

FARAGHER · ELLERTH · THE 5-PILLAR PROGRAM

The Affirmative Defense Field Guide

What *Faragher v. Boca Raton* and *Burlington v. Ellerth* actually require, broken down into the operational program that satisfies each element, with documentation checkpoints your counsel can review.

AFFIRMATIVE DEFENSE

EEOC

HARASSMENT LIABILITY

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HOW TO USE THIS GUIDE

The affirmative defense is not a document you file. It is argued from a program you can prove you were running *before* a complaint arrived. This guide translates two 1998 Supreme Court decisions into the specific, provable steps that satisfy each element, and shows where empathiHR's program creates the records that carry the employer's burden of proof.

01 • The Stakes

Why the affirmative defense matters more in 2026, not less

On January 22, 2026, the EEOC voted 2–1 to rescind its 2024 Enforcement Guidance on Harassment in the Workplace. Headlines framed it as deregulation. For employers, the practical effect is the opposite: it removes a federal reference point without touching the law that actually decides harassment cases.

Three things did **not** change when the guidance was withdrawn. Title VII of the Civil Rights Act still prohibits workplace harassment. *Bostock v. Clayton County* (2020) still holds that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII. And the **Faragher/Elzerth affirmative defense**, the single most important tool an employer has to avoid vicarious liability for a supervisor's harassment, remains fully valid, because it comes from the Supreme Court, not from EEOC guidance.

What did change is the map. With the federal guidance gone and many states expanding their own protections, the employer's defense increasingly rises or falls on one question a court will ask after the fact: *did you actually run a reasonable program, and can you prove it?*

THE CORE IDEA

You cannot create an affirmative defense after a complaint is filed. It is built from records that already exist, a distributed policy, training rosters, hotline logs, investigation files, and corrective-action documentation, **all dated before the events in dispute**. The program and its records are what the defense is argued from.

1998

Faragher & Elzerth decided; the defense has governed supervisor-harassment cases for over 25 years

2

Elements the employer must prove, and both are required

You

The burden of proof is on the employer, by a preponderance of the evidence

02 • Origin

Where the defense comes from

Two cases decided the same day, June 26, 1998, created the framework every harassment defense still runs on. Read together, they answer two questions: when is an employer automatically liable for a supervisor's harassment, and when can the employer defend itself?

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

Kimberly Ellerth resigned after roughly fifteen months, alleging a mid-level supervisor subjected her to repeated offensive sexual remarks and threats. Critically, she suffered **no tangible job detriment**, she was even promoted once, and she never reported the conduct, though the company had a policy. The Court held she could still recover from the employer *without* proving the employer was negligent, but that the employer could raise an affirmative defense. Ellerth established the pivotal concept of the **tangible employment action** as the dividing line for liability.

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

Beth Ann Faragher, an ocean lifeguard, was harassed for years by two supervisors. The City had an anti-harassment policy, but had **never distributed it to the beach staff** and made no effort to monitor supervisor conduct. That failure is why the City lost: it could not show it exercised reasonable care. Faragher announced the same two-element defense as Ellerth and made the lesson concrete, a policy that sits in a binder, undelivered, is not reasonable care.

THE FARAGHER LESSON

The City of Boca Raton *had* an anti-harassment policy. It still lost, because the policy was never communicated to the employees it was supposed to protect. Existence is not enough; **distribution, training, and enforcement** are what courts credit.

Vance v. Ball State University, 570 U.S. 421 (2013): who counts as a "supervisor"

The defense only applies to harassment by a *supervisor*. In Vance, the Court narrowed that term: an employee is a supervisor for vicarious-liability purposes **only if the employer empowered them to take tangible employment actions** against the victim, to hire, fire, promote, reassign with significantly different responsibilities, or change benefits. Someone who merely directs another's daily tasks is treated as a co-worker, and co-worker harassment is judged under a different, negligence standard (the employer is liable only if it knew or should have known and failed to act).

