser's tortious conduct.[198] The policymaker standard, like the corporate ethos model, looks for individuals that can make policy, but does not make the onerous requirement that the harasser have the power to ratify his or her own boorish conduct.

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195. *Id.* at 667.

196. This appears to be similar to the policymaker standard, except that the policymaker standard has no requirement that a proxy have the capability to make a *bad* policy, just that the proxy be able to make policy. The distinction is probably not a useful one, as any employee who has the corporate power to make policy, could probably also make tortious or illegal policy.

197. The capability to commit a tortious act is patently present in every case—it is simply the judgment that a bad act is required for a crime or tort to occur.

198. *See* FRENCH, *supra* note 132, at 43. The author explains the organizational relations between various employees by reference to CID Structure concepts:

> An organizational chart tells us, for example, that anyone holding the title "Executive vice-president for finance administration" stands in a certain relationship to anyone holding the title "director of internal audit" and to anyone holding the title "treasurer," etc. In effect it expresses, or maps, the interdependent and dependent relationships, line and staff, that are involved in determinations of corporate decisions and actions. The organizational chart provides what might be called the grammar of corporate decision-making. What I shall call internal recognition rules provide its logic.

Id.

V. CONCLUSION

In *Ellerth* and *Faragher*, the Supreme Court provided a relatively comprehensive framework for analyzing employer liability in Title VII sexual-harassment cases. The Court did not, however, provide explicit, extensive guidance on the proxy liability issue. Confusion within the circuits followed as the courts attempted to analyze *Ellerth* and *Faragher*'s vague language. *Ellerth*'s suggestion to look to the *Restatement* provides a previously unarticulated conclusion: proxies are those who can impute corporate intent to the employer. An ideal instrument for measuring corporate intent is the policymaker standard. By adopting the policymaker standard, the courts can introduce a level of consistent objectivity into proxy-liability analysis, providing clarity to a currently unpredictable area of Title VII sexual-harassment law.