Tangible employment action. A significant change in employment status, hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits (Ellerth, Vance).

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Educational guide, not legal advice. Confirm the specifics with qualified employment counsel before you rely on this.

03 · The Framework

The two–element defense

When a supervisor's harassment did *not* culminate in a tangible employment action, the employer may raise an affirmative defense. It has two elements. Both must be proven, by the employer, by a preponderance of the evidence. Miss either one and the defense fails.

The Affirmative Defense

1

Employer's reasonable care

Prevented & promptly corrected harassing behavior

- Policy, effectively distributed
- Real reporting channels
- Prompt, documented investigation

2

Employee's unreasonable failure

To use the preventive or corrective process provided

- Knew the reporting process
- Did not use it (or delayed)
- No reasonable fear of retaliation

Employer must prove BOTH elements by a preponderance of the evidence.

"When no tangible employment action is taken, a defending employer may raise an affirmative defense ... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Faragher v. City of Boca Raton / Burlington v. Ellerth (1998)

WHY BOTH ELEMENTS MATTER TO HOW YOU OPERATE

Element one is entirely within your control, it is the program you build. Element two depends on the employee's conduct, but you can only reach it if your reporting process was real, well-known, and safe to use. A process employees reasonably feared to use will not satisfy element two. In practice, **investing in element one is what makes element two available.**

O4 · Availability

When the defense is available, and when it isn't

The first question in any supervisor-harassment case is whether a tangible employment action occurred. That single fact determines whether you have a defense at all.

Harassment by a supervisor
(one who can hire, fire, promote, reassign)

Did the harassment culminate in a tangible employment action?

YES

Strict liability

Defense is **UNAVAILABLE**. The culminating firing, demotion, or reassignment is an official act of the employer.

NO

Defense **AVAILABLE**

Employer may avoid or limit liability by proving both elements (1 + 2).

Three scenarios, three different rules

HOW LIABILITY IS ANALYZED BY HARASSER AND OUTCOME

Situation	Standard	Defense available?
Supervisor harassment culminating in a tangible action	Vicarious (strict) liability, the tangible action is an official act of the enterprise	No. The affirmative defense is barred.
Supervisor harassment <i>without</i> a tangible action	Vicarious liability, subject to the affirmative defense	Yes, if the employer proves both elements.
Co-worker or non-supervisor harassment	Negligence, liable only if the employer knew or should have known and failed to take prompt corrective action	N/A, different framework; prompt response is still the key.

THE TRAP IN CONSTRUCTIVE DISCHARGE AND REASSIGNMENT

The defense is unavailable when supervisor harassment culminates in a tangible employment action connected to it; unrelated later employment actions do not automatically trigger strict liability. The trap is that discipline of a complainant, or a poorly handled transfer, can be alleged as exactly that culminating action and convert a defensible case into strict liability. Any employment action affecting a complainant during or after a complaint should be reviewed with counsel first.

05 • Element One

Reasonable care, what courts actually look for

"Reasonable care to prevent and promptly correct" is not abstract. Courts and the EEOC have repeatedly examined the same concrete elements. Here is what they credit, and what empathiHR builds and documents.

A written policy that is genuinely distributed

A clear, written anti-harassment policy, prohibiting the conduct, describing the complaint process, and promising no retaliation, that is **effectively communicated to every employee**. Faragher turned on distribution; keep proof that each employee received and acknowledged it.

A reporting procedure with more than one door

Employees must have a clearly described way to complain that does not force them to report to the harasser. Courts scrutinize the relationship between the person designated to receive complaints and the alleged harasser, so **multiple avenues**, including a neutral, third-party channel, matter.

Training that reaches employees and supervisors

Regular anti-harassment training, with supervisor-specific content on recognizing, reporting, and responding to complaints. Many states now mandate it; even where they don't, it is core evidence of reasonable care.

Prompt, impartial investigation and real corrective action

Complaints must be taken seriously, investigated promptly and impartially, and met with corrective action reasonably calculated to stop the harassment. A policy that is never enforced is treated as no policy at all.

THE THROUGH-LINE

Every one of these elements produces a record: an acknowledgment form, a training roster, a hotline log, an investigation file, a corrective-action memo. **Those dated records, created in the ordinary course, before any dispute, are the evidence that proves element one.**

O6 · The Program

Mapping the defense to the 5-pillar program

empathiHR's program exists to build and maintain the exact records the affirmative defense requires. Each pillar maps to an element of the defense, and produces documentation your counsel can review long before a complaint is filed.

1. Policies

ELEMENT ONE, PREVENT

A current, distributed anti-harassment and anti-retaliation policy with acknowledgment tracking, the dissemination Faragher treated as powerful evidence of reasonable care, captured as dated records.

2. Compliance Training

ELEMENT ONE, PREVENT

Role-specific, state-compliant training for employees and supervisors, with completion rosters that evidence reasonable care and satisfy state mandates.

3. Reporting Hotline

ELEMENTS ONE + TWO, THE CHANNEL

A 24/7, neutral, third-party channel by phone, email, and web. Timestamped intake gives employees a real door and gives you proof one existed, the linchpin of element two.

4. Investigations

ELEMENT ONE, CORRECT PROMPTLY

Prompt, impartial, video-documented investigations by a neutral investigator, producing a defensible file: scope, evidence, credibility findings, and closure.

5. Management Consulting

ELEMENT ONE, MAINTAIN

Ongoing advisory so corrective action is appropriate, employment decisions affecting complainants are reviewed, and the program stays current as the law changes.

ONE QUALIFIER EMPATHIHR ALWAYS STATES PLAINLY

No program guarantees an outcome. empathiHR's track record of zero adverse actions applies **when the Affirmative Defense program is fully implemented and maintained**, because the defense only protects an employer who actually ran, and can prove it ran, a reasonable program.

07 • Element Two

The reporting channel that has to be real

Element two lets an employer show the employee unreasonably failed to use the process. But it is only available if the process was one a reasonable employee would use. This is where many defenses quietly collapse.

The Supreme Court noted that proof an employee unreasonably failed to use a complaint procedure "will normally suffice" on the second element. But the flip side is decisive: an employee who reasonably feared retaliation, or who had no realistic avenue that bypassed the harasser, has *not* unreasonably failed, and element two is lost. A reporting channel that is anonymous, neutral, and demonstrably safe is what lets you argue non-use was unreasonable rather than understandable.

RETALIATION IS THE DEFENSE-KILLER

You cannot argue an employee should have complained while also tolerating retaliation against those who do. Retaliation against a reporter can make later employees' non-reporting look reasonable, weakening element two in future cases. Anti-retaliation has to be communicated, monitored, and enforced, and the monitoring has to be documented.

Counsel checkpoint. Can you show, with dated records, that the complaining employee knew about at least one reporting channel that did not run through the person they were complaining about?

O8 · Evidence

Documentation checkpoints your counsel can review

Because the defense is argued from the program's records, documentation is how you prove it. These are the records that carry the employer's burden, the artifacts a court or opposing counsel will ask to see. Review each with your legal team now, not after a charge lands.

THE AFFIRMATIVE-DEFENSE EVIDENCE FILE

Record	What it proves	Element
Signed policy acknowledgments	Every employee received and understood the policy. Under <i>Faragher</i> , dissemination is powerful evidence of reasonable care, not a categorical standalone requirement.	1
Training completion rosters	Employees and supervisors were trained, with dates and content	1
Hotline / intake logs	A real reporting channel existed and complaints were received and timestamped	1 · 2
Investigation files	Prompt, impartial fact-finding: scope, interviews, evidence, credibility findings	1
Corrective-action memos	Action reasonably calculated to stop the conduct was taken and communicated	1
Anti-retaliation monitoring notes	Employment decisions affecting complainants and witnesses were reviewed	1 · 2
Policy version history	The program was maintained and updated as the law changed	1

ASK THIS AT YOUR NEXT LEGAL REVIEW

For each record above: *does it exist, is it dated, and could we produce it tomorrow?* A gap you find today is fixable. The same gap discovered during litigation is not.

09 • Current

What changed in 2024–2026

The defense is stable. The environment around it is not. Three developments shape how employers should think about harassment liability right now.

1 • EEOC harassment guidance rescinded (January 22, 2026)

The EEOC's 2024 Enforcement Guidance on Harassment was withdrawn by a 2–1 Commission vote, effective immediately. Guidance is interpretive, not binding law, so Title VII, *Bostock*, and the Faragher/Ellerth defense are unchanged. The practical takeaway from nearly every employment firm: keep running an effective, documented program. The rescission removes a reference document, not your obligations or your exposure.

2 • The Speak Out Act (effective December 2022) still constrains agreements

The federal Speak Out Act makes **pre-dispute** nondisclosure and non-disparagement clauses covering sexual-harassment or assault disputes unenforceable. It does not reach agreements entered *after* a dispute arises (such as settlements). It continues to shape how employers draft onboarding and separation paperwork.

3 • State law is moving the other direction

As the federal guidance recedes, many states have expanded protections and restricted NDAs beyond the federal floor, often covering all workplace discrimination, not just sexual harassment. For multi-state employers, state law is now frequently the more demanding standard. (See empathiHR's companion guide, the *Multi-State Harassment Training Mandate Map*.)

NET EFFECT

Less federal guidance, more state-level obligation, and an unchanged Supreme Court defense that still rewards employers who can prove they ran a reasonable program. The strategy does not change: **build the program, keep the records, review with counsel.**

10 · Apply It

The field self-audit

Ten questions. If you cannot answer "yes, and I can prove it with a dated record" to each, you have found where your affirmative defense is thin. That is exactly the conversation to have with counsel and with empathiHR.

- ☐ 1 We have a written anti-harassment and anti-retaliation policy that is current with 2026 law.
- ☐ 2 Every employee has received the policy and signed a dated acknowledgment.
- ☐ 3 Employees and supervisors have completed anti-harassment training, to include a comprehension assessment, and we hold the rosters.
- ☐ 4 There is at least one reporting channel that does not route through an employee's own supervisor.
- ☐ 5 That channel is neutral, available 24/7, and you can show it has been clearly communicated to employees.
- ☐ 6 Complaints trigger a prompt, impartial investigation using a defined and consistent process.
- ☐ 7 Investigations produce a documented file: scope, evidence, credibility findings, and closure.
- ☐ 8 Corrective action is appropriate, taken promptly, and communicated to the parties.
- ☐ 9 We monitor for retaliation and document that we reviewed decisions affecting complainants.
- ☐ 10 Regular, periodic reviews of the program occur, with version-history tracking.

TURN THE AUDIT INTO A PROGRAM

empathiHR builds and maintains each of the elements above, and, just as important, the records that let you prove them. Schedule a compliance assessment to see where your affirmative defense stands today.

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Important

About this guide

Educational information, not legal advice. This guide is provided by empathiHR for general educational purposes. It is not legal advice and does not create an attorney–client or consultant–client relationship. Employment law changes frequently and varies by jurisdiction, industry, and the specific facts of each situation.

This guide addresses the federal Faragher/Ellerth framework. Many states impose additional or stricter requirements, and some (such as Texas) apply a heightened corrective–action standard. Before acting on anything in this guide, review your policies, programs, and specific circumstances with qualified employment counsel. empathiHR works alongside your legal counsel to build and maintain the operational program described here.

Case citations, statutes, and figures were current as of the update date on the cover and should be re–verified against primary sources before you rely on them. Where the law is unsettled or a figure is not fixed by statute, this guide says so.



